EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2016/0009

BETWEEN:

CEDAR VALLEY SPRINGS
HOMEOWNERS ASSOCIATION INCORPORATED

Appellant

and

HYACINTH PESTAINA

Respondent

ANUHCVAP2016/0010

BETWEEN:

CEDAR VALLEY SPRINGS
HOMEOWNERS ASSOCIATION INCORPORATED

Appellant

and

[1] KENNETH MEADE
[2] HILDA MEADE

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

On written submissions:

Mr. Jason A. Martin for the Appellant
No Written Submissions filed by the Respondents

2017: January 18.

Interlocutory appeal – Breach of covenant – Building scheme – Striking out claim pursuant to rule 26.3(1)(b) of the Civil Procedure Rules 2000 – Whether necessary and proportionate in the circumstances

The appellant brought proceedings in the court below against the respondents to these appeals, seeking damages for breach of restrictive covenants, restrictions and stipulations contained in a schedule to conveyances made to the respondents by the company Stanford Development Company Limited ("SDC"). SDC was the owner of a larger parcel of land which had been subdivided and developed as a building scheme called Cedar Valley Springs Development ("the Development"). The respondents are all owners of parcels of land or lots within the Development, having purchased same from SDC. The appellant, a non-profit company pleaded that it was incorporated for the purpose of administering the affairs of the Development, and is also the owner of a lot within the Development, having also acquired same from SDC.

The appellant further pleaded that the conveyed lots in the Development were all subject to covenants stated to be for the benefit of the Development, and these covenants were expressed to be binding on the properties comprising the Development. In particular, one of the covenants was that the owner of each lot was to share equally in all maintenance costs and expenses and replacements to the common property of the Development. The appellant pleaded that as administrator of the Development, it had the responsibility, among other things, for the maintenance and general upkeep of common property and for levying contributions from all property owners as maintenance fees, and that the respondents were in arrears with their contributions. The appellant accordingly commenced these proceedings in the court below for recovery.

Prior to the claims coming on for case management, the respondents filed applications to strike out the claims pursuant to rule 26.3(1)(b) of the Civil Procedure Rules 2000, on the basis that they failed to disclose any reasonable ground for being brought. The learned master ruled that the appellant could sue as successor in title to the original covenantee, having purchased from the covenantee, and stated that 'the pleading … [was] sufficient to allow the action to proceed'. He subsequently stated however, that the appellant, in the pleadings, had failed to show a connection between the burden to pay the maintenance fees, and the assertion that the fees ought to be paid to the appellant. He proceeded to grant the respondents' applications, striking out the appellant's claims and awarding costs to the respondents. The appellant appealed the learned master's ruling, arguing that he erred in striking out the claims having accepted on the facts pleaded that it had a cause of action and also, that he misapplied the relevant legal principles in striking out the claims where the pleadings did not present a clear and obvious case of unsustainable claims.

Held: allowing the appeals and setting aside in their entirety the learned master's orders striking out the underlying claims; and awarding costs of the appeals to the appellant to be paid by the respondents fixed in the sum of $750.00 in respect of each appeal that:

1. The learned master erred in principle in striking out the appellant's claims, having already found that the appellant's cause of action was sufficiently pleaded to enable the claims to proceed. Furthermore, his basis for striking out the claim –

that there was a need to plead additional facts – could have been adequately and proportionately addressed through alternative means (for instance, by directing the appellant to amend the claims to address the failure), particularly since the respondents' applications to strike out had come up for determination prior to the claims being case managed.

Real Time Systems Ltd v Renraw Investments Ltd and Others [2014] UKPC 6 applied.

JUDGMENT

[1] PEREIRA CJ: These are two interlocutory appeals arising from the decision of a master made on 10th May 2016 in which he struck out the claims of the appellant brought against the respondents Kenneth Meade and Hilda Meade in High Court claim no. 721 of 2015 and against the respondent Hyacinth Pestaina in High Court claim no. 722 of 2015 (together called "the respondents"). In both claims the appellant sought damages for breach of 'restrictive covenants, restrictions and stipulations' contained in the Third Schedule to conveyances to the respondents made by one Stanford Development Company Limited ("SDC") which was the owner of a larger parcel of land and which land was subdivided and developed as a building scheme known as the Cedar Valley Springs Development ("the Development").

[2] The two appeals may be conveniently dealt with together as they gave rise to the same issue before the master as on the appeals, namely, whether the appellant's claims failed to disclose any reasonable ground for bringing the claims and thus should be struck out pursuant to rule 26.3(1)(b) of the Civil Procedure Rules 2000 ("CPR"). The learned master, on applications brought by the respondents filed prior to the claims coming on for case management,[1] invoked the powers given under CPR 26.3(1)(b) and struck out the claims. He also awarded costs to the respondents. The appellant, being dissatisfied, has appealed both rulings and

[1] This must be taken to be so given that defences were filed by the respondents on or about 14th October 2015 and the applications to strike out issued two days later, on 16th October 2015.

contends, though set out as three separate grounds of appeal, that the learned master erred in striking out the appellant's claims:

(a) having regard to the fact that he accepted on the facts pleaded by the appellant that it had a valid cause of action against the respondents but yet went on to hold that the appellant was required to plead that the respondents were involved in or, voluntarily or by some other means, committed themselves to the appellant's mandate in respect of the payments of maintenance fees notwithstanding that the appellant had specifically pleaded that the respondents had a history of making intermittent payments to the appellants and was simply in arrears in respect of same; and more generally

(b) on the basis that the learned master misapplied the relevant legal principles in striking out the appellant's claims where the pleadings did not present a clear and obvious case of an unsustainable claim thereby depriving the appellant at that very early stage of the ability to strengthen its case through the available processes of disclosure.

Background

[3] The following facts are to be gleaned from the pleaded case of the appellant:

(a) The respondents are all owners of parcels of land or lots within the Development having purchased from SDC.

(b) The appellant is also the owner of a lot within the Development having acquired same from SDC. Accordingly, the appellant and the respondents share a common transferor or predecessor in title, namely, SDC, from whom the lots were acquired on conveyance following the creation of the building scheme by SDC.

(c) The conveyed lots carry the notation on their land registers, and thus recorded thereon, that they are subject to the covenants, restrictions and stipulations contained in the conveyances. These covenants are stated to be for the benefit of the Development and are expressed to be binding on the properties comprising the Development no matter into whose hands same might be conveyed and on all persons deriving title thereunder to the intent that the covenants are to be observed and performed by all successors in title of the lots within the Development.

(d) One of the covenants so recorded in the land registers in respect of the conveyed lots, provide for the owner of each such lot to share equally in all maintenance costs and expenses and replacements to the common property of the Development.

(e) The appellant is a non-profit company incorporated for the purpose of administering the affairs of the Development and that as administrator of the Development, it has the responsibility for the maintenance and general upkeep of common property and things over which the respondents are granted rights such as roadways, utilities, pipes, and drains which the respondents continue to utilise.

(f) For the purpose of performing its duties, the appellant levies contributions from all property owners as maintenance fees on a monthly basis.

(g) The respondents have made some payments of maintenance fees over time but are in arrears which arrears are now being claimed by the appellant by way of damages for breach of the covenant requiring the equal sharing of maintenance costs in respect of the common property within the Development.

[4] The Court was not provided with a copy of the respondents' filed defences but interestingly, the first respondent in his affidavit in support of his application to

strike out the claim (claim no. 721) stated, in response to the averment by the appellant that some arrears in the maintenance fees had been liquidated by the first respondent, that '[t]hat is simply not possible'. It is not clear how this statement is to be understood.

The Master's Ruling

[5] The learned master, in paragraph 2 of his ruling stated: 'I agree with the claimant's position that it can sue as successor in title to the original covenantee having purchased from said covenatee [sic]. … [T]he pleading … is sufficient to allow the action to proceed.' He then went on to say at paragraph 4 as follows: 'While the pleadings show the burden to pay the maintenance fees, there is nothing on the pleadings to show a connection between this burden and the assertion that the fees ought to be paid to the claimant. This is critical.' (Emphasis in original). He then opined at paragraph 8 as follows:

> "The claimant says that the association was formed to, among other things, conduct the maintenance tasks set out in the covenant. In exchange for these services, the defendants and the other homeowners are to pay the covenanted maintenance fees to the claimant. But the pleadings must show, at the very least, that the defendants were either involved in or voluntarily or by some other means committed or obligated themselves to the association's mandate. It may be the case that the association or something akin to it was forecasted in the deed and thus the claimant was committed to the present arrangement. But nothing of this sort is apparent on the pleadings."

Discussion

[6] A useful starting point is the consideration of the appellant's complaint to the effect that the master misapplied the relevant legal principles in relation to a strike out application. Counsel for the appellant, Mr. Martin, relies on the three authorities of this court, namely: Baldwin Spencer v The Attorney-General of Antigua and Barbuda et al,[2] Tawney Assets Limited v East Pine Management Limited et

[2] ANUHCVAP1997/0020A (delivered 8th April 1998, unreported).

al,[3] and Citco Global Custody NV v Y2K Finance Inc.[4] From these authorities the following principles may be distilled:

(a) This summary procedure which calls for the exercise of a discretionary power, should only be used in clear and obvious cases as it is a drastic step. The result of such a measure is that it deprives a party of his right to a trial and his ability to strengthen his case through the process of disclosure and other procedures such as requests for information.

(b) This procedure should only be used where it can be seen on the face of the claim that it is obviously unsustainable, cannot proceed or in some other way is an abuse of process of the court. This has been expressed in terms that the claim should not be struck out if there is a 'scintilla' of a cause of action.[5]

(c) In treating with an application to strike out made pursuant to CPR 26.3(1)(b), the trier of the application should proceed on the assumption that the facts alleged in the statement of case are true.

(d) The employment of this procedure is appropriate in the following instances: where the claim sets out no facts indicating what the claim is about, or if it is incoherent and makes no sense, or if the facts it states, even if true, do not disclose a legally recognisable claim against the defendant.

(e) Conversely, this procedure would be inappropriate 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 to be fully investigated.

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[3] BVIHCVAP2012/0007 (delivered 17th September 2012, unreported).
[4] BVIHCVAP2008/0022 (delivered 19th October 2009, unreported).
[5] As expressed in the Canadian case of Operation Dismantle Inc v R [1986] LRC (Const) 421 which was cited in Baldwin Spencer v The Attorney-General of Antigua and Barbuda et al ANUHCVAP1997/0020A (delivered 8th April 1998, unreported).

[7] As I alluded to earlier, these claims had not yet reached the stage of case management. CPR 27.3(3) states, as a general rule, that the case management conference must take place not less than four weeks nor more than 8 weeks after the defence is filed. Further, CPR 20.1(1) allows for a party to amend his statement of case once and without the court's permission, at any time prior to the date fixed by the court for the first case management conference. Additionally, CPR 20.1(2) empowers the court to allow an amendment to a party's statement of case at the case management conference or at any time on an application to the court.[6] CPR Part 26 also gives to the court a wide range of powers all aimed at ensuring that the court achieves the objective of dealing with cases justly,[7] and one of these wide powers which may be exercised in actively managing a case in furtherance of that overriding objective is the power to take any step, give any direction or make any order as may best meet the justice of the case.

[8] Here the strike out application was made two days after the defence(s) were filed. The taking of this step by the respondents may be viewed as an attempt at foreclosing the appellant's opportunity to amend its claim if considered necessary before the date fixed for case management. The applications to strike out by the respondents, do not however foreclose the court's ability, when faced with such an application, from engaging its plenitude of case management powers contained in CPR Part 26 to fashion a proportionate response (short of acceding to the respondents' wishes) in furthering the overriding objective where, as here, the learned master found, in my view rightly, that a cause of action as against the respondents had been disclosed on the facts as pleaded. Nonetheless, the learned master grounded his basis for exercising this exceptional power to strike on the failure of the appellant to additionally plead facts which would demonstrate that the appellant was entitled to recover the loss allegedly caused by the pleaded breach of covenant.

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[6] On having regard to the factors set out in sub-rule (3).
[7] CPR 1.1(1).

[9] In this connection I consider the decision of the Privy Council in Real Time Systems Ltd v Renraw Investments Ltd and Others[8] to be quite instructive. There, the issue arose as to whether it was appropriate to strike out the claimant's claim for the repayment of a loan framed in general terms even in the face of a letter of request before action, requesting particulars as to whether the loan was oral or written, when it was made and who were the parties and if oral, its specific terms and conditions. The application to strike out was made on the basis of abuse of process for failure to identify proper particulars of the alleged loans as well as for non-compliance with rule 8.6 of the Civil Proceedings Rules 1998 of Trinidad and Tobago. Rule 8.6 of those rules is in substance the same as our CPR 8.7(1) which states that '[t]he claimant must include in the claim form or in the statement of claim a statement of all the facts on which the claimant relies'. Lord Mance, in delivering the judgment of the Board had this to say at paragraphs 15 to 18:

> "15 The present proceedings have never reached the stage of a case management conference. Rule 20.1 enables a party at any time prior to a case management conference to change its statement of case. Since Real Time's statement of case was insufficiently particularised, it seems that it could without permission have changed it by adding the required details: see Bernard v Seebalack, para 27. And, even if a more restricted view of "change" were taken, that would lead to the odd consequence, on the Centre's case, that a party could, without permission, correct a major omission by "changing" its statement of case under rule 20.1, but could not remedy a more minor error consisting of failure to include sufficient details in its statement of case.
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> "16 In the Board's opinion, the Centre's submissions involve a misconception as to the scheme of the Civil Proceedings Rules and the role of the court under them. Rule 35.3 involves a restriction on the ability of a party to request information. But it says nothing about the court's powers. In the present case, the Centre is not applying for information. It is applying to strike out, and it is in these circumstances for the court to decide upon the appropriate response.
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> "17 In that connection, 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

[8] [2014] UKPC 6.

> 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." (My emphasis).

[10] I adopt this dictum in its entirety and would apply it to the present case as the same principles underpin the scheme of our Civil Procedure Rules. Further, there are a number of cases from this Court which underscore the principles of proportionality in the context of a breach and the appropriate sanction in giving effect to the overriding objective. In my view, it is never an appropriate or proportionate response to utilise this exceptional and draconian measure to deprive a party of his right to a trial and his ability to strengthen his case through the process of disclosure and other procedures such as requests for information or indeed to be deprived of an opportunity to amend his case by adding additional information or further facts which better particularise his cause of action which he has clearly made out on his pleaded case. I agree with the appellant[9] that the master's concerns do not touch on the appellant's cause of action and in any event can be adequately addressed through the process of disclosure, and other

[9] See para. 16 of appellant's Legal Submissions in Support of Notice of Appeal for appeal ANUHCVAP2016/0010.

procedures such as requests for further information and, I would add, by providing further particulars by amendment.

[11] The learned master clearly found that the appellant had sufficiently pleaded its cause of action such as to enable the claims to proceed. In short, this was a finding at the very least that there was a 'scintilla of a cause of action'.[10] On that basis he ought to have found that this was not a suitable case for applying this nuclear option. It was, as the appellant contends, not a clear and obvious case warranting this summary treatment.

[12] It seems to me that the master took a wrong turn when, having concluded that a cause of action had been made out, he went further, holding that this was not enough and that the appellant needed to plead facts showing the basis on which it said it should be compensated for the alleged breach of covenant. Viewing the learned master's reasons in their full context, they tend to suggest that the master then sought to enter upon an evaluation of the appellant's claim from the standpoint of assessing the appellant's likely prospects of success on the claims. This exercise, with respect to the learned master, appears to have led him into applying a different test to the claim, akin to the tests carried out when considering whether to grant summary judgment. But this was not open to the learned master on a strike out application under CPR 26.3(1)(b). It is important to bear in mind that the applicable test on a strike application is not the same as that on an application for summary judgment although some features do bear some similarity. Care should be exercised with a focus on the nature of the application so to avoid conflating them. This difference was recently explained by the Court in Dr. Martin G.C. Didier et al v Royal Caribbean Cruises Ltd. and Royal Caribbean Cruises Ltd v Medical Associates Ltd et al.[11]

[10] Baldwin Spencer v The Attorney-General of Antigua and Barbuda et al ANUHCVAP1997/0020A (delivered 8th April 1998, unreported).
[11] SLUHCVAP2014/0024 consolidated with SLUHCVAP2015/0004 (delivered 6th June 2016, unreported).

[13] Without rendering any opinion on whether the appellant was required to plead these additional facts, having regard to the totality of the appellant's pleading as to its maintenance fee collection relationship together with the averment of intermittent payments made by the respondents, the learned master's reasoning amounted to no more than a finding that the appellant needed to plead additional facts or, in essence, a finding that the appellant was not in compliance with CPR 8.7(1) as regards an expressed averment setting out the basis of the relationship between the appellant and the respondents. But it was certainly not a finding that the claim did not disclose a cause of action on its face and thus a reasonable ground for bringing the claim. Unfortunately, the learned master seems to have then focused his mind on the appellant's chances of success in establishing entitlement to the sums claimed in seeking to enforce the covenant the alleged breach of which formed the basis of the claims.

[14] This failure to plead all the facts or, put another way, the need to plead additional facts could have been adequately and proportionately addressed by the learned master by alternative means, having been faced with the application to strike out at a time when case management had not yet occurred, by invoking his case management powers and fashioning an order under CPR 26.1(2)(w) which could no doubt have directed the appellant to amend its case to address this failure within a specified period. If considered necessary, the learned master could have gone further, when ordering an amendment, by directing the imposition of a sanction for failure to amend. This was an approach open to the master to adopt even in the absence of the respondents themselves utilising this less draconian approach available under CPR 26.4 in seeking to address this perceived omission to fully plead the facts of the claim, rather than having immediate resort to this measure which should only be engaged as a weapon of last resort.

[15] For these reasons, I am of the view that the learned master erred in principle in exercising his discretion and striking out the claims. This is sufficient to dispose of this appeal by allowing the appeal. However, for completeness, I will address the

appellant's other ground which challenges the master's finding that it failed in its pleaded case to show the respondent's involvement or its commitment to the Association's mandate in respect of the payment of maintenance fees to it.

[16] I agree that this finding was erroneous considering the appellant's expressed averment at paragraphs 10 to 12 of its statement of claim in High Court claim no. 721 of 2015 and at paragraphs 11 to 13 of its statement of claim in High Court claim no. 722 of 2015 which set out the actions taken by the appellant in respect of maintenance fee collections from all property owners coupled with the averment of intermittent payments by the respondents to the appellant in respect thereof. While it may reasonably be considered that more detail or more information setting out the basis of the relationship would be helpful (and which the respondents could request) it simply does not justify the striking out of an otherwise viable cause of action because of the lack thereof as a first or proportionate step where alternative methods for addressing this deficiency are available.

[17] What is clear on the facts as pleaded is that a relationship exists or existed between the appellant and the respondents as it relates to the collection of maintenance fees in respect of the upkeep of the common areas and facilities within the Development against which it is asserted that payments had been made by the respondents to the appellant. There is also the additional facts pleaded that the appellant is itself a property owner within the building scheme to which the covenants equally and correspondingly attached.

[18] It is well established that where a building scheme exists, each purchaser, as it relates to one another, has mutual obligations and is entitled to mutual benefits in relation to any covenants or stipulations attached to the land. Building schemes constitute what is described as a "local law" which is binding upon purchasers of the subdivided lots and their respective successors in title. This local law is enforceable by each purchaser and their successor in title against all other purchasers in the scheme and their successors in title. Such mutual obligations

allow each purchaser to enforce their rights as against each other and the common vendor need not be made a party.[12] Accordingly, the appellant, as owner of land in the building scheme would be able to enforce the mutual agreements covenants and stipulations contained in the original conveyance as against other landowners in the scheme.

[19] I agree that the master accordingly erred in concluding in essence that a relationship as between the appellant and the respondents in respect of maintenance fees has not been pleaded in the face of the averments contained in the statement of claim. Furthermore, it is now well settled that with the advent of witness statements that the strictures to which pleadings were required to conform in earlier pre-CPR times have now been ameliorated with the advent of CPR, where, once the case is sufficiently pleaded to enable the party to know the case which he has to meet, fuller details may be fleshed out in the witness statements.[13] Here, it cannot be said that the respondents are left in doubt as to the case they were required to meet having regard to the appellant's pleaded case. For this additional reason I would also allow the appeal.

Conclusion

[20] For the reasons above given, I would allow the appeals and set aside in their entirety the master's orders striking out the claims. I would award costs of these

[12] See Elliston v Reacher [1908] 2 Ch 374; Re Dolphin's Conveyance Birmingham Corporation v Boden and Others [1970] Ch 654; Baxter v Four Oaks Properties Ltd [1965] Ch 816.

[13] See McPhilemy v Times Newspapers Ltd [1999] 3 All ER 775; East Caribbean Flour Mills Limited v Ormiston Ken Boyea SVGHCVAP2006/0012 (delivered 16th July 2007, unreported); Ian Peters v Robert George Spencer ANUHCVAP2009/0016 (delivered 22nd December 2009, unreported).

appeals to the appellant fixed in the sum of $750.00 in respect of each appeal to be paid by the respondents.

I concur.
Gertel Thom
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar