EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. BVIHCV 64 of 2013

BETWEEN:

CLEARLIE TODMAN-BROWN

Respondent/Claimant

and

THE NATIONAL BANK OF THE VIRGIN ISLANDS LIMITED

Applicant/Defendant

Appearances:

Dr. Joseph S Archibald QC for the Respondent/Claimant
Mr. Paul Dennis QC with him Ms. Akilah Anderson for Applicant/Defendant

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2013: July 30
August 16

JUDGMENT

Watchwords: – Summary Judgment Rule 15.2 – Striking Out – 26.9(3)
Considerations in exercising the discretion – whether there is a triable issue

[1] BYER J.:- By application dated the 23rd day May 2013 the Applicant/Defendant sought the following relief as against the Respondent/Claimant:

(a) Summary Judgment be entered in favour of the Defendant under CPR 15.2 (a) on the basis that the Respondent/Claimant Clearlie Todman-Brown (the Claimant) has no real prospect of succeeding on the claim; alternatively
(b) The Claimant's claim be struck out in its entirety pursuant to CPR 26.3 (1) (b) on the basis that it discloses no reasonable grounds for bringing the claim
(c) Costs of this application be granted to the Defendant
(d) Any such further or other order as this Honorable Court sees fit."

[2] The essence of the application therefore requires that the case as filed before the Court has to be examined in its totality.

The Claimant's Case

[3] The Respondent/Claimant by her statement of claim filed on the 25th February 2013 stated that in May 2007 she obtained a loan from the Applicant/Defendant Bank to construct a home on her piece of land, Parcel 147. Pursuant to the said agreement with the Applicant/Defendant Bank the Claimant charged by way of mortgage the said parcel 147 to the Bank. During the course of the construction, the relationship between the Respondent/Claimant and her contractor deteriorated which resulted in the failure of the contractor to complete the home for the Respondent/Claimant on time or at all. Out of those set of circumstances, the Respondent/Claimant filed suit against the Contractor for breach of contract and was successful.

[4] The Respondent/Claimant as a result of this failure by the contractor fell into major financial issues and by her own admission, she fell into arrears with the Applicant/Defendant Bank. Upon this state of affairs, the Respondent/Claimant attempted to request of the Bank, an extension of the facility to allow her to further finance the construction and to complete the building. This was refused.

[5] Upon the Applicant/Defendant issuing the statutory notices to exercise its power of sale, the Respondent/Claimant sought to move the court seeking several

declarations from the Court based on the allegation of a failure on the part of the Applicant/Defendant Bank in upholding what the Respondent/Claimant says were certain obligations and undertakings due to her and /or a negligence in their dealings with the Respondent/Claimant. The Respondent/Claimant therefore claimed by paragraph 11 of the Statement of Claim the following:

[6] "P*articulars of Negligence:*

(1) Undertaking as a bank a duty of care towards the Claimant to inspect the building works during the construction of the house on Parcel 147 and to ensure that money paid out of the Claimant's Loan funds under the Instrument of Charge and according to the Construction Drawdown Schedule, properly matched the stipulated stages of the works set out in the said schedule.

(2) Breaching or failing or abandoning that duty of care either by lack of due inspections or by careless inspections or by careless reporting of such inspections or by careless assessment of such inspections or by carelessly disbursing the Loan funds direct to the building contractor without first assessing whether the works had reached the stipulated stages relating to the monies which the Bank paid to the building contractor.

(3) Paying the building contractor 96.73% of the Loan funds for all stages of the works which were in fact 40% incomplete.

(4) Res ipsa loquitur (i.e. the matter speaks for itself)

[7] *Particulars for breach of contract*

(1) The Defendant having undertaken to the Claimant to inspect the works from time to time before paying out any money to the building contractor upon his request at specified stages of the building works, paid out $677,600 of the agreed construction loan funds of $700,500 to the building contractor covering all stages up to completion, leaving only $22,900 retention unpaid in November 2008, in circumstances where the Trial Judge found that the building contractor abandoned the building works with 40% of the building

incomplete and uninhabitable for any of the purposes for which it was intended, and requiring a further $431,00 as estimated in Trial testimony by the building contractor's expert witness to complete the building works.

(2) Failure to inspect the building project properly or to assess the stages of the works in relation to the payments required by the building contractor.

(3) Paying to the building contractor 96.73% of the Loan funds for all stages of the works which were in fact 40% incomplete.

(4) Res ipsa loquitur (i.e. the matter speaks for itself.)

[8] *Particulars of loss and damage*

(1) Loss of value of the house agreed to be constructed on Parcel 147

(2) Loss of expected rents from the rental units designed for the house

(3) Loss of the expectation of the Claimant's residence in the house thereby resulting in the Claimant having to incur rents from January 2009 up to the present time

(4) Loss of monies incurred for additional bank interest due to inability to meet the bank loan payments brought about by the financial disaster in the Defendant's paying out practically all the Loan funds to the building contractor when the building was 40% incomplete and uninhabitable for any of its intended purposes."

[9] The Respondent/Claimant therefore prayed for the following declarations:

(1) "*A Declaration that the intended sale of land Parcel 147 of Black 2438B of the West Central Registration Section in Tortola including the 60% completed house thereon ("Parcel 147"), by the Defendant as Chargee will be unlawful and inequitable*

having regard to the facts that the Defendant as Chargee has by letter of 3 September 2012 coupled with a statutory three-months notice also dated 3 September 2012 under Section 72 of the Registered Land Ordinance 1970, Cap 229, addressed to the Claimant, called for US696,156.51 and other monies to avoid sale of Parcel 147, and that up to the present time, after expiry in December 2008 of the said statutory notice, the Defendant has not indicated any market value or the best price available or any upset price to be considered for the purposes of the sale of Parcel 147.

(2) *A Declaration that any such sale without first ascertaining the market value or the best price available or any upset price for the sale by the Defendant of Parcel 147 will be unlawful and inequitable if effected by public auction; and will also be unlawful and inequitable if carried out by private treaty without the prior sanction of the Court.*

(3) *A Declaration that any such sale will be unlawful and inequitable if effected prior to the Defendant's response to the Claimant's letters of 5 November 2012 and 12 December 2012 and email of 9 January 2013 requesting the Defendant to disclose to the Claimant the Defendant's disbursements of the Loan funds under Instrument of Charge No. 1236/2007 together with a full print-out statement of the Loan account from its commencement until 3 September 2012 showing the monthly or other periodic calculation of interest with notation as to whether it is simple or compound interest.*

(4) *An injunction including urgent interim injunction against the intended sale of Parcel 147 by the Defendant, whether by public auction or private treaty*

(5) *An injunction including urgent interim injunction to restrain the Defendant from selling Parcel 147 by public auction or private treaty while Parcel 147 is the subject of current appeal*

proceedings in the Court of appeal; which Appeal proceedings arise from a BVI High Court Civil action No 195 of 2009 between Clearlie Todman- Brown as Claimant and her building contractor Melvin Rymer d/b/a Melvin Rymer Architect Inc as Defendant in which a High Court judge the Honourable Madam Justice Indra Hariprashad –Charles after Trial gave written judgment in 113 paragraphs dated 11 May 2011 for the Claimant for against the building contractor in the amounts of $409,150 damages,%61,515 prescribed costs and $5475 expert witness fees plus statutory interest of 5% per annum thereon until payment of the judgment on the ground that the building contractor breached the building contract when he abandoned the project on Parcel 147 in December 2008 after receiving from the Defendant Bank $677,000 of the loan funds and left the building 40% incomplete and uninhabitable for the purposes for which it was intended; and the said judgment debt remains wholly unpaid up to the present time; And the Chief Justice The Honourable Mrs Janice Pereira at a status hearing of the Court of Appeal in Tortola on 15 January 2013 ordered and directed that the appellant Melvin Rymer should expedite the necessary steps of an appellant for hearing of the appeal, which is now expected to be heard in the Virgin islands during the week commencing 6 May 2013 .

(6) Damages for loss and damage suffered, as a result of the negligence and/or breach of contract of the Defendant as the Claimant's banker during the period 3 May 2007 to December 2008

(7) Interest

(8) Further or other relief

(9) Costs"

The Defendant's Case

[10] The Applicant/ Defendant Bank filed a defence on the 27th March 2013. By their defence the Applicant/Defendant Bank admitted that the Respondent/Claimant had entered into a loan agreement with them however it was not only for the construction of the building on Parcel 147 but also was to enable the refinancing of a former loan. The Respondent/Claimant was therefore required and did so

charge, Parcel 147 to the Applicant/Defendant and was further mandated to make regular payments towards the loan.

[11] The Applicant/Defendant further averred that the Respondent/Claimant undertook to make the payments and that on her own admission; she fell into arrears which default triggered the right of the Applicant/Defendant to issue the statutory notices upon the default. Before any further action could be taken this Claim was filed which they aver has sought to fetter the right of the Applicant/Defendant to enforce their statutory rights of enforcement.

[12] The Applicant/Defendant further averred in their defense that they knew of the agreement that existed between the Respondent/Claimant and her contractor but that they were never a party to that agreement and were not therefore in a position to monitor this agreement on behalf of the Respondent/Claimant. Further the Applicant/Defendant averred and exhibited that all payments that were made to the contractor were made with the express consent and by the authority of the Respondent/Claimant herself and that there was therefore no duty to the Respondent/Claimant by the Applicant/Defendant to act on her behalf and that there was therefore no breach of any implied contract or otherwise or any negligence on their part in their dealings with the Respondent/Claimant.

[13] The Applicant/Defendant therefore denied each and every allegation indicating that they were not liable to the Respondent/Claimant at all.

Applicant/Defendant's Submissions

[14] The applicants have sought to make their application in the alternative, pursuant to Part 15.2(a) of the CPR 2000 and 26.3(1) (b) of the CPR 2000. However the main thrust of the Applicant/Defendant's submissions was in relation to the operation of Part 15.2(a) of the CPR 2000. The gravamen of the power to be utilized under this Part is whether the Respondent/Claimant has a "***real prospect of succeeding***" in

its case. The Applicant /Defendant on that point referred the Court to the case of Alfa Telecom Turkey Limited v Cukurova Finance International Limited and Cukurova Holdings AS[1] and the dicta of Lord Hope in Three Rivers District Council v Bank of England (No.3)[2] and stated what was the nature of this test that is to be applied for the determination of a summary judgment:

> "*The rule…is designed to deal with cases which are not fit for trial at all: the test of no real prospect of succeeding requires the judge to undertake an exercise of judgment; he must decide the case without a trial and give summary judgment; it is a discretionary power; he must then carry out the necessary exercise of assessing the prospects of success of the relevant party; the judge is making an assessment of the case as whole which must be looked at ; accordingly the criterion which the judge has to apply under [CPR Pt 24] is not one of possibility; it is the absence of reality"*

[15] The Applicant/Defendant therefore made the submission that in looking at the totality of the Respondent/Claimant's case, that the grounding of the cause of action was based on what they considered a bald unbuttressed assertion of the existence of an obligation or responsibility or duty on the Bank. This was however untenable, they argued in circumstances where no viable basis of duty or obligation had been pleaded or advanced in the evidence put before the court upon which the Respondent/Claimant sought to rely in opposition to the Application as filed.

[16] The Applicant/Defendant further argued that the essence of the claim was contained and to be found in Paragraph 11 of the Statement of claim which only made bald assertions that the Bank was in default of its obligation to the Respondent/Claimant by failing to monitor and manage the contract the Respondent/Claimant had entered into with the contractor to which the Bank was not a party.

[1] HCVAP 2009/001
[2] [2001] 2 All ER 4513

[17] The Applicant/Defendant in their arguments further advanced on the Court that despite these allegations and nebulous references to “equitable obligations” which they were accused of by the Respondent/Claimant of breaching, they argued that the Respondent/Claimant had failed anywhere in their pleadings to identify the basis of this obligation nor had they identified any agreement to do so. Having failed to do so they have failed to meet the threshold required to defeat the application for summary judgment.

[18] Further, the Applicant/Defendant in summation argued that the pleadings without more were themselves so deficient that even if the Court refused to make the order pursuant to the Part 15.2 that that it was clear that the pleadings should be struck out under the provisions of Part 26.3 (1)(b) for failing to disclose any reasonable cause of action.

The Respondent/Claimant’s Submissions

[19] In response the Respondent/Claimant to the application categorically denies that the pleadings filed on her behalf disclose no viable claims against the Bank.

[20] The point of contention with the Respondent/Claimant is that there was no need for the contract to be in writing as between the Bank and the Claimant. The pleadings show that the mere fact that there was a contract for the Bank to disburse funds, and did so to the Contractor even when he was in obvious default under his agreement was ipso facto proof that they had failed to protect the Claimant, from the contractor’s default, and as such had breached their “equitable obligations” against which the Respondent/Claimant was entitled to claim relief.

[21] The Respondent/Claimant argued that the claim having been made for substantial reliefs to which the Applicant/Defendant had not answered, made it a matter that could not be dealt with summarily but had to be one that would only have to be assessed by the Trial judge at that stage.

[22] The Respondent/Claimant further sought to rely on a document that was exhibited to the Court on the Affidavit in opposition filed by the Respondent/Claimant that was entitled "the Drawdown schedule". This was presented to the Respondent/Claimant by her contractor for the payment of all sums due under the construction contract, which the Respondent/Claimant contends directed the payments by the Bank despite there being no privity of contract with the Bank to this document. Thus they having sight of this document, the Respondent/Claimant contended, and they having paid monies even without checking actual progress amounted to prima facie negligence for which the Respondent/Claimant is entitled to be heard.

[23] It would therefore not be equitable on a summary hearing to prevent the Respondent/Claimant from ventilating her issues before a full trial.

[24] In support thereof the Respondent/Claimant sought to rely on several authorities including an extract from the White Book Volume 1 [2009]; M4 Investments Inc v Clico Holdings (Barbados) Inc[3]; Three Rivers District Council case [4]; Swain v Hillman and another [5]all of which were entirely helpful.

The Court's Analysis and Findings:-

[25] The application before the court is twofold both under the Part 15.2(a) of the CPR 2000 and in the alternative Part 26.3 (1) (b) CPR 2000. Part 15.2 CPR 2000 states

> "*The Court may give summary judgment in the Claim or on a particular issue if it considers that the –*
> *(a) Claimant has no real prospect of succeeding on the claim or the issue; or*
>
> *(b) Defendant has no real prospect of successfully defending the claim or the issue."*

[3] 68 WIR 65
[4] Op cit
[5] [2001] 1All ER 91

[26] In support of this application the Rules provide that the same must be served on the other party to the proceedings with requisite evidence in support thereof[6].

[27] It is therefore only upon examination of these documents filed together with the case as pleaded that a Court can make the determination of whether the party against whom the complaint is made has "*no real prospect in succeeding on the claim"* [7] In order to do so the Court must be invited to "[*assess] the prospects of success of the relevant party… It is the assessment of the case as a whole which must be looked at accordingly*. *The criterion which the judge has to apply under CPR 24 is not one of probability it is the absence of reality"*[8]

[28] It is therefore imperative that the Court in making the requisite assessment that all of the evidence and pleadings as filed must be taken into account. In this instant case this comprises the Statement of Claim and Claim form filed on the 25th February 2013, the Defence filed on the 27th March 2013, the affidavit of Richard Lake in support of the Application filed on the 23rd May 2013 and the exhibits thereto and the Affidavits of the Claimant filed on the 10th July 2013 and the 25th July 2013 and exhibits thereto.

[29] From these documents the Court understands that the Respondent/ Claimant's case is that the Applicant/Defendant had an obligation to monitor the terms and execution of a contract made between the Respondent/Claimant and her contractor. A contract to which admittedly the Applicant/Defendant was neither a party nor which governed the relationship as between the Applicant/Defendant and the Respondent/Claimant. It was this obligation that the Respondent/Claimant says has been breached.

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[6] Part 15.4 and 15.5 CPR 2000
[7] Swain v Hillman Op cit at 96 per Pill LJ
[8] Three Rivers District Council and ors v Bank of England (no.3) Op cit

[30] The Court also understands that the Applicant/Defendant has said there was no such obligation and that further all and any payments which are alleged to have been paid to the Contractor in breach of these so called obligations were with the express consent and authority of the Respondent/Claimant. These respective cases are buttressed as they are by the further evidence that was filed and the documents that were brought to the Court's attention.

[31] The Court has made an in-depth assessment of the cases that were pleaded. The Court is in agreement with Counsel for the Applicant/Defendant that the lack of specificity in the pleadings surrounding the nature of the agreement which is alleged to have been breached, or that was so disregarded to amount to negligence on the part of the Applicant/Defendant is a fatal flaw. It is indeed trite law that a contract is binding as between parties need not be in writing but in order to be relied on, any oral agreement must have specifics which must be pleaded to allow the other party against whom it is alleged to know upon what is relied. Thus there would need to be some indication of inter alia when, where in what manner and the subject matter or nature of the agreement in the pleadings.

[32] The Court has been unable to satisfy itself that anywhere in the Statement of Claim or even in the Affidavit of the Respondent/Claimant herself in opposition are any of these specifics given. Not one officer's name. Not one instance when a conversation was had between a named officer of the Bank and the Claimant. Not one instance of the nature or tenor of any undertaking or agreement is pleaded or even averred to by the Respondent/Claimant. On the basis that this is the gravamen of the Respondents/Claimant case, the next question would have had to be, would this failure result in the entire effective dismissal of the Respondent/Claimant's case at this summary juncture?

[33] A court must therefore consider that, "*the hearing of an application for summary judgment is not a summary trial. The court at the summary*

judgment application will consider the merits of the respondent's case only to the extent necessary to determine whether it has sufficient merit to proceed to trial....At a trial the criterion to be applied by the Court is probability: victory goes to the party whose case is the more probable (taking into account the burden of proof).This is not true of a summary judgment application...it is the absence of reality" [9]

[34] Having been empowered by the Rules and the learning of the cases so helpfully provided by Counsel for the parties, the Court is required to look at the case as a whole. The pleadings have been effectively been closed and there was no attempt even after the filing of the Defense to attempt to make good any highlighted deficiencies in the Statement of Claim. Without more, the Court is of the opinion that the Respondent/Claimant has failed to provide to the court, any tangible information upon which the Court can rely, to allow this claim to proceed on the basis that the Respondent/Claimant has established a claim with a real prospect of success.

[35] In making this assessment this Court is of the view that there is simply not enough evidence to raise a real prospect of a contrary case which would facilitate a trial.[10] There is in fact an "*absence of reality".*[11]

[36] The Claim in this court's opinion, when looking at all the documents before it, including the entire set of signed requests for the "draw downs" on the loan by the Respondent/Claimant further belies the contentions made by the Respondent/Claimant. In the Court's opinion they do not raise a case to which this court should further expend the court's resources to determine what may be considered a speculative claim

[9] White Book [2001] Para 24.2.3
[10] Korea National Insurance Corporation v Alvarez Global Corporate and Specilaty AG [2007] EWCA Civ 1066 reported in Blackstone's Civil Practice 2009 para 34.10
[11] Three Rivers case op cit

[37] It is recognized that the court in exercising its discretion and making this determination the overriding objective of the rules must be borne in mind, however, "*a judge should not allow a matter to proceed to trial where the [defendant] has produced nothing to persuade the court that there is a realistic prospect that the defendant will succeed in defeating the claim brought by the claimant. In response to an application for a summary judgment a defendant is not entitled without more merely to say in the course of time something might turn up that would render the claimant's case untenable. To proceed in that vein is to invite speculation and does not demonstrate a real prospect of successfully defending the claim"* [12]

[38] Although this quotation was made in the context of the viability of a defence the words are just as instructive to any challenged claim and in so accepting that, it becomes clear that even with the overriding objective speculative claims should not be fostered or encouraged by the Court.

[39] I therefore find that the application for Summary Judgment in favor of the Applicant/Defendant is granted.

Striking out Application

[40] The court having found on the application with regard to summary judgment I find no reason to determine the alternative prayer of the Applicant/Defendant.

[41] I wish to state on the record the Court's gratitude to the submissions and authorities provided by Counsel for the parties in this matter.

[12] Per Sunders CJ(Ag) in Bank of Bermuda Ltd v Pentium Civ App no 14 of 2003 BVI at paragraph 18

[42] Order

i. The Application for Summary Judgment is granted in favour of the Applicant/Defendant

ii. Costs are awarded to the Applicant/Defendant in the sum of $2,500.00

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Nicola Byer
High Court Judge