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OFFSHORE CASES

OCTOBER 2017

BERMUDA

SUPREME COURT

MICHAEL W JONES and STEWART TECHNOLOGY SERVICES LTD - RULING

[2017] SC (Bda) 92 Civ (30 October 2017)

STRIKE OUT APPLICATION – RULES OF THE SUPREME COURT 1985, ORDER 18 RULE 19 – WHETHER REASONABLE CAUSE OF ACTION – WHETHER ISSUE ESTOPPEL – WHETHER DEFENDANT A PRIVY OF PARTIES TO US ACTION SAID TO GIVE RISE TO ESTOPPEL – WHETHER ABUSE OF PROCESS

This was a strike-out application by Stewart Technology Services Ltd (the Defendant) against a claim of breach of contract by Michael Jones (the Plaintiff). The Defendant sought to strike out the statement of claim pursuant to RSC Order 18 rule 19 on the ground that it discloses no reasonable cause of action; or alternatively on the ground that is scandalous, frivolous or vexatious, or is otherwise an abuse of the process of the court, in that it depends upon issues which have already been judicially determined by a State Court in the USA. The claim was also said to be an abuse of process in that it allegedly breached various settlement agreements between the parties to the US action.

Background

In summary, the Plaintiff claimed that the Defendant, in breach of contract, failed to pay him profits to which he was entitled, namely 45% of the US$1,900,000 generated by the Defendant between 2007 and 2012. The Plaintiff claimed that he had entered into an oral contract with Patrick Sutherland, an agent of the Defendant, that in consideration for undertaking work to transfer the offshore consulting ventures of Insigne Consulting to the Defendant, he would be entitled to 45% of the profits generated by those consulting ventures. The 45% reflected the Plaintiff's interest in Insigne Consulting. The other 55% interest in Insigne Consulting was owned by Mr Sutherland and his wife Yanique Lawrence. In an earlier application however, the Plaintiff had not pleaded that his claim was based on an oral contract for undertaking work, but that his claim was based solely upon his alleged 45 % interest in Insigne Consulting.

Defendant's grounds for strike-out application

Counsel for the Defendant submitted that the Plaintiff's claim was subject to issue estoppel, or was alternatively an abuse of process, by reason of various agreements and orders entered into or made in an action brought in the General Court of Justice in North Carolina between Mr Jones as plaintiff and Mr Sutherland and Ms Lawrence as defendants (the "US action"). The parties included Insigne Consulting but not the Defendant.

The US action was settled by a Settlement Agreement and Mutual Release dated 30 December 2011, in which Mr Jones agreed to 'release, acquit and forever discharge' Mr Sutherland, Ms Lawrence and Insigne Consulting from any claims, actions or demands. The two parties signed a Stipulation dismissing the action with prejudice. They entered into a second Settlement Agreement and Mutual Release in November 2012 and a third in January 2017 both of which reaffirmed the terms of the First Settlement Agreement.

Pursuant to the third Settlement Agreement, the US court made a Consent Permanent Injunction which ordered that Mr Jones "*shall immediately take all action necessary to dismiss with prejudice or otherwise permanently terminate all claims asserted against Sutherland in the Bermuda lawsuit*."

Counsel for the Defendant submitted that the dismissal of the US action with prejudice gave rise to an issue estoppel which prohibited the Plaintiff from asserting in the present case that he had held a 45% interest in Insigne Consulting.

The Court recognised the Stipulation as being capable of giving rise to an estoppel in Bermuda and rejected the submission by counsel for the Plaintiff that the Stipulation merely prevents the Plaintiff from pursuing a cause of action against any of the Sutherland parties based upon his alleged 45% interest in Insigne Consulting. Justice Hellman concluded that it prevents him from "*asserting such an interest for any purposes in any litigation anywhere against any of the Sutherland parties or their privies, including the Defendant*".

Justice Hellman found that the facts giving rise to an issue estoppel would also justify the Court in dismissing the action as an abuse of process. Furthermore, under the First Agreement, the Plaintiff released the Sutherland parties from any and all

claims, and the Sutherland parties were defined to include "*any entity in which any Sutherland Party owns a controlling interest, either directly or indirectly*." On the Plaintiff's pleaded case, Mr Sutherland and Ms Lawrence had a 55% interest in the Defendant and therefore the Defendant is included within the scope of the release in the First Agreement.

Further complicating matters, however, Mr Sutherland and Ms Lawrence both swore that they have no ownership interest in the Defendant are not directors of the company and do not direct or control its affairs. They said they had made no agreement with the Plaintiff regarding the establishment of the Defendant or any share of its ownership or profits.

The decision

In summing up, Justice Hellman said: "*If the facts are as the Plaintiff contends, then his claim is abusive because it is in breach of the terms of the First Agreement. If the facts are as the Defendant contends, then the claim is not abusive for that reason but for another, namely because it is based upon a pack of lies. Either way, the Plaintiff's claim is an abuse of process.*"

The Court allowed the Defendant's application and struck out the Plaintiff's claim both on the ground of issue estoppel and because it is an abuse of process.

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.