

EASTERN CARIBBEAN SUPREME COURT
ANTIGUA & BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV 2009/0693

MARLON BROWN
d/b/a Marlon A. Brown & Co.

Claimant

and

NIGEL JAMES

Defendant

Before:

Ms. Agnes Actie

Master [Ag.]

Appearances:

Ms. Marie Lou Creque of counsel for the claimant

Ms. Sherie Ann- Bradshaw of counsel for defendant

2014: January 15;
April 22.

JUDGMENT

- [1] **ACTIE, M. [AG.]:** This is an application to strike out a statement of claim.
- [2] By claim form and statement of claim filed on 23rd November 2009, the claimant, a building contractor, claims against the defendant for damages for breach of contract. The claimant states that by virtue of a contract partly in writing and partly oral agreed to build a dwelling house for the defendant. The claimant alleges that the defendant failed and /or refused to make payments due under the contract and prematurely terminated the contract.
- [3] The defendant applies to the court for an order pursuant to part 26.3(1)(c) to strike out the claimant's statement of claim stating that it is an abuse of process of the

court or is likely to obstruct the just disposal of the proceedings. The application is grounded on the following:

- (a) The claim is founded on a premise that the claimant has executed and carried the completion of work for the benefit of the defendant based on plans that have been duly approved by the Development Control Authority (DCA).
- (b) The plans were never approved by DCA.
- (c) Neither certificates nor any of the requisite documents were ever submitted or issued by the DCA in respect of the construction of the defendant's home.
- (d) The basis upon which the claimant executed the works was unlawful or otherwise renders the contract unenforceable against the defendant.
- (e) The failure to abide by the statutory requirements under the **Land Development & Control Act** facilitates the commission of a legal wrong.

In the alternative the defendant seeks the court's permission to change his statement of case pursuant to **CPR 2000** Part 20.

Background

[4] The parties entered into an agreement for the construction of a dwelling house on 25th January 2008, which contained inter-alia the following clause:

"(1) The Owner is desirous of erecting on their lands situate at ... a (1) storey new and complete dwelling house consisting of three bedrooms, two (2) bathrooms, one (1) living room, one (1) dining room, one (1) kitchen, one (1) utility room and a garage and has caused several drawings, plans, elevations and specifications of the said works to be prepared, **setting forth the work to be done which said plans have been duly approved by the Development Control Authority in Feb, 2008.**" (my emphasis)

[5] The defendant in the application to strike out contends that the purported approval by the Development Control Authority was fraudulently obtained. The defendant states that the plans drawn and used to construct the dwelling house having not been approved in accordance with the **Land Development & Control Act** rendered the plans illegal and as a result the contract entered between the parties is void due to the illegality.

[6] The defendant further contends that the illegal plan is an illegality that goes to the substance of the **Land Development & Control Act** and would be an abuse of public policy to permit the claimant to receive a benefit upon an unlawful act which he perpetuated, assisted, knew or reasonably should have known. The defendant relies on the principle of "ex taupi causa" and in support relies on the following authorities:

(1) **Tawney Assets Limited v East Pine Management Limited**

(2) **Moore Stephens v Stone Rolls Ltd.**

(3) **Beresford v Royal Insurance Company Ltd**¹

(4) **Law Commission Consultation Paper No. 189- the illegality Defence**

[7] The claimant opposes the application to strike out the claim. The claimant contends that the defendant's house was constructed in accordance with plans as approved by the Development Control Authority.

Court's general powers to strike out Statement of Case

[8] The court has jurisdiction to strike out a Statement of Case under **CPR 2000** Rule 26.3(1) which states as follows:-

"In addition to any 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:-

¹ (1938) AC 586UKHL 39

- (a) There has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings.
- (b) The statement of case or part to be struck out does not disclose any reasonable ground for bringing or defending a claim.
- (c) The statement of case or the part to be struck out is an abuse of the process of the court or likely to obstruct the just disposal of the proceedings."

[9] The defendant's application to strike out the claim in essence is premised on the ground that the contract entered between the parties is illegal and is accordingly void and unenforceable against the defendant. The defendant alleges that the failure to abide with the statutory requirements of the **Land Development & Control Act** facilitates the commission of a legal wrong and relies on the "ex turpi causa" principle.

[10] It is a well-established principle that the court will not lend assistance to a party who is seeking to enforce a right on an illegality or fraud. In **Moore Stephens (A Firm) v Stone & Rolls Ltd.**, Rimer LJ on the "ex turpi causa" principle states:

"...whether a claim brought is founded in contract or in tort, public policy only requires the court to deny its assistance to a plaintiff [claimant] seeking to enforce a cause of action if he was implicated in the illegality and in putting forward his case he seeks to rely upon the illegal act."

[11] I note that the defendant has not pleaded fraud in the statement of case but is only now alleging illegality and fraud in the application to strike out the claimant's statement of case. The contract between the parties states that: "the owner had caused several drawings, plans etc. to be prepared setting forth the work to be done *which said plans have been duly approved by the Development Control Authority in February 2008.*" (my emphasis). It is assumed that the said plans were lawfully approved by the authority unless the contrary is shown. The defendant now alleges that the purported approval was fraudulently obtained but has not led any evidence in support of the allegation. It is trite law that allegations of fraud and illegality must be specifically pleaded in a statement of case.

[12] In **Motor & General Insurance Co. Ltd. v Peterson Modeste** George-Creque, JA said²:

“Notwithstanding the fact that CPR does not contain a specific rule with regard to the manner in which allegations of fraud are to be pleaded, the principle that where an allegation of fraud is made particulars must be given, is a long and well settled principle which does not require restating in CPR for giving it force. In **East Caribbean Flour Mills Limited v Ormiston Ken Boyea**¹⁷, a post CPR decision of this court, Barrow JA, in delivering the judgment of the court cited with approval paragraph 51 of the judgment of Lord Hope of Craighead in **Three Rivers** in which Lord Hope said this:

“..... as a general rule; the more serious the allegation of misconduct, the greater is the need for particulars to be given which explains the basis for the allegations. This is especially so where the allegation being made is of bad faith or dishonesty. **The point is well established by authority in the case of fraud.**”
(My emphasis)

[13] The defendant has failed to establish that the DCA approval was fraudulently obtained. The striking out of a party's statement of case is a drastic step which is only to be taken in exceptional cases. The seminal test for striking out was restated by Sir Dennis Byron CJ in **Baldwin Spencer v the Attorney General of Antigua & Barbuda**³ where he stated:

“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”.

[14] The Privy Council in **Real Time Systems Ltd v Renraw Investments Limited**⁴ in relation to an application to strike out a statement of case stated:

“the court has an express discretion under rule 26.2 whether to strike out (it “may strike out”). It must therefore consider any alternatives, and rule 26.1(1)(w) enables it to “give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective”, which is to deal with cases justly. As the editors of *The Caribbean Civil Court Practice* (2011) state at Note 23.6, correctly in the Board's view, the court may under this sub-rule make orders of its own

² HCVAP 2009/008- St. Lucia

³ (Antigua & Barbuda Civil Appeal No. 20A of 1977

⁴ (Trinidad and Tobago) [2014] UKPC 6 (03 March 2014)

initiative. There is no reason why the court, faced with an application to strike out, should not conclude that the justice of the particular case militates against this nuclear option, and that the appropriate course is to order the claimant to supply further details, or to serve an amended statement of case including such details, within a further specified period. Having regard to rule 26.6, the court would quite probably also feel it appropriate to specify the consequences (which might include striking out) if the details or amendment were not duly forthcoming within that period”.

[15] The defendant has not led any evidence to indicate that the claimant perpetuated or had knowledge of the alleged fraud. The defendant also contends that the approved plans formed an integral part of the contract, such a material term that cannot be severed. The defendant has not convinced the court that the term relied on in the contract was a condition precedent which had not been fulfilled and accordingly makes the contract unenforceable. I am not convinced that this is a case to exercise the draconian discretion of striking out the claim. The issues now being introduced are matters that should be fully ventilated on evidence at trial. The facts and the authorities on point militate against granting the defendant’s application to strike out the claimant’s statement of case. Accordingly, the application to strike out the statement of case is refused.

[16] The defendant in the alternative seeks the court’s permission to change his statement of case pursuant to **CPR 2000** Part 20. I note that the defendant has not complied with Practice Direction 20 which supplements Rule 20.1(2). The Practice Direction provides;

“2.2 when making an application to change a statement of case, the applicant must file with the court;
(1) the application with affidavit in support;
(2) a copy of the statement of case with the proposed changes ...”

[17] Paragraph 4 of Practice Direction 20 outlines the factors which the court must have regard to when considering an application to amend a statement of case. The claimant’s statement of claim was filed in 2009. The defendant has not provided any particulars to indicate when he became seized with knowledge that the purported DCA approval was fraudulently obtained and that the fraud was

perpetuated or known by the claimant. This, in my view, would be a pertinent factor to guide the court in considering an application to amend the defendant's statement of case. The defendant has not satisfied the provisions of Part 20 and the attendant practice direction. Accordingly, I make no order in relation to the defendant's alternative relief for an amendment to his statement of case.

Order

[18] Having regard to the facts and the authorities it is hereby ordered that:

- (1) The defendant's application to strike out the statement of claim is refused with costs to the claimant in the sum of \$1,000.00.
- (2) The matter shall be listed before the Master for further case management.

Agnes Actie
Master [Ag.]