EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV 2010/0678

BETWEEN:

[1] KENNETH BURNS
[2] JUNE BURNS

Claimants

and

REDMAN LIMITED

Defendant

Appearances:

Mrs. Cynthia Combie-Martyr of Counsel for the Claimant/Applicant

Ms. Trudy Glasgow of Counsel for the Defendant/Respondent

2013: April 8th

DECISION

[1] TAYLOR-ALEXANDER, M: By this application the claimants seeks to strike out the defence on procedural grounds pursuant to the Civil Procedure Rules 2000 (CPR) Part 26.3(1) (b) and 15.2(b). They allege that:—

(a) The defence does not disclose any reasonable ground for defending the claim;

(b) The defence is not recognisable in law;

(c) The defendant has no real prospect of successfully defending the claim on the facts or law;

(d) The claimants are entitled to damages for breach or non fulfilment of obligations to complete the construction of the claimants' unit by the contractual completion date in accordance with the terms of the agreement dated the 11th June 2007 as set out in the claim and as a matter of law, pursuant to Articles 999-1008 of the Civil Code of the Revised Laws 1957 of Saint Lucia.

[2] Where such an application is successfully advanced the court is required to strike out the statement of case an enter judgment on the claim. The basis for such a rule has been stated by Adrian Zuckerman in Civil Procedure Principles of Practice, Second Edition, at page 279. It states:—

> "*The normal pre-trial and trial processes are necessary and useful to resolving serious or difficult controversies. But where a party advances a groundless claim or defence it would be wasteful to put the case through such processes since outcome is a foregone conclusion. A more appropriate response in such cases would be to strike out the groundless claim or defence at the outset and spare the unnecessary expense and delay that the employment of the normal process would involve"*

[3] An examination of the pleadings puts this application in perspective.

The Pleadings

[4] The claimants', husband and wife are purchasers under an Offer to Purchase (OTP) and Purchase and Construction Agreement (PCA) with the defendant for a condominium unit located at Bella Rosa, Gros Islet, in the state of Saint Lucia. It is alleged that the defendant breached the terms of the agreement resulting in loss to the claimants. The allegations of breach are contained in paragraph 4 to 9 of the statement of case and

are that despite receiving the sum of US$ 94,000.00/EC250,000.00 on the 28th June and 3rd July 2007, the defendant failed to meet the projected date of completion of the 1st stage of the condominium project, being construction up to the ground floor slab by the 10th August 2007 and thereafter failed to meet all subsequent stages of construction, practical completion and hand over by the agreed date of 31st March 2008. The condominium was finally handed over in February 2010.

[5] The defendant refutes those facts averring instead that payment towards the purchase price was not made consistent with the agreement as the payment towards the first stage of construction was made by two part payments, accommodating the claimants who were awaiting the sale of their home located at Cap Estate in order to complete the purchase of the condominium. In any event the defence avers the balance of the first tranche of the agreed payment was made on the 3rd of July 2007.

[6] It was only in November 2007 and after payments had been made and accepted, that the agreement was eventually signed and only because numerous design changes made by the claimants forced the defendant to insist on the agreement being executed.

[7] Breach of the OTP and PCA is denied. The defendant acknowledges a projected completion date, but alleges that difficulties with their building contractor, well known to the claimant, compromised the building site. It is alleged that when the condominium unit was handed over in February 2010, the claimants had stated that they wished to push past their difficulties and begin a fresh start.

[8] The PCA, the document at the centre of this controversy and relevant to understanding the facts as pleaded by the parties was not annexed either to the claim or the defence.

The Application

[9] There are four grounds identified in the application. There is an affidavit of Kenneth Burns which offers evidence in support of the grounds. In summary it states:—

(a) In so far as the defence denies the payment by the claimants of a refundable deposit on the 17th of January 2007, this is specifically refuted by the OTP and PCA.

(b) Statements made in the defence confirm knowledge of the reliance by the claimants on the terms in the agreements as to timely completion of the condominium. In particular, the acknowledgment at paragraph 4 by the defendant that the claimants were awaiting the sale of their home to use these funds towards the purchase of the villa.

(c) The defendant admits the execution of a PCA in 2007 and in so far as the defendant refutes the execution date of the agreement, reference is made to the PCA.

(d) The statement of the defendant that it only received a signed copy of the agreement in November 2008 is inconceivable given its acknowledgment of the fact that 90% of the purchase monies for the condominium had been paid by June 2008.

(e) The defendant admits the existence of an agreement with a confirmed completion date, and cannot therefore deny its breach of the agreement.

[10] The affidavit in response of the defendant challenged the grounds and alleged the following:—

(a) The failure of the claimants to have met the initial timelines for payment, invalidated the initial agreement between the parties.

(b) A revised draft contract was issued which updated the purchase and construction from a two bedroom unit to a three bedroom unit for a total price of EC$470,000.00.

(c) Development Control Authority (DCA) approval was required for the change of the condominium from a two to a three bedroom unit.

(d) Despite the date on the agreement submitted by the claimants, Christopher Jenkins director of Redman Limited was off island during March to August 2007 and it is unclear as to how he could have executed the agreement while he was off island.

(e) There is no provision for penalties to apply in the event of delay.

[11] None of these allegations were pleaded in the defence, and I am constrained to consider them in an application made pursuant to CPR part 26.3 (1) (b). The affidavit also restated the following averments in the defence:—

(a) The sale with respect to the claimants' home was in train well before the claimants signed the PCA with the defendant.

(b) The timelines stipulated in the PCA were stage dates given as estimates of the timescale involved.

(c) The delays with the project were at all times communicated to the claimants.

(d) While DCA certification of practical completion was received in October 2009, the Deed of Transfer was only signed on the 4th February 2010, which was when the claimants settled outstanding issues with regard to property management.

The Relevant Procedure

[12] The application is grounded in 26.3 (1) (b) and 15.2(b) of the CPR which parts provides as follows:—

"In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that —

(a) .....;

(b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim

(c) …….;

(d) …….;

Part 15.2 of the CPR provides:—

"The court may give summary judgment on the claim or on a particular issue if it considers that the —

(a) .....

(b) defendant has no real prospect of successfully defending the claim or the issue.

- *Rule 26.3 gives the court power to strike out the whole or part of a statement of case if it discloses no reasonable ground for bringing or defending the claim."*

[13] Various cases decided by the court offer guidance on the application of these rules.

[14] In Baldwin Spencer v The Attorney General of Antigua and Barbuda et al Civil Appeal No. 20 A 1997 a case that preceded the CPR and concerned the interpretation of Order 18 rule 19 of the old rules[1], but which reasoning in my view continues to bear relevance in the interpretation of part 26.3 (1), Byron CJ said:—

> *"...the operative issue for determination must be whether there is 'even a scintilla of a cause of action'. If the pleadings disclose any viable issue for trial then the court should order the trial to proceed but if there is no cause of action the court should be equally resolute in making that declaration and dismissing the appeal."*

and at page 5 of the judgment:—

> *"This summary procedure should only be used in clear obvious cases, when it can be seen on the face of it, that the claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court" The court is not concerned at this stage with the truth or otherwise of the pleadings".*

[15] More modern authorities remain consistent with the reasoning in Baldwin Spencer. The claimant relied on the following unreported authority of Julian Prevost v Rayburn Blackmore DOMHCV2005/0177, where Rawlins J (as he then was) reasoned:—

> *"The court has always had jurisdiction to strike out actions on this ground if having examined the claim it finds that the action will have no chance of success even if the pleading process were to continue and the matter goes to trial. This is a jurisdiction which the court exercises very sparingly and only in the most clear and* obvious *cases, for example when it is clear*

[1] The old rules refer to the former Rules of the Supreme Court that prevailed prior to the enactment of CPR 2000.

that the case has no legal basis. This is because the court errs on the side of having trials on the merit of cases."

[16] It is under the guidance of these reasoned principles that I now proceed to examine the grounds relied on.

Reasonable grounds for defending the claim

[17] The claimant submits that not only does the defence disclose no reasonable ground for defending the claim, but that the defence is one unknown in law.

[18] The statement of case of the defendant agrees that there were timelines in the contract for completion of the various phases of construction but avers that the agreement had been flexibly applied by both parties, such that the claimant itself had breached the terms as to payment. The defendant submits that the dates for completion were merely estimates of timescales. In so far as there were delays the defendant alleges these were not the fault of the defendant, but were as a result of delayed DCA approval due to design changes made by the claimants and from difficulties with the building contractor of which the claimants were aware. In effect the defendant alleges that time was not of the essence and that any breaches that did occur were beyond their control.

[19] Whether untimely completion will warrant a successful claim for breach usually requires an assessment of the language of the contract and the intention of the parties. The failure in this case to state that time was of the essence does not prevent a court from so construing, but similarly un-timeliness need not transfer a technical breach into a material breach. There can be no doubt from the PCA that there were dates provided for the completion of the various stages of the construction. Even though the dates were agreed as only stage dates as is alleged by the defendant, completion ought to have occurred within a reasonable time of the stage

dates. It is questionable whether a delay of just under two years was within the reasonable contemplation of the parties. Despite those observations I am satisfied that the issue of whether time was of the essence, and though not stated when it became of essence is a substantive issue for determination.

[20] Additionally, the claimants have pleaded that they are entitled to damages for breach or non fulfilment of obligations pursuant to Articles 999-1008 of the Civil Code of the Revised Laws 1957 of Saint Lucia.

[21] These articles create an entitlement to damages where a party successfully establishes liability. Article 1001 to 1005 provide for the circumstances in which an obligor may be found liable in damages for the non fulfilment of an obligation, but not incur the obligation to pay damages. In particular Article 1002 and 1003 provide:—

"1002. *The debtor, though in good faith, is liable to damages in all cases in which he fails to establish that the non-fulfilment of an obligation proceeds from a cause which cannot be imputed to him.*

1003. The debtor is not liable to damages when the non-fulfilment of an obligation is caused by a fortuitous event or by irresistible force, without any fault on his part, unless, by the special terms of the contract, he is liable, notwithstanding the occurrence of these contingencies."

[22] Although a fortuitous event in not defined, it seems to me that the defence raises the question of whether the delays referred to as having been caused by the DCA and the building contractor, were foreseeable delays within the contemplation of the defendant or were unavoidable. These are not issues for premature determination and certainly not without the benefit of evidence of the parties.

[23] The claimant's application on those grounds is further challenged by the failure to have annexed the PCA to the claim, such that in an application under part 26.3 (1) the court is confined to the averments in the pleadings of the parties. Although the PCA became part of the record later in the pleadings, I am limited to consider it, in the assessment of whether the statement of case raises a triable, or triable issues.

[24] Although I found there to have been some issues of internal conflict with the defence, it raised issues material to the determination of the facts in issue and to the question of damages. To my mind the defence has narrowed the battleground with which the parties are to contend at trial, and I find that there are no grounds or no sufficient grounds to strike the defence, pursuant to Part 26.3 (i) (b).

The defendant has no real prospect of successfully defending the claim on the facts or law

[25] This rule is to be distinguished from rule 26.3 which gives the court power to strike out the whole or part of a statement of case "if it discloses no reasonable ground for bringing or defending the claim" while the distinction between the two provisions have been described to be elusive. Lord Woolf in Swain v Hillman *(supra)* at p 4 referring to similar provisions in the UK CPR explained that the reason for the contrast in language between rule 3.4 and rule 24.2, is that under rule 3.4, unlike rule 24.2, the court generally is only concerned with the statement of case which it is alleged discloses no reasonable grounds for bringing or defending the claim.

[26] In Monsanto plc v Tilly, The Times, 30 November 1999; Court of Appeal (Civil Division) Transcript No 1924 of 1999; Stuart Smith LJ said that rule 24.2 gives a somewhat wider scope for dismissing an action or defence. In Taylor v Midland

Bank Trust Co Ltd [1999] All ER (D) 831 he said that the court should look to see what will happen at the trial and that, if the case is so weak that it had no reasonable prospect of success, it should be stopped before great expense is incurred.

[27] This test in my view requires a determination not just of the adequacy of the defence and whether assuming the averments to be true a case has been made out in the pleadings but allows the court to consider an affidavit or other evidence and documents so far filed in the proceedings to determine the likelihood of success. The test that continues to be applicable is that laid out by Clarke J in Swain v Hillman [2001] 1 All ER 91, 92, a case deciding the implication of the old RSC Ord 18, r 19 . It continues as the seminal test for the identical provision under the UK CPR 24.2, a provision identical in terms to our CPR 15.2 Lord Woolf MR said:

"Under r 24.2, the court now has a very salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words 'no real prospect of being successful or succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, as Mr Bidder QC submits, they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

And at paragraph 94 and 95:—

"Useful though the power is under Part 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. As Mr Bidder put it in his submissions, the proper disposal of an issue under Part 24 does not involve the judge conducting a mini trial, that is not the object of the provisions; it is to

enable cases, where there is no real prospect of success either way, to be disposed of summarily."

[28] The dicta of Lord Hope of Craighead offers further guidance on the application of the rule. At paragraph 95, he said thus:—

I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in Swain v Hillman, at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all."

[29] For the reasons which I have already given (in paragraph [21] and [22]), I consider that the defendant has set up a triable defence. The scope of my assessment is considerably wider under Part 15.2 and as such I am able to consider the terms of the PCA and the additional factors stated by the defendant in its affidavit in response to the application. Having done so, I still hold the view that summary judgment at this stage will force me to undertake a premature

determination of the timeliness of the obligations of the defendant and in so far as there has been an admission of a breach of the terms of the PCA whether such breach was merely a technical breach or was a material breach entitling the claimant to the damages it alleges flows. Accordingly I am inclined to dismiss the application for summary judgment and to refer the proceedings for case management conference, on the 30th April 2013.

[29] Counsels for the parties exhibited enormous patience in awaiting the decision of this court for which I extend my appreciation. I am grateful for the usual assistance provided by counsels and in particular the level of preparedness and presentation exhibited by counsel for the claimants is to be commended. The outcome of the application is in no way an indictment on the quality of her submissions and presentation.

Conclusion:–

[30] The applications of the claimants to strike out the defence and for summary judgment are dismissed.

[31] The court has a discretion in whether to award costs where as in this case the defendant succeeded on the application. Despite the court giving the defendant additional time to respond adequately to the application of the claimants little guidance was offered to the court. This amongst other factors accounted for the delay in the issuing of this judgment as the court was forced in the interest of doing justice to the parties to research over and beyond its normal duty to make up for the shortcomings of the response of the defendant. For this reason I decline to make an award for costs.

V. GEORGIS TAYLOR-ALEXANDER

HIGH COURT MASTER