

IN THE HIGH COURT OF BELIZE, A.D. 2023

CLAIM No. 622 of 2022

BETWEEN

ELIJIO BRICENO

CLAIMANT/RESPONDENT

AND

KIDNEY CARE CENTER LTD

1ST DEFENDANT/1ST APPLICANT

CARLOS PERERA

2ND DEFENDANT/2ND APPLICANT

DECISION OF THE HONOURABLE MADAM JUSTICE PATRICIA FARNESE

HEARING DATE: March 23, 2023.

APPEARANCES:

Andrew Bennett, Counsel for the Claimant/Respondent.

Kimberly Wallace, Counsel for the Defendants/Applicants

REASONS AFTER ORAL DECISION ON APPLICATION TO STRIKE OUT

Introduction:

[1] The Claimant request leave of the Court to commence an action in the name of and on behalf of the First Defendant. In effect, the Claimant is requesting permission to file a derivative claim. The Defendants have brought an application to strike out the claim on the grounds that the Claimant lacks standing and improperly filed this claim as a fixed date claim.

[2] The Parties do not dispute that the rule in *Foss v Harbottle*¹ applies in Belize. That rule stands for the proposition that the company itself is the proper claimant in any action to address wrong done to the company. No person is permitted to maintain an action on behalf of the company without the consent of the company. That consent can come from a decision of the Board of Directors or a vote of the shareholders conducted at a general meeting of the membership. The Claimant has not sought permission to bring the claim as he argues that he is seeking a remedy for the wrongful actions of the very people whose permission he would need to obtain to file a derivative claim. Relying on Rule 26.3(1) of the *Supreme Court (Civil) Procedure Rules* (CPR), the Defendants ask that I strike the claim as there is no reasonable prospect of success in light of the Claimant's failure to seek permission.

[3] In his response to the application to strike out his claim, the Claimant relies on *Burland v Earle*,² which raised the question of whether the rule in *Foss v Harbottle* ought to apply when the alleged wrongful conduct is undertaken by those in control of the company or the majority shareholders. The court in *Burland v Earle* held that permission should be allowed to proceed in those circumstances.

[4] After reviewing the Defendants' submissions, I do not find a satisfactory response to the question raised in *Burland v Earle*. The question of how a party is to bring an action on behalf of a company where the alleged wrongdoers act as gatekeepers to accessing permission to bring the claim is unresolved. The Defendants have not provided clear authority to refute the conclusion reached in *Burland v Earle* or to establish that the decision is not applicable in Belize. I am guided in my decision to not strike out the claim by the fact that claims are to be struck out in only the clearest of cases. I do not find that the circumstances of this case meet that high bar.

[5] I am also not prepared to strike out the claim because the Claimant improperly initiated this claim as a fixed date claim. As outlined in *Bogaert v. The Commissioner of Lands & Surveys*:³

The Court has the ability to convert proceedings to a fixed date claim form under Rule 26.9 and correct the procedural error.

As was done in *Bogaert*, I will use my discretion (arising from CPR Rule 26.9(3)) to convert the fixed date claim to an ordinary claim. Exercising my discretion in this way furthers the Court's overriding objective to deal with cases justly, fairly, and expeditiously. The Claimant is not out of time to file a new claim. If the application to strike out is granted, a new claim will be filed resulting in a waste of the Court's resources.

¹ (1843) 2 Hare 461.

² [1901] UKPC 49.

³ Claim No. 317 of 2019 at para 8 [*Bogaert*].

Disposition:

[6] I am satisfied that there is an arguable case to be tried. The application to strike out the claim is dismissed. Costs is awarded in the sum BZ \$1,000.00.

Dated April 27, 2023.

A handwritten signature in blue ink that reads "Pfarnese".

Patricia Farnese
Justice of the High Court