EASTERN CARIBBEAN SUPREME COURT
COLONY OF MONTSERRAT

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim Number: MNIHCV2016/0006

Between

Sean Ross Mclaughlin — Claimant

And

(1) Montserrat Development Corporation
(2) Department for International Development
(3) Martin Dawson

Defendants

Before:
Ms. Agnes Actie — Master

Appearances:
Mr. Sylvester Carrot of counsel for the claimant
Ms.Sheree Jemmotte Rodney of counsel for the first defendant
Ms. Marcelle Watts for the second and third defendants

2016: July 21
August 9

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1. ACTIE M: Before the court are three applications respectively filed by the defendants to strike out the claim form and statement of claim filed by the claimant. The applications are refused for the reasons given below.

Background Facts

2. The claimant in a claim form filed on 11th February 2016 claims against the defendants for the following "breach of contract, breach of the provisions of the Labour Code 2012 in respect of wrongful termination of his employment and breach of the European Convention on Human Rights".

3. The statement of claim states that the claimant was employed by Montserrat Development Corporation (MDC) under a contract of employment for 3 years. The Department of International Development (DFID) is a Government Department of the United Kingdom which provided funding for the MDC. The claimant alleges that he became aware of misappropriation of funds and reported the matter to DFID. The claimant alleges that he suffered victimization from Board members of MDC and DFID as a result of his whistle blowing and his contract of employment was eventually terminated. He contends that the defendants breached Article 10 of the European Convention on Human Rights as they failed to provide him with protection as a whistle blower.

4. The claimant avers that the termination of his contract was unlawful as (1) the same was not in accordance with the Labour Code 2012 in that reasons were not given for the termination and (2) the termination was in breach of Article 10 of The European Convention on Human Rights which places a positive obligation on the first, second and third defendants to protect his rights as a whistle blower. He avers that Article 10 takes precedence over the provisions of the Labour Code 2012.

5. The claimant further avers that the first and second defendants are public authorities for the purposes of the European Convention on Human Rights and that the protection afforded to the claimant under Article 10 extends to acts carried out whilst residing in Montserrat. He contends that no effort was made by the first or second defendant to redeploy or assist him in finding alternative employment or alternatively protecting his identity as a whistle blower causing him to suffer loss, damage, personal injury, distress and inconvenience.

6. All three defendants respectively filed a defence to the claim together with an application to strike out the claim form and statement of claim.

7. The claimant filed a reply to the defendants' defences together with submissions in reply to the applications to strike out the claim.

FIRST DEFENDANT**'S** APPLICATION TO STRIKE OUT

8. On 18th April 2016, the first defendant filed a defence and on the even date filed a notice of application to strike out the claimant's claim pursuant to CPR 26.3 (1) (c). Counsel for the first defendant contends that the claim is unsustainable; an abuse of process and further or in the

alternative fails to disclose any reasonable grounds for bringing the claim. Counsel contends that the European Convention on Human Rights is not enforceable in Montserrat. Counsel further contends that the claimant should petition the European Court of Human Rights as the Convention was made between High Contracting States and does not have any applicability in Montserrat. Counsel contends that the claimant's claim is misconceived with no real prospect of success and should be struck out

9. Counsel further contended that the claimant alleged that the first defendant infringed the provisions of the Labour Code by failing to give reasons for the termination of his employment but failed to stipulate the relevant provisions of the Code. Counsel states that she is unaware of any provision of the Labour Code that requires reasons to be given in circumstances where a contract was terminated upon giving the required notice stipulated in the contract of employment.

SECOND AND THIRD DEFENDANTS APPLICATIONS TO STRIKE OUT

10. On 22nd April 2016, the second and third defendants' respectively filed a defence and on 25th April 2016 filed a notice of application to strike out the claimant's claim form and statement of claim. They both allege that the claim form and statement of claim fail to disclose any reasonable ground for bringing the claim and an abuse of process. Counsel aver that the claimant failed to indicate the purported cause of action against the second and third named defendants as there never existed a contractual relationship between themselves. Counsel for the second and third defendants like counsel for the first defendant avers that the protection under Article 10 of the European Convention on Human Rights is to be provided by States and not individuals who were not contracting parties to the treaty. Counsel contends that the pleadings fail to disclose how the second and third defendants violated the claimant's freedom of expression. Counsel also maintains that the proper forum for such actions is the European Court of Justice.

11. Counsel further contends that the second defendant is protected under the Public Authorities Act and as such the claim is statute barred having been instituted in excess of the six months period required by the Act.

The Claimant**'s Reply**

12. The claimant filed a reply to each of the defendants defence along with submissions in reply to the applications to strike out the claim.

13. Counsel asserts that the applications are made under three heads namely: (1) the court does not have jurisdiction to entertain the claimant's claim (2) the claim has not been sufficiently particularized and (3) the claim is out of time (a point taken by the second defendant).

14. Counsel contends that the defendants applications made pursuant to CPR 26.3 (1) (b) (c) are in essence challenging the court's jurisdiction. It is counsel's contention that the applications should have been made in accordance with CPR 9.7. Counsel avers that the defendants having filed their respective defence are deemed to have submitted to the court's jurisdiction to determine the matter. Counsel in support cites the case in Hoddinott v Persimmon Homes (Wessex) Ltd[1]. Counsel further contends that it is not now open to the defendants to challenge jurisdiction under the pretext of an application to strike out. Counsel avers that the applications should be refused as they amount to an abuse of process and cites the case of Burns- Anderson Independent Network Plc v Wheeler[2].

15. Counsel avers that the defendants challenge to the sufficiency of pleadings is unsustainable. He avers that the function of a statement of case is to give fair notice of the case that is to be met and the issues upon which the court will have to adjudicate upon and cites the case of Mc Philemy v Times Newspapers Ltd[3]. Counsel is of the view that the statement of case in its present form makes clear the general nature of the claimant's case. He avers that there is no obligation to plead the provisions of the Labour Code as counsel in the Attorney General Chambers should possess sufficient knowledge of the relevant provisions of the Code. Counsel further avers that the defendants should have engaged the provisions of CPR 34 and 38 to obtain further and better particulars rather than making the applications to strike out the statement of claim. Counsel further contends that the defendants have not challenged the fact that there exists a cause of action for protection of the claimant as a whistle blower and cites the authority of Ozgur Gunden v Turkey[4].

[1] [2008] 1 WLR 806
[2] (2005) EWHC 575
[3] (1999) 3 All ER 775
[4] [2000] ECHR 233144/93

LAW AND ANALYSIS – STRIKING OUT

16. CPR 26.3(1) provides that the court may strike out a statement of case or part of a statement of case if it appears: (a) that there has been a failure to comply with a rule, practice direction, order or direction given by the court in proceedings or (b) the statement of case or part to be struck out does not disclose any reasonable ground for bringing or defending the claim.

17. The striking out of a claim has been described as draconian as it deprives a party of an opportunity to present its case at trial. The Court of Appeal in Tawney Assets Limited v East Pine Management Limited[5] citing Baldwin Spencer v The Attorney General of Antigua and Barbuda[6] states:

> "The striking out of a party's statement of case, or most of it, is a drastic step which should only be used in clear and obvious cases, when it can clearly 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 must therefore be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of case is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial"

18. Counsel for the claimant avers that the defendants' applications to strike out the claim are in effect challenging the court's jurisdiction to determine this matter. He avers that the defendants have all alleged that the European Convention on Human Rights (ECHR) is inapplicable in Montserrat and suggesting the European Court of Justice as the proper forum to determine the case.

19. The European Convention on Human Rights (ECHR) is an international treaty to protect human rights and fundamental freedoms in Europe. The court accepts that the ECHR 1998 does not have extra territorial effect[7] and does not extend to Montserrat unless incorporated in the Domestic Laws. Article 10 of the Convention provides for freedom of expression and information, subject to certain restrictions that are "in accordance with the law" and "necessary" in a democratic society. Section 13 of the Constitution of Montserrat contains similar provisions which should be informed and

[55] BVIHCVAP 2012/007
[6] ANUHCVAP 1997/ 0020A
[7] R(Quack Fishing Ltd) v Secretary of State 1 AC 529

interpreted as Article 10 of the European Convention on Human Rights. Section 13 of the Montserrat Constitution provides for the protection of freedom of expression as follows:

> 13. (1) Except with his or her consent, no person shall be hindered in the enjoyment of his or her freedom of expression, and for the purposes of this section the said freedom includes freedom to hold opinions and freedom to receive and impart ideas and information without interference, and freedom from interference with his or her correspondence and other means of communication.
>
> (2) Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society—
>
> *(a)* in the interests of defence, public safety, public order, public morality

20. The Court of Appeal in Capital Bank International Limited v Eastern Caribbean Central Bank and another[8], making reference to the Article 6 of the European Convention on Human Rights stated as follows:

> "that section 6(1) of the European Convention has been construed by the European Court of Human Rights. This has been adopted in the participating states and should inform the meaning that we give to our similar sections in the Constitutions of the territories of the region. In this case, section 8(8) of the Constitution is derived from section 6(1) of the European Convention of the Protection of Human Rights. The linkage between this Constitution and international norms for the protection of human rights and fundamental freedoms was expressed in the Minister of Home Affairs v Fisher (1979) 3 A.E.R. 21 at p.25 in the well known words of Lord Wilberforce:
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> > "Chapter 1 is headed `Protection of Fundamental Rights and Freedoms of the Individual'. It is known that this chapter, as similar portions of other constitutional instruments drafted in the postcolonial period, starting with the Constitution of Nigeria, and including the constitutions of most Caribbean territories, was greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms. That convention was signed and ratified by the United Kingdom and applied to dependent territories including Bermuda. It was in turn

[8] Civil Appeal Nos. 13 & 14 of 2002

> influenced by the United Nations Universal Declaration of Human Rights 1948. These antecedents, and the form of Chapter 1 itself, call for a generous interpretation avoiding what has been called `the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to. Section 11 of the Constitution forms part of Chapter 1.

21. I am in agreement with counsel for the claimant that the defendants' applications to strike out are challenging the court's territorial jurisdiction to determine the claim. CPR 9.7 provides the procedure by which a party may challenge both the court's territorial jurisdiction or the court's jurisdiction to hear a matter. CPR 9.7 states as follows:-

1. A defendant who disputes the court's jurisdiction to try the claim may apply to the court for a declaration to that effect.
2. A defendant who wishes to make an application under paragraph (1) must first file an acknowledgement of service.
3. An application under paragraph (1) of this rule must be made within the period for filing a defence; the period for making an application under this rule includes any period by which the time for filing a defence has been extended where the court has made an order, or the parties have agreed, to extend the time for filing a defence. Rule 10.3 sets out the period for filing a defence.
4. An application under this rule must be supported by evidence on affidavit.
5. A defendant who –
   (a) files an acknowledgment of service; and
   (b) does not make an application under this rule within the period for filing a defence;
   is treated as having accepted that the court has jurisdiction to try the claim."
6. An order under this rule may also –
   (a) discharge an order made before the claim was commenced or the claim form served;
   (b) set aside service of the claim form; and
   (c) strike out a statement of claim.

22. In interpreting CPR 9.7, Lord Collins in the Privy Council decision in Texan Management Ltd v Pacific Electric Wire& Cable Company Ltd[9] at paragraph 26 states:-

> "….. *First, r.9.7 applies to applications* ***disputing the court's jurisdiction and also to applications arguing that "the court should not exercise its jurisdiction."*** Second, the types of order which may be made under this rule do not expressly mention (by contrast with English CPR r.11(6)) an order staying the proceedings: EC CPR r.9.7(6). Third, the application must be made within the period for filing a defence, and the note states that EC CPR r.10.3 sets out the period for filing a defence: EC CPR r.9.7(3). Fourth, the application must be supported by evidence on affidavit: EC 9.7(4). Fifth, if an acknowledgment of service is filed, and an application is not made within the period for filing a defence, the defendant is treated as having accepted that the court has jurisdiction to try the claim: EC CPR r.9.7(5). "

23. The authority is pellucid that a defendant who fails to comply with the provisions of CPR 9.7 is deemed to have accepted the court's jurisdiction to try the claim. The defendants having all filed defences without challenging jurisdiction are deemed to have submitted themselves to the court's jurisdiction to determine the matter. Accordingly, the applications to strike out the claim fail on this ground.

INSUFFICIENCY OF PLEADINGS

24. The second ground of the applications to strike out is lack of particularity of the pleadings. The first defendant avers that the claimant failed to stipulate the provisions of the Labour Code which were allegedly infringed.

25. Counsel for the second and third defendants asserts that the claimant has not sufficiently particularized the cause of action against her clients. Counsel further asserts there did not exist any contractual relationship between the parties, a point conceded by counsel for the claimant.

[9] [2009] UKPC 46

26. CPR 8.7 requires a claimant to properly set out its case and to plead the factual matrix of the case in the statement of case. The principle that the basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer was established by Saville LJ in British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd[10] and was approved in East Caribbean Flour Mills v Ormiston Ken Boyea et al[11] in which case Barrow J A cited with approval Lord Woolf MR in McPhilemy v Times Newspapers Ltd[12] who had this to say about the general approach to pleadings under the CPR :

> "...The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statement, will make the detail of the nature of the case the other side has to meet obvious..... In particular they are still critical to identify the issues and the extent of the dispute between parties. What is important is that the pleadings should make clear the general nature of the case of the pleader....." (my Emphasis)

27. Barrow JA in East Caribbean Flour Mills v Ormiston Ken Boyea etal in interpreting Part 8.7 of states that "the basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it'.

28. In my judgment there is some force in the defendants' criticism of the pleadings. A review of the claim form suggests that the claimant was employed by the all three defendants. Counsel for the claimant both at the oral hearing and in submissions concedes that the second and third named defendants were not the claimant's employers as that there wasn't any contractual relationship existing between them. However counsel did not file or make application to file an amended statement of claim to negate that inference.

29. I note the fact that the claimant has filed a reply since the filing of the applications by the defendants to strike out the claim. I also note that the reply and the submissions in response to the applications

[10] (1994) 72 BLR 26, 33-34
[11] Civil Appeal No. 12 of 2001)
[12] [1993] 3 All ER 775

to strike out have generously outlined the factual matrix giving rise to the claim filed against the defendants. The reply specifies the section of the Labour Code allegedly infringed by the first defendant. The reply references the sections of the Montserrat Constitution that is analogous to Article 10 of the European Convention on Human Rights.

30. I take judicial notice of the fact that the defendants' applications to strike out the claim were filed contemporaneously with the respective defence which did not give the claimant an opportunity to file a prior reply. I am convinced that the extant applications challenging the insufficiency of the pleadings and jurisdiction would have been obviated had the claimant pleaded all the particulars now contained in his reply in the statement of claim instead. This would have given the defendants an opportunity to plead their version of facts in their defence. Counsel for the claimant contends that the defendants should have requested better particulars instead of making the application to strike out. He also contends that counsel in the Attorney General Chambers should have comprehensive knowledge of the provisions of the Labour Code.

31. My short response is that a claimant is always under an obligation to plead all material facts for the orderly progress of the claim. "Pleadings are not a game to be played at the expense of litigants nor an end in themselves, but a means to the end and that end is to give each party a fair hearing" per Saville LJ in British Airways Pension Trustees Ltd V Sir Robert Mc Alphine and Sons. Each party must state his case with precision and particularity so that his opponent may know what the real point in dispute so that they may adequately prepare. The fact that the nature of the grievance may be obvious to counsel in the Attorney General chambers or that the defendants can ask for further particulars are not valid reasons for the claimant's failure to file a properly pleaded case to enable the defendants to file a proper defence in response.

32. I accept the defendants contention that the statement of claim has not sufficiently delineated the cause(s) of action as against the first, second and third defendants. I am of the view that the claimant should have pleaded the provisions of the Labour Code and the Constitution of Montserrat rather than alleging a breach of European Convention of Human Rights in the statement of claim rather than in the reply. This would have given the defendants an opportunity to file a proper defence since they do not have a right of reply to the claimant's reply other than in witness statements and arguments at trial.

33. The court in an application to strike out has a judicial discretion whether or not to make the order to strike out the pleadings. Striking out of a statement of claim is made in very rare circumstances where the court is convinced that the claim is unsustainable. The defendants, other than disputing jurisdiction, have not convinced the court that the claim is unsustainable. The court in an application to strike out has the power to order either that the pleading be amended or that the objectionable matter be struck out, once the defect can be remedied.

34. The Privy Council in Real Time Systems Limited *v* (1) Renraw Investments Limited (2) CCAM and Company Limited (3) Austin Jack Warner,[13] in relation to striking out states:

> "17. 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 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.
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> 18. The Centre could in the present case have applied not under rule 26.2 to strike out, but under rule 26.3 for an "unless" order, requiring Real Time to serve an amended statement of case or adequate details within a specified period, failing which the statement of case would be struck out. Since the Centre's interest was in getting rid of the proceedings, it did not so apply. But it would again be very strange if, by choosing only to apply for the more radical than the more moderate remedy, a defendant could force the court's hand, and deprive it of the option to arrive at a more proportionate solution."

[13] [2014] UKPC 6

35. It has already been established that the defendants have submitted to the court's jurisdiction to determine the claim having failed to comply with CPR 9.7. Applying the principles derived from the Privy Council in Real Time Systems Limited *v* (1) Renraw Investments Limited etal I will accordingly refuse the applications to strike out the claim and order an amendment of the statement of claim. This would be more in keeping with the overriding objectives of the CPR 2000.

LIMITATION PERIOD

36. Counsel contends that the second defendant is protected by the Public Authorities Act which requires any claim against a public authority to be filed within six months of the cause of action. The second defendant avers that the extant claim having been filed outside of the six (6) months period is therefore statute barred.

37. The plea of limitation is a full defence if it is established on evidence that the second defendant is protected by the Public Authorities Act. However the matter before the court is still inconclusive as the cause(s) of action against the second defendant is still obscure which resulted in the extant application to strike out the claim for lack of particularity of the cause of action. A simple response to the second defendant's challenge is provided by Pereira CJ in Hazeline Maynard v The Saint Christopher and Nevis Solid Waste Management Corporation where at paragraph 30 she states:

> " ….. it is well established that the resort to striking out is a draconian step, ordinarily of last resort and one which should be exercised with caution. Also, I entertain grave doubt as to whether a defence of limitation is raised save in the clearest of cases. The question is whether a claim is barred can be in and of itself fact sensitive and thus not at all suitable for this approach but should be left for trial"[14]

38. I am of the view that it will be premature at this point to rule on the defence of limitation of action against the second defendant as it was earlier ruled that the statement of claim is to be amended to particularize the cause of action against the respective parties. Applying the principles outlined by Pereira CJ in Hazeline Maynard v The Saint Christopher and Nevis Solid Waste Management Corporation I accordingly refuse the second defendant's application to strike out the claim on this ground.

[14] Paragraph 30

CONCLUSION

39. In conclusion and applying the principles enunciated in the above referenced authorities it would not be proper to strike out the claimant's statement of case when there is no reason at this stage to suppose that these problems cannot be put right by an amendment to the pleadings. Accordingly, the defendants' applications to strike out the claimant's statement of case are refused on all grounds. I propose therefore to direct the claimant to file an amended statement of claim and to allow the defendants file an amended defence, if necessary.

COSTS

40. The final issue to be determined is costs. Counsel for the first defendant seeks costs in the sum of $3500.00. Counsel for the second and third defendants seeks cost of $3000.000 respectively. Counsel for the claimant suggests costs in the sum of $1500 to the first defendant and costs in the sum of $1000 each for the second and third defendants.

41. The general principle is that costs should be awarded to the successful party. The parties have all had some measure of success on the various issues raised in the applications before the court. The court having found in favor of the claimant on challenge to the jurisdiction. I am of the considered view that the application challenging jurisdiction may not have arisen had the claimant pleaded the relevant provisions of Montserrat Constitution analogous to Article 10 of the European Convention on Human Rights. I also take into consideration that counsel for the defendants should have engaged the prescribed procedure outlined in CPR 9.7 as their applications were in fact challenging the court's territorial jurisdiction to hear the claim. The defendants on the other hand had some level of success on the insufficiency of the pleadings in the statement of claim. It is accepted that counsel for the claimant was under a duty to properly particularize his case. However I am of the view that in the interest of justice and saving time and expense it would have been more judicious had the defendants requested better particulars from the claimant in relation to the alleged infringed provisions of the Labour Code and the corresponding provision of Article 10 of the Convention in the Montserrat Constitution. The parties all having some level of success I accordingly order that all parties shall bear their own costs.

ORDER

42. In summary and for the above reasons I order as follows:

(1) The claimant shall on or before the 30th August 2016 file and serve an amended claim form and statement of claim to:-

   (a) Particularize the cause (s) of action against the respective defendants.

   (b) Specify the relevant sections of the Labour Code and the Constitution of Montserrat allegedly breached by the defendant(s).

(2) The defendants shall file an amended defence, if necessary, within 28 days of service of the amended claim form and statement of claim.

(3) The claimant may serve an amended reply, if necessary, within 14 days of service of the amended defence (s).

(4) Thereafter the matter shall be listed for further Case Management Conference.

(5) Each party shall bear his/its own costs.

AGNES ACTIE

MASTER