In The Supreme Court of Bermuda

CIVIL JURISDICTION

2015: No. 485

BETWEEN:-

JAMES A L PENISTON
trading as EAST BANK CONSULTANTS

Plaintiff

-and-

GAYTHORNE MARK GIBBONS

Defendant

EX TEMPORE JUDGMENT

(In Court)

Strike out application – Rules of the Supreme Court, Order 18, rule 19(1)(d) – whether too late to bring said application – whether valid assignment of debt

Date of hearing: 11th April 2017

The Plaintiff appeared in person
Mr Edward P Bailey, Edward P Bailey & Associates, for the Defendant

Introduction

1. By a specially indorsed writ of summons dated 3rd December 2015 "*East Bank Consultants*" ("EBC") claimed $78,992 from the Defendant for breach of a building contract. EBC sued in their capacity as assignees of the debt. The assignor was Hunts Sanitation Ltd. The assignment was made by way of a deed of assignment dated 3rd July 2015. Importantly, however, the Defendant was not given written notice of the assignment until after the writ had been issued. The matter has been listed before me today for trial.

2. By a summons dated 22nd February 2017, the Defendant seeks pursuant to Order 18, rule 19 of the Rules of the Supreme Court 1985 ("RSC") to strike out the Plaintiff's claim on two grounds: (i) that EBC has no legal personality and is therefore unable to sue; and (ii) that the purported assignment was a nullity ("the assignment point"). That summons has also been listed before me today.

First ground

3. It is true that EBC has no legal personality. However at a hearing on 21st November 2016 I gave the Plaintiff leave to amend the style of the Plaintiff in the title to the action from "*EBC*" to "*James A L Peniston t/a EBC*" as I was satisfied that this nomenclature accurately reflected the Plaintiff's true identity. Ie that EBC was a trading name for Mr Peniston. Thus the effect of the amendment was not to substitute a new plaintiff but to correctly name the existing one. RSC Order 20, rule 5(3), which deals with an amendment to correct the name of a party where such amendment involves the substitution of a new party, was not therefore engaged. But if that rule had been engaged, I should have been satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue. The Defendant's counsel at the November hearing, who was not Mr Bailey, did

not object to the amendment or seek leave to appeal the Court's decision. The first ground of the strike out application therefore fails.

Preliminary objection to second ground

4. The Plaintiff submits that it is too late to raise the assignment point in a strike out application. RSC Order 18, rule 19(1) provides that a court may "*at any stage of the proceedings*" order a pleading or the indorsement of a writ to be struck out. However the commentary to rule 19 in the 1999 Edition of the White Book at para 18/19/3 provides:

> "*Although the rule expressly states that the order may be made 'at any stage of the proceedings', still the application should always be made promptly, and as a rule before the close of pleadings. ... The application may be made even after pleadings are closed (per Brett M.R. in Tucker v. Collinson (1886) 34 W.R. 354, or the trial set down (Goymer v. Lombard North Central Wheelcase Ltd (1993) The Times, April 1, CA), though it should not be heard at the opening of the trial, save in exceptional circumstances (Halliday v Shoesmith [1993] 1 W.L.R. 1, CA).*"

5. In Halliday v Shoesmith, the last mentioned case in the above extract, Beldam LJ, giving the judgment of the Court, stated at 5 C – D:

> "*It seems to me that where a party to litigation delays making an application of this kind until the opposite party has incurred all the costs of preparing for trial and has indicated that he is himself intending to exercise his right to proceed to trial, he has conducted himself in a way which has induced the opposite party to incur costs and expense and, if his contentions be right, has unwarrantably increased the potential liability of the opposite party to pay his costs. It seems to me that such an application should, in the ordinary way, be made at the earliest opportunity and that a court should not embark on hearing such an application at the eleventh hour, save in the most exceptional case and on receiving a valid explanation for the lateness of the application.*"

6. An additional factor in the present case, although I was not addressed on this point, is the possibility that the Plaintiff would run into difficulties over the applicable limitation period if required to procure a fresh assignment and commence fresh proceedings in order to pursue a claim.

7. However, even if I were to decline to entertain the strike out application it would be open to the Defendant to raise the assignment point by way of legal argument during the course of the trial. Initially the Plaintiff submitted that the Defendant's failure to raise the point until now somehow gives rise to a waiver or estoppel which prevents him from doing so. But I reject that argument, which was not supported by the citation of any authority. Indeed, the Plaintiff subsequently accepted that it was open to the Defendant to take the point during the trial and I am satisfied that the strike out application has given the Plaintiff adequate notice of it.

8. As this is a point of law it is not necessary for the Defendant to seek leave to amend his pleadings in order to raise it, although pursuant to Order 18, rule 11 he could have pleaded the point had he so chosen. As the commentary to rule 11 states at para 18/11/1 of the 1999 Edition of the White Book:

> "*If a party intends to raise a point of law on the facts as pleaded, it is a convenient course to do so in the pleadings ... But nevertheless he may, at the trial, raise a point of law open to him even though not pleaded (Independent Automatic Sales Ltd v Knowles & Foster [1962] 3 All E.R. 27).*"

9. The Plaintiff referred me to the further commentary at 18/11/2, which states:

> "*Where costs can be saved by obtaining a ruling on a point of law which requires serious argument and consideration being disposed of before trial, the point should be raised in the pleading and application should be made under O.33, rr 3 and 4(2) for the trial of the point as a preliminary issue. See further Everett v Ribbands[1952] 2 Q.B. 198; and Carl Zeiss Stiftung v. Herbert Smith & Co. [1969] 1 Ch. 93; [1968] 2 All E.R. 1002, CA.*"

10. However there is no suggestion in either case cited in that extract that failure to try a point as a preliminary issue when that point could properly have been dealt with in that way precludes it from being raised at trial. Thus the fact that the Defendant did not seek to have the validity of the assignment tried as a preliminary issue would not preclude him from raising it at trial. Were I to dismiss the strike out application then the assignment point could usefully be dealt with as a preliminary point at the start of the trial. If I ruled in the Defendant's favour then that ruling would be dispositive of the trial.

What we are concerned with, then, is not whether the Court should hear the Plaintiff's argument on the validity of the assignment, but rather with the vehicle by which that argument should be put before the Court.

11. The strike out application was initially listed for 2nd March 2017. However on that date Mr Bailey was off island due to the bereavement of a family member, and so the matter was delisted. At his request, it was relisted for 16th March 2017, which was already listed as the trial date. For whatever reason, both the trial date and the hearing of the strike out application were adjourned to today.

12. The costs of preparation for the trial, which has a time estimate of half a day, will have been relatively modest. If and to the extent that any unnecessary costs of trial preparation have been incurred as a result of the Defendant's delay in raising the assignment issue, then that can be addressed by an appropriate order for costs.

13. The lateness of the strike out application is due to a change of attorney by the Defendant. Mr Bailey came on the record on 17th January 2017 and issued the strike out application a little over one month later. This was not, I accept, moving with the utmost dispatch. The Defendant's previous attorney had not spotted the assignment point, and prior to May 2016, the Defendant was not legally represented.

14. These are hardly exceptional circumstances. But on the particular facts of this case I am satisfied that Mr Bailey need not show exceptional circumstances to justify my hearing the strike out application. This is because, as I have already explained, if I had declined to do so it would have been open to him to raise the assignment point at trial, when elementary principles of good case management would have dictated that I ruled on it as a preliminary point. This is an "*exceptional case*" in the sense used by Denning LJ (as he then was) in the Carl Zeiss Stiftung case at 99A (as opposed to an "*exceptional case*" in the Halliday v Shoesmith sense) in that

there is no dispute as to the facts upon which the validity of the assignment falls to be decided.

15. As the validity of the assignment has been raised in the context of a strike out application, and as, for reasons which I shall shortly explain, the merits of the application are very clear cut, the strike out application is the vehicle which I shall use to deal with the assignment point.

The second ground

16. Section 19(d) of the Supreme Court Act 1905 ("the 1905 Act") provides as follows:

> "*(d) any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been, effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not been passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor…*" [Emphasis added]

Thus an assignment of debt is effective from the date on which express written notice of the assignment is given to the debtor.

17. In the present case the requirements of section 19(d) have not been complied with because, as noted above, the Defendant was not given notice of the assignment until after the writ was issued. The facts are therefore on all fours with the facts of East Bank Consultants v Ferigo [2016] Bda LR 100, in which Kawaley CJ held:

> "*10. … section 19(d) in my judgment is a provision which clearly requires express notice to be given of an assignment and clearly specifies that, until that notice has been given, the assignment does not take effect.*

11. It follows that the Plaintiff, assuming that the capacity issue could be cured by way of a subsequent amendment application, did not possess the standing to bring these proceedings when the Writ was issued and that is a fatal flaw for the validity of the claim."

18. That reasoning applies equally to the facts of the instant case. As Denning LJ (as he then was) said of section 136(1) of the Law of Property Act 1925, which was in all material respects the same as section 19(d) of the 1905 Act, in WF Harrison & Co Ltd v Burke [1956] 1 WLR 419 at 421:

"*It is only necessary to read section 136 of the Law of Property Act, 1925, to realize that the notice in writing of the assignment is an essential part of the transfer of title to the debt, and, as such, the requirements of the Act must be strictly complied with, ...*"

19. In the circumstances, the Plaintiff's claim is liable to be struck out as an abuse of process under RSC Order 18, rule 19(1)(d) and I so order.

20. [After hearing the parties as to costs, the Court awarded the Defendant the costs of the strike out application and the Plaintiff the costs of preparing for trial. The Plaintiff was given leave to appeal.]

DATED this 11th day of April, 2017

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Hellman J