

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

Antigua and Barbuda

Claim No: ANUHCV2000/0171

BETWEEN:

ROYAL BANK OF CANADA

Claimant/Applicant

and

ALPHEUS JACOBS

Defendant/Respondent

Before:

Master Jan Drysdale

Appearances:

C. Debra Burnett, Mandi Thomas and Chatrisse Beazer of counsel for the
Claimant/Applicant

Hugh Marshall of counsel for the Defendant/Respondent

2019: January 17th

June 6th

DECISION

[1] Drysdale, M.: This is an application filed by the Claimant/Applicant to strike out the Affidavits of the Defendant/Respondent and his witness Ivan Hixon filed in support of an assessment of damages.

Background

[2] The Claimant/Applicant filed a Claim against the Defendant/Respondent for the principle sum owed under a loan, interest and costs. The Claimant/Applicant claimed that the Defendant/Respondent defaulted on a loan which resulted in the

Claimant/Applicant making a lawful demand for the repayment in full of the sum owed. That consequent upon the failure of the Defendant/Respondent to satisfy his indebtedness properties owned by the Defendant/Respondent were sold by the Claimant/Applicant to satisfy the debt.

- [3] After being advertised the properties were sold at auction but the same resulted in a significant shortfall of what was due and owing to the Claimant/Applicant. The Claimant/Applicant therefore initiated proceedings for the remaining balance which it asserted was the sum of \$2,214,281.74.
- [4] The Defendant/Respondent filed a defence and counterclaim in which it was asserted that the Claimant/Applicant failed in its statutory duty to have interest of the Defendant/Respondent as chargor and to sell the properties at a fair market value. The Defendant/Respondent attributed his loss as the sum of \$2,329,674.00.
- [5] The matter proceeded to trial and initially both the claim and counterclaim were dismissed by the Court. On appeal however the counterclaim was sustained in part it being determined that the process of advertising the Coolidge property fell short of the standard that should be expected of a reasonable responsible bank in selling a **property of that value. It was therefore ordered that 'an inquiry be made to determine any damages suffered by the Respondent with respect to the Coolidge property.'**
- [6] Accordingly in support of that judgment the matter was referred to the Master for assessment. The Defendant/Respondent filed the two affidavits referred to above which appear to be erroneously titled as affidavits in support of an application for assessment but which in fact are affidavits for the assessment of damages hearing which affidavits are the subject of this application to strike out.

GROUNDS OF APPLICATION TO STRIKE OUT

- [7] The grounds for the strike out application are contained hereunder:
 - [a] 'The affidavit filed by the Defendant herein in support of his application for assessment of damages based on the ruling of the Court of Appeal in Suit No.10/2004, namely Caribbean Banking

Corporation v Alpheus Jacobs contained inadmissible statement/matters.

- [b] The contents of the Affidavit of Ivan Hixon filed 16th November 2018 are entirely irrelevant to the issue to be determined by this Honourable Court at the Assessment of Damages hearing, namely what if any damage the Defendant herein suffered as a result of the inadequate advertisement and subsequent sale of the Coolidge property by the Claimant herein.

 - [c] The Affidavit of Alpheus Jacobs filed in support of the **Defendant's Application** for Assessment of Damages is an abuse of the process of the court as the matter contained therein are substantially res judicata and irrelevant to the issue to be determined by this Honourable Court.

 - [d] The disputed paragraphs in the Affidavits mentioned in 2 and 3 above are in breach of the common law rules of evidence, that admissible evidence is that which is relevant and not excluded by any rule of law or practice.

 - [e] The said Affidavit purports to rely on exchange of correspondence between Counsel which were done **"without prejudice" and in the circumstances where** Counsel for the Claimant/Respondent has not waived any prejudice.

 - [f] It is within the powers of this Honourable Court to strike out irrelevant or inadmissible matters from an affidavit pursuant to Part 30.3(3) of the Civil Procedure Rules.'
- [8] The parties were heard on oral submissions in relation to the issues raised by the application. Before exploring the submissions of the parties it is useful to set out the contents of the affidavits challenged.

The Affidavit of Ivan Hixon

[9] The Affidavit of Ivan Hixon is relatively short being a total of 4 paragraphs. He deposes that he is a contractor by profession and has had over 29 years of experience. He deposes that in particular he builds swimming pools, houses and commercial buildings. He deposes further that during the year 1999 he was engaged in construction and that from his recollection that construction costs varied from \$250.00 per square foot to \$300.00 per square foot. Finally he deposed as to the current costs of construction being between the sum of \$350.00 to \$400.00 per square foot.

The Affidavit of the Defendant/Respondent

[10] The Affidavit of the Defendant/Respondent was filed on 16th November 2018 and is far more extensive than his witness. It contains a total of twenty paragraphs and also has exhibited several documents one of which is a without prejudice letter which is also being challenged by virtue of this application.

[11] A summary the Affidavit of the Defendant/Respondent is contained below:

- [i] In or about 1993 he acquired property in the Coolidge area on which he built his dream house. The house contained 4 bedrooms and 3.5 bathrooms, a double car garage and a swimming pool. In total the house was 7,801 square feet.
- [ii] That after the construction of the property it was valued at the sum of \$2,800,000.00. This valuation was accepted by the Claimant/Applicant.
- [iii] The property is within a high end area and land there is typically sold at a premium with construction costs now ranging from the sum of \$350.00 to \$400.00.
- [iv] That in 1999 the Claimant/Applicant in preparation for selling the property obtained a valuation in the sum of \$1,565,000.00. That valuation was based on the cost approach and reduced the total area of the property by 4,918 square feet. That accordingly the value ascribed per square footage of the property is not reasonable.

- [v] The Claimant/Applicant sold the property without having any or due regard to his interest to obtain the best price. The Claimant/Applicant failed to give sufficient notice to properly advertise the sale of the property to afford interested buyers an opportunity to organise their finances and make meaningful bids.
- [vi] The Claimant/Applicant eventually sold the property for the sum of \$1,203,000.00. This sum was significantly lower than the actual cost to build the property which the Claimant/Applicant being the lender was fully aware of.
- [vii] **The Claimant's/Applicant's** sale of the property at a gross undervalue resulted in him being informed by written correspondence that he was still owing the bank the sum of \$1,221,800.00.
- [viii] That the property owned by him at Fitches Creek which building had been destroyed by fire and would either require demotion or significant refurbishment was sold at a significantly higher premium per square foot than the property at Coolidge.
- [ix] Had the Coolidge property been sold at a fair market value that it would have extinguished the debt owed to the Claimant/Applicant.

The Arguments

- [12] **The Claimant's/Applicant's** arguments were more or less a restatement of the grounds of the application indicated above. The Claimant/Applicant argued that the Court of Appeal dealt with the issue of the valuation report and found expressly in favour of the Claimant/Applicant. Accordingly the issue of valuation being decided is now res judicata. The Claimant/Applicant therefore contended that the issue for determination before this Court is not of the value of the property but what he could have obtained if the property had been advertised properly.

- [13] The Claimant/Applicant also raised issue with the use and attempted reliance by the Defendant/Respondent on a without prejudice letter issued by counsel for the Claimant/Applicant. Simply put the Claimant argues that in the absence of a decision to waive prejudice by the author of that communication that the Defendant/Respondent was unable to utilise the same as an exhibit or in any form in these proceedings.
- [14] Particularly the Claimant/Applicant identified paragraphs 3 to 7 and 17 of the Affidavit of the Defendant/Respondent as being irrelevant and paragraphs 9 to 12 as having been already determined by the a Court of Appeal.
- [15] Finally in relation to the affidavit of Ivan Hixon which speaks only to construction costs Claimant/Applicant argues that the same is wholly irrelevant to the issue at hand.
- [16] The Defendant/Respondent succinctly presented his arguments in opposition and stressed that the applicant in exercising the power of sale breached its duty. Ergo the Defendant/Respondent argued that the matter to be determined was the loss if any that the Defendant/Respondent had sustained. The Defendant/Respondent posited that the size of the property, the replacement cost on the open market or by private treaty all these issues which have been raised in the affidavits complained of are relevant factors to be determined in relation to a loss.

ANALYSIS AND APPLICATION OF THE LAW

- [17] Having regard to the above it is evident that two questions need to be answered to address this application to strike out:
- [1] Whether the without prejudice letter is subject to privilege and should therefore be struck out
 - [2] Whether the affidavits of Ivan Hixon and the Defendant/Respondent contain irrelevant and or inappropriate content which should be struck out.

ISSUE 1 - Whether the without prejudice letter is subject to privilege and should therefore be struck out

[18] As a general principle of law communication between parties are not subject to privilege save where the communication is without prejudice. Without prejudice communication whether oral or written which forms part of negotiations are protected communication. This essentially renders any such communication inadmissible in court unless a party can demonstrate that the communication falls within an exception or as indicated by **Lord Hope of Craighead** 'unless the party can show that there is a good reason for not doing so.'¹

[19] The letter in question is a breakdown of the principal amount owed less the sale of two properties one of which being the Coolidge property, the principal balance and costs. The letter notes that interest has not been included in the principal balance and costs and ends with the statement inviting a response to the communication.

[20] Although the letter was concise it is clear and obvious that the same was an attempt at negotiations for the remaining balance. However it appears that the Defendant/Respondent is attempting to utilise that communication not as evidence of a negotiated settlement or to set aside an agreement or of evidence of perjury but rather as evidence that the Coolidge property was sold at an undervalue of the cost he expended to build the same. This is not a permissible exception to the privilege and the Defendant/Respondent not having obtained the consent of the Claimant/Applicant is estopped from attempting to rely on that exhibit or from referring to it in his affidavit.

ISSUE 2 - Whether the affidavits of Ivan Hixon and the Defendant/Respondent contain irrelevant and or inappropriate content which should be struck out.

[21] The Claimant/Applicant **contends that the Defendant/Respondent's** affidavits are in violation of CPR 26.3(c) and 30.3 and should therefore be struck out. CPR 26.3(c) concerns the power of the Court to strike out a statement of case

¹ **Ofulue and another v Bossert [2009] UKHL 16**

and CPR 30.3 concerns the Courts power to strike out content from an affidavit. The two sections are contained hereunder and read as follows:

‘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-...

(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.

30.3(3) The court may order that any scandalous, irrelevant or otherwise oppressive matter be struck out of any affidavit.’

[22] After due consideration of the Affidavits filed by the Defendant/Respondent and the decision of the Court of Appeal, this Court is in agreement that a significant part of the Affidavit of the Defendant/Respondent in particular paragraphs 4 to 7 and 9 to 12 and paragraph 17 are an attempt to challenge the valuation utilised by the Claimant/Applicant. The Defendant/Respondent in the affidavit repeatedly asserts his difficulty with the valuation and has attempted to point out the fallacy in relying on the same. However the Court of Appeal in its decision expressly held that that valuation was not an exact science and that the Claimant was not negligent in relying on a valuation which was markedly divergent to one produced by the Defendant/Respondent. This matter having already been adjudged by a court of competent jurisdiction precludes the Defendant/Respondent from continuing his pursuit of this claim and is therefore an abuse of the process of the court and is irrelevant to these proceedings.

[23] The Affidavit of the witness for the Defendant/Respondent suffers a similar fate of it being irrelevant to these proceedings. That Affidavit seeks to establish the construction costs of property at the time the **Defendant's/Respondent's property** was built and the probable replacement costs. This is not the issue to be determined. The Court agrees with the Claimant/Applicant that the issue is what

damages the Defendant/Respondent sustained consequent on the failure to properly advertise the sale. **It is this Court's considered** opinion that the Defendant/Respondent in the circumstances should concern himself with inter alia establishing that a better sale price could have been obtained but for this breach rather than the replacement cost of the property. The Affidavit of this witness therefore adds nothing to these proceedings and should be struck out in its entirety.

Order

[24] Based on the foregoing the order of the court is as follows:

1. That the affidavit of Ivan Hixon is struck out.
2. Paragraphs 4 to 7, 8 to 12 and paragraph 17 are struck out from the affidavit of the Defendant/Respondent.
3. The Claimant/Applicant is awarded costs in the sum of \$350.00.

Jan Drysdale

Master

By The Court

Registrar