

Is it a Hopeless Case?

Summary

Applications for strike out are being increasingly used in the civil litigation process as a means to test, at an early stage, the courts view of the merits of a claim which, as yet, is not fully tested and where the entire evidential basis of a claim has yet to be demonstrated.

In the recent judgment in *Louis & otrs v Finegold & antr*¹, delivered on February 27 2013, the First Deemster, Deemster Doyle exercised the courts jurisdiction to strike a claim out where it considered that the case against the applicant was “hopeless and had no reasonable prospect of succeeding at trial.”

The law

It has long been established by common law that an application to strike out a claim should not be granted unless the court is certain that the claim is bound to fail². Since the Rules of the High Court of Justice 2009 were introduced, the court draws its power to strike out a claim from Rule 7.3, which states that the court may strike out a claim if it appears that the claimant discloses no reasonable grounds for bringing the claim.

In the case of *InterRetire v HSBC*³ last year, Deemster Doyle reiterated that an application to strike out should not be granted unless the court is certain that the claim is bound to fail, effectively unarguable and has no chance of succeeding; it must be a plain and obvious case. The Deemster confirmed this remains the legal basis for strike out in the case of *Louis v Finegold*.

The pleadings

The case concerned three claimants (the “Claimants”) and two defendants (the “First Defendant” and the “Second Defendant”).

¹ Judgment 27 February 2013

² Islamic Investment Company of the Gulf (Bahamas) Ltd v Cains Advocates Ltd (judgment 6 January 2012)

³ Judgment 5 September 2012

The First Defendant applied to have the claim against him struck out on the basis that there were no legal grounds for the claim.

The Claimants' case was that both defendants had breached terms of a contract (the "Agreement"), which bound all of the parties. The First Defendant contested that he was party to the Agreement on the basis that he had not signed it himself and that the Second Defendant had not been acting as his agent when it was signed. On this basis, there could be no claim against him for breach of its terms.

Evidence

The Agreement said:

- The Second Defendant agreed on his own behalf and on behalf of the First Defendant and "other undisclosed principals" to invest in the third claimant by February 28 2011.
- The Claimants claimed that both defendants were bound by this and that they both failed to comply with their contractual obligation.

The First Defendant denied being party to the Agreement and therefore being bound by it, and also denied that the Second Defendant had authority to sign the Agreement on his behalf. The Second Defendant concurred with this account, asserting that it was given no actual authority and that there was no evidence of any implied or imputed authority. In light of this, counsel for the defendants submitted that the Claimants had no realistic prospect of success at trial against the First Defendant and therefore asked the court to strike out the claim against it.

Counsel for the Claimants submitted that application should not be granted unless the court is certain that the claim is bound to fail and is effectively unarguable, submitting that the First Defendant did not satisfy this test. The Claimants argued that the case needed to go to trial to apply the proper tests of fact and of law in order to decide whether the Second Defendant had actual or ostensible authority to bind the First Defendant, adding that the evidence was lengthy and complex. The Claimants further submitted that there was ambiguity over whether the Second Defendant was acting in a capacity as agent for investors, suggesting that the words "and as trustee for the benefit of the Investors" could have wrongly recorded the intention of the defendants and therefore not be construed according to their ordinary everyday meaning; the Claimants asserted that the true meaning could not be determined on the First Defendant's bare denial.

Decision

Deemster Doyle allowed the application, striking out the claim against the First Defendant. He decided that it was plain on the face of the Agreement that the First Defendant was not bound by it; he was not party to the Agreement and the Second

Defendant had no actual or ostensible authority to act on his behalf. The Deemster said of the Agreement that “the language is contrary to any concept of agency”.

In supporting evidence, the court bundle contained documents that the First Defendant had signed on his own behalf – the Deemster said that this evidence undermined the Claimants’ submission that it was the First Defendant’s intention to create an agency agreement, noting that when the First Defendant had wanted to be bound by a document he simply signed it himself.

The Deemster concluded: “The claim against the First Defendant is hopeless and should not be permitted to go any further. To permit that claim would be a great waste of time and money. Moreover it would not be in furtherance of the overriding objective of the 2009 Rules.”

The overriding objective, of course, is to enable the High Court to deal with cases justly, which includes aims such as saving expense; and dealing with the case in ways which are proportionate to the amount of money involved; the complexity of the issues; and the financial position of each party.

Commentary

This case shows that the bar for a successful strike out application remains high, but that the court will not hesitate to strike out a claim which it considers has no proper legal basis.

The court will not permit a case to go to trial simply because something *may* turn up during the trial which may have a bearing on the issues in dispute.

Contact Us:

For further information please contact us by telephone +44 1624 690300 or by email at enquiries@simcocks.com

Ridgeway House

Ridgeway Street

Douglas

Isle of Man

IM99 1PY

Tel: +44(0)1624 690300

Fax: +44(0)1624 690333

Web: www.simcocks.com

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