IN THE SUPREME COURT OF BELIZE, A.D. 2014

CLAIM NO. 325 OF 2014

BETWEEN:

KEVIN MILLIEN	**Claimant**
AND	
BT TRADING LIMITED	**1st Defendant**
GEORGE POPESCU	**2nd Defendant**
ALPHA SERVICES LIMITED	**3rd Defendant**

In Chambers.

BEFORE: Hon. Chief Justice Kenneth Benjamin.

January 21 & 27, 2015.

Appearances: Ms. Priscilla Banner for the Claimant.
Mr. Rodwell Williams SC, Ms. Lisette Staine with him, for the Defendants.

JUDGMENT

[1] Before the Court for its determination are two Notices of Application filed on behalf of the 3rd Defendant and the 1st Defendant. The Court heard the applications by chronological date of filing.

[2] The first in time was the application by the 3rd Defendant which was first filed on July 7, 2014 and was extensively amended to seek the following orders:

"1. That this Statement of Case be struck out pursuant to CPR 26(3)(1)(b) and (c).

2. Alternatively, that the Claimant do, within 14 days, give adequate security for the Third Defendant's costs to the satisfaction of the Registrar and, in the meantime, all further proceedings against the Third Defendant be stayed.

3. That the costs of this application be for the Third Defendant against the Claimant."

The stated grounds of this application were:

"1. That the Statement of Case is an abuse of process of the Court as it discloses no reasonable grounds for bringing the claim against the Third Defendant and there is no cause of action disclosed against them, or it is likely to obstruct the just disposal of the proceedings.

2. That the Claimant is and at the time of the claim was ordinarily out of the jurisdiction."

The application was supported by the second Affidavit of Cadine Joseph sworn to on January 7, 2015. In that affidavit the 3rd Defendant offered an undertaking not to register "any further resolutions, minutes or other such documents in respect of the 1st Defendant which had the effect of altering the ownership of and or transferring ownership and control of the 1st Defendant or the subsidiaries to any third party". This undertaking was not accepted on behalf of the Claimant.

[3] The Claimant opposed the application and filed his fourth Affidavit in support of such opposition. It was pointed out in the affidavit that one of the grounds relied upon by the 3rd Defendant in its application of July 7, 2014 seeking the discharge or varying of the injunction, was relied upon as one of the stated grounds.

APPLICATION TO STRIKE OUT THE STATEMENT OF CASE

[4] The Claim Form seeks against the 3rd Defendant relief by way of an order directing the 3rd Defendant to permit the Claimant to inspect the books and records of the 1st Defendant and to make copies or extracts therefrom. In addition, a permanent injunction is being sought against all the Defendants "Whether by themselves, their servants or agents or any of them or otherwise howsoever from in any way taking, selling, pledging, transferring, charging, diluting or in any way disposing of or taking any steps to bring about or facilitate or register the transfer of the ownership of the Claimant's shares held in or the assets of the 1st Defendant or its subsidiaries, BT Prime Ltd and Boston Prime Ltd without the Claimant's consent". The Statement of Claim states that the 3rd Defendant is and was at all material times the registered agent of the 1st Defendant, an international business company registered in Belize. In its Defence the 3rd Defendant admits becoming the registered agent but with effect from July 19, 2014. The 2nd Defendant is a director and member of the 1st Defendant and the record reflects that he has sworn to affidavits on behalf of the 1st Defendant in which he has described himself as the sole Director and one of the two members of the 1st Defendant. The basis of the Claimant's cause of action is that he is, along with the 2nd Defendant, a director and member of the 1st Defendant and owns 50% of its issued shares.

[5] At paragraphs 13 and 14 of the Statement of Claim, the Claimant averred that he was informed by Mr. Rodwell Williams of the 3rd Defendant that he had been removed as a director of the 1st Defendant, that the 2nd Defendant is the sole signatory of the 1st Defendant and that the 3rd Defendant had no information as to whether or not the Claimant was a shareholder of the 1st Defendant. Also it was said that the Claimant's request to the 3rd Defendant to inspect the books and records of the 1st Defendant was refused by Mr. Williams. The Defence of the 3rd Defendant denies these assertions but it was admitted that on June 25, 2014, the Claimant was informed that he was no longer a director of the 1st Defendant.

[6] It was contended by Mr. Williams on behalf of the 3rd Defendant that the 3rd Defendant is a mere registered agent with no power to transfer or otherwise dispose of

the shares of the 1st Defendant. Further, it was said that the inspection of the books and records of the 1st Defendant could be achieved through the pre-trial discovery process against the other Defendants. On these bases, learned Senior Counsel argued that no cause of action was made out against the 3rd Defendant and the Claim is unwinnable. As to the claim for a permanent injunction, it was argued, that in the absence of a cause of action, a claim for an injunction cannot be sustained ("The Siskina"). **(Siskina (Cargo Owners) v Distos Cia Naviera SA, The Siskina [1977] 3 All E R 803).**

[7] In responding to the arguments tendered to support the application by the 3rd Defendant, learned Counsel contended on behalf of the Claimant that having regard to its previous reliance upon the identical ground in the previous application for discharge or variation of the injunction, the issue has already been dealt with and the Court ought not to entertain its re-adjudication. It was further argued that the denial of the Claimant as a member of the 1st Defendant of access to its books and records is a valid lis.

[8] This Court made an order dated July 11, 2014 varying the portion of its order of July 2, 2014 headed "Provision of Information by the Defendants". No definitive adjudication was made upon the issue of whether a reasonable cause of action existed although it can be extrapolated that had the Court considered otherwise it would have so determined. In the premises, the Court now proceeds to consider the issue.

[9] Rule 26.3(1)(b) and (c) of the Supreme Court (Civil Procedure) Rules, 2005 ("CPR") empowers the Court to strike out a statement of case where it appears to the court that:

> "(a) …
>
> (b) that the statement of case or the part to be struck out is an abuse of process or is likely to obstruct the just disposal of the proceedings;
>
> (c) that a statement of case or part to be struck out discloses no reasonable grounds for bringing or defending a claim …"

The 3rd Defendant has grounded its application on these powers.

[10] The approach to be taken in resolving such applications was helpfully provided in the judgment of Conteh, CJ in **Belize Telemedia Ltd v Magistrate Usher (2008) 75 WIR 138** (paras. 19 and 20)

> "19. The provision of the Rules in Part 26.3(1)(c) which enables the Court to strike out a claim because it discloses no reasonable grounds for bringing or defending the claim is undoubtedly a salutary weapon in the Court's armory, particularly at the case management stage. It is intended to save the time and resources of both the Court itself and the parties: why devote the panoply of the Court's times and resources on a claim such as to go through case management, pre-trial review and scheduling a trial with all the time and expense that this might entail, only to discover at the end of the line that there was no reasonable ground for bringing or defending a claim that should not have been brought or resisted in the first place? This provision in the rules addresses two situations:
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> > (i) When the content of a statement of case is defective in that even if every factual allegation contained in it were proved, the party whose statement of case it is cannot succeed; or
> >
> > (ii) Where the statement of case, no matter how complete and apparently correct it may be, will fail as a matter of law.
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> (See *Green Book, The Civil Court Practice* 2008, CPR 3.4 [4] at p. 76 and *The White Book* 2005: Civil Procedure at paras. 3.4.1 and 3.4.2.
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> 20. It is important to bear in mind always in considering and exercising the power to strike out, the Court should have regard to the overriding objective of the rules and its power of case management. It is therefore necessary to focus on the intrinsic justice of the case from both sides: why put the defendant through the travail of full blown trial when at the end, because of some inherent defect in the claim, it is bound to fail, or why should a claimant be cut short without the benefit of trial if he has a viable case?"

It is salutary to note the importance of applying the overriding objective in achieving a result that meets the justice of the case.

[11] The substantive claim was triggered by the Claimant's allegation that he discovered that his shareholding in the 1st Defendant had been diluted without his knowledge or consent by the increase of the authorized share capital in circumstances

where he asserts to having been a director and 50% shareholder. Further, he was informed by Mr. Williams speaking on behalf of the 3rd Defendant that he was no longer a director of the 1st Defendant. He said he was told that the 2nd Defendant is the sole signatory for the 1st Defendant. In addition, he has complained of being denied access to the books and records of the 1st Defendant by the 3rd Defendant. On the basis of the foregoing, he has pleaded in the Statement of Claim the following at paragraph 16:

> "… the purpose of these actions by the 2nd Defendant acting through the 1st Defendant is to deprive him of his ownership interest in the 1st Defendant and his right to make decisions in respect of the 1st Defendant and its subsidiaries including any decisions relating to the sale, if any, of the business and assets of those companies".

[12] It is plain that the 3rd Defendant has become embroiled in the dispute between the Claimant and the 2nd Defendant as to their ownership interests in the 1st Defendant. Purporting to act on behalf of the 3rd Defendant, Mr. Williams admitted to communicating with the Claimant. The 3rd Defendant claimed not to be aware of whether or not the Claimant remained a shareholder of the 1st Defendant while denying access to its books and records. The Defence of the 3rd Defendant disputed these matters. Also, it was argued that the 3rd Defendant was nothing more than a registered agent.

[13] As I see it, the actions of the 3rd Defendant are worthy of investigation. If found to be true, the Claimant's allegations of fact can suffice to attract an order granting access to the books and records of the 1st Defendant. Although the discovery process will encompass such documents as are relevant to the issues before the Court, it does not provide the extent of access contemplated by s. 74(1) of the International Business Companies Act, Chapter 270. Hence, there is no alternative means available to the Claimant to assert his right as a member.

[14] It cannot be gainsaid that the 3rd Defendant is an agent of the 1st Defendant which is patently under the direction of the 2nd Defendant. It follows that the Claimant is entitled to seek a restraining order against the 3rd Defendant in the terms sought in

tandem with that sought against the other Defendants. Accordingly, the application to strike out the Statement of Case is refused.

APPLICATION FOR SECURITY FOR COSTS

[15] From the outset, the Claimant has admitted to being ordinarily resident in New York in the United States of America. However, he has opposed the respective applications by the 1st and 3rd Defendants for security for the costs of the proceedings.

[16] The 1st Defendant has by Notice of Application filed on December 12, 2014 sought the following orders:

> "1. That the Claimant does within 7 days give adequate security for the First Defendant's costs of the proceedings in the sum of $144,667.00 to be held to the credit of a deposit account in the joint names of counsel for the parties at a local bank, or paid into court to the credit of this claim;
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> 2. That all further proceedings against the First Defendant be stayed until such time as security for costs is provided in accordance with the terms of this order;
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> 3. That if security for costs is not provided in accordance with the terms of this order within 7 days, the Claim be struck out without further order of this Court.
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> 4. That the costs of this Application be for the 1st Defendant against the Claimant in any event."

The third Affidavit of George Popescu in support of the application exhibited a letter dated December 10, 2014 requesting security for costs and an itemized proposed bill of costs. It was further deposed that the Claimant did not have any assets within the jurisdiction against which an order for costs may be enforced and hence it would be difficult, if not impossible, to collect any costs awarded in the absence of the order being sought.

[17] The Claimant has asserted his shareholding in the 1st Defendant and stated the following in paragraphs 12, 13, 14, 15 and 16 of his fourth Affidavit:

> "12. I am lawfully a 50% shareholder of the 1st Defendant in this matter. The 1st Defendant is a Belize registered company. The shares which I hold in the 1st Defendant are assets for the purposes of enforcement of any order for costs which the Honourable Court may make in this matter.
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> 13. In fact, even if this Court were to find that I were not a lawful 50% owner of the 1st Defendant's shareholding (which I do not admit), the 1st and 2nd Defendants have themselves at the very least stated in their Defence dated 12th December 2014 that I was the owner of some 12,500 shares (I say that it is much more than this) and stated at paragraph 12 of the said Defence that:
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> > *"Paragraphs 12, 15, 16 and 17 of the Statement of Claim are denied and the First and Second Defendants say that should there be a sale of the business and assets of the First Defendant Company, the Claimant is to receive his just reward and return on his investment in the First Defendant Company."*
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> 14. Therefore even on the Defendants own misguided view of the amount of shareholding to which I am lawfully entitled, they admit that I would be entitled to proceeds of sale of the business and assets of the First Defendant company. The business and assets of the 1st Defendant company are substantial and I note the Defendants have failed to quantify the value of the business and assets for this Honourable Court which would absolutely give the Court an idea of the value of the shares which I hold in the First Defendant.

15. Even if the said Defendant do not sell the business and assets of the First Defendant, I am advised by my Attorneys-at-Law and verily believe that under the Belize Civil Procedures Rules, enforcement may be affected against the shares owned in a company for the collection of any costs order.

16. I also say that in any event the Defendants have not provided any information as to the basis for the security for costs being sought from this Court."

The applications by the 1st and 3rd Defendants for security for costs were opposed on this basis.

[18] The applicable rules in the CPR are Rules 24.2 and 24.3 which so far as relevant read:

> "24.2 (1) A defendant in any proceedings may apply for an order requiring the claimant to give security for the defendant's costs of the proceedings.
>
> (2) …
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> (3) An application for security for costs must be supported by evidence on affidavit.
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> 24.3 The Court may make an order for security for costs under rule 24.2 against a claimant only if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order, and that -
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> …
>
> (g) the claimant is ordinarily resident out of the jurisdiction."

The Court is clothed with a discretionary power to make an order for security for costs on the sole ground that it is satisfied that it is just to make the order. In doing so, the court must first ascertain that one of the listed conditions applied and the order is to be made having taken into account all the surrounding circumstances affecting the case.

[19] The main plank of the applications is that the Claimant has no assets within the jurisdiction against which the 1st and 3rd Defendants can enforce an order for costs. In short, it is their position that the Claimant cannot meet an order for costs from local assets should he elect not to honour such an order if made against him.

[20] The substantive claim is a dispute as to the shareholding in the 1st Defendant between the Claimant and the 2nd Defendant. The pleadings suggest that the 1st Defendant, though not a trading company, is a holding company for profitable subsidiaries which third parties are prepared to acquire for substantial valuable consideration. Indeed, the Claimant's investment was characterized as being inferentially intact and of value in paragraph 12 of the Defence. It must further be iterated that the 1st Defendant of which the 3rd Defendant is the registered agent is now under the de facto control of the 2nd Defendant. It passes strange that it can be asserted without ambivalence that the Claimant has no assets which are available to the Defendants for enforcement.

[21] In the premises, the applications by the 1st and 3rd defendants for security for costs are denied and the Notices of Applications accordingly dismissed. The costs of all applications by the 1st and 3rd Defendants dealt with by the Court at this hearing shall be the Claimant's in the cause.

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KENNETH A. BENJAMIN
Chief Justice