In The Supreme Court of Bermuda

CIVIL JURISDICTION

2017: No 66

BETWEEN:-

ATTORNEY GENERAL

Plaintiff

-and-

(1) ZANE DE SILVA
(2) WENDALL BROWN
(3) DELANO BULFORD
(4) ISLAND CONSTRUCTION SERVICES LIMITED
(5) S.A.L. LIMITED

Defendants

RULING

(In Chambers)

Strike out application – RSC Order 18, rule 19 – whether members of a statutory Board arguably owed fiduciary duties to the Government – whether Second Defendant arguably had a material interest in the Fifth Defendant – whether decision taken collectively by the Board could give rise to civil liability on the part of its members

Date of hearing: 9th May 2018
Date of ruling: 15th May 2018

Mr Norman MacDonald, Senior Crown Counsel, Attorney General's Chambers, for the Plaintiff

Ryan Hawthorne (noting brief), Trott & Duncan Limited, for the First and Fourth Defendants

Mr Saul Froomkin QC, Christopher Swan & Co, for the Second and Fifth Defendants

The Third Defendant did not appear and was not represented

Introduction

1. By a summons dated 20th June 2017, the Second and Fifth Defendants apply to strike out the claim against them pursuant to RSC Order 18, rule 19, or alternatively the inherent jurisdiction of the Court, on the grounds that it is: (i) scandalous, frivolous and vexatious, and (ii) otherwise an abuse of process. For ease of reference, and for purposes of this application only, I shall refer to them jointly as "the Defendants". There are other Defendants, but they did not take an active part in this application.

The law

2. The law on striking out was summarised by the Court of Appeal in Broadsino Finance Co Ltd v Brilliance China Automotive Holdings Ltd [2005] Bda LR 12. Stuart-Smith JA, giving the judgment of the Court, stated at 4 – 5.

> "*... Where the application to strike-out on the basis that the Statement of Claim discloses no reasonable cause of action (Order 18 Rule 19(a)), it is permissible only to look at the pleading. But where the application is also under Order 18 Rule 19(b) and (d), that the claim is frivolous or vexatious or is an abuse of the process of the court, affidavit evidence is admissible. Three citations of authority are sufficient to show the court's approach. In Electra Private Equity Partners (a limited partnership) v KPMG Peat Marwick [1999] EWCA Civ 1247, at page 17 of the transcript Auld LJ said: 'It is trite law that the power to strike-out a claim under Order RSC Order 18 Rule 19, or in the*

inherent jurisdiction of the court, should only be exercised in plain and obvious cases. That is particularly so where there are issues as to material, primary facts and the inferences to be drawn from them, and where there has been no discovery or oral evidence. In such cases, as Mr Aldous submitted, to succeed in an application to strike-out, a defendant must show that there is no realistic possibility of the plaintiff establishing a cause of action consistently with his pleading and the possible facts of the matter when they are known….. There may be more scope for an early summary judicial dismissal of a claim where the evidence relied upon by the Plaintiff can properly be characterised as shadowy, or where the story told in the pleadings is a myth and has no substantial foundation. See eg Lawrence and Lord Norreys (1890) 15 Appeal Cases 210 per Lord Herschell at pages 219–220'. In National Westminster Bank plc v Daniel [1994] 1 All ER 156 was a case under Order 14 where the Plaintiff was seeking summary judgment, but it is common ground that the same approach is applicable. Glidewell LJ, with whom Butler-Sloss LJ agreed, put the matter succinctly following his analysis of the authorities. At page 160, he said: 'Is there a fair and reasonable probability of the defendants having a real or bona fide defence? Or, as Lloyd LJ posed the test: 'Is what the defendant says credible'? If it is not, then there is no fair and reasonable probability of him setting up the defence'."

Background

Pleadings

3. The Plaintiff is the Attorney General and brings this action on behalf of the Government of Bermuda. The Second Defendant, Wendall Brown ("Mr Brown"), is a prominent businessman who was from June 2006 until December 2010 a member of the Board of Trustees of the Golf Courses ("the Board") established under section 3(1) of the Golf Courses (Consolidation) Act 1998 ("the 1998 Act").

4. The Schedule to the 1998 Act provided that the Board should consist of not fewer than seven and not more than eleven members, and that members of the Board ("the Trustees") shall be appointed annually by the Minister charged with responsibility for golf courses.

5. The functions of the Board under section 5(1) of the 1988 Act include having the general control, management and administration of the Port

Royal Golf Course ("the Course"). From 2007 – 2009 the Course was refurbished, with the cost borne by the Government.

6. Mr Brown was at all material times a director of the Fifth Defendant, SAL Limited ("SAL"). The Plaintiff alleges at para 9(2) of the Amended Statement of Claim ("ASC") that he was also an owner of SAL and one of its controlling minds and wills, but Mr Brown denies this. The Plaintiff alleges that Mr Brown: (i) caused or permitted the Board to award a contract to SAL so that he made a profit by reason of his position as a Trustee; and (ii) caused or permitted the Third Defendant, Delano Bulford ("Mr Bulford"), who was at all material times a member of the Board, to receive a secret commission in respect of a contract awarded by the Board to a company known as Miracle Steel Structures Limited ("Miracle Steel").

7. The Plaintiff alleges at para 9(5) of the ASC that SAL dishonestly assisted Mr Brown to secure the award of a contract to it.

8. The Plaintiff's case against Mr Brown and SAL in relation to the award of a contract to SAL is pleaded at paras 30 – 32 of the ASC.

"*30. In April 2008 Mr Lemoine [the project manager responsible for the day to day management of the refurbishment of the Course] began to investigate the construction of concrete paths for carts. On 22 April 2008 the Board of Trustees agreed to resurface all of the cart paths in concrete.*

31. By a memorandum to the Board dated 7 May 2008 Mr Lemoine recommended that the contract for the construction of the cart paths should be awarded to Richold Construction Co Ltd ("Richold") but that the concrete should be supplied by [SAL]. On receipt of this memorandum [Mr Brown] did not disclose his interest in [SAL] to the Plaintiff or obtain the plaintiff's permission to contract with [the Board] and did not withdraw from the discussion that ensued.

32. On 9 May 2008 the [Board] sent Richold a purchase order for the construction [of] the concrete cart paths. Richold constructed the cart paths using concrete supplied by [SAL]. ..."

9. The Plaintiff's claim against Mr Brown in relation to Miracle Steel is pleaded at paras 33 – 45 of the ASC. In summary, the Board decided to award the contract for the supply of the maintenance shed to Miracle Steel

for the price of $187,847 and to pay the commission of $10,000 due on the contract from Miracle Steel to Mr Bulford. DLRK Associates ("DLRK"), a business of which Mr Bulford was the proprietor, invoiced the Board for the commission payment. At Mr Brown's suggestion, the Board advised Mr Bulford to get Miracle Steel to invoice the Board for the commission instead, so that Mr Bulford would receive the commission directly from Miracle Steel and not from the Board. Miracle Steel duly invoiced the Board for payment of $10,000, being "*a fee payable to [DLRK]*". The Board authorised payment, but recorded that the invoice represented commission payable to Mr Bulford. The Plaintiff alleges that Mr Brown knew that the commission payment was improper, and attempted to conceal it from the Plaintiff.

10. The Plaintiff alleges at para 47 of the ASC that Mr Brown was in breach of fiduciary duty in that he: (i) failed to disclose his interest in SAL to the Plaintiff; (ii) failed to withdraw from any discussion being held by the Board about the possibility of SAL being awarded a contract for the supply of concrete for car paths; (iii) failed to obtain the Plaintiff's permission to contract with the Board; (iv) made a profit by reason of his position as Trustee; and (v) caused or permitted Mr Bulford to receive the above-mentioned commission payment.

11. The Plaintiff alleges at para 50 of the ASC that Mr Brown's knowledge is to be imputed to SAL. Accordingly, it is alleged, SAL knew of the fiduciary relationship between the Board and the Government, and that Mr Brown was acting in breach of trust. SAL dishonestly assisted Mr Brown in the breach of trust by entering into the contract for the supply of concrete, and is therefore liable to the Plaintiff in dishonest assistance.

12. Mr Brown and SAL have filed a Defence in which they deny any wrongdoing. Specifically, at para 8 of the Defence they deny the allegations contained in paras 9(2) and 9(5) of the ASC. Paras 30 – 32 of the ASC are admitted at para 14 of the Defence, which further states:

"*... that [Mr Brown] had no interest in [SAL] and further that in any event the contract for the cart paths being between the Board and [Richold] did not raise any issues of*

potential conflict. [SAL] was the sub-contractor of [Richold], there being no privity between the Board and [SAL]. The said Defendants further say that … the said contract for the construction of the cart paths was put out to public tender, and although [SAL] tendered for the contract along with seven other contractors, its tender was rejected by Mr Lemoine … who recommended [Richold]."

13. Para 47 of the ASC is denied at para 16 of the Defence, which further states:

"*… the said Defendants say … that [Mr Brown] had no interest in [SAL] and accordingly he had no interest to declare and accordingly there was no reason to withdraw from the discussions or requirement to obtain permission from the Plaintiff. [Mr Brown] denies further that he made any profit by reason of his position as a Trustee and denies that he caused or permitted [Mr Bulford] to receive a commission as alleged or at all.*"

14. Para 50 of the ASC is denied at para 17 of the Defence, which further states:

"*… there is no basis in fact or in law to impute any knowledge of [Mr Brown] to [SAL]. They further deny that the Board … had a fiduciary relationship towards the government, and deny that [Mr Brown] was acting in breach of trust as alleged or at all. The said Defendants further deny the allegation of dishonest assistance or that any assistance was rendered by [SAL] to [Mr Brown] as alleged or at all.*"

Ownership and control of SAL

15. W Paul King ("Mr King"), who is a director, Vice-President and Secretary of SAL, swore an affidavit on behalf of the Defendants. He stated that on 16th January 2006, SAL was purchased by Phillips Holdings Limited ("Phillips"), and exhibited various documents, including:

(1) *Register of Directors and Officers of SAL as of March 2014*. This showed that Mr Brown was one of six directors. They were all appointed on 16th January 2006, on which date Mr Brown was also appointed President of the company and Mr King was appointed Vice-President.

(2) *Register of members of SAL*. This showed that the authorised capital of the company was $48,000.00, divided into 9,600 shares of $5.00 each. On 16th January 2006, Phillips became the registered owner of

all 9,600 shares. Phillip's address was "Paddington", 21 Richmond Road, Pembroke HM08 ("Paddington").

(3) *Register of Directors and Officers of Phillips*. This showed that on 1st November 2005, Mr Brown was appointed director and President of the company and Mr King was appointed director and Vice-President. There were no other directors. The Register showed that Mr King was the Secretary and that a company known as Limestone Services Ltd ("Limestone Services") was the Assistant Secretary. The address of both was given as "Paddington".

(4) *Register of Shareholders of Phillips*. This showed that there were two shareholders: a company known as Cahow Limited ("Cahow"), whose address was "Paddington", which held 44,857 shares, and a company known as Butterfield VanCap Limited ("VanCap"), whose address was 65 Front Street, which held 5,143 shares.

16. In November 2017, there was an exchange of emails regarding Cahow between Norman MacDonald, the Senior Crown Counsel who argued the present application for the Plaintiff, and Mr King. On 17th November 2017, Mr MacDonald emailed Mr King asking: "*Are any of the shares held in trust for someone else?*" Mr King replied on behalf of Limestone Services, perfectly properly: "*Limestone Services does not disclose that information*".

17. Janae Nesbitt ("Ms Nesbitt"), who was a law student employed in the Plaintiff's Chambers, swore an affidavit on behalf of the Plaintiff. She exhibited various documents, which included:

(1) *Register of Directors and Officers of Cahow*. This showed that on 16th November 2000, Mr Brown was appointed director and President of the company and Mr King was appointed director and Vice-President. There were no other directors.

(2) *Register of Members of Cahow*. This showed that the authorised capital of the company was $12,000.00 divided into 12,000 shares of $1.00 each. On 1st March 2004 these were allotted to a company

known as Limestone Nominees Ltd ("Limestone Nominees"), whose address was "Paddington". Previously, on 9th November 2000, Mr Brown had signed the memorandum of association of Cahow as a subscriber for all 12,000 shares.

(3) *Register of Directors and Officers of Limestone Nominees*. This showed that on 24th January 1994, Mr King was appointed director and President of the company and Jo Anne King ("Ms King") was appointed director and Vice-President. Their address was given as "Paddington". There were no other directors. The Register was last updated on 3rd November 2011.

(4) *Register of Members of Limestone Nominees*. This showed that the authorised capital of the company was $12,000.00 divided into 12,000 shares of $1.00 each. On 24th January 1994, 6,000 shares were allotted to Mr King, and on 18th March 2009, 6,000 shares were allotted to Ms King. Their address was given as "Rockhurst", 8 Monkey Hole Lane, Southampton SB 02.

18. On 21st March 2018, Ms Nesbitt emailed Bill Morrison, the Chief Executive of SAL, to ask whether the shares in SAL were held in trust for another person or company, and if so, who they were held in trust for. Mr Morrison replied, not unreasonably: "*I would appreciate you identifying yourself and also give the reason for you[r] inquiry*". If there was any further email correspondence between them, it was not put before the Court.

19. I should add for completeness that Shakira Dill-Francois, Deputy Solicitor-General, swore an affidavit in these proceedings in which she stated that on 4th July 2017, presumably by email, she asked Saul Froomkin QC ("Mr Froomkin"), counsel for the Defendants, whether Mr Brown was a beneficial owner of SAL via Cahow or VanCap. Mr Froomkin replied by email dated 10th July 2017, but did not provide the information requested.

20. There was therefore no evidence before the Court: (i) as to whether Mr and Ms King held the shares in Limestone Nominees on their own behalf or as nominees; (ii) as to whether Limestone Nominees held the shares in Cahow

on its own behalf or as a nominee – the company's name suggests the latter; (iii) as to whether Cahow and VanCap held shares in Phillips on their own behalf or as nominees; (iv) as to the beneficial ownership of VanCap; and therefore (v) as to whether Mr Brown held an underlying beneficial interest in SAL.

The strike out application

21. The Defendants apply to strike out the ASC insofar as it relates to them on the following grounds:

    (1) Mr Brown owed fiduciary duties to the Board and not the Government. The Government has no cause of action against Mr Brown as, in common with other members of the Board, he owed no duty to it.

    (2) Mr Brown did not have an interest in SAL. Alternatively, if he did have an interest, which is denied, the interest was not material and was therefore not required to be disclosed.

    (3) The decision to fund the commission payment to Mr Bulford was made by the Board collectively and was therefore not one which could give rise to individual liability for breach of fiduciary duty on the part of its members.

22. I shall consider each ground in turn.

Fiduciary duties

23. Section 3(2) of the 1998 Act provides that the Board shall be a body corporate with perpetual succession and a common seal with power to sue and be sued in its corporate name. Mr Froomkin submitted that therefore the fiduciary duty owed by Mr Smith and the other Board members was to the Board and not the Government.

24. Mr MacDonald did not agree and submitted that the 1988 Act supported his position. He relied upon the following provisions in the Act:

(1) The Preamble, which states:

"*WHEREAS it is expedient to consolidate the statutory provisions which relate to golf courses owned by the Bermuda Government, to provide for a single Board of Trustees to manage such golf courses, and to make connected provision*".

(2) Section 5(3), which provides:

"*The Minister may, after consultation with the Board, give to the Board such general directions as to policy to be followed by the Board in the performance of its functions as appear to the Minister to be necessary in the public interest and the Board shall give effect to such directions.*"

(3) Section 10 provides:

"*(1) Any proposed capital development expenditure shall be subject to the prior approval of the Minister and the Minister of Finance and shall be included in the Annual or Supplementary Estimates.*

(2) Any funds appropriated by the Legislature for the operation or maintenance of the Golf Courses or for capital development shall be applied, subject to the terms of the appropriation, in accordance with—

(a) any instructions issued by the Minister of Finance or any direction issued by him under section 3(1) of the Public Treasury (Administration and Payments) Act 1969 [title 14 item 1]; or

(b) any other instructions issued by the Minister."

25. Thus the Board managed the Course on behalf of the Government and was subject to the supervision of the Minister in that: he could give the Board general directions as to policy to be followed by the Board in the performance of its functions; any proposed capital expenditure by the Board required his approval; and any funds appropriated by the Legislature for the operation or maintenance of the Course or for capital development were to be applied in accordance with any instructions issued by him. In those

circumstances, Mr MacDonald submitted, the members of the Board owed a fiduciary duty to the Government.

26. I was also addressed by both counsel as to whether the Board was a "*Government Board*" within the meaning of the Interpretation Act 1951. Even if it was, that would take the matter no further.

27. I am satisfied that, in light of the provisions in the 1988 Act cited by Mr MacDonald, it is properly arguable that Mr Brown owed fiduciary duties to the Government.

Interest in SAL

28. Mr Froomkin submitted that Mr Brown had no legal interest in SAL or any of the companies in the chain of companies that owned it. There was no evidence that he had any beneficial interest in SAL, whether directly or indirectly. In the alternative, which was denied, that Mr Brown did have an interest, it was not one which he was required to disclose because it was not material. As to what was a material interest requiring disclosure, Mr Froomkin referred the Court to Johnson v EBS Pensioner Trustees Limited [2002] EWCA Civ 164. In that case, in the context of the doctrine of abuse of confidence, the court reviewed the authorities on the disclosure which a fiduciary was required to make when entering into a contract with his client. Dyson LJ (as he then was), with whom Douglas Brown LJ agreed, stated at para 70:

> "*In Moody v Cox [1917] 2 Ch 71, Lord Cozens-Hardy MR said that the duty was to disclose "everything that is material, or may be material, to the judgment of his client before the transaction is completed". In other words, there must be disclosure of everything that would or might influence the principal in his decision whether to proceed with the transaction at all, or to proceed with the transaction on the terms being offered by the other contracting party.*"

29. Mr Froomkin submitted that the "materiality" test applied equally to the disclosure required of a fiduciary to his principal in other situations, eg where there was a conflict of interest or where the fiduciary stood to make a

secret profit from a transaction. He submitted that any interest held by Mr Brown was immaterial as SAL contracted to supply concrete with Richold not the Board. Morever, the Board's decision to award the main contract to Richold and the sub-contract to SAL was based on the independent recommendation of Mr Lemoine. Thus even if Mr Brown did have an interest in SAL, it would have made no difference to the award of the contracts.

30. Mr MacDonald submitted that Mr Brown had a material interest in SAL in that he was a director and President of the company. When the Board was considering whether to award a sub-contract to SAL, he neither disclosed that interest nor recused himself. He had placed himself in a position where he faced a conflict of loyalties: his duty to the Board to get the best deal for the Government conflicted with his duty to SAL to get the best deal for the company.

31. Moreover, Mr MacDonald submitted, until discovery had taken place, the Court was in no position to conclude whether or not Mr Brown had any underlying beneficial interest in SAL. Tellingly, although Mr Froomkin submitted that Mr Brown had no interest in the company, Mr Brown had not sworn an affidavit to that effect. If he did have an interest, then he stood to profit from the award of the sub-contract. Any such profit would offend against the principal that a fiduciary must not make a profit from his fiduciary position without the consent of his principal. For this purpose, Mr Brown's principals were not only the Board but also the Government. If Mr Brown had stood to gain from the award of the sub-contract, it was mere conjecture to say that the Board would have awarded it to SAL, and that the Minister would have approved the award, in any event.

32. I am satisfied that on the material before me it is properly arguable that Mr Brown had an interest in SAL.

Commission payment

33. This aspect of the Plaintiff's case was dealt with only briefly by both counsel. Mr MacDonald submitted that in approving the commission payment, and, on the Plaintiff's case, attempting to conceal it from the Government, the members of the Board were acting in breach of the fiduciary duty that each of them individually owed to the Government. Mr Froomkin submitted that as the Board acted collectively, its decisions could not give rise to individual liability for breach of fiduciary duty on the part of its members. Suffice it to say that I am satisfied that the Plaintiff's position is properly arguable.

Conclusion

34. Mr Froomkin has not satisfied me that the Plaintiff's claim against Mr Brown and SAL is scandalous, frivolous or vexatious or that it is otherwise an abuse of process. Far from this being a plain and obvious case for striking out, I am satisfied that the claim is properly arguable, although I express no view as to its ultimate merits. The strike out application is therefore dismissed.

35. I shall hear the parties as to costs.

DATED this 15th day of May, 2018

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Hellman J