

**THE EASTERN CARIBBEAN SUPREME COURT  
IN THE HIGH COURT OF JUSTICE  
ANTIGUA AND BARBUDA**

**CLAIM NO. ANUHCV 2010/0730**

**BETWEEN:**

[1] ROSE MARIE KELLY  
[2] TREVOR D. JONES

Claimants

**AND**

[1] JAMES WARNER  
[2] NIGEL DANIEL

(As Executors of the Estate of Ernest Henry, Deceased)

[3] ESCO HENRY  
[4] ESTATE OF MERLE HENRY (DECEASED)  
[5] ESTATE OF AUDREY HENRY (DECEASED)

Defendants

**Appearances:**

Leslie-Ann Brisset George for the Claimants  
Gail S. Pero-Weston for the First and Second Defendant  
Loy L. A. Weste for the Third Defendant

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2013: November 07

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**JUDGMENT**

[1] **HENRY, J.:** This is an application by the 1<sup>st</sup> and 2<sup>nd</sup> defendants for an order pursuant to Rule 26.3 (1)(b) of the Civil Procedure Rules 2000 that the Amended Fixed Date Claim Form and Amended Statement of Claim filed on 11<sup>th</sup> January,

2013, to be struck out, and that the costs of this application be borne by the Claimants/Respondents.

[2] The grounds of the application are:

- (a) The amended claim fails to establish or adequately establish any reasonable cause of action against the 1<sup>st</sup> and 2<sup>nd</sup> defendants, as well as any or any adequate particulars of damages suffered by the claimant, as a result of any act and/or omission of the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
- (b) Further, the claimants have failed in respect of the entire amended statement of case to provide any or any sufficient particulars of breach by Ernest R. Henry, deceased and by extension the 1<sup>st</sup> and 2<sup>nd</sup> defendants as Executors of his estate. Similarly, the claimants have failed to establish any or any sufficient nexus between the acts or omissions of Ernest R. Henry and the damages alleged suffered by the claimants.
- (c) Further or in the alternative, the said Amended Claim Form and Amended Statement of Claim in its entirety does not establish or adequately establish any legal nexus between the claimant and the 1<sup>st</sup> and 2<sup>nd</sup> defendants insofar as it concerns any duty and or obligation owed to the claimant by the 1<sup>st</sup> and 2<sup>nd</sup> defendants in their respective or joint capacity as Executors of the Estate of Ernest R. Henry.
- (d) Further, that at paragraph 3 of the Amended Statement of Claim, the claimants allege that ". . . an Agreement for Sale/Purchases and Powers of Attorney, were executed by the vendors, to enable the Defendants' Agent and Administrator of their estate, Ernest R. Henry to execute Instruments of Transfer." Subsequent matters concerning the acts and/or omissions or involvement of Ernest R. Henry, deceased were pleaded at paragraphs 4, 7, 8, 9, 11 and 13 of the Amended Statement of Claim. The said paragraphs taken separately or together fail to provide any or any adequate particulars of a contractual relationship or legal obligation between Ernest R. Henry and the claimants and consequently any conceivable breach of contract by the said Ernest R. Henry and by extension the first and second defendants.

Accordingly, they request that the said paragraphs should be struck out as disclosing no reasonable cause of action as against the 1<sup>st</sup> and 2<sup>nd</sup> defendants as Executors of the Estate of Ernest R. Henry

[3] In their Amended Fixed Date Claim Form the Claimants claim against the defendants James Warner and Nigel Daniel as the executors of the Estate of Ernest Henry and the other three defendants specific performance of a written agreement of Sale/Purchase entered into on the 25<sup>th</sup> April 2007, between the claimants and the defendants, whereby the defendants Merle Henry and Audrey Nicholls agreed to sell

and the claimants agreed to purchase a property situated at Ffryes Estate, St. Mary's, Antigua, Registration Section South West, Block # 551184A, Parcel # 330. The claimants state that they will rely upon the terms and conditions of the said contract at the hearing of the action. They also seek alternatively, damages in lieu of specific performance.

- [4] In regard to the claimants claim against the Executors of Ernest Henry, the Amended Statement of Claim alleges that Audrey Nicholls and Merle Henry (the vendors) agreed to sell and they agreed to purchase the said property. The claimant Rose Marie Kelly, travelled to Trinidad where the vendors lived to meet and to negotiate the Agreement of Sale. At the Vendors' Solicitors, an Agreement for Sale/Purchase and Powers of Attorney, were executed by the Vendors to enable the defendants' agent and Administrator of their estate, Ernest R. Henry, to execute Instruments of Transfer.
- [5] The Statement of Claim further states that it was a term of the Agreement that in addition to the purchase price, the claimant would pay all legal fees, transfer taxes, and fees associated with the transfer of the property. The claimant paid the agreed purchase price and was at all material times ready willing and able to pay all legal fees, transfer taxes and fees associated with the transfer of the property and otherwise to perform their obligations under the Agreement. However, Ernest Henry demanded a sum of money from the claimants, before he would execute the Instrument of Transfer. The claimants refused to pay him and the transfer was delayed.
- [6] Further, in early June 2008, Ernest Henry became ill, and travelled to the United States for treatment, and the execution of the Instrument of Transfer was further delayed. On 27<sup>th</sup> June 2008, however, the daughter of Audrey Nicholls delivered two letters to the claimant Rose Kelly which purported to rescind the sale of the subject property. Further, on 22<sup>nd</sup> July 2008, the third defendant acting on behalf of Ernest Henry delivered to the claimant Rose Kelly two envelopes from the Bank of Antigua which contained two (2) cheques in the amount of EC\$77,812.50 each from the Vendors together with a note purporting to return the amount of the purchase price.
- [7] The claimants declined to cash the cheques, and instructed their Attorney to lodge a caution over the subject property. However, the defendants wrongfully and in breach of contract, sold the subject property to a third party for an amount in excess of \$3 million. Consequently, the defendants failed and/or refused to complete the Agreement for Sale/Purchase dated 25<sup>th</sup> April 2007. Finally, it is pleaded that by reason of the above matters, the claimants have suffered loss and damage.

Particulars of special damages are set out with a prayer for specific performance or in lieu thereof, damages.

- [8] In response to the application to dismiss the claimants submit that:
- A. The basis of the claim is in relation to a contract for sale of land; that they are seeking an equitable remedy of specific performance and that a breach is not an essential part of the cause of action in equity, only in an action for damages at law.
  - B. Further, that at all times Ernest Henry was a registered proprietors/trustee; that name is recorded in the Proprietorship section of the Land Register and that according to that section he held the property on trust for several persons and was a joint proprietor. Therefore any sale of the property to the third person, which amounts to a breach of contract, must involve Ernest Henry signing the necessary Transfer Instrument or giving the necessary authority for the said transfer in his capacity as Proprietor and/or Trustee. The transfer instrument is intended to be produced during the discovery process
  - C. Striking out is a remedy of last resort and should be exercised sparingly.
- [9] In their submissions, the 1<sup>st</sup> and 2<sup>nd</sup> defendants reiterate that their challenge is to the sufficiency of the pleadings. They point out that the claimants' submissions rely on matters not pleaded in their Statement of claim. (2) Any alleged failure of Ernest Henry to act under the Power of Attorney granted to him by the 3<sup>rd</sup> and 4<sup>th</sup> defendants and the enforcement of any terms of that Deed, is a matter for the grantors not a third party. (3) There is no substantial point of law at issue which would require judicial clarification. Nor do the pleadings raise any live issues. Each of the circumstances identified by the claimants in their submissions are inapplicable to the instant case as pleaded, and (4) the Statement of Case falls far short of establishing a case against the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
- [10] The Civil Procedure Rules section 26.3 provides that "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) ...."
- [11] The Caribbean Civil Court Practice, commenting on provision (b) above notes that the provision addresses two situations:

- 1) Where the content of a statement of case is defective in that, even if every factual allegation contained in it were proved, the party whose statement of case it is cannot succeed; or
- 2) Where the statement of case, no matter how complete and apparently correct it may be, will fail as a matter of law.

[12] In **Citco Global Custody NV v Y2K Finance Inc**<sup>1</sup>, Edwards JA set out the principles which ought to guide a court when considering an application to strike out a party's statement of case. She stated:

"On hearing an application made pursuant to CPR 26.3(1)(b) the trial judge should assume that the facts alleged in the statement of case are true. Despite this general approach, however, care should be taken to distinguish between primary facts and conclusions or inferences from those facts. Such conclusions or inferences may require to be subjected to closer scrutiny.

Among the governing principles stated in Blackstone's Civil Practice 2009 the following circumstances are identified as providing reasons for not striking out a statement of case: where the argument involves a substantial point of law which does not admit of a plain and obvious answer; or the law is in a state of development or where the strength of the case may not be clear because it has not been fully investigated. It is also well settled that the jurisdiction to strike out is to be used sparingly since the exercise of the jurisdiction deprives a party of its right to a fair trial, and its ability to strengthen its case through the process of disclosure and other court procedures such as requests for information; and the examination and cross-examination of witnesses often change the complexion of a case. . ."

[13] Civil Procedure Rules 2000 imposes a duty on a claimant to set out his/her case. This includes a statement of all the facts on which the claimant relies. In addition the claim form or statement of claim must identify or have annexed thereto a copy of any document which the claimant considers is necessary.<sup>2</sup>

#### **The Claim for Breach of Contract**

[14] The only cause of action pleaded, is the claim for breach of a contract for sale of land. It can be gleaned from the statement of claim that the written agreement was between claimants and Merle Henry and Audrey Nicholls (the now deceased

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<sup>1</sup> ECSC Civil Appeal No. 22 of 2009 [BVI]

<sup>2</sup> Rule 8.7(1)

vendors). Their estates are sued as the 4<sup>th</sup> and 5<sup>th</sup> defendants. There is no allegation that Ernest Henry was a party to this agreement. The breach, according to paragraph 15 of the statement of claim, consists of the defendants selling the same property to a third party. It is not pleaded what part, if any, Ernest Henry played in the sale to the third party.

- [15] Generally only a person who is a party to a contract can sue on it. There are exceptions, of course, as in the case of a trust or a third party contract. But the claimants have pleaded no facts that would place them within one of the exceptions.
- [16] In her submission in response to this application the claimants state for the first time that Ernest Henry was listed as a joint proprietor/trustee in the Land Register. Claimants therefore conclude that he must have had some input in the sale to the third person. But this was never pleaded in the statement of claim. And certainly no attempt has been made to plead a cause of action in relation to his capacity as a proprietor/trustee.
- [17] Further, the claimants also seek to rely on an agency relationship between Ernest Henry and the vendors as the basis for a cause of action against Ernest Henry. While it has been held that a Power of Attorney is invariably a method certain in proving an agency relationship,<sup>3</sup> again the claimants have not pleaded any circumstances which would allow a third party to maintain an action against an agent personally. The Power of Attorney was not annexed to the pleadings, so the full terms thereof are not known.
- [18] Although striking out a statement of case against a party should be used sparingly by the court, I am constrained to agree with the 1<sup>st</sup> and 2<sup>nd</sup> defendants that the Amended Statement of Claim has failed to sufficiently set out a cause of action against Ernest Henry and consequently against the 1<sup>st</sup> and 2<sup>nd</sup> defendants as Executors of his Estate.
- [19] Accordingly, the claim is hereby struck out against the 1<sup>st</sup> and 2<sup>nd</sup> defendants herein. Cost to the 1<sup>st</sup> and 2<sup>nd</sup> defendants in the sum of \$1000.00.

  
**CLARE HENRY**  
High Court Judge  
Antigua & Barbuda

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<sup>3</sup> Edwin M. Hughes v La Baia [2011] UKPC 9