

**EASTERN CARIBBEAN SUPREME COURT**

**ANTIGUA AND BARBUDA**

**IN THE HIGH COURT OF JUSTICE**

**CLAIM NO. ANUHCV2016/0649**

**BETWEEN:**

**CONSTANCE SLOWIK**

**Claimant**

**and**

**1. ELI FULLER**

**2. ADVENTURE ANTIGUA LIMITED**

**3. PINE BROOK MANAGEMENT COMPANY LIMITED**

**(Trading as Grand Pineapple Beach Resort)**

**Defendants**

**Appearances:-**

Ms. Safiya Roberts and Ms. Rhodsha Oliver for the Claimant

Ms. E. Ann Henry QC with Ms. Mandy Thomas for the 3rd Defendant

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2017: June 30

July 20  
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## JUDGMENT

[1] **CORBIN-LINCOLN, M.:** Pine Brook Management Company Limited (Grand Pineapple) has applied to strike out the claim on the ground that it discloses no reasonable ground for bringing a claim against it.

[2] The application is dismissed for the reasons given below.

### The Law - Striking Out

[3] Parts 26.1 (b) and (c) of the Civil Procedure Rules 2000 (**CPR**) states that the court may strike out a statement of case or part of a statement of case if it appears to the court that the statement of case or the part to be struck out does not disclose any reasonable ground for bringing a claim or is an abuse of the process of the court.

[4] It is well established that in considering whether to strike out a claim the court is only concerned with the statement of case and no evidence is admissible. 1 All pleaded facts are presumed to be true<sup>2</sup>. The court should exercise its discretion to strike out a claim sparingly and "*in clear and obvious cases where 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.*"<sup>3</sup>

### The Claim

[5] The statement of claim avers that Grand Pineapple held itself out as a tour operator by providing tours to guests at its hotel. Ms. Constance Slowik acquired a copy of Grand Pineapple's brochure which included particulars of the hotel and contained the following representations "*about tours and excursions which could be booked through the hotel*":

*" Unrivalled Choice: We offer the ultimate range of holiday options covering a variety of airlines that fly to Jamaica, St. Lucia, Antigua, The Bahamas and Grenada, access to all availability, Island Routes excursions and added extras. Take a look through this brochure to see just how much choice you have".*

*In order to maintain its high standards, the company only works with certified partners that meet consumer safety criteria and receive high marks in customer satisfaction. Below is a taste of our customer's favourite tours" However these and many more are available at*

<sup>1</sup> Odgers on Pleadings and Practice, 20th edition, page 152-153, Swain v Hillman [2001] 1 All E.R 91

*islandroutestours.co.uk. The Xtreme Circumnavigation Tour is a featured tour."*

[6] On arrival at Grand Pineapple Ms. Slowik was presented with welcome letter from the General Manager which included particulars of tours in Antigua and "*contained the following representations*":

*" For your safety and security we recommend that all tours and excursions be reserved through our Island Routes - Tour Desk, located in the lounge adjacent to the Topaz Restaurant. As such, engaging in any transactions with beach purveyors will be done at your own risk."*

[7] The statement of claim avers further that:

*"In reliance on the representations contained in the ... letter and brochure the Claimant booked an excursion through the Island Routes tour desk at the hotel. By doing so, the Claimant entered into an agreement dated the 5th day of January 2014 with the Third Defendant, whereby the Third Defendant agreed to provide a tour of Antigua and Barbuda. The cost of the excursion was added to the Claimant's hotel bill and the excursion was scheduled for the 7th day of January 2014.*

*It was an implied term of the agreement between the Claimant and the Third Defendant that the tour would match the description contained in the welcome letter and brochure."*

[8] On 7th January 2014 Ms. Slowik boarded a vessel owned by the 1st defendant for a tour operated by the 2nd defendant. The statement of claim avers Ms. Slowik suffered injuries when the captain suddenly turned the boat directly into a wave causing the vessel to bounce off the wave and come down with a thud. Ms. Slowik was thrown upwards and landed heavily onto a set behind her.

[9] The statement of claim avers that the representations made by Grand Pineapple were false and Grand Pineapple was in breach of contract in that the tour did not conform to the representations in the welcome letter. Particulars of the misrepresentation and/or breach of contract include that Grand Pineapple :

(1) failed to ensure that the 1st defendant and/or 2nd defendant acted with reasonable skill and care in the operation of the tour.

(2) failed to ensure that the 1st defendant and/or 2nd defendant met consumer safety criteria as represented in its brochure

### **Grand Pineapple's Application**

[10] Grand Pineapple contends that the statement of claim discloses no reasonable ground for bringing a claim against it.

[11] Learned Queen's Counsel for Grand Pineapple submits that:

(1) The statements contained in the brochure and welcome letter do not amount to representations in relation to the tour which Ms. Slowik took or any particular tour.

(2) The statements in the brochure *"are general statements more in the nature of Puff or a promotion of its business, rather than a representation"* by Grand Pineapple concerning the specific Tour taken by Ms. Slowik or any other tour.

(3) The welcome letter *"was more in the nature of a warning to guests not to buy tours from "beach purveyors", than making a representation of fact concerning the specific Tour taken by the Claimant or any other tour."*

(4) The contents of the welcome letter and brochure can in no way be read as speaking to the skill and care of the operator of the Tour.

(5) Even if the statements were to be found to be representations touching and concerning the tour taken by Ms. Slowik she has not overcome the question of the duty of care.

(6) There is no pleading of a contract which is enforceable having regard to the elements of an enforceable contract i.e (a) there must be two or more separate and definite parties; (b) there must be consensus ad idem; (c) the parties must intend to create legal relations; and (d) the promises of each party must be supported by consideration or some other factor which the law considers sufficient;

(7) Even if the court finds that a contract exists it is not possible to imply a term in an unwritten contract in which the essential terms are not pleaded.

(8) The claimant's pleadings show that it is the 2nd defendant with whom she entered into a contract of carriage.

## **ANALYSIS**

[12] The court's task at this stage of the proceedings is to determine whether the statement of claim discloses grounds for bringing a claim and raises triable issues.

### **The Misrepresentation Claim**

[13] A misrepresentation *"is a positive statement of fact, which is made or adopted by a party to a contract and is untrue."* <sup>4</sup> At common law a person is liable for representations made negligently under the rule in **Hedley Byrne & Co Ltd v Heller & Partners Ltd**.<sup>5</sup> The duty owed at common law is one of honesty. <sup>6</sup>

[14] The statement of claim avers that the statements contained in the brochure and welcome letter were representations by Grand Pineapple presumably in relation to the tour which she took with the 2nd defendant. Grand Pineapple asserts the statements were mere puff. Whether the

statements were representations or mere puff will have to be determined objectively having regard to the intention of the parties. The intention of the parties can however only be deduced from the whole of the evidence. 7

4 Halsbury's Laws of England (4th edn., 2003) vol. 31 para. 701

5 [1963] 2 All E.R. 575

6 Howard Marine and Dredging Co. Ltd. v A. Ogdgen and Sons (Excavations) Ltd. [1978] 2 All E.R. 1134

7 Heilbut, Symons & Co. v Buckleton [1913] AC 30

## **The Contract Claim**

[15] The elements of a valid contract are: (a) there must be two or more separate and definite parties; (b) the parties must be in agreement on specific matters; (c) the parties must intend to create legal relations "*in the sense that the promises of each side are to be enforceable simply because they are contractual promises*" and (d) there must be consideration 8.

[16] Learned Queen's Counsel for Grand Pineapple submits, among other things, that by Ms. Slowik's own pleadings she asserts a contract between herself and Grand Pineapple for what appears to be the same object or purpose as the contract allegedly made with the 2nd defendant and for what appears to be the same consideration.

[17] Counsel for Ms. Slowik submitted that the statement of claim sets out two (2) separate contracts - one with Grand Pineapple as "tour organizer" and the other a contract of carriage with the 2nd defendant.

[18] Counsel submits that in relation to the contract between Ms. Slowik and Grand Pineapple the offer was made by Ms. Slowik and accepted by Grand Pineapple when Ms. Slowik booked the tour "*through the Island Routes tour desk*" at Grand Pineapple as pleaded in paragraph 7 of the statement of claim. While counsel submitted that the contract with Grand Pineapple was to organize the tour, paragraph 3 of the statement of claim avers that Grand Pineapple "*held itself out as a tour operator*" and paragraph 7 avers that the contract was for Grand Pineapple to "*provide a tour of Antigua and Barbuda*". It is asserted that it was an implied term of the contract that the tour would match the description contained in the brochure and welcome letter.

[19] It therefore appears to be Ms. Slowik's pleaded case that the express term of the contract was for Grand Pineapple to provide a tour of Antigua and Barbuda and it was an implied term that the tour would conform with the representations

8 Halsbury's Law of England (4th edn., 2003) vol. 9(1) para. 603

contained in the brochure and welcome letter. It is asserted that this contract is separate from the contract of carriage entered into with the 2nd defendant.

[20] Paragraph 7 of the statement of claim avers that an unspecified cost of the excursion was added to Ms. Slowik's hotel bill. This unspecified sum which was added to her bill appears to be

what Ms. Slowik is contending was the consideration for the contract between her and Grand Pineapple. Proceeding on this premise there appears to be no pleaded consideration for the contract between Ms. Slowik and the 2nd defendant or alternatively it was the same consideration. Be that as it may, for the purposes of the application before the court I presume it to be true that the sum added to Ms. Slowik's bill for the excursion is the consideration for the contract between her and Grand Pineapple.

[21] The statement of claim therefore makes express averments with respect to three (3) of the essential elements of a valid contract.

[22] With respect to the issue of whether the parties intended to create legal relations this is a question of fact which can only be determined on the totality of the evidence.

*"No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as "the surrounding circumstances" but this phrase is imprecise: it can be illustrated but hardly defined...When one speaks of intention of the parties to the contract, one is speaking objectively; the parties cannot themselves give direct evidence of what their intention was, and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. "*<sup>9</sup>

9 Lord Wilberforce in Reardon Smith Line Ltd v Hansen-Tangen (1976) 3 All ER 570 p 574

[23] Having considered the statement of claim and the relevant law I do not find that Ms. Slowik's pleaded case can be said to be obviously unsustainable. It raises triable issues some of which can only be determined on the totality of the evidence. I therefore do not find that this is a suitable case for striking out.

[24] It is therefore ordered as follows:

- (1) The application to strike out the statement of claim is dismissed.
- (2) The 3rd defendant {Grand Pineapple } shall file a defence within 28 days.
- (3) Pursuant to **CPR 27.3** (3) The court office shall fix a date for the first case management conference not less than 4 weeks nor more than 8 weeks after the defence of the 3rd defendant is filed

### **Costs**

[25] Grand Pineapple shall pay costs of the application to Ms. Slowik.

[26] This is not an application determined at case management, a pre-trial review or trial and costs therefore fall to be assessed under **CPR 65.11**.

[27] The parties shall agree on costs failing which the court shall hear the parties and determine costs on the date fixed by the court office for the first case management conference.

**Fidela Corbin Lincoln**

**Master**