

The Eastern Caribbean Supreme Court

IN THE HIGH COURT OF JUSTICE

COMMONWEALTH OF DOMINICA

DOMHCV2014/0214

BETWEEN:

[1] THE NATIONAL BANK OF DOMINICA LTD

Claimant/Respondent

AND

[2] DR. CURVIN FERREIRA

[3] MRS. HERNICA FERREIRA

[4] C&H FERREIRA LTD

AND

[5] NATIONAL INVESTMENT CORPORATION INC.

2nd Defendant to the Counterclaim/Respondent

Before: The Hon. Justice M E Birnie Stephenson

Appearances

Miss Cara Shillingford for the Applicants

Mrs Coleen Felix Grant for the Respondents

2017:
2018: April 27

RULING ON WRITTEN SUBMISIONS

[1] Stephenson J.: By Part 26 Civil Procedure Rules 2000 (CPR), the Court has power to order the whole or part of a statement of case to be struck out. This power may be resorted to on an application by any party before the court who is seeking to attack the statement of case filed by the other side.

PROCEDURAL BACKGROUND

[2] This matter was initiated by the National Bank of Dominica ('NBD') against Dr Curvin Ferreira, Mrs Henrica Ferreira and C & H Ferreira Ltd. ('The Applicants') for stated sums of money being the balance due and owing to the NBD pursuant to a loan agreement between NBD and the Applicants.

[3] NBD claims that the Applicants defaulted on their loan agreements and are therefore indebted to the Bank. NBD also claims their outstanding interest on the loan further in the alternative that the Mortgaged **property to be sold plus costs. NBD's fixed date claim form was accompanied** by an affidavit in support of their claim sworn to by Linda Toussaint Peter.

[4] The Applicants filed their defence which they subsequently amended and filed a counterclaim against **the NBD and against National Investment Corporation Inc ('NICI') who they added** as an Ancillary Defendant. NICI is a wholly owned subsidiary of NBD and it has filed its response to the claim made against the company..

[5] **The Applicant made an application for an order striking out NBD's claim. This application is** accompanied by an affidavit in support.

[6] Part 26.3 of CPR provides

"In addition to any other 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-

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 the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;*
- c. *The statement of claim or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings; or*
- d. *The statement of case or the part to be struck is prolix or does not comply with the requirements of Part 8 or 10.”*

[7] It is well established law that the jurisdiction to strike out is to be used sparingly, as striking out which **has been described as a “nuclear option” deprives a party of its ability to strengthen its case through the process of disclosure and the court processes and procedures.**

[8] The principles upon which this jurisdiction is exercised are well settled. In the Baldwin Spencer Case¹ Chief Justice Dennis Byron succinctly stated the principles which is to be applied by this Court. He said

“The court is empowered to dismiss an action in a summary way without a trial where the statement of claim discloses no cause of action, or is shown to be frivolous or vexatious or is otherwise an abuse of the process of the court. This summary procedure should only be used in clear and obvious cases, when it can clearly be seen, on the face of it, that a claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court.”²

[9] In *Three Rivers District Council –v- Bank of England (No. 3)*³ Lord Templeman said

“If an application to strike out involves a prolonged and serious argument, the judge should, as a general rule, decline to proceed with the argument unless he not only harbours doubts about the soundness of the pleading, but in addition is satisfied that striking out will obviate the necessity for a trial. ...”⁴

¹ *Baldwin Spencer –V- The Attorney-General Of Antigua And Barbuda, Lester Bryant Bird Asian Village Antigua Limited, CIV. APP. NO.20A OF 1997 (Antigua & Barbuda)*

² *Ibid* at page 5

³ [2003] 2 AC 1

⁴ *Ibid* paras 96-97

[10] **The Court in dealing with these applications is encouraged to take a “broad brush” approach and** look simply to see whether the case is a plain and obvious one for striking out rather than considering each ground in detail.

[11] A statement of case may be struck out if it sets out no facts indicating what the case is about or if the facts stated even if true do not disclose a legally recognisable claim against the Defendant. **A statement of case will be struck out if the relief sought wouldn't be ordered by the Court.**

[12] A Court has the power to strike out a case to prevent the misuse of its procedure in a way which is inconsistent with the literal application of its rules of procedure and which would be manifestly unfair to the litigants before the Court or bring the Administration of Justice into disrepute among right thinking people. *Re Hunter –v- Chief Constable of the West Midlands Police*⁵

[13] The question of whether a claim should be struck out depends on the particular circumstances of the case. One of the reasons for striking out a case is to stop the proceedings and to prevent a waste of precious Court time and resources. The Court will exercise its power to strike out only where it is just and proportionate to do so.

[14] The threshold to be met in order for an application to strike out to be successful has been held to be high and the Courts have been cautioned to approach such application carefully and that striking out is always an order of last resort. *Re: Alpha Rock Solicitors –v- Alade*⁶

[15] In considering this application the Court is obliged to avoid a mini trial or lengthy examination of the facts. There is a danger of coming to factual conclusions without the benefit of disclosure and oral evidence where the issue of credibility of law is to be decided.⁷

⁵ [1982] AC 529 Lord Diplock at page 536

⁶ [2014] All E R (D) 40 Nov.

⁷ *Re: E D & F Man Liquid Products* [2008] EWCA Civ. 472 (2003) *The TIMES* 10th April

[16] In deciding whether to exercise its power, the Court should have regard to the Overriding Objective.

This case is a claim brought by the NBD against the Defendants seeking repayment of monies lent to the Defendants advanced under a credit facility.

The application

[17] The Application before the Court is for the Fixed Date Claim, the affidavit sworn in support of the Claim, the reply filed on behalf of NBD be struck out. Learned counsel Miss Cara Shillingford on behalf of the Applicants cited and relied on Part 26.3 of CPR 2000 and the following decisions in support of her application:

- (i) Bernard Christopher –v- Roosevelt Skerrit et anor⁸;
- (ii) Baldwin Spencer –v- The Attorney General of Antigua and Barbuda et al⁹
- (iii) Dominica Aid Bank-v- Levi Maximea et anor¹⁰

as well as the learning in Zuckerman in Civil Procedure Principles of Practice in support of her submissions. It was submitted that the Court is clothed with the discretion to strike out matters that have no prospect of succeeding. Further that this discretion is to be used in clear and obvious cases and must be used sparingly.

[18] **The Applicant contended that NBD's case as pleaded is unsustainable. It is the Applicant's case that** the terms of the loan agreement between NBD and the Applicant was that they were to repay a total of EC\$660,000.00 which was duly paid by the Applicants in compliance with the contractual loan obligations with NBD.

[19] The Applicants content that the facts as pleaded by NBD negates a breach of contract and in the circumstances of this case did not disclose a breach of contract and in the **circumstances NBD's** pleadings discloses no grounds for bringing the claim against the Applicants.

[20] NBD submits in response that on the contrary the claim filed by the bank establishes a Mortgage claim against the Applicants.

⁸ DOMHCV2010/0287

⁹ CIVAPP20A OF 1997 (Antigua & Barbuda)

¹⁰ DOMHCV2009/0054

[21] NBD contends that in compliance with CPR 8.6 the Fixed Date Claim form filed sets out briefly a short description of the nature of the claim and the remedy sought. That the case as pleaded in fact establishes a Mortgage Claim.

[22] It was further argued that the affidavit sworn in support of the Fixed date Claim sets out the following matters clearly:

- a. That there was a loan approved for specific amounts for the Applicants;
- b. That the Promissory notes were executed by the Applicants and NBD;
- c. The Loan proceeds were advanced to the Applicants;
- d. The security documents were duly signed by both NBD and the Applicants;
- e. That the third named Applicant guaranteed the loan and is therefore is a proper party before the court;
- f. That particulars as to the amounts paid and the amounts owed are clearly stated.

[23] It was further submitted on behalf of NBD that based on the facts as averred in the affidavit in support a valid mortgage claim has been established and the facts adduced raises many question fit to be tried.

[24] It was further submitted by Learned Counsel on behalf of NBD that the Applicants have not made any **arguments that NBD's claims are confusing difficult to follow or not properly presented itself as a case** they could not answer.

[25] It was also submitted on behalf of NBD that the Applicants have answered the claim brought against the by NBD and they have also launched a counterclaim and added an Ancillary Defendant and in those circumstances it is clear that NBD has showed a clear and arguable cause of action and case.

[26] NBD went on to submit that the summary procedure of striking out a case is not to be used in this case as there is a sustainable case and that the Applicants have shown that there are central issue of dispute which have to be considered and decided on.

[27] It was submitted that the case brought by NBD does not amount to an abuse of process as contended by the Applicants within the confines of the law.

- [28] On the issue that there may be defects in their claim form and that their claim may not comply with procedure as set out in CPR it was submitted by NBD that it is trite law that in such circumstances the Court has a power to order compliance instead of adopting the draconian approach of striking out the claim.
- [29] It was also submitted by Learned Counsel on behalf of NBD that the application before the court as currently exists required the court to examine the documents and facts disclosed in the written evidence which amounts to conduct of a mini trial which ought not be done in the process of an application to strike.
- [30] NBD contended that they have a clear cause of action before the court which should be allowed to proceed to trial and the Applicants Application to strike out the proceedings should be dismissed.
- [31] The Applicants insist in their arguments that the claimants have failed to properly present a case for them to answer and went into great and in depth and detail as to what was paid by them and what their obligations were in the transaction and what were the obligations of the Ancillary Defendant. They also asked the Court to find that the claim was not a mortgage claim but a case of breach of contract which was not pleaded by NBD.
- [32] The Applicants maintained that NBD has failed to properly plead a claim for breach of contract and has not established a reasonable cause of action.
- [33] The Applicants have also maintained that there was serious non compliance with the requirements of CPR and that the claim brought by NBD was an abuse of process.
- [34] The Applicants contended that NBD has failed to give crucial particulars such as the daily interest rates to be paid.
- [35] The applicants also complain that there has been failure on the part of NBD to submit key contractual documents in their non compliance with CPR Part 66.4 (1)(b) and that the omission of the documents are unacceptable.

COURT'S CONSIDERATION & DISPOSITION

- [36] On an application to strike out a claim on the grounds that the statement of case does not disclose any reasonable ground for bringing the action the Court is concerned with the statement of case as pleaded.¹¹
- [37] Based on the submissions made by Counsel for the Applicants and a review of the pleadings filed by both sides it is clear that there is a triable issue. It is clear that there are substantial questions and points of law which do not admit to plain and obvious answers.
- [38] It is trite law that a party to a case has the ability to strengthen its case through the process of disclosure which continues throughout the case. Therefore any failure by NBD to provide any documents can be remedied by orders for discovery.
- [39] The examination and cross examination of witnesses more often than not change the complexion of cases during the process of trial. The Courts are encouraged to be careful and not to deprive a party of the right to a trial on issues essential to a case.
- [40] The Court is also obliged when dealing with applications before it to exercise whatever discretion it is clothed with to deal with cases justly. It is trite law that a statement of case is not suitable for striking out if it raises a live issue of fact which can be properly determined at the trial of the matter.
- [41] The Applicant submits that in the instant case that the case for NBD should have been couched in the language of a claim for breach of contract. The law and authorities for cases such as these do **not entirely support the Applicants' contention in this regard.**
- [42] In Banking claims such as the case at bar, the statement of claim should set out the banks claim with sufficient particularity to enable the Defendant to understand exactly what the claim is. The capacity in which the Claimant sues and the Defendant is sued should be specified, the instrument

¹¹ Re: M4 Investments Inc –v- CLICO Holdings Barbados Ltd. Barbados Civil Appeal nos. 2 & 4 of 2004

sued on should be identified by its date and amount and the date when it is payable should be stated.¹²

[43] In the case at bar it is clear that based on the pleadings before the court that NBD has made a claim known to the law against the Applicants who have, by their pleaded defence and counterclaim coupled with a joinder of an ancillary defendant pleaded a defence which raises a clearly defined triable issue.

[44] With respect, I have to disagree with the submissions of learned Counsel Miss Cara Shillingford for the Applicant and in the circumstances of this case it would be unjust to strike out the claim as sought by the Applicant.

[45] In light of the above and applying the relevant principles of law to the facts as pleaded by NBD. I consider that it would be inappropriate, disproportionate and unfair to the Claimant to strike out the Claim here in. I am of the considered view that the allegations for breach of contract and indeed for the existence of the contract, the probable terms, liabilities and responsibilities should be ascertained, examined and adjudicated upon.

[46] Accordingly the application to strike out is dismissed with costs to the Respondent. This is **therefore the Court's order:**

1. The Application to strike out the Statement of Case is dismissed
2. This matter is now remitted to the Court list for directions on the Fixed Date Claim to be heard on the 24th day of May 2018.
3. Costs to Respondent in the sum of \$1,500.00

[92] As a post script this decision was essentially completed to be delivered in January 2018 but due to the unavailability of full court facilities to ensure the timely delivery and proper editing and presentation of this ruling, there was a delay in delivering this ruling and the Court apologises for this and for any errors which may appear herein. Though the Civil High Court is not yet ready I opted to go ahead and deliver the decision in chambers in the presence of Counsel solely as there was no space to accommodate the parties.

¹² See Atkins Court Forms (1988) Issue Volume 6 page 254 at paragraph 40

[93] I wish to thank Counsel for their assistance rendered to the Court in this matter and to apologise for the length of time that it has taken me to render my decision. However Counsel is well aware of the constraints experienced by the Court.

M E Birnie Stephenson
High Court Judge

[SEAL]

By the Court

Registrar