EASTERN CARIBBEAN SUPREME COURT
ANGUILLA

IN THE HIGH COURT OF JUSTICE

CLAIM NO: AXAHCV 2012/0065

BETWEEN:

VANROY ROMNEY

Claimant

and

SHERIDAN SMITH

Defendant

Appearances:

Ms. Jenny Lindsay for the Claimant
Mrs. Latoya Hobbs-Nurse for the Defendant

2018: February 27;
May 22.

JUDGEMENT

[1] **Moise, M.:** The claimant brought this action against the defendant for breach of contract in the sum of **Sixty-two Thousand, Four Hundred and Twenty United States Dollars ($62,420.00US)**. The contract relates to the performance of certain electrical works which the claimant carried out on property belonging to the defendant for a period ending in the year 2006. As I understand it, the agreement between the parties was not reduced to writing and can be described as an oral agreement. The matter has had a long procedural history before this Court as it relates to the disclosure of certain electrical plans which were at some point in the defendant's possession. There are now two applications before me. The claimant applies for an order striking out the defence and entering judgment in his favour along with costs. The defendant on the other hand applies for an order striking out the claim against him and entering judgment in his favour. I have denied both applications and made no order as to costs. These are my reasons for doing so.

[2] Before examining each application, it is important to outline some of the procedural history of this matter before the Court. On 12th October 2012 the claimant commenced this action. This would have been approximately 6 years on from the performance of the contract. The matter went through its normal case management procedures and on 28th October, 2013 case management directions were given and it was ordered that the parties give standard disclosure to each other on or before 22nd November 2013. Upon disclosure however, the claimant complained that the defendant failed to disclose certain documents, some of which were electrical plans which relate to the job which was performed by him. The other was a particular cheque which does not appear to be an issue of contention anymore. Although some plans were disclosed, it is apparent that not all of the electrical plans relating to the work done were disclosed by the defendant. It was argued that the plans were an important feature in the case and the failure to disclose these documents was a breach of the defendant's duty as ordered by the master on 28th October, 2013. In that regard, the claimant filed an application on 31st January 2014 requesting an order for specific disclosure of the documents as well as the check which the defendant did not disclose. This was granted on 14th May, 2014. Notwithstanding this, the defendant did not disclose the documents and on 18th June, 2014 the claimant applied to the court for an unless order that if the documents were not disclosed the defence would be struck out and judgment entered in favour of the claimant.

[3] On 24th July, 2014 Master Raulston Glasgow (as he then was) granted the request made by the claimant to the effect that the documents were to have been disclosed on or before 30th September 2014, failing which the defence would be struck out and judgment entered in favour of the claimant. However, the defendant made an application to the court prior to the expiration of the unless order, requesting a variation of the order on the basis that despite his best efforts he could not locate the outstanding electrical plans and therefore could not disclose them. Insofar as the cheque was concerned he stated that this cheque was referred to in error and did not exist. This application for variation and relief from sanctions was heard on 21st October, 2014 and was granted. In effect, Master Georges V. Taylor-Alexander (as she then was) accepted the evidence of the defendant that he could not locate the plans and varied the order for specific disclosure and relieved the defendant from any sanctions which may be imposed for his failure to disclose the documents within the time prescribed.

[4] The claimant applied to have this order set aside on the basis of the fact that neither he nor his counsel was present at the hearing when the variation order was made. This application was not successful and the claimant's appeal of this decision to the Court of Appeal was similarly unsuccessful. The claimant has now brought this application regarding disclosure of the same documents, more particularly the electrical plans, which were the subject of previous applications and was also considered by the Court of Appeal. The defendant on the other hand argues, inter alia, that given the claimant's own admission that he cannot proceed to trial without the documents, the claim against him should be struck out on that basis as the claimant now has no real prospect of successfully prosecuting his case. I will deal with each application in turn.

The Claimant's application

[5] The claimant's application is generally for an order striking out the defense and entering judgment in his favour. In the first instance, the claimant relies on Rule 26.3 of the Civil Procedure Rules 2000 (CPR) which outlines the Court's powers to strike out a statement of case in the following manner:

> ***26.3(1) 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 case 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 out is prolix or does not comply with the requirements of Part 8 or 10.***

[6] In the alternative, the claimant requests that the court strikes out the defence on its own initiative in keeping with the provisions of Rule 26.2 of the CPR which states that ***"[e]xcept where a rule or other enactment provides otherwise, the court may exercise its powers on an***

application or of its own initiative." However, given that there is an application before me I am not of the view that Rule 26.2 is of much assistance and I will proceed to determine this application on the criteria set in Rule 26.3 of the CPR. The claimant also relies on Rule 28.12 where it states that ***"[t]he duty of disclosure in accordance with any order for standard or specific disclosure continues until the proceedings are concluded".*** Reliance is also placed on Rule 28.13 which states as follows:

> ***28.13 (1) A party who fails to give disclosure by the date ordered, or to permit inspection, may not rely on or produce at the trial any document not so disclosed or made available for inspection.***
>
> ***(2) A party seeking to enforce an order for disclosure may apply to the court for an order that the other party's statement of case or some part of it be struck out.***
>
> ***(3) An application under paragraph (2) relating to an order for specific disclosure may be made without notice but must be supported by evidence on affidavit that the other party has not complied with the order.***
>
> ***(4) On an application under paragraph (2) the court may order that unless the party in default complies with the order for disclosure by a specific date that party's statement of case or some part of it be struck out.***

[7] The claimant has grounded his application on the following propositions:

(a) That the defendant's actions in failing to comply with court orders obliging him to disclose specific documents has been contumacious and/or contumelious. The claimant is materially prejudiced. He cannot have a fair trial as he has no prospect of success without disclosure of the documents;

(b) The defendant has repeatedly failed to comply with orders of the Court to disclose specific documents over an inordinate period of time. A fair trial is no longer possible. This is an abuse of process;

(c) In the alternative, the defendant's failure to disclose the documents has led to a situation where the defendant, by his own contumacious and/or contumelious conduct, has no evidence to rebut the claim. The defendant has no prospect of success and the court of its own initiative ought to enter summary judgment for the claimant and strike out the defense;

[8] The claimant argues that by court orders dated 14th May and 24th July, 2014, the defendant was obligated to disclose the electrical plans. It was argued that despite the variation of these orders on 21st October, 2014 the master never relieved the defendant of his duty to disclose. Counsel for the claimant argued that the only element of the order which was varied was the time within which to disclose the documents. On that basis, the claimant argues that the defendant's failure to disclose the documents, even at this late stage, is contumacious and/or contumelious and amounts to an abuse of the process of the court. The claimant also argues that the court should have regard to the overriding objective to do justice in this case and consider that without the documents the claimant is unable to prove his case. In that regard it was further argued that the defendant is no longer in a position to rebut the claim against him and therefore has no prospect of success. As a result of this, it is argued that judgment should be entered summarily against the defendant.

[9] The defendant, on the other hand, argues that the issues raised in this application have already been dealt with by the master on 21st October, 2014. These matters were referred to the Court of Appeal and the decision of the master was upheld. In essence, the defendant states that he had satisfied the master that it was impossible to locate and disclose the documents and that this current application is a re-litigation of issues upon which the court has already determined even up to the level of the Court of Appeal. The defendant essentially argues that the claimant is barred from making this application as the issues raised are res judicata and can no longer be litigated.

[10] For my part, I am in agreement with the submissions of the defendant to some extent. In a close examination of the procedural history of this case, I am of the view that it would be wrong to submit that the defendant has failed to comply with orders of the Court to disclose specific documents over an inordinate period of time. No doubt, Master Glasgow on 24th July, 2014 was satisfied that the defendant was in breach of the case management orders enough to grant an unless order in favor of the claimant. However, this order was varied on 21st October, 2014. The master accepted as a matter of fact that the defendant could not disclose the documents as he could not locate them. On that basis the unless order as well as the order for specific disclosure were varied on 21st October, 2014 and the defendant was relieved from any sanctions which the

court may have imposed. This order was appealed to the Court of Appeal and Michel JA at paragraph 43 of the judgment described the defendant's application for variation and relief from sanctions ***"as an application for variation of the specific disclosure order, the violation of which led to the making of the 'unless order'."*** His Lordship went further at paragraph 44(2) and (3) and stated as follows:

> ***"there was uncontroverted affidavit evidence before the master explaining the impossibility of performance of the obligation to make specific disclosure of certain documents, on the basis of which evidence the master made the order that she did on 21st October, and which order she found no basis to set aside in her order of 4th December. There is, therefore, no basis upon which this Court could upset this factual finding of the master…"***
>
> ***Grounds 3, 4, 5 and 6 of the appellant's grounds of appeal are disposed of by the finding made by the master, on the basis of the evidence before her, as to the impossibility of performance of the obligation to disclose at all or within the time specified in the disclosure order.***"

[11] The Court of Appeal accepted that both orders were varied by the master and saw no reason to trouble the basis on which this was done. Essentially, it was found that it was impossible for the defendant to make the specific disclosure as ordered to by the Court within the time prescribed by the unless order, or at all. It stands to reason therefore, that if this was the finding of fact made by the master, the court would no longer impose a duty on the defendant to do something which is impossible for him to do. For my part, I see no reason at this stage in the proceedings to revisit matters which have already been litigated; unless of course there are new emerging circumstances or some other reason to do so. In his affidavit dated 12th June, 2017, the claimant, at paragraph 4, states his belief that the defendant is withholding the documents to prevent a fair trial from taking place. He states that he handed the documents over to the defendant and that he is of the belief that the defendant would not lose or destroy these documents. Insofar as that is the claimant's view he is well within his right to say so. He has however presented no evidence to suggest that the facts already accepted by the master on 21st October, 2014 ought to be disturbed. I also bear in mind that the contractual relationship between the parties came to an end in 2006; just short of six years before the claimant filed this action before the court. Even if it is argued that the defendant once had these documents in his possession it would not be entirely unreasonable some 6 to 8 years later to conclude that he simply could no longer find them. In any event, the master came to the conclusion in October

2014 that the documents could not be found and compliance with the previous orders was impossible. There is nothing before me now to satisfy me that I should revisit or disturb these findings.

[12] At paragraph 6 of his affidavit of 12th June, 2017 the claimant states that at no time was the defendant relieved of his duty to specifically disclose documents as listed in the orders of 14th May and 24th July, 2014. That is also not entirely accurate. Given the specific nature of the words expressed by Michel JA in the Court of Appeal, it seems clear to me that the order for specific disclosure which gave rise to the unless order of Master Glasgow has been varied. It does not mean that the defendant does not have a duty to disclose the documents if they are found, but he has been relieved of his duty to disclose documents which he has satisfied the court as a matter of fact are no longer in his possession and which he cannot locate. The claimant's belief that this is not true is not sufficient to trouble these findings of fact and I do not propose to do so at this stage in the proceedings. In his affidavit dated 20th June, 2017 the defendant refers to his previous evidence regarding the fact that he could not locate the documents. To refer to the defendant's failure to disclose the documents as contumacious and/or contumelious would give no regard to the fact that the defendant approached the court by way of application together with an affidavit and satisfied the master as to the reasons for his failure to disclose these documents to the extent that he was relieved from sanctions at the hearing on 21st October, 2014.

[13] In her oral submissions, counsel for the claimant argues that the court should draw adverse inferences from the defendant's silence on what happened to the documents. She relies on the authority of ***Issa Nicholas (Grenada) Limited v. Time Bourke Holdings (Grenada) Limited***[1] for this submission. In that case the Court of Appeal considered the application of Rule 26.8 insofar as it related to the filing of a witness statement out of time. After considering the method adopted by the appellant in placing this new evidence before the Court, Pereira CJ stated that ***"[t]he reasonable inference to draw from this is that the failure to timely file a witness statement of Mr. Mouly may be considered as being intentional."*** Essentially the Court of Appeal determined that a party's behavior can lead to the drawing of adverse inferences insofar

[1] GDAHCVAP2015/0029

as it related to the determination of whether the criteria in Rule 26.8 were satisfied. I am not at all persuaded that a similar situation arises in the present case.

[14] It is argued by the claimant that the defendant has not given a proper explanation as to what happened to the documents and the fact that he has chosen to remain silent on this issue is a ground upon which the court should draw adverse inferences against him. However, I am not of the view that this is an accurate reflection of the facts. It would be wrong to say that the defendant is silent on what has happened to the documents when he himself approached the court with affidavit evidence to state that he attempted to locate the documents and could not find them. The court accepted this as a matter of fact at the hearing on 21st October, 2014. It appears to me that the claimant is attempting to re-litigate these issues and the findings of fact made by the master on that date; which were upheld by the Court of Appeal. In any event, I do not agree that there are adverse inferences to be drawn in this case about the defendant's conduct given the decision of the master on 21st October, 2014 and the findings of fact which she made then.

[15] The furtherance of the overriding objective must always be at the forefront of the court's mind. In that regard, the claimant argues that the delay in disclosing these documents means that a fair trial is no longer possible and invokes Rule 25.1(i) of the CPR where it states that the court should ensure that "***no party gains an unfair advantage by reason of that party's failure to give full disclosure of all relevant facts prior to the trial or the hearing of any application;"*** Essentially, the claimant argues that it would be wrong to allow the defendant to capitalize on his own default in a manner which allows him to gain an unfair advantage. Insofar as this submission is concerned, the claimant relies on the case of ***Barbados Redifusion Services Limited v. Asha Merchandani et al.***[2] In that case the Caribbean Court of Justice considered the Court's powers to strike out a statement of case where there has been a material non-disclosure which undermines the prospect of there being a fair trial. In some of the cases assessed by the court in coming to its conclusion, it was suggested that the court may have the power to strike out the statement of case even where the documents were lost or destroyed inadvertently. The issue for consideration was whether the failure to disclose

[2] CCJ Appeal No. CV 1 of 2005

rendered a fair trial no longer possible. After considering the English authorities on the issue President de la Bastide stated the following at paragraph 40 of his decision:

> ***"I think I have quoted enough of the English authorities to demonstrate that notwithstanding the dicta of Millett J. in the Logicrose case, it remains good law that a striking out order may in appropriate circumstances be made in response to, and in a sense, as a punishment for, the contumelious or contumacious or defiant breach of a peremptory order of the court. This, however, is subject to the proviso that a court which is called upon to make such an order on this ground, must approach the matter holistically and undertake the balancing exercise needed to ensure that proportionality is maintained and that the punishment fits the crime."***

[16] There are however a number of observations to be made from President de la Bastide's decision insofar as it may be applicable to the present case. Firstly, he refers to the striking out of the statement of case as a response to, or punishment for the party's contumelious or contumacious conduct and for the defiant breach of the peremptory order of the court. I have found as a matter of fact that the defendant's conduct cannot be so described, given the fact that he approached the court to explain why the documents were not disclosed and that the master on 21st October, 2014 accepted his explanation and granted him relief from any sanctions which may be imposed upon him. He was also granted a variation of the order to the extent that he cannot now be described as being in defiant breach as argued by the claimant. Secondly, President de la Bastide at paragraph 39 of his judgment qualified what is meant by a fair trial and stated as follows:

> ***"There are a number of other cases (to which I need not refer) in which the English courts have applied the principle that a strike out order may, and indeed should be made, whenever a party's failure to comply either with the rules or with an order of the court, has rendered a fair trial no longer possible. It is necessary, however, to make clear what is meant by a 'fair trial' and for this purpose it is convenient to cite the following passage from the judgment of Chadwick L.J. in Arrow Nominees Inc. v. Blackledge & Ors. [2000] 2 BCLC 167 (at paragraph 55):***
>
> > ***"Further, in this context, a fair trial is a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the court. The court does not do justice to the other parties to the proceedings in question if it allows its process to be abused so that the real point in issue becomes subordinated to an investigation into the effect which the admittedly fraudulent conduct of one party in connection with the process of litigation has had on the fairness of the trial itself".***

Later in his judgment the same Judge again made it clear that the question whether in that case the trial should have been allowed to run its course, had to be determined by reference to whether that was fair to the innocent party as well as in the interest of the administration of justice generally."

[17] President da la Bastide sought to give guidance on how the court should proceed on such an application and concluded that the court should take into account the interest of the administration of justice in general. He states, for example, at paragraph 44 that ***"[a] judge dealing with an application to strike out, should start off by reminding himself that to strike out a party's case and so deny him a hearing on the merits, is an extreme step not to be lightly taken."*** As it relates to the possibility of a fair hearing due to the destruction of crucial documents, the President also stated the following at paragraph 45 of his decision:

> ***"Broadly speaking, strike out orders should be made either when that is necessary in order to achieve fairness or when it is necessary in order to maintain respect for the authority of the Court's orders. In this context "fairness" means fairness not only to the non-offending party but also to other litigants who are competing for the finite resources of the Court. If there is a real risk that a fair trial may not be possible as a result of one party's failure to comply with an order of the Court, then that is a situation which calls for an order striking out that party's case and giving judgment against him. One way in which such a situation may come about, is if crucial documents which are not disclosed within the time prescribed by an order for discovery, are subsequently lost or destroyed, albeit without fault on the part of the non-disclosing party. Another is where a party has been so fraudulent in relation to the discovery process, for example, by forging or deliberately suppressing documents and lying about it, that it is impossible to place any reliance on what he has disclosed as being either authentic or complete, without a long and expensive inquiry."***

[18] President de la Bastide noted firstly that the court may strike out a party's statement of case "***if crucial documents which are not disclosed within the time prescribed by an order for discovery, are subsequently lost or destroyed, albeit without fault on the part of the non-disclosing party."*** Here it is not necessary for the party to be at fault. If he breached the order and the documents are subsequently lost he may face the ultimate sanction of the court in striking out his statement of case and entering judgment for the other party. The circumstances in this case, however, may not be as described by President de la Bastide. The evidence is not that the documents were lost subsequent to the failure of the defendant to comply with the court orders to disclose them. He stated before the master that he searched for the documents and

could not find them and was granted relief from sanctions and a variation of the order. It must be observed that the claimant brought this action against the defendant almost 6 years subsequent to his performance under the contract. I do not accept that the defendant should face the ultimate sanction of having his defense struck out and judgment entered against him in circumstances where he simply cannot locate electrical plans which were in his possession over half a decade prior to the filing of the claim against him.

[19] The claimant continues to assert that he cannot prove his case without the documents, but that is not the same as saying that a fair trial is not possible. He states in his affidavit that he is ***"unable to prepare for trial owing to Defendant's repeated breaches. My Claim is likely to fail because of these ongoing breaches. I simply cannot prepare my witness statements without disclosure of the ordered documents. I verily believe that there cannot be a fair trial without disclosure of the documentation."*** For my part, I doubt that the claimant has presented sufficient evidence to prove that a fair trial is not possible at this stage. He simply states in his affidavit that he cannot prove his case or prepare his witness statements without the documents and states nothing more to substantiate this assertion. This is a case for the recovery of sums allegedly owed to the claimant for professional work done on the defendant's property. I am not of the view that there is a proper basis on which to find as a matter of fact that this matter can simply not continue without disclosure of the documents in a manner which can balance fairness to both sides. This is especially so when I consider the fact that it is an action brought approximately 6 years subsequent to the contractual relationship between the parties coming to an end. If the defendant states that he cannot locate the documents at this stage, I am not of the view that judgment should now be entered against him.

[20] The Court may be called upon at trial to consider the nature of a contractual relationship which ended some years ago. It does not appear to me to be unlikely that documentation which was part and parcel of the contractual arrangement may very well be lost, especially considering a claim which was filed some years subsequent to the performance of the contract. At that stage the parties may simply have to accept that the matter will proceed to trial on the best evidence which is currently available. After hearing all of the issues and the evidence presented, a trial court will be in the best position to draw whatever inferences can be drawn from the evidence available and the conduct of the parties. What the court should not do, in my view, is to persist

in re-litigating the same issues at the case management stage. This undermines the overriding objective and may lead to the wastage of the resources of the parties as well as the court.

[21] I am encouraged by President de la Bastide to observe that ***"[a] judge dealing with an application to strike out, should start off by reminding himself that to strike out a party's case and so deny him a hearing on the merits, is an extreme step not to be lightly taken."*** To accede to the claimant's request would mean that the court should enter judgment in the sum of US$62,420.00 against the defendant without considering the merits of the case. To my mind, this would not be a proper way for the court to exercise what is one of the most extreme powers contained under the rules. It would not be proper for the court, having relieved the defendant from sanctions for failing to disclose the documents and varying the order for him to do so, to then turn around 4 years later, strike out his defence and enter judgment against him. This would not further the overriding objective to do justice in this case.

[22] President de la Bastide also noted that the Court may strike out the statement of case "***where a party has been so fraudulent in relation to the discovery process, for example, by forging or deliberately suppressing documents and lying about it, that it is impossible to place any reliance on what he has disclosed as being either authentic or complete, without a long and expensive inquiry."*** Given the clear finding of fact made on 21st October, 2014 that it was impossible for the defendant to disclose the documents, I am not of the view that his conduct can be described as fraudulent. I do not accept that the evidence points to a situation where the defendant has forged or deliberately suppressed documents. Further, I do not accept as a matter of fact that he has lied about the documents so as to make it impossible to rely on what he has said about the non-disclosure. In any event, these issues were before the master on 21st October, 2014 and she accepted his evidence in that regard as being truthful. No doubt it may be disadvantageous to the claimant if the documents are not found; but the Court cannot demand of a defendant that he does something which is not possible for him to do.

[23] The claimant argued in his affidavit and in his legal submissions that the defendant is lying and is simply frustrating the process by withholding the document. In fact the claimant in his affidavit alleges that the defendant misrepresented certain facts before the master on 21st October, 2014. He states, for example, that the architect who drew up some of the plans can be contacted

despite the defendant's assertion otherwise. As I have indicated before, this order by the master on that date, along with the circumstances under which it was made, was the subject of an appeal. This appeal was unsuccessful and the court ought not to re-litigate these matters in this instance without more. Further, there is nothing in the affidavit of the claimant which raises any issue of fact which was not before the master when she made her determination on 21st October, 2014. The issues are all the same and after careful consideration the master came to her conclusion that it was not possible for the defendant to disclose the document. Michel JA at the Court of Appeal made specific reference to this finding of fact and stated that he saw no reason to interfere with it. I too do not propose, without more, to revisit this issue as I am of the view that there must be an end to the litigation of issues already determined by the court.

[24] The claimant also argues that the defendant's failure to disclose the documents has led to a situation where the defendant, by his own contumacious and/or contumelious conduct, has no evidence to rebut the claim. In that regard the claimant requests that the court enters summary judgment in his favour. It is not necessary to elaborate in detail on the requirements which must be established in order for the court to enter summary judgment in favour of one of the parties. It would suffice to say that the proposition put forward by the claimant is not sustainable. It is trite that he who asserts must prove and this submission by the claimant suggests that without calling upon him to prove his own case the court should decide that the defendant cannot rebut the claim due to the non-availability of documents which was once in his possession. This is not a proper basis for the entry of summary judgment and I do not accept that this is a course of action which the court should pursue.

[25] In the circumstances the application to strike out the defence and enter judgment in the claimant's favour is denied.

The defendant's application

[26] The defendant applies for an order striking out the claim against him under the same provisions as outlined in the claimant's own application. The grounds for this application are as follows:

(a) The claimant's failure to comply with the overriding objective of the CPR which requires him to specifically plead his case and annex to his claim every document he intends to rely on to plead his case;

(b) The speculative nature of the claim discloses no reasonable ground for the claimant bringing or maintaining the claim and for the defendant to defend;

(c) The inordinate delays by the claimant has amounted to an abuse of the court's process;

(d) The claimant by his own admission has no real prospect of success and the court of its own initiative ought to enter summary judgment for the defendant and strike out the statement of case.

[27] From the onset I wish to state that many of the assertions contained in the legal submissions presented by counsel for the defendant in support of this application have not been substantiated by affidavit evidence. At paragraphs 11 through to 13 of his affidavit dated 20th June, 2017 the defendant states as follows:

> ***11. These Proceedings were commenced in 2012 by the claimant who failed to comply with the requirements set out in the CPR rules which specifically require the claimant to identify or have annexed to his statement of case a copy of any document which he considers necessary to prove his case.***
>
> ***12. I am informed by my solicitors and verily believe that a claimant who has failed to prove his case cannot rely on the impossibility of a second or third party to disclose documents as a means of seeking relief from the court to proceed to trial.***
>
> ***13. I am informed by my solicitors and verily believe that in applying the overriding objective under the CPR 2000 the Court always seeks to act in the interest of justice and therefore should not entertain a claim/or claimant who failed to properly prepare his case to prove the claim as filed.***

[28] This is the extent of the defendant's evidence insofar as it relates to the proposition that the claimant has failed to comply with the overriding objective of the CPR. For my part, I am not at all sure that the overriding objective is something which a party complies with. As 1.1 of the CPR states, ***"[t]he overriding objective of these Rules is to enable the court to deal with cases justly."*** No doubt the parties must assist the court in giving effect to the overriding objective, but it would be wrong to suggest that failure to observe the overriding objective is a ground on which the statement of case should be struck out. For the most part, it is for the court to further the overriding objective in the manner in which the rules are applied; albeit with the

assistance of the parties. Grounding an application as a breach of the overriding objective does not seem to me to be well founded.

[29] However, it would appear that the defendant is submitting that the claimant's failure to identify or annex certain documents to his statement of claim should result in it being struck out. I assume that the documents to which the defendant refers are the very documents he once had in his possession and can no longer find. I make that assumption as neither in his affidavit nor in the legal submissions filed on his behalf does he refer to any other documentation. It would be wrong, in my view, to strike out the claimant's claim on that basis. That would certainly not further the overriding objective. The evidence suggests that at one point in time during the contractual relationship between the parties these documents were handed over to the defendant. He cannot now find them. It is difficult to see on what basis the claimant was to have annexed or identified plans on which he would rely when these plans were simply not in his possession at the time of the filing of the claim. I do not wish to say much more on that issue except that it is not a ground on which I am prepared to adopt such a measure as the striking out of the claim filed by the claimant.

[30] The second ground on which the defendant's application is based is that ***"the speculative nature of the claim discloses no reasonable ground for the claimant bringing or maintaining the claim and for the defendant to defend."*** There is generally nothing by way of affidavit evidence to properly canvas this issue. As far as this ground is concerned, however, the defendant states the following in his legal submissions:

> ***59. It is imperative therefore that every claim filed by a Claimant must provide the court with sufficient facts to establish his cause of action. If he fails to state any one of those facts the claim is bad and might be struck out unless the courts orders otherwise.***
>
> ***60. The Claimant's claim is speculative and discloses no reasonable cause of action for the Claimant bringing or maintaining the claim.***

[31] In support of this submission the defendant relies on the case of ***Inna Gudavadze et al v Carlina Overseas Corp et al[3] at paragraph 20 and 22*** where the following was stated***:-***

[3] BVIHC (COM) 2012/0011

"In my judgment the Claimants have no prospect of sustaining their claim to the relief sought by them in these proceedings. It must be remembered that the claim is for purely ancillary injunctions preventing dealings with the 24.5% shareholding. No declaration as to beneficial ownership and no order for the transfer of the trust property from Vano to the alleged beneficiaries is asked for

" ... The only question as between the Claimants and ACG can be whether Vano granted the security in breach of trust.. .. "

" ... The Claimants' original pleading did not even allege that ACG took the pledge, and subsequently the charge, in the knowledge that they had been given and granted in breach of trust..."

[32] I am not of the view that the decision in this case is particularly helpful in the matter at hand. As The defendant himself rightfully included in his legal submissions, the claim is for ''***an overdue debt of US$62,420.00 being the balance due and owing for some electric installation work"*** done by the claimant on the defendant's property. The matter has been locked in interlocutory applications regarding the defendant's duty to disclose these plans. I do not accept that the claimant's statement of case does not disclose any reasonable ground for bringing a claim. He is simply claiming payment for work which he states was done and not paid for. As President de la Bastide in the CCJ noted ***"[a] judge dealing with an application to strike out, should start off by reminding himself that to strike out a party's case and so deny him a hearing on the merits, is an extreme step not to be lightly taken."*** In my view, even if I were to accept that the documents should have been referred to by the claimant in his statement of claim, striking out the claim at this stage would be too draconian a measure for the court to adopt. It is not now in dispute that these plans existed and were in the defendant's possession. He has satisfied the court that he can no longer find them and he has been relieved from any sanctions which may be imposed on him for this. Justice would not now require that the claimant's case be struck out because he did not identify these documents as evidence on which he would rely on in his statement of claim.

[33] The third ground on which the defendant's application is based is that the inordinate delays by the claimant have amounted to an abuse of the court process. At paragraph 16 of his affidavit dated 20th June, 2017 the defendant states:-

"I am being continually prejudiced by the inordinate delays and the manner in which the claimant has and continues to conduct these proceedings. The claimant

has throughout these proceedings appealed all matters that were fully ventilated before the court on the basis that he was not satisfied with the ruling."

[34] Essentially the defendant argues that the claimant's persistence in seeking to set aside and appeal previous court orders has led to delays in the process. This, it is argued, is an abuse of process. I have stated earlier in this decision my own conclusion that to some extent the current application which the claimant has before the court is an attempt to re-litigate some of the issues which were already determined by Master Taylor-Alexander on 21st October, 2014. However, I would not go so far as to say that the claimant's attempts at setting these orders aside and the subsequent appeals amount to an abuse of the process. The claimant was not satisfied with the decision and was well within his right to pursue an appeal. He was unsuccessful, but this does not mean that he was abusing the process of the Court in doing so. I accept that this matter has been delayed for some time. However, the blame cannot be placed squarely at the feet of the claimant. I do not accept that the process has been so abused so as to warrant the striking out of the claimant's statement of case.

[35] Lastly, the defendant submits that the claimant by his own admission has no real prospect of success and the court of its own initiative ought to enter summary judgment for the defendant and strike out the statement of case. I repeat the contents of paragraphs 19 and 20 of this decision. Despite the claimant's assertion, I am not now satisfied that this matter simply cannot proceed to trial on whatever evidence is available. The defendant argued in his legal submissions that in general the nature of the agreement between the parties was concluded orally. It would be for the court to decipher what transpired and come to whatever conclusion it comes to on the basis of the best evidence available at this stage. In my view, there needs to be some further case management and with the assistance of the parties in this process the matter should proceed to trial for the determination of the substantive issues. Whatever evidence is available at this stage should be presented to the trial court. I am not inclined to strike out the statement of case of either party. If the claimant persists in his view that he cannot proceed to trial without the documents, then it would be for him at the next case management process to determine whether his claim will continue. What ought not to continue is the persistent litigation of case management issues already decided by the court. It may mean that the parties should now be granted leave to file witness statements and to prepare for

trial, but the issue of further disclosure at this stage has been fully litigated and the process needs to move on.

[36] In the circumstances the defendant's application to strike out the statement of case of the claimant is also denied.

[37] The usual practice is that costs should be ordered in favour of the successful party. However, there were two applications before me; one from each party to this claim. Both applications were denied. In the circumstances I make no order as to costs. I therefore order that the matter is to be listed for the next sitting of the master in Anguilla. At this hearing the master will consider all outstanding case management issues with a view to preparing this matter for trial. The parties are encouraged to assist with this process as there is a need for some measure of finality to litigation in this case.

Ermin Moise
Master

By the Court

Registrar