

ST CHRISTOPHER AND NEVIS
ST. CHRISTOPHER CIRCUIT

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV2022/0121 formerly SKBHCV2017/0002
BETWEEN:

[1] PINNEYS HOTEL DEVELOPMENT LIMITED
Claimant

and

[1] ST. KITTS NEVIS AND ANGUILLA NATIONAL
BANK LIMITED
Defendant

Appearances:

Angela Cozier for the Claimant
Damian E. S. Kelsick, KC for the Defendant

2024: June 6
July 24

JUDGMENT

[1] **SAUNDERS, M:** In these proceedings the Claimant ("*Pinneys Hotel*") has sought consequential loss arising from the Defendant's ("*the Bank's*") breach of a loan agreement because the Bank refused to disburse the loan. The Bank's defence, in summary, is that although it admits that it had agreed to issue the loan, it alleges that it was Pinneys Hotel that first repudiated the agreement by its failure to provide adequate security.

[2] On 16 February 2024 Pinneys Hotel issued its third application to strike out the Bank's pleadings ("*the Third Application*") and also to seek relief that the Court has no jurisdiction, or, should refrain from exercising its jurisdiction to permit

the Bank's Amended Defence filed 3 July 2018 (*"the Amended Defence"*) to subsist. Pinneys Hotel stated as grounds of the Third Application that the Amended Defence did not comply with:

- a. Paragraphs (1) and (2) of a prior Order of Master Actie that prolix paragraphs of the Bank's Defence be struck out; and
- b. Part 10.5 of the CPR.

[3] On 6 June 2024, I heard the parties' oral submissions and having also read their written submissions, Pinneys Hotel's affidavit in support and the Bank's Notice of Opposition, I have decided to dismiss the Third Application for the reasons set out below.

BACKGROUND TO THE THIRD APPLICATION

[4] On 11 October 2017 Pinneys Hotel applied for the first time to Strike Out certain parts of the Bank's Defence on grounds that they were an abuse of process, prolix and failed to disclose a reasonable ground for defending the claim (*"the First Application"*). The First Application was granted, in part, by Master Actie (as she then was) on 26 June 2018 (*"the Actie Order"*). The Actie Order struck out paragraphs 3(a)(vi) to 3(xxiv) of the Defence for prolixity (*"the Prolix Paragraphs"*) and the Bank was ordered to file and serve the Amended Defence to reflect that ruling. Paragraphs 1 and 2 of the Actie Order, in full, are as follows:

"1. Paragraphs 3(a)(vi) to (xxiv) of the defence are struck out pursuant to CPR 26.3(1)(d).

2. The defendant shall file and serve an amended defence to reflect paragraph (1) of the order, within seven (7) days of the delivery of the judgment."

[5] The Bank filed the Amended Defence which took out the Prolix Paragraphs but also added certain paragraphs (*"the New Allegations"*) in an attempt to reformulate what it had intended to say in the Prolix Paragraphs. On 18 July 2018, Pinneys Hotel applied to strike out the New Allegations (*"the Second*

Application”) on the basis that the Bank should have obtained Court permission to plead them. Master Dyer (Ag.), as she then was, granted the Second Application. On appeal, however, it was decided that the First Case Management Conference had not passed, the Bank did not need permission to amend the Defence to rely on the New Allegations and the Amended Defence was deemed properly filed (*“the Court of Appeal Judgment”*).

IS THE AMENDED DEFENCE IN COMPLIANCE WITH PARAGRAPHS (1)-(2) OF THE ORDER

[6] Pinneys Hotel now argues that the Amended Defence does not comply with paragraphs 1-2 of the Actie Order as material from the Prolix Paragraphs, although struck out, has been included in the New Allegations. It is not in dispute that, the Prolix Paragraphs are entirely struck though in the Amended Defence, the New Allegations were an attempt by the Bank to encapsulate the Prolix Paragraphs in a manner that was not objectionable to the Court and that while the Prolix Paragraphs are made up of nineteen (19) paragraphs, the New Allegations are only comprised of five (5). It is also not in doubt that the Court of Appeal Judgment had deemed the Amended Defence properly filed and had decided that it was open to the Bank to amend its defence as it deemed fit at the relevant time.

[7] It is not sufficient for Pinneys Hotel to point to a paragraph in the New Allegations and to say that it contains the substance, or, part of the substance of one of the Prolix Paragraphs and that ipso facto that paragraph should be struck out, or, that the Bank is in breach of the Actie Order. Whether written material is “prolix” is a function of the inscrutableness, as a whole, of the relevant words and paragraphs employed. The Actie Order, in my view, therefore, cannot be construed as a ban on the use of particular phrases, or, paragraphs which make up the Prolix Paragraphs. To do so would mean that an order that a certain portion of a document is “prolix” is necessarily an order that constituent words or paragraphs, regardless of whether they are themselves “prolix”, should be removed from a litigant’s lexicon entirely. When I asked Ms. Cozier whether she considered the New Allegations to also be prolix, she answered that she did not. To me, that answer belies any possible

suggestion that the New Allegations were pleaded in breach of the Actie Order as argued.

- [8] Ms. Cozier also submitted that the New Allegations continued the same paragraph numbering as the Prolix Paragraphs (so, 3(a)(vi),(vii),(viii),(ix)... to 3(xxiv)) and that was also a breach of the Actie Order. As I have discussed above, the Actie Order mandated that the Prolix Paragraphs, pleaded in the manner in which they had been, be struck out. The striking out of the Prolix Paragraphs had nothing to do with their numbering. This second submission amounts to a suggestion that the Bank was required to skip the paragraph numbers that were struck out and to start pleading the New Allegations at, for example, “3(xxv)”. Had the Bank pleaded the Amended Defence in that way, not only would the numbering be counterintuitive, I do not believe that it would have been more consistent with what the Actie Order mandated.

IS THE AMENDED DEFENCE IN NON-COMPLIANCE WITH PART 10.5 OF THE CPR

- [9] Part 10.5 of the CPR is as follows:

“Defendant’s duty to set out case

10.5 (1) The defence must set out all the facts on which the defendant relies to dispute the claim.

(2) Such statement must be as short as practicable.

(3) In the defence the defendant must say which (if any) allegations in the claim form or statement of claim –

(a) are admitted;

(b) are denied;

(c) are neither admitted nor denied, because the defendant does not know whether they are true; and

(d) the defendant wishes the claimant to prove.

(4) If the defendant denies any of the allegations in the claim form or statement of claim –

(a) the defendant must state the reasons for doing so; and

- (b) if the defendant intends to prove a different version of events from that given by the claimant, the defendant's own version must be set out in the defence.*
- (5) If, in relation to any allegation in the claim form or statement of claim, the defendant does –*
 - (a) admit it; or*
 - (b) deny it and put forward a different version of events, the defendant must state the reasons for resisting the allegation. 109 108*
- (6) The defendant must identify in or annex to the defence any document which is considered to be necessary to the defence.*
- (7) A defendant who defends in a representative capacity must say –*
 - (a) what that capacity is; and*
 - (b) whom the defendant represents.*
- (8) The defendant must verify the facts set out in the defence by a certificate of truth in accordance with rule 3.11.”*

[10] There has been considerable guidance from the Court of Appeal over the years concerning a Defendant's duty to set out their case pursuant to Part 10.5 of the CPR. Without rehashing all of those decisions and the specific rules in part 10.5 of the CPR that they applied, it is sufficient to refer to the decision of the Court of Appeal **Elwardo Lynch v Ralph Gonsalves** Civil Appeal No.18 of 2005. In that decision the defendant's case was struck out having pleaded, without more, “no admission” in respect of the claimant's allegation that he had published defamatory statements of him. In finding that the trial judge was entitled to make the finding that the claimant was not obligated to prove that allegation, Barrow JA stated as follows at [11]-[12]:

“What the defence stated, in response to the allegation in the statement of claim that the defendant published the defamatory words, was: “No admission is made to paragraph 4 of the Statement of Claim.” Unsurprisingly, the judge held that that defence was a violation of the rule because the defendant could not claim that he did not know whether it was true that he had published the words alleged.

...

With respect, I do not see the need to address these arguments because, as I understand it, the consequence of failing to defend against an allegation is the same as it was under the old rules of court. In the old rules it was explicitly stated in RSC order 18, rule 3 that if there is no defence to a material allegation in the statement of claim that allegation must be treated as admitted. Where an allegation was admitted RSC order 27 rule 3 entitled a plaintiff to apply for judgment on admissions. In CPR 2000 the same purport is contained in rule 12.5, which states that the consequence of failure to file a defence to the claim or any part of it is that the court office, at the request of the claimant, must enter judgment for failure to defend. Rule 12.5(c)(i) makes clear that a defendant is in the same position if his defence has been struck out as if he simply had not filed a defence or a defence to a part of a claim. When there is a failure to defend the rule does not require the claimant to prove his case; the claimant is at once entitled, at the stage of the failure to defend, to apply for judgment”.

- [11] Ms. Cozier has also referred me to the recent decision of the Court of Appeal **Nixon v Nixon** DOMHCVAP2018/0005 in support of her objections to allegations in the Amended Defence and has contended that the approach which she urges on the Court is endorsed in that decision. In **Nixon v Nixon** the appellants argued that the respondents’ defence did not comply with Part 10.5 insofar as they neither admitted nor denied any of the allegations in the statement of claim and also failed to put forth a different version of events to the one alleged by the appellants. The respondents contended, however, that paragraphs 1 to 49 of the statement of claim contained the introduction and factual background to the claim and were not pleadings in support of any of the 5 stated causes of action and therefore did not attract a response. In giving the Court’s decision Michel JA stated as follows:

“The respondents’ contention that the manner in which the various allegations and claims are made in the statement of claim makes it difficult for them to respond does not avail them. The allegations are made, the claims are made and, in accordance with rule 10.5 of the CPR, they must be admitted, denied or expressly not admitted or

denied, or proof of them must be required from the claimants/appellants”

- [12] The Court of Appeal went on to decide that the defence in **Nixon v Nixon** was not in compliance with Part 10.5 of the CPR and the appeal against the Judge’s decision was allowed. Contrary to Ms. Cozier’s submissions, however, Pinneys Hotel’s objections to the Amended Defence are distinguishable from the facts of **Nixon v Nixon**. I have set out below in tabular form the paragraphs of the Amended Defence complained about, the objection by Pinneys Hotel and my comments concerning why I did not consider the objections to be of any merit.

Amended Defence Paragraph	Paragraphs of Amended Defence objected to by Pinneys Hotel and stated objection	My Comments
1.	1(d) - That the paragraph fails to state a reason for the denial in contravention of 10.5(4)(a)	Paragraph 1(d) denies that the Bank repudiated the loan agreement and directs the reader to paragraph 3 of the Defence. At paragraphs 3 and 3(a), the Bank admits it did not disburse the loan, but denies that was a breach, stating that the “Defendant” failed to provide effective security for the loan. In reading those several paragraphs it is readily apparent that the reference to “Defendant” was actually supposed to be a reference to “Claimant”. Mr. Kelsick, in fact, confirmed that at the hearing. I therefore understand paragraphs 1(d), 3 and 3(a) to be saying, that because of Pinneys Hotel’s failure to provide sufficient security, the Bank did not disburse the loan. In my view paragraph 1(d) cannot be characterised as a bare denial as it directs the reader to the appropriate paragraph where the reason is given for the denial- a common manner of pleading. The offending portion of the

		paragraph can be cured by an order that it be amended by the Bank to make reference to "the Claimant".
2.	3(a) -That the paragraph contains a clear admission of the entire claim and that it is prolix.	As dealt with in "1." in this table, the reference to "Defendant" in 3(a) is a clerical error.
3.	3(a), 3(a)(i)-(v), 3(b), 7, 8, 12 - That these paragraphs fail to state that they neither admit nor deny, or put the Claimant to strict proof which are mandatory under Part 10.5(3)	Before discussing the specific objections raised, it should be noted that Part 10.5(3) of the CPR provides that a defendant must say which allegations of the claimant's claim or statement of claim are admitted, denied, or, if it is neither that it is because the defendant does not know and wishes the claimant to prove. Part 10.5(3) of the CPR does <u>not</u> say what every paragraph of the Defence must do, it only states what must be done by the defendant in respect of every paragraph of the <u>statement of claim</u>. Pinneys Hotel's objection, therefore, that these paragraphs are not themselves admissions, denials or statements that the Bank does not know, is not necessarily fatal to the defence as the paragraphs, as I discuss further below, are part of a plea in confession and avoidance by the Bank, which it is entitled to make. 3(a) and 3(a)(i)-(v)- as discussed in "1." Of this table, these paragraphs form part of the Bank's pleading at "3" that although it admitted the loan agreement, it did not disburse the loan because of Pinneys Hotel's failure to provide security. These paragraphs are part of a plea in confession and avoidance as separate for a traverse (see e.g., Kok Hoong [1964] A.C. 993 at pg. 1009) 7- This paragraph is another instance of the Bank pleading that it relies on matters pleaded

		at paragraph 3 of the Amended Defence and therefore that, because of Pinneys Hotel's failure to provide sufficient security, the Bank did not disburse the loan. It is also part of a plea in confession and avoidance (see e.g., Kok Hoong [1964] A.C. 993 at pg. 1009) 8- This paragraph alleges, in summary, that although the perfection of the security was a condition precedent of the loan, that it was Pinneys Hotel's obligation under the agreement. It is plainly a plea in confession and avoidance which the Bank is entitled to make (see e.g., Kok Hoong [1964] A.C. 993 at pg. 1009). 12- This paragraph only repeats and relies on the various matters pleaded at paragraphs 3, 6, 8 and 11 of the Amended Defence. It is another instance of a confession and avoidance as discussed above (see e.g., Kok Hoong [1964] A.C. 993 at pg. 1009).
4.	3(a)(i)-(vi), 3(a)(vi)-(x), 3(b)(i)(A)-(C), 3(b)(iii), 3(c)(i)(A)-(C), 3(c)(ii) and (iii), 3(c)(A)-(E) and 3(iv) and 3(v), 3(c) A-E and (iv) and (v), 3(c)(vi) A-G, 3(c)(vii)- That these paragraphs fail to identify or annex the documents necessary to the Defence in breach of 10.5(6) of the CPR	The only documents referenced in these paragraphs are: 3(a)(ii) – “a Certificate of title registered Book 6, Folio 69 of the Register of Titles for the Island of Nevis”. This document was specifically described and identified in that paragraph. There was no further need to attach the certificate of title. In that regard, see Henry J (as she then was) in (Ken) Ormiston Arnold Boyea v Luke Boyea SVGHCv2019/0175 at [9]. 3(a)(vi) – “Fixed Date Claim filed on December 15, 2000”. In my view the document is

		sufficiently identified in the paragraph and there is no need to also annex it (See (Ken) Ormiston Arnold Boyea v Luke Boyea). 3(a)(ix) – In this paragraph, reference is made to NCCL Memorandum of Articles of Association. In my view the document is sufficiently identified in the paragraph and there is no need to also annex it (See (Ken) Ormiston Arnold Boyea v Luke Boyea). 3(b)(i)(A)-(C) and 3(b)(iii) – These subparagraphs reference a “Loan”, “Caveat” and in 3(b)(iii) a letter dated 27 May 2016 which terminated the Loan Agreement. Pinneys Hotel’s amended statement of claim refers to a loan agreement (which is in fact the subject of this dispute) and a caveat lodged allegedly by Theodore Hobson QC. In my view, it is clear that the Bank is referring to these documents previously described and introduced by Pinneys Hotel in their claim. The letter referenced at 3(b)(iii) is properly described by its date and there was no further need to attach it (See (Ken) Ormiston Arnold Boyea v Luke Boyea). 3(c)(ii) and (iii) – I did not understand from these paragraphs that the Bank was referencing warranties and representations that took the form of documents. If what Pinneys Hotel seeks is further information regarding, e.g., when the warranties and representations were made, these particulars could have been requested of the Bank. As it stands, the Bank is free to give evidence of the warranties and representations (at the relevant time) having pleaded the general nature of its case (see Barrow JA (as he then was) in East Caribbean Flour Mills Limited v Ormiston Ken Boyea
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		Civil Appeal No.12 of 2006) 3(c)(A)-(E) and (iv) and (v)- my decision is the same in relation to the warranties and representations in these paragraphs as in the prior objection. 3(c)(vi) A-G - The cheques which Pinneys Hotel complains about in these paragraphs are its cheques which are alleged by the Bank to have not been cashed by the Bank. In any event, the cheques were identified in the Amended Defence and there was no further need to attach them (See (Ken) Ormiston Arnold Boyea v Luke Boyea) 3(c)(vii)- Pinneys Hotel's complaint that this allegation "cannot be proved by a document" and is therefore inconsistent with Part 10.5(6), is unsupported by any authority. There is no requirement upon a litigant to produce or identify a document in support of every allegation it makes. In other words, the Bank is entitled to prove the allegation at trial by e.g. oral evidence. There are no other references to documents in the paragraphs save for the categorical statement in 3(a)(iv) that "<i>No original corporate documents for NCCL whatsoever are available</i>". It would not be fair to expect the Bank to identify documents it says are unavailable.
5.	3(a)- That this paragraph is an admission of the entire claim	As set out above at numbers "1" and "3" of this table, this paragraph does not admit the entire claim. The reference to "Defendant" in the paragraph is an obvious clerical error. The pleading can be easily cured by granting an amendment to the Bank solely for the purpose of changing "Defendant" to "<i>Claimant</i>".

		All that paragraph 3 of the Amended Defence does is to admit that the Bank did not disburse the loan, but deny that it was in breach of the loan agreement by going on to set up its allegation that it was Pinneys Hotel that first repudiated the agreement. As indicated previously, it is a plea of confession and avoidance (see e.g., Kok Hoong [1964] A.C. 993 at pg. 1009).
6.	3(b)(i)- The paragraph references a “1(a)(i)” which does not exist in the Amended Defence and is therefore in breach of 10.5(6)	This, again, is another clerical error which is acknowledged in the Bank’s submissions and which may be cured by the deletion of the words “<i>As stated in paragraphs 1(a), 1(a)(i) and 1(a)(i) above.</i>”
7.	4- That this paragraph is an admission of the claim	In this paragraph the Bank admits that Pinneys Hotel paid certain administrative fees in respect of the loan but that that did not release Pinneys Hotel from performing the rest of the agreement. I do not agree that this paragraph amounts to an admission of the claim. At most, the paragraph is an instance of a plea in confession and avoidance as opposed to a traverse (see e.g., Kok Hoong [1964] A.C. 993 at pg. 1009).
8.	5, 6(a) and 10- That these paragraphs contain bare denials as they rely heavily on the particulars of the current paragraph 3 of the Amended Defence which was struck out for prolixity by the Actie Order.	In reference to these objections, I refer to my reasoning at [6]-[8] in the body of this Judgment. As is also set out in the body of my reasoning, the Court of Appeal Judgment deemed the Amended Defence properly filed because the Bank was entitled to amend the Defence when it did. The point is that had the Court of Appeal not found that the Bank was so entitled it would have been restricted to simply deleting the Prolix Paragraphs. As the Bank did not need permission, however, it had the prerogative to make any amendments it wished. That was the

		express dicta of Carrington JA at [13] of the Court of Appeal Judgment.
9.	6(b)(i)-(iii)- That it has already been determined by the Court that the lodging of a caveat by Theodore Hobson QC was without reasonable cause.	The Bank, in these paragraphs, has alleged that the caveat was lodged by Theodore Hobson QC as the legal representative of the Nevis Island Administration and not in his capacity as the Bank's Director. The Bank's pleaded case, therefore, is that Hobson QC's actions are not referable to the Bank. Paragraph 8 of the Statement of Claim, to which the Bank's allegation responds, acknowledges that Hobson QC was not a Director of the Bank when the caveat was lodged but only maintained it on his appointment to the Board of Pinneys Hotel subsequently. It is therefore an issue for trial whether this allegation of the Bank can be sustained.
10.	9- That this paragraph repeats paragraph 6 of the Amended Defence and is objected to on the same bases as the objections relating to (5, 6(a) and 10) and (6(b)(i)-(iii))	I refer to my comments at "8." and "9." of this table above.
11.	11- That this paragraph does not amount to a defence to the claim	All that paragraph 11 of the Amended Defence does is to reply to the allegations in the Amended Statement of Claim at paragraphs 14-34 by referring and relying on the several matters pleaded by the Bank at 3, 6 and 8. For the reasons I have set out above at numbers "2."-"8." of this table, I am not of the view that the objections with regard to those paragraphs of the Amended Defence can be sustained.

IS THE THIRD APPLICATION AN ABUSE OF PROCESS

[13] The Bank has argued that the objections which are the subject of the Third Application are yet another attempt to strike out the, or, parts of the Amended

Defence and that they could and should have been made in the Second Application. The Bank's submission is that because the Amended Defence has not changed between the Second and Third Application, the Third Application is an abuse of process. I have been referred by Mr. Kelsick to **The Kelliste 11** BVIHAD2011/005-009, a decision of Ellis J (as she then was), in which she summarised the position regarding abuse of process by the issuance of successive interlocutory applications as follows:

"[28] The rejection of an interlocutory application is not generally a bar to its renewal if the rejection was 'not a determination of issues, but merely an exercise of discretion and the decision whether or not to grant a discretionary procedural remedy'.

...

[31] However the fact that estoppel/ res judicata does not apply to such applications does not imply that a party can endlessly re-apply for the same reliefs from a court. A court's power to restrain abuse of process can undoubtedly be used to halt unmeritorious and repetitive interlocutory applications. This was confirmed by Smith L.J. in Stephenson v Garnett, where prescribed the appropriate course which should have been adopted by the judge in the following way:

"In my opinion the learned judge at chambers ought to have exercised the inherent jurisdiction which he undoubtedly possesses of staying the action on the ground that is frivolous and vexatious and an abuse of the process of the court. I do not rest my decision upon the ground that the matter is res judicata, for I do not think that it can be said that it is."

[32] This statement of the principle is accepted as the correct approach which should to be adopted by the Court when exercising its discretion to entertain a second procedural interlocutory application.

[33] Counsel for the Defendants contend that the Court has the ability to re consider their application because there were matters which had not been disclosed on the previous application and which would have been material to the outcome.

...

[45] In the Court's judgment, the Defendant cannot now seek to rely on matters which were available and which were known at the time of the earlier hearing but which they failed to deploy for the purpose of putting their full case forward. In any event, the Court is not satisfied that the matters complained of are sufficiently material. Material facts or information are those facts which may bear on the outcome of the matter."

[14] Ms. Cozier submitted that the decision **Nixon v Nixon** was not available when the Second Application was issued and that the Third Application was partly premised on the Court of Appeal Judgment. Those two facts, she contended, were sufficient reasons for the issuance of the Third Application, the Second Application having failed. To the contrary, no new principles of law were decided by the Court of Appeal in **Nixon v Nixon**. The decision, in fact, only notes that Part 10.5 of the CPR was applied. All that **Nixon v Nixon** decided was that it was still not open to a defendant to simply ignore allegations pleaded in a statement of claim regardless of whether they felt those allegations were material to a cause of action. In my view, it was very open to Pinneys Hotel to take the objections which it has in the Third Application in the Second Application considering the state of the law at the time. Some of the objections in the Third Application did not even relate to the New Allegations.

[15] Additionally, the Court of Appeal Judgment made it clear that the Bank was entitled to file the Amended Defence which contained the New Allegations. While the issue before the Court of Appeal was not whether the New Allegations had been pleaded in breach of the Actie Order, one would have thought that had that been so, the Court of Appeal would have at least commented upon such a contempt on their examination of the facts. All of that was known to Pinneys Hotel when it issued the Third Application. The Court of Appeal Judgment, quite contrary to what is contended, should have made it clear to Pinneys Hotel that the Bank was entitled to rely on the New Allegations. Instead, what was done was to issue another application to take a point concerning the Actie Order that could well have been made in the

Second Application. In my view, the Third Application is an abuse of the Court's process.

CONCLUSION

[16] For the reasons I have set out above my Order is as follows:

- a. The Third Application is dismissed.
- b. The Bank shall amend the Amended Defence as follows:
 - i. By deleting "Defendant" in paragraph 3(a) and replacing it with "Claimant"
 - ii. By striking out the words "*As stated in paragraphs 1(a), 1(a)(i) and 1(a)(i) above*" in paragraph 3(b)(i).
- c. I shall hear the parties on costs at the next hearing of the matter.

Yuri Saunders

Master

Registrar