IN THE SUPREME COURT OF BELIZE A.D. 2017

CLAIM NO. 239 of 2017

OSCAR A. SABIDO **CLAIMANT**

AND

CARLOS MANUEL CIPRIANO FIGUEROA **DEFENDANTS**

NESTOR FIDEL GAYTAN MARTINEZ

FINANCIAL INTELLIGENCE UNIT **INTERESTED PARTY**

BEFORE the Honourable Madam Justice Sonya Young

Hearing
19.7.2017

Written Submissions
Claimant – 28.7.2017
Interested Party – None

Decision
28.7.2017

Mr. Oscar Sabido, SC for the Claimant.
Mrs. Tricia Pitts-Anderson for the Interested Party.

Keywords: Civil Procedure – Service of Claim Form – Interested Party – Filing of Defence – Waiving Proper Service – Application to Strike Out Claim – Application to Remove a Party – Costs – Supreme Court of Judicature Act Cap. 91 – Supreme Court (Civil Procedure) Rules 2005 (CPR)

DECISION

1. On the 24th April, 2017, a fixed date claim form was issued out of the Supreme Court of Belize in this matter. It initiated proceedings against the Financial Intelligence Unit (FIU) and others as Defendants. The next day that claim was amended and it then named the FIU as an Interested Party. The substantive claim concerned outstanding attorneys fees which the Claimant says were due and owing from the Defendants who were clients of his. The FIU, he further claimed, held monies belonging to the Defendants and as far as he knew, payment out to them was imminent. No application for an interim injunction had been made.

2. However, counsel for the Claimant sent an advanced and unsealed copy of the claim to the FIU under lengthy cover letter dated the 25th April, 2017. A copy of the attachment was not before the court. But the letter was and it stated in its first paragraph:

> *"We enclose herein an advanced copy of a claim filed yesterday against Carlos Figueroa copy of RCR#A-041291 is also enclosed evidencing proof of date filed. This is not service of the claim on FIU."*

3. It continues some paragraphs later:

> *"We are respectfully requesting … for the reason that the claim herein copied to you by advance copy is before the court and all matters being sub-judice in relation thereto that no payment be made to Carlos Figueroa until all matters of the claim against him for legal fees are settled to the satisfaction of both parties."*

4. And it concludes:

> *"A copy of this letter will be provided to the Court at the time of hearing when this office will be appearing before the Court as attorneys on record for Carlos Figueroa.*
>
> *In anticipation we thank you for your attention to this matter and we will respectfully request that Carlos Figueroa be advised of the legal developments in this case."*

5. Counsel for the Claimant explained that he adopted this procedure particular because the claim was *"extremely urgent."* It does not appear that the claim

was ever served on the FIU in accordance with the methods of service outlined in the CPR. It has apparently still not been served on the Defendants, who are both stated to be outside Belize, and did not participate in these proceedings in any way.

6. On the 9th June, 2017 there was filed, on behalf of the FIU, a notice of change of attorney (the reason for this baffles the court even now), a defence and a notice of application to strike out claim supported by an affidavit. All these documents state the FIU as an interested party and so the court accepts that what they had received from the Claimant must have been the amended claim form.

7. The application to strike out first requested an order that the FIU be removed as an Interested Party, indicating that there was *"no lis between the Respondent and the Interested Party."* In the alternative it asked for strike out as the claim disclosed no good arguable cause of action and no likelihood of success. Its main thrust was that the claim did not comply with section 34(1) of the Legal Profession Act Cap.320 and alleged that a bill of fees had not been served on the Defendants prior to bringing the claim. It spoke to the procedure used for commencing the claim for an injunction stating that it ought to have been initiated by an application. It raised that the claim for fees was an abuse of process as there was a same or substantially the same set of facts being raised in an Inferior Court appeal. It also asked that a named attorney be substituted as a party to the claim instead of the FIU since the money in issue had by then been paid out to said attorney as counsel for the Defendants.

8. After these documents were filed and served by the FIU, the Claimant responded by filing an affidavit objecting to the procedure followed by the FIU. He maintained that his statement of case had not yet been served on them. Therefore, there was no need for a response of any kind from them. Further, he urged, that as an Interested Party they did not have the right to file a defence. He also filed a notice of removal purporting to remove the FIU as a party to the claim. He asked for costs on the FIU's application to strike out. While addressing the court, at the hearing he also sought costs on the defence filed. He submitted that not only were they both premature but they had been rendered otiose by his filing of the notice removing their name from the claim.

9. Now there is no known procedure whereby a Claimant could by notice remove a party from a claim. Correctly, he achieves same by filing an amended claim form and statement of claim reflecting the removal. At this stage, of the proceeding (prior to Case Management), he is free to amend his claim as he sees fit with neither application to nor permission of the court. His notice is therefore of no effect except perhaps as an indication to the Interested Party of his intention and, to the court, that he concedes that particular issue.

The issues for the court to consider now is:

10. 1. Whether the Interested Party had the right to file a defence

2. Whether the filing of the defence and strike out application were premature and/or unnecessary and

3. Whether the Claimant or Defendant ought to have their costs.

Whether the Interested Party had the right to file a defence:

11. The Claimant maintains that the Interested Party was never served. He seeks support for his contention through the letter he sent with the advanced copy of the claim form. He says, further, that since the FIU were named as interested parties only they did not have the right to file a defence. He relies on Rule 10.2 which directs that only a Defendant who wishes to defend all or part of a claim must file a defence.

12. A Defendant as defined by Rule 2.4 means: *"a person against whom a claim is made …"* It is instructive that Defendant is not defined as a person so named in a claim. It, therefore, stands to reason that determining who is really a Defendant, depends on whether or not a claim has been made against that person.

13. When the Claimant states at paragraph 9 of his claim form and paragraph 13 of the Statement of Claim.

***"AND** the Claimant claims*:

4. An order of injunction to restrain the Defendants from receiving these funds from the FIU, before they make arrangement with SABIDO & CO. LLP to pay the fees agreed.

14. Then at paragraphs 7 and 8 of the claim form:

> *"The FIU is about to release the funds to the Defendant Carlos Figueroa … Despite a request by SABIDO & CO LLP by their letter to the FIU … to release the funds to SABIDO & CO LLP the attorneys on record …..…*
>
> *The Claimant claims 18% commission on the amount to be released … and an order of injunction to restrain the Defendants from receiving these funds from the FIU before settling fees with SABIDO & CO. LLP."*

15. Then at paragraph 11 of the Statement of Claim:

"If the FIU releases the funds as planned SABIDO & CO LLP will be deprived of the legal fees legitimately earned …"

16. What the Claimant seeks in fact is to restrain the FIU from releasing the funds to the Defendants. The mere fact that he speaks to the Defendants receiving the funds does not in essence change the application he is really making. If the FIU were to release those funds to anyone else, satisfaction of his potential judgment via this route would certainly be defeated. Further, his adding the FIU as an Interested Party reinforces this interpretation. Had this not been his true intention he would perhaps have sought only to serve the FIU with a copy of any injunctive orders made rather than joining them as a party to the claim. But, for the Claimant it was necessary to join the FIU although there was no cause of action against them so that they would be bound by the result. This according to ***Amon v Raphael Tuck [1956] 1 QB 357*** is sufficient to make such a Party a Defendant.

17. Black's Law Dictionary 7th Ed defines an interested party as a party who has a recognizable stake (and therefore standing) in a matter. The Supreme Court of Judicature Act in section 2 defines party as including *"… every person served with notice of, or attending, any proceeding although not named on the record."*

18. This solidifies in my mind the fact that an interested party so named in a claim, could file a defence if a claim has been made out against him. I also find that a claim has been made out against the FIU and they do have a right to file a defence herein once they had been served. This takes us to the other leg of the matter – has the interested party been served.

Whether the filing of the defence and strike out application were premature and/or unnecessary

19. Now there are pre-action conducts which a Claimant could engage in and for which no procedure is outlined in the Rules. Generally, these procedures ought to enable the parties to understand each other's position so they are better informed as to how best to proceed. Such conduct could include notifying a potential Defendant of the intended contents of a claim form or even providing a draft of such a claim. Where, however, a Claimant sends a copy of a filed claim form to a Defendant, if that Defendant accepts this as good service, he may waive his right to proper service. According to the Rules, he demonstrates this waiver through his filing of an acknowledgment of service.

20. This is borne out quite clearly by Rule 5.19 which deals with deemed date of service of the claim form. At sub-rule (3) it states:

> *"where an acknowledgment of service is filed whether or not the claim form has been duly served the claimant may treat –*
>
> *(a) the date of filing the acknowledgment of service; or*
>
> *(b) (if earlier) the date shown on the acknowledgment of service for receipt of the claim;*
>
> *as the date of service."*

21. This deemed date of service indicates that notwithstanding what the Claimant's intention may have been, the Defendant may accept any service as sufficient. One must not forget the purpose of service is to ensure as far as possible that documents actually come to the attention of the party being served. However, service is the formal delivery of legal process. Service of the claim form is left up to the Claimant so that he retains control

of the timing and the process. It is the Claimant who must prove this service. The date of service of the claim form dictates the procedural timetable, control of which ends for both parties on the filing of documents such as the defence, an application for default judgment or judgment on admission or the summary hearing of a fixed date claim form at first hearing.

22. Each of these acts may occur at a prescribed time which begins to run from the date of service of the claim form. Therefore, there must be some clear way for the court to assess when time actually began to run. For an ordinary claim form a Defendant may file a defence at any time before the Claimant files his application for default. However, for a fixed date claim form the procedure is vastly different because a Claimant here is precluded from applying for a default judgment pursuant to Rule 12.2(a). Rule 27.2(3) tells us that if at the first hearing, the fixed date claim is not defended, that hearing could be treated as a trial of the claim. A fixed date claim form stands undefended at first hearing if 28 days have passed since service of the claim form and no application to extend time for filing the defence has been made – Rule 10.3(1) and (8). Rule 27.2(7) adds that:

> *"(7) Unless the defendant files an acknowledgment of service, the claimant must file evidence on affidavit of service of the fixed date claim form and the relevant documents specified in Rule 5.2(3) at least 7 days before the first hearing."*

23. The Rule says must because the date of service is of the utmost importance to the Claimant as it instructs his right to the summary trial of his claim at first hearing. That acknowledgment of service form is imperative especially since the Claimant, here, asserts that he has not served. There is absolutely nothing before the court from which it could determine even a deemed date of service in order to calculate those 28 days. In any event, if the court were

to accept the date of receipt of the letter by the FIU as the date of service that date is unknown because the defence filed is silent on this particular issue. Perhaps so with good reason, since the Claimant's letter was clear: *"This is not service on the FIU."* More than likely, more than 28 days have already passed since *"service."* The court also considers that if what was sent under cover was not sealed then it could not have contained the date for first hearing and so was not a valid fixed date claim form in any event.

24. Now let us be clear, a Defendant who decides not to enter an acknowledgment of service, but files a defence instead has not acted improperly, providing that the defence is entered within the 14 days specified for entering the acknowledgement of service – Rule 9.2 (4). Again, there must be some way of calculating those 14 days particularly because a default judgment cannot be entered to a fixed date claim.

25. I therefore find in this case service of the claim form on the FIU has not been proven. Therefore, time for filing a defence has not yet begun to run. I agree with the Claimant that the filing of the defence was premature and wholly unnecessary.

26. The court now turns its attention to the application to strike out the claim. Where the FIU knew they no longer possessed the funds in issue, a simple application to be removed as an interested party, supported by an affidavit would certainly have achieved all that they and perhaps the Claimant truly desired. They were correct in being cautious, especially so, where counsel for the Claimant stated specifically that he intended to present his letter to them to the court. However, the full strike out application was to my mind unnecessary and amounted to using a sledge hammer to crack a nut. It was

an overall waste of resources, time and effort. It asked the court to consider matters which were not within the purview of the interested party's case and which the court could not make a determination on without the input of the named Defendants. It also raised issues about an interim application which the Claimant obviously did not wish to make and which the court could not consider. It sought to join parties which really did not concern the FIU in any way whatsoever. The application to strike out the claim must accordingly be dismissed.

27. The application by the FIU to be removed as a party is granted as prayed in light of the notice filed by the Claimant (which the court considers as a consent thereto).

Whether the Claimant or Defendant ought to have their costs:

28. In the present case counsel for the Claimant asserts that he is entitled to his costs for having to peruse the filed defence and defending the application to strike out the claim. He says he is so entitled because counsel pre-empted proper service, disregarded prescribed procedure and ploughed ahead unnecessarily with filing all documents. In the same breath he explains that he has deemed it necessary to remove the FIU as an interested party through information disclosed in the defence and the strike out application.

29. The FIU says that since they have been successful at being removed from the claim and the Claimant has admitted that their intervention has benefited his case, they ought to have their costs. Both parties have seen some level of success. But this is not a case where a party was wrongly joined. This is a case where intervening actions by the FIU have overtaken any interest the Claimant may have had in the FIU and renders their continued participation

irrelevant. The FIU's success is fairly hollow and must be considered in relation to all that they have done which was unnecessary.

30. The CPR request that in furthering the overriding objectives, it is the duty of the parties to help the court. It is no fulfilment of that duty to make unnecessary and needlessly complicated applications which counsel on the other side and the court must address and consider. However, the Claimant's letter and its contents particularly where he informs that he intended to disclose that letter to the court must also be considered. The novelty of the issues arising here must also be borne in mind.

31. Rule 63.6(5) and (6) directs that:

> *"In deciding who should be liable to pay costs, the court must have regard to all the circumstances.*
>
> *(6) In particular it must have regard to -*
>
> *(a) the conduct of the parties both before and during the proceedings;*
>
> *(b) whether a party has succeeded on particular issues, even if he has not been successful in the whole of the proceedings;*
>
> *(c) whether it was reasonable for a party –*
>
> *(i) to pursue a particular allegation;*
>
> *and/or*
>
> *(ii) to raise a particular issue;*
>
> *(d) the manner in which a party has pursued –*
>
> *(i) his case; or*
>
> *(ii) a particular allegation; or*
>
> *(iii) a particular issue."*

32. Simon Brown LJ in ***Budgmen v Andrew Gardner Partnership [2001] EWCA Civ 1125 at paragraph 26*** explained:

> *"For my part I have no doubt whatever that judges nowadays should be altogether readier than in times past to make costs orders which reflect not merely the overall outcome of proceedings but also the loss of particular issues. If, moreover, the "winning" party has not merely lost on an issue but has pursued an issue when clearly he should not have done, then there are two good reasons why that should be reflected in the cost order: first, as a sanction to deter such conduct in future; secondly, to relieve the "losing party" of at least part of his costs liability. It is one thing for the losing party to have to pay the costs of issues properly before the court, another that he should have to pay also for fighting issues which were hopeless and ought never to have been pursued".*

33. I find it fair and just, therefore, to award the Claimant costs in the sum of $2,400.00 or 80% of what I would have ordered in these proceedings.

It is hereby ordered:

1. The defence filed herein by the FIU is struck out as premature.
2. The application to strike out the claim herein is dismissed.
3. The application to remove the Financial Intelligence Unit as a party to the claim is granted.
4. The Claimant is to file an amended Statement of Case giving effect to this order before any service on the Defendants herein.
5. Costs to the Claimant in the sum of $2,400.00 being 80% of the costs awarded.

SONYA YOUNG
JUDGE OF THE SUPREME COURT