THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO.: SLUHCV2009/1067

BETWEEN:

FIRSTCARIBBEAN INTERNATIONAL BANK (BARBADOS) LIMITED

Claimant/ Respondent

and

1. THE ROSERIE COMPANY LIMITED
2. THOMAS ROSERIE
3. SONIA ROSERIE
4. CHEMICAL MANUFACTURING & INVESTMENT LIMITED

Defendants/ Applicants

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini High Court Judge

Appearances:

Mr Deale Lee with Ms Zinaida McNamara of Counsel for the Claimant/ Respondent
Mrs Cynthia Hinkson-Ouhla of Counsel for the Defendants/Applicants

PRESENT:

Mr Athanasius Popo, representative of the Claimant/Respondent
Mr Thomas Roserie, Second Defendant/Applicant and Director of the First and Fourth Defendants/Applicants
Mrs Sonia Roserie, Third Defendant/Applicant and Director of the First and Fourth Defendants/Applicants

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2019: January 22
March 29

DECISION

[1] ST ROSE-ALBERTINI, J. [Ag]: On 31st July, 2018 the defendants' filed an application supported by affidavit, seeking an order that paragraphs 18 to 21 ("the paragraphs") of the claimant's witness statement of Curtis Small filed on 2nd July 2018 ("the witness statement") be struck out, along with the exhibits referred to in the paragraphs.

[2] The grounds of the application are that the claimant has:- (1) failed to comply with Rule 8.7 of the Civil Procedure Rules 2000 ("CPR") which requires a claimant to set out all the facts on which it relies in its claim form or statement of claim; (2) failed to comply with CPR 8.7A which requires the court's permission or agreement of the parties to rely on any factual allegation not set out in the claim; (3) failed to plead material which has always been available to the claimant and has not sought the court's permission or the applicants' agreement to include such information; (4) introduced new facts which amends the claim without applying to the court to amend its pleadings; and (5) that the introduction of these new facts have changed the nature of the claim as pleaded and has prejudiced the defendants in the advance of their defence.

[3] The claimant filed an affidavit in answer on 17th September 2018 and opposes the application.

The Issues

[4] The issues to be determined are:

1. Whether the matters contained in paragraphs 18 to 21 of the witness statement, contravene CPR 8.7 and 8.7A and introduces new allegations which the claimant should not be permitted to rely on?
2. If so, whether the appropriate recourse is to strike the paragraphs and respective exhibits from the witness statement?

The Challenged Paragraphs and Exhibits

[5] The paragraphs are reproduced verbatim below:-

> "18. Under the terms of the demand loans #2696787, #2691661 and #1250269 and the aforesaid Hypothecary Obligation Mortgage Debenture & Floating Charge (exhibit CS4) provides at paragraph 7 that: *"The Principal Debtor and or The Surety and the Mortgagee mutually agree as follows:-*
>
> *(a) That the debts shall become due and payable and this security enforceable immediately upon demand being made by the Mortgagee or any officer on its behalf or upon the happening of any of the following:….*
> *(ii) if a distress or execution is levied or issued against The Mortgaged Premises or the Surety's Property and is not paid within seven days."*
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> 19. That is to say the Claimant, the First, Second and Third Named Defendants mutually agreed that the all debts owed to the Claimant would become due and payable upon demand if a distress or execution is levied against the immovable property belonging to the First Named Defendant or the property secured by the Second & Third named defendants and is not paid within seven days.
>
> 20. On 13th June 2001 judgments were entered against the First and Fourth Named Defendants (Copies of the judgments exhibited hereto as "CS19"& "CS19") and by virtue of these judgments notices of judicial sales were gazetted on 11th August, 2003 for the properties – Block 0849D Parcel 270, Block 0848C Parcel 50, Block 0848C parcel 48 belonging to the First Named Defendant and which formed part of the Claimant's security. A copy of the judicial sale notices are attached hereto and marked as "CS20").
>
> 21. Following the breach of the terms of the said facilities the Claimant issued a letter of demand dated 28th October, 2003 to the First Named Defendant for payment of the following sums:

(a) $734,615.67
(b) $378,663.14
(c) $530,215.21
(d) $937,288.37

A copy of the said letter is exhibited hereto and marked "CS21."

[6] The exhibits appear to be incorrectly referenced in the paragraphs. However, Exhibit CS17 is a copy of court order dated 25th February, 2004 issued in Claim No. SLUHCV2001/0204 between Trinidad Cement Limited v Roserie Company Limited, which concerns obtaining a loan to settle a judgment debt. Exhibit CS18 is a copy of a writ of execution dated 18th July, 2003 issued in Claim No. SLUHCV2001/127 between Republic Bank Limited v The Roserie Company Limited. Exhibit CS19 contains inter alia, a notice of Judicial Sale relating to the said writ of execution, advertised in the Saint Lucia Government Gazette of 11th August, 2003. Exhibit CS20 in a copy of a demand letter dated 23rd October, 2003. I refer to them collectively as the exhibits.

The Defendants**/ Applicants'** Submissions

[7] Counsel for the defendants, Mrs Ouhla, contends that the matters referred to in the paragraphs are not particulars of the claim as previously pleaded in the statement of claim or reply to defence. She stated that the defendants always fiercely contested the issuance of the demand and maintained that they had not committed any breach of the terms and conditions of the loans. The purpose of a reply is to clarify issues raised in the defence, yet the only reply given by the claimant was that it was entitled to issue the demand and did so. The claimant's case was fully set out in its statement of case and reply to defence and contain no pleading in relation to default events, not even in the most succinct manner. The only reference to Hypothecary Obligations ("the hypothecs") was in relation to securing the debts claimed. To now say that the demand letters were triggered by a default event under clause 7 of the hypothecs offends the requirements of CPR8.7, in that the claimant was required to plead the full particulars of its case to allow the defendants to be fully seized of the matters to which they should answer.

[8] Mrs Ouhla argued that in a pre-action letter dated 3rd November, 2004 the claimant through its attorneys stated the reasons for issuing the demand letter as being that the loans were subject to repayment in full on demand and that the defendants had not adhered to the repayment commitments as agreed. The claim which followed years later was advanced in the same terms. If the reason was breach of the terms of the hypothecs as the claimant now says, the options would have been to amend the claim or having chosen to serve a reply, to put forward its version of facts regarding the reason for issuing the demand letter. She says that the circumstances were such that a bare denial that the demands were not improperly made would not suffice and such bare denial should be seen as an admission.

[9] Counsel submitted that the claimant ought to have pleaded the facts surrounding the reason for issuing the demand letters but failed to do so at every available opportunity. There have been numerous applications before the court and never before has any reference been made to an alleged breach of clause 7 of the hypothecs or to the exhibits. She stated that particulars in pleadings require a balance between the need for fair notice and excessive demand for detail. However the defendants had no notice of these particulars and the claimant now seeks to rely on its bare denial as an extremely wide allegation within which to fit any particulars. She submitted that pleadings are supposed to establish the parameters of the case which the defendants have to answer; but the statement of claim and the reply are insufficient to allow the facts contained in the paragraphs to stand as particulars.

[10] Mrs Ouhla contends that the purpose of a witness statement is to particularize the facts relied on by the claimant in its pleadings and not for introducing new facts. The claimant is now seeking to revise its case through the witness statement by introducing new facts to fill in the gaps, which has the effect of changing the nature of the claim. Additionally the exhibits were not disclosed in standard disclosure and have surfaced for the first time in the witness statement, despite the fact that the dates of the documents indicate that they were always available to the claimant, even before the claim was filed.

[11] She advanced the view that there is a difference between amplification and fabrication. The former entails particularizing the facts pleaded on which the cause of action is predicated and is permissible by the court rules. The claimant, however, is now seeking to bolster its case by raising new particulars which are a fabrication of the reason for calling in the loans and is not permissible. To do so at this late stage means that the defendants are taken by surprise, thereby causing grave prejudice to them, as they were never given the opportunity to address these particulars in advancing their defence. It was the claimant's duty to set out in its statement of case all facts on which it relies, as well as any documents considered necessary to its case. Permission has not been granted by the Court nor have the parties agreed that the claimant may rely on these new allegations. Having failed to do so, the claimant should be precluded from relying on these new allegations which were not set out in the claim, when it could have been set out there, if that was indeed the reason for issuing the demand.

[12] On the issue of prejudice to the defendants, Mrs Ouhla submitted that to say as the claimant has, that no prejudice would be caused to the defendants by its conduct, is to deny the obvious delay in providing this information and the lack of disclosure of the documents prior to serving the witness statement. Consideration must be given to the means of the parties, having regard to the overriding objective to deal with cases justly, including ensuring that the parties are on equal footing and treated in a manner proportionate to their financial position. She says that a mere hand out of costs, as the claimant has suggested is simply insufficient to remedy the prejudice to the defendants, as the introduction of these new facts at this late stage of the proceedings have greatly prejudiced their defence. Fairness would not be achieved if any remedy other than striking out the paragraphs is granted.

The Claimant/ Respondent**'s Submissions**

[13] Counsel for the claimant Mr Deale Lee stated that the real issues are whether the paragraphs complained of speak to matters that were not foreshadowed in the pleadings

and whether the appropriate recourse is to strike out the paragraphs. He submits that the case for the claimant is very clear and the defendants are well acquainted with the claim. There were loan agreements secured by the hypothecs and the terms and conditions made provision for the issuing of a demand for payment. Demand was issued in accordance the terms of the loans and the debts remain outstanding. He says that the letter referred to as exhibit TR3 in the defendants' affidavit states that the claimant's decision to demand payment was caused by the failure of the defendant to adhere to "agreed terms" and "repayment conditions as agreed".

[14] Mr Lee argued that the defendants in their defence accepted that loans were granted but joined issue with the respondent on the demand, contending that the demand was unjustified. The issue of the legality of the demand was not an aspect of the claimant's case but rather an issue raised by the defendants and therefore, the burden of proving that the demands were unlawful lies with the defendants. The assertion was denied in the claimant's reply, by stating that the hypothecs were accessory to the underlying obligations that permitted payment of the debts to be demanded by the claimant. Consequently the claimant has sought in the witness statement to give the full facts surrounding issuance of the demands.

[15] Counsel submitted further that it was clear from the pleadings that the issue of justification of the demand would have to be addressed in further particulars placed before the court and the claimant sets out the full details by identifying the documents which establish the conditions for issuing the demand for payment of the loans. In that regard the paragraphs cannot be said to contain new facts. It relates to the pleadings that the claimant seeks to rely on and merely supports the denial by expounding on the facts stated in the claim. Thus, the paragraphs provide a more detailed explanation of the issuance of the demands in response to the defendants' allegation of unlawfulness.

[16] Mr Lee contends that it was appropriate for the claimant to give evidence of the validity of the demand in its witness statement, by expounding the issues raised in the pleadings. He says that the paragraphs do not add a new cause of action or seek new relief or change the nature of the claim. It is also not a case where the pleadings are so wide as to include

anything. The claimant is at liberty to amplify the facts surrounding its case and has done so, having stated in the pleadings that the claim was based on a demand issued in accordance with the hypothecs. For these reasons, Counsel says, the paragraphs ought not to be struck out.

[17] Counsel went on to say that in the event the Court disagrees, it would still be necessary that the Court be satisfied that the appropriate course is to strike out the paragraphs. In pursuing the overriding objective the first option is to see how best justice can be achieved between the parties and if cost is a viable option, the court should shy away from striking out. It is only if there are no other means by which the matter can be addressed that striking out becomes an appropriate remedy.

[18] He stated that the defendants have not shown any specific prejudice suffered as a result of the paragraphs, save that they were taken unaware. Nonetheless leave may be granted to respond to the facts alleged in the paragraphs, so that the court may be seized of all material facts relevant for determination of all the issues raised at trial. Any inconvenience or prejudice caused to the applicants can be addressed in costs on the application or the substantive claim.

Issue 1 : Whether inclusion of the paragraphs and exhibits in the witness statement contravenes CPR 8.7(1) and (3), and 8.7A and introduces new allegations which the claimant should not be permitted to rely on?

[19] The law in question is found at CPR 8.7(1) and (3). It states:

> *(1) The claimant must include in the claim form or in the statement of claim a statement of all the facts on which the claimant relies.*
> *[…]*
> *(3) The claim form or the statement of claim must identify any document which the claimant considers to be necessary to his or her case.*

[20] CPR 8.7A further states:

> *The claimant may not rely on any allegation or factual argument which is not set out in the claim, but which could have been set out there, unless the court gives permission or the parties agree.*

[21] An examination of the relevant legal authorities convey that in determining whether material offends CPR 8.7 and 8.7A, it is necessary to determine whether the material in question are pleadings or particulars.

[22] The Court of Appeal decision in Eastern Caribbean Flour Mills v Ormiston[1] in which Barrow JA cited with approval dicta of the House of Lords in the case of Three Rivers District Council v Bank of England (No. 3) [2001] UKHL 16 is apposite. He stated:

> *"In my judgment a balance must be struck between the need for fair notice to be given on the one hand and excessive demand for detail on the other…*
>
> *"The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it…'*
>
> *'The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged… This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between parties.*
>
> *What is important is that the pleadings should make clear the general nature of the case of the pleader.'"*[2]

[23] Barrow JA continued:

> *"The position, as gathered from the observations of both their Lordships, is that the pleader makes allegations of facts in his pleadings. Those alleged facts are the case of the party. The "pleadings should make clear the general nature of the case," in Lord Woolf's words, which again I emphasize. To let the other side know the case it has to meet and, therefore, to prevent surprise at the trial, the pleading must contain the particulars necessary to serve that purpose. But there is no longer a need for extensive pleadings, which I understand to mean pleadings with an extensive amount of particulars, because witness statements are intended to serve the requirement of providing details or particulars of the pleader's case."*[3]

[24] He concluded that:

> "*the defendant gave a clearly presented summary of the particulars of the alleged misconduct. The general allegations of misconduct, of misappropriating corporate*

[1] Civil Appeal No12/2006 (St Vincent and the Grenadines, delivered 16th July 2007)

[2] Paragraph 41

[3] Paragraph 43

assets, business opportunities and funds were substantiated by particulars that included receiving secret payments of monies that the defendant contends rightfully belong to the defendant. It was a clear, dominant and repeated allegation by the defendant that Mr. Boyea received secret payments from a number of sources and that all of these secret payments were received in breach of his fiduciary duty and contractual obligations, and that they were payments of monies that belonged, by right, to the defendant."[4]

[25] Barrow JA then made the distinction between those pleadings and particulars which could properly be contained in a witness statement and said:-

> *"[i]f, therefore, at the time of exchanging witness statements the defendant had discovered alleged further instances of receipt of secret payments I can see no other sensible way of treating these newly discovered instances but as further particulars of the central allegation of the receipt of secret payments."*[5]

[26] The case of Charmaine Bernard (Legal Representative of the Estate of Reagan Nicky Bernard) v Ramesh Seebalack[6] also illustrates the distinction. There the claimant applied to re-amend her statement of case to include particulars of special and general damages. It was argued on her behalf that the amendment was not required as the statement of case included a claim for damages and that information about it could have been provided by the claimant pursuant to Part 35 of the CPR either of her own initiative, in response to a request by the defendants, or pursuant to a court order; or that the details of the claim for damages could have been provided by the claimant in a witness statement as in part they were.

[27] The Board held that an amendment of the statement of case was required pursuant to Part 8.6, which is headed "Claimant's duty to set out his case", and which provides that the claimant must include in the claim form or in his statement of case a short statement of all the facts on which he relies. The Court ruled that there was nothing in the original statement of case to indicate the heads of general damages that were being claimed, therefore, in order to satisfy Part 8.6, it was necessary to amend the statement of case to make good that omission.

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[4] Paragraph 52
[5] Paragraph 53
[6] [2010] UKPC 15 at paragraphs 14-15 and 17

Analysis

[28] Based on the foregoing, the paragraphs can only be admissible if the Court is satisfied that the matters therein are in fact particulars of a sufficiently made allegation on the pleadings and not new allegations or a change of case. Additionally, the paragraphs may be permitted in the absence of any unfairness, abuse of process or other disentitling conduct.

[29] On examination of the claim form, statement of claim, and reply to defence, the pleadings at no time allege breach of clause 7 of the hypothecs. In fact, there is no allegation by the claimant of any breach by the defendants of any of the provisions of the hypothecs. Breach of clause 7 is alleged for the very first time in the witness statement. The paragraphs document the alleged particulars of such breach and the documents in support.

[30] Throughout the claimant's pleadings, all that is alleged is that loans were granted, they were secured by the hypothecs, a demand was issued calling in the loans in accordance with the hypothecs, and that the debts remain outstanding. In relation to the lawfulness of the demand, an issue expressly raised by the defendants' in their defence, the respondent merely denied that the demands were unlawful and pleaded that it was entitled to make the demand. At paragraph 2 of its reply the claimant merely stated that the hypothecs were accessory to the underlying obligations, breach of which permitted the claimant to demand payment of the debts.

[31] I note that clause 7 of the hypothecs permit the claimant to call in the loans at any time, without reason, as was clearly the essence of the claimant's pleadings. The clause also permits the loans to be called in on the occurrence of certain events. However, the law does not intend that pleadings be couched such that the claimant is at liberty to select what breach will be advanced in a witness statement. Likewise, the defendants ought not to be left wondering what condition may have been breached and what case must be answered and then have to wait until witness statements are exchanged to find out.

[32] The present claim being one for repayment of debts secured by hypothecs would be akin to a simple claim for breach of contract. It is trite that in such a claim, the claimant must include in the pleadings the provision of the contract which is alleged to have been breached and the facts alleged to have constituted breach of that provision. In the absence of this, the cause of action is not made out. I am therefore of the view that any alleged breach of paragraph 7 ought to have been set out in the claimant's statement of claim, as the circumstance which would give rise to the cause of action and ground the claim. Having omitted to do so, the claimant could and should have seized the opportunity to allege the breach of paragraph 7 in the reply to defence, given that the defendants specifically raised the lawfulness of the demand and denied breach of any provision of the hypothecs. Applying the law as outlined in the cases above, to these facts, it is my considered opinion, that the matters stated to in the paragraphs are new allegations and not particulars of a sufficiently pleaded allegation in the original claim.

[33] The leading authorities accept that with the advent of witness statements particulars in pleadings may now be brief because further details of the particulars of the pleaded case, will be given in the witness statements. However pleadings may only be as brief as the nature of the claim reasonably allows and further details can only relate to the claim as pleaded. It is true that pleadings must strike a balance between the need for fair notice on the one hand and excessive requirement for detail on the other, however the matters contained in the paragraphs could not possibly be considered as excessive detail. At a minimum an alleged breach of clause 7 on the basis of a default event ought to have been pleaded, so as to permit amplification of such particulars in the witness statement.

[34] To now raise breach of paragraph 7 of the hypothecs is to make a new allegation of which the applicants would not have had fair notice. The pleadings as contained in the claim form, statement of claim and reply to defence would not have enabled the defendants to know that the case against them was that they were in breach of paragraph 7, so as to be in a position to properly prepare to answer it. The claimant, by its omission, failed in its duty to demarcate the parameters of its case and the extent of the dispute, despite this issue being raised by the defendants. To attempt to introduce these particulars and exhibits in the witness statement for the first time is in my view tantamount to trial by

ambush. The Court will not countenance such conduct on the part of a litigant, as this is an unsavory practice, which the rules are designed to eliminate.

[35] Having found the matters in the paragraphs to be new allegations and not particulars of a sufficiently pleaded allegation and having not obtained the permission of the Court or the agreement of the defendants, the claimant cannot be permitted to rely on these allegations. In order to make good the omission the claimant would have had to apply to the Court for permission to amend its statement of claim, which it has not done and would have had to satisfy the Court of the matters set out in CPR 20.1(3).

Issue 2 : Whether the appropriate recourse is to strike out the Paragraphs and Exhibits from the Witness Statement?

[36] CPR 29.5(2) provides:

> *"(2) The court may order that any inadmissible, scandalous, irrelevant or otherwise oppressive matter be struck out of any witness statement."*

[37] CPR 1.1 and 1.2 provide:

> "1.1 (1) The overriding objective of these Rules is to enable the court to deal with cases justly.
>
> *(2) Dealing justly with the case includes –*
> *(a) ensuring, so far as is practicable, that the parties are on an equal footing;*
> *(b) saving expense;*
> *(c) dealing with cases in ways which are proportionate to the –*
> *(i) amount of money involved;*
> *(ii) importance of the case;*
> *(iii) complexity of the issues; and*
> *(iv) financial position of each party;*
> *(d) ensuring that it is dealt with expeditiously; and*
> *(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.*
>
> *1.2 The court must seek to give effect to the overriding objective when it –*

(a) exercises any discretion given to it by the Rules; or
(b) interprets any rule."

Analysis

[38] In support of its contention that the paragraphs should not be struck out, the claimant relies on the principle that the power to strike out should be exercised restrictively, only as a last resort and in the clearest of cases. The claimant further relies on rulings that the Court ought to exercise its discretion to permit amendments to allow a party to deploy its real case, where it is necessary to ensure that the real controversy between the parties is determined, and guided by the overriding objective. The claimant also appeals to the use of the Court's general case management powers, in particular, that the Court may give any direction for the purpose of managing the case and furthering the overriding objective to deal with cases justly.

[39] I agree that these principles are correct, however the Court cannot overlook that from the outset there has been no application by the claimant to amend its statement of claim and this is not being considered here. There has also been no application by the defendants to strike out the claimant's statement of claim and that is also not being considered here. But more importantly the principles and cases relied upon by the claimant relate to striking out and permitting amendments to statements of case, and not to witness statements. That distinction is not inconsequential.

[40] The starting point is CPR 29.5(2) which gives the Court the power to strike out of any witness statement, matters that are inadmissible. Having determined that the matters in the paragraphs offend CPR 8.7 (1) and (3) and 8.7A, with the consequence that the matters cannot be relied on, the Court is entitled to exercise its discretion to strike out the paragraphs and the exhibits.

[41] The principles and cases cited in relation to striking out statements of case do not assist the claimant. They generally concerned applications to strike out pleadings, which were

made before the matters reached case management. The tenor of these decisions conveys that when proceedings have not reached case management it is apt for the Court to consider other alternatives to striking out a claim. It has been said that it is inappropriate to strike out a statement of case in circumstances where a cause of action is made out, even if a weak one and if it is at the stage of proceedings where the opportunity exists for that party to utilize the civil procedures available to it to strengthen its case. In that regard dicta of Pereira CJ in the case of Cedar Valley Springs Homeowners Association Incorporated v Kenneth Meade and Hilda Meade[7] is instructive. There the Learned Chief Justice provided examples such as the process of disclosure, requests for information, and amendment of pleadings as procedures for strengthening a case but qualified these examples by saying that such additional information or further facts are in relation to a cause of action which has clearly been made out on the pleaded case and which better particularizes that pleaded case. I am of the view that the same may be said of witness statements in the sense that such statements may only bolster a case in relation to a cause of action already made out on the pleaded case.

[42] Further, in Real Time Systems Limited v Renraw Investments Limited et al[8] the Privy Council made the point that *"the normal expectation is that, by the time of exchange of witness statements, the pleadings would have been settled and the issues would be being explored in greater depth at the evidential level…"*[9] Having said this, the Privy Council went on to acknowledge that *"it does not follow …… that, if the pleadings are not satisfactory prior to exchange of witness statements, there is nothing that can be done about it."*[10]

[43] I understand the above to mean that the acceptable standard is that by the time proceedings have reached the exchange of witness statements, pleadings ought to be settled and what should be contemplated is further particularization of allegations already made. Whether unsatisfactory pleadings could still be rectified after exchange of witness statements is an entirely different matter and certainly not one which can be corrected

[7] ANUHCVAP2016/0009 delivered on 18th January, 2017
[8] [2014] UKPC 6
[9] Paragraph 13
[10] Paragraph 14

through the contents of a witness statement, with new pleadings or allegations of fact being included, that never arose on the original pleadings.

[44] The cases suggest that the restrictive approach to striking out is generally applicable where proceedings are at a stage at which the statement of case can be rectified by the usual civil procedures. At such stage, further or better particulars are less likely to significantly prejudice the opposing party. All things considered it is not the case here that striking out the paragraphs would deprive the claimant of its right to be heard. The case may still be heard as pleaded, but without the new allegations of fact contained in the paragraphs.

[45] Similarly the cases and principles relating to permitting amendments are of little assistance. The claimant relied on dicta from the case of Mark Brantley v Dwight C. Cozier[11] to advance the proposition that amendments are generally permitted where necessary to allow a party to deploy its real case, provided it is not irrelevant and has a real prospect of success. That is so, to ensure the real question in controversy between the parties is determined, provided that such amendments can be made without causing injustice, regardless of how negligent or careless the omission, and can be compensated in costs. It should however be noted that the statement is not absolute. The proviso being that an amendment may be permitted only if it does not cause injustice to the other party and that the basis of a claim or defence, as the case may be, will not be fundamentally challenged at the last minute.

[46] I have taken into account the following factors in determining whether or not the paragraphs and exhibits should be struck out:-

1. The lawfulness of the demand was raised by the applicants in their defence in which they also denied breach of the hypothecs, to which the respondent filed a reply and omitted to include the alleged breach of clause 7 in the said reply.
2. The claim form and statement of claim was filed as far back as 31st December 2009, the defence was filed 5th November 2013, the respondent's reply was filed 30th April 2014, and the claimant's witness statement was filed 2nd July

[11] SKBHCVAP2014/0027 (St. Christopher and Nevis, delivered on 27th August 2015)

2018. There has been a delay of some eight and a half years from the date the claim was filed to the filing of the witness statement in which the respondent has raised for the first time the alleged breach of clause 7.

3. The alleged judgment in support of the breach is dated 13th June 2001 and the Gazette advertising the sale of the properties is dated 11th August 2003. This indicated that the information was always available to the respondent to include in its pleadings or standard disclosure or at any time thereafter prior to filing the witness statement in 2018.
4. The parties were ordered to file their List of Documents on or before 19th January 2015 which the respondent did and failed to include the exhibits.
5. At case management the parties agreed the issues for trial, which were set out in the case management order dated 19th October 2017, the first issue being "whether the claimant unlawfully called in the loans….in breach of the contractual relations between the parties…" to which the alleged breach would have clearly been relevant; still the alleged breach of clause 7 was not raised.
6. In pre-action letters as far back as 3rd November 2004, the respondent stated that the recall of the credit advances was caused by the failure of the first and fourth defendants to adhere to the repayment commitments as agreed. This reason given for the demand in the pre-action letter not only omits the alleged breach of clause 7 of the hypothecs but would have had the tendency to mislead the defendants.

[47] Having considered the overriding objective to deal with cases justly I am of the view that the paragraphs and exhibits ought to be struck out from the witness statement.

[48] The new allegations of fact contained in the paragraphs essentially change the nature and basis of the claim at the last minute and introduce matters of which the defendants have had no notice whatsoever. These matters were not foreshadowed in the pleadings, at case management, or on disclosure. The pre-action correspondence tended to mislead and such change in the dynamics of the claim at this late hour militates against justice.

[49] Pleadings are now closed, case management has long passed, standard disclosure has taken place and applications for specific disclosure have been determined. The proceedings are now at a stage where the various civil procedures which the Court may consider to rectify an omission in the pleadings are no longer available to the claimant. There has been a delay of some eight and a half years from the date the claim was filed to the filing of the witness statement. If the alleged breach is not a new or change of circumstance, as the claimant says, then it has always available to the claimant, having arisen some five to six years before the claim was filed. I accept that there have been several applications in the matter, some of which have gone through appeals, but none of which have been deemed frivolous. However, there were numerous opportunities to plead or otherwise disclose the alleged breach in the reply to defence, through disclosure, and at case management.

[50] I note that disclosure is a continuing process, as contemplated by CPR 28.12 but the continuing duty is in relation to documents which come to the attention of a party during the proceedings. The claimant has not said that the information has only just come to its notice. It is now saying this was the reason behind the demands. It follows that having always had this information prior to the claim being filed, and in the face of repeated questions as to the reason for and lawfulness of the demand letters, such conduct admits of complacency if not a nonchalant attitude toward prosecuting the claim in the manner required by the rules.

[51] The likely result of this omission in the pleadings is that the case has not proceeded expeditiously. It is quite likely that had the alleged breach been pleaded or disclosed in a timely manner this case could have progressed differently and the parties may not have had to incur the expense of the claim to date, which includes several interlocutory applications and appeals, not to mention judicial time and resources expended thus far.

[52] While the case may be relatively simple, it concerns a significant sum of money to both parties. The result of these new particulars is that the parties are not on an equal footing. The defendants are one step behind, as it now appears they always have been. It is plainly

unjust to allow the claimant to spring this alleged breach on the defendants at this late stage of the proceedings and as mentioned earlier it amounts to trial by ambush.

[53] The foregoing is the extent of the injustice to the defendants if the paragraphs are not struck out. On the other hand if the paragraphs are struck out, the claimant will have the opportunity to prosecute its claim as pleaded. In all the circumstances, it appears that the greater injustice will be suffered by the defendants if the paragraphs are not struck out. In my judgment costs on this application or in the substantive claim will not suffice to compensate the defendants for this injustice.

Conclusion

[52] I therefore make the following orders:-

1. Paragraphs 18 to 21 of the witness statement of Curtis Small filed on on 2nd July 2018 along with the exhibits "CS17", "CS18", CS19" and "CS20" referred to therein are hereby struck from the said witness statement.
2. Costs on this application will be costs in the substantive claim.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar