

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES**

IN THE HIGH COURT OF JUSTICE

SVGHCV2019/0135

BETWEEN

**BANK OF ST. VINCENT AND THE GRENADINES LTD.
(formerly the National Commercial Bank (SVG) Ltd)**

CLAIMANT

AND

**EMERY ROBERTSON JNR
EMERY ROBERTSON JNR
(Representative of the Estate of Emery Robertson Snr.)**

DEFENDANTS

Before: The Hon. Mde. Justice Esco L. Henry High Court Judge

Appearances:

Mr. Richard Williams with him Ms. Dannielle France for the claimant/respondent
Ms. Samantha Robertson for the defendants/applicants

2022: June 15

ORAL DECISION

BACKGROUND

[1] **Henry, J.:** This is an interlocutory application by Mr. Emery Robertson Jnr in his personal capacity and on behalf of the estate of Mr. Emery Robertson Snr. in a representative capacity. Mr. Robertson has applied¹ for an order striking out the Fixed Date Claim Form filed by the Bank of St. Vincent and the

¹ By Notice of Application filed on 30th June 2021.

Grenadines ('the bank') against the defendants. He also seeks an order for costs and to strike out the witness statement of Andrene Hazel on the ground that it was filed late.

- [2] Mr. Robertson contends that the FDCF should be struck out pursuant to Civil Procedure Rules 2000 ('CPR') rule 26.3 for non-compliance with rule 66.4(1) of the CPR, by reason that the bank failed to provide with the claim form all documents and information which are relevant to the mortgage on which the claim is based. He complained that the bank filed no witness statements within the timeline mandated by case management order². Further, that the bank filed one witness statement 10 days after the deadline stipulated for filing witness statements. He submitted that the referenced witness statement should also be struck out.
- [3] The bank submitted that the court's power to strike out a party's statement of case pursuant to rule 26.3(1) of the CPR must be used sparingly in accordance with well-established principles enunciated by the Court of Appeal in **Tawney Assets Limited and East Pine Management Limited et al**³. It conceded that its statement of claim does not fully comply with the requirements of CPR rule 66.4(1). It argued however that the information stipulated by that rule is set out in Andrene Hazel's witness statement. It reasoned that the court is empowered to make an order granting leave for it to file a further amended statement of case to include the requisite information.
- [4] For the reasons articulated in this decision, the application to strike out the FDCF is dismissed as is the application to strike out Andrene Hazel's witness statement. Consequential orders are required to facilitate readiness of this matter for trial on June 30th, 2022.

ISSUES

- [5] The issues are: -
1. Whether the fixed date claim form should be struck out pursuant to CPR rule 26.3? and
 2. Whether Andrene Hazel's witness statement should be struck out?

²Issued on 10th December 2014.

³BVIHCVAP2012/007.

LAW AND ANALYSIS

Issue 1 – Should fixed date claim form be struck out pursuant to CPR?

[6] The principles which guide the court in striking out a claim form or statement of case have been enunciated in a number of cases including **Tawney Assets Limited and East Pine Management Limited et al**. An order striking out a statement of case is reserved as a measure of last resort. It is deployed very infrequently in cases where the court is satisfied that the claimant will be unable to prove the assertions outlined in the claim; where the statement of case is incurably bad or has no prospects of succeeding at trial and/or discloses no reasonable ground for bringing the claim.

[7] In determining such applications, the court must act judicially and seek to give effect to the overriding objective of the CPR to do justice between the parties. The Court is also expected to consider less drastic alternatives to further the overriding objective and enable the parties to proceed to trial of the dispute. It has to take into account any prejudice or advantage which may be occasioned to the respective parties by any order it makes. The court has applied those principles to the case at bar.

[8] In his Notice of Application, Mr. Robertson expressly applied for an order that 'Fixed Date Claim Form be struck out pursuant to CPR 2000 Part 26.3 for non-compliance with part 66.4(1) of the CPR.' In his supporting affidavit⁴ he averred that he has been advised and believes that the court is empowered to strike out a statement of claim for non-compliance with any paragraph of rule 26.3. He makes clear at paragraph (4) of his affidavit that this application is being pursued under rules 66.4(1) and 26.3(1)(a) of the CPR.

[9] He did not ground his application, either in the Notice of Application or the supporting affidavit on 'abuse of process' pursuant to paragraph (c) of CPR rule 26.3(1) or under paragraphs (b) or (d) on the grounds that it does not disclose a reasonable ground for bringing a claim or that it is prolix and does not conform to the requirements of Part 8 or 10. He did not indicate if and when he received the witness statement of Andrene Samuel. The court notes that it is referred to in his supporting affidavit without any denial that it was served on him.

⁴Filed on 30th June 2021.

[10] CPR rule 26.3(1) (a) empowers the court among other things to strike out a statement of case or part of it for failure to comply with any rule. It provides: -

‘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.’

[11] ‘Statement of case’ is defined in the CPR to mean: -

‘(a) a claim form, statement of claim, defence, counterclaim, ancillary claim form or defence and a reply; and

(b) any further information given in relation to any statement of case under Part 34 either voluntarily or by order of the court;’

Taken together with rule 26.3(1)(a) it is clear that the court may in the exercise of its discretion strike out a claim form that does not comply with that particular rule.

[12] Rule 66.4(1) of the CPR states: -

‘66.4 (1) On a claim for possession of the mortgaged property or for payment of the mortgage debt the claimant must file with the claim form evidence by affidavit –

(a) exhibiting a copy of the original mortgage;’

It is evident that no affidavit evidence was filed with the claim form or the amended fixed date claim form.

[13] There is common ground among the parties that the bank did not exhibit the original mortgage with the claim form filed in this case. Mr. Robertson submitted that this constitutes a flagrant breach of rule 66.4(1) which must be visited with the nuclear sanction of striking out. The bank rejoined that the mortgage was referenced in its Amended Claim Form (filed on 21st July 2010) and exhibited to Andrene Hazel’s witness statement filed on 19th January 2015.

[14] Mr. Robertson submitted that missing from the claim form by way of attachment are documents and relevant information pertaining to the mortgage, including the loan application, offer or approval letter and terms of the loan which all go to the root of the action. He reasoned that having regard to the contents of Andrene Hazel's witness statement it is self-evident that other relevant documents were not disclosed to him in compliance with the rules. In this regard, he argued that the loan activity statement attached to the witness statement reveals that the loan was effective from 1996.

[15] He placed reliance on the **Limitation Act**⁵ and **Halsbury's Laws of England**⁶ to support his contention that the claim in the instant suit is statute-barred. He also cited **Hornsey Local Board v Monarch Investment Building Society**⁷ to similar effect. He submitted that the cause of action accrued on 31st December 1996, was enforceable since that date and therefore the relevant limitation period for bringing an action for repayment expired on 1st January 2003, approximately 7 years before the action was commenced. He submitted that the claim was statute-barred before it was filed and should be struck out as an abuse of the court's process. This contention did not form any part of the grounds of the Notice of Application and is therefore disregarded.

[16] The bank argued that it has complied substantially with the requirements of CPR rule 66.4(1) and that it has satisfied the spirit of the provision even though it failed to strictly comply. It submitted that strict compliance should be waived because the defendants have been supplied with sufficient material in the statement of case and Ms. Hazel's witness statement to enable them to understand the nature of the claim. Mr. Robertson submitted that in order to cure the defect in this case with respect to non-compliance with CPR 66.4(1), the cl. would have to make a certain appl. to remedy that wrong.

⁵ Cap. 129 of the Laws of Saint Vincent and the Grenadines Revised Edition 2009.

⁶ Vol. 28, 4th Ed. Para. 884 and Vol. 32 4th Ed. Para. 1009.

⁷ [1889] 24 QBD 1.

[17] A useful starting point for consideration of this application is considering what is the role of pleadings and witness statements. This was addressed by the Court of Appeal in **East Caribbean Flour Mills v Ormiston Ken Boyea et al** where the Court opined: -

‘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, 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.’⁸

[18] The question is whether the Amended Claim Form⁹ contained the elements of the claim particularized in the manner stipulated by rule 66.4 (1) and whether the witness statement although not filed at the same time as the Amended claim form supplemented the pleadings in material respects to provide Mr. Robertson with a sufficient idea of the nature of the claim against the defendants and to provide substantial compliance with the spirit of that provision. Paragraph 2 of the Amended Statement of claim pleads: -

‘By virtue of a loan agreement dated on or about the 31st day of December 1996 the 1st Defendant borrowed the sum of \$50,000.00 from the Claimant which was duly secured by a legal mortgage made by the 1st and Second defendant and which (sic) dated the 31st day of September 1997 and registered as 180 of 1997.’

[19] That paragraph identifies the mortgage number, the date of execution, the parties to the agreement and the amount allegedly borrowed. In my opinion, those general details supply the main provisions of a mortgage agreement and satisfy the requirements of CPR rule 8.6(1)(a) that stipulates that a claimant must include in the claim form ‘a short description of the nature of the claim’. It also satisfies CPR rule 8.7(1) and (2) which mandates the inclusion in the claim form or statement of

⁸ Saint Vincent and the Grenadines Civil Appeal No. 12 Of 2006, para. 43 per Barrow JA.

⁹ Filed on 19th July 2010.

claim, a statement of all the facts on which the claimant relies. The further requirements are that the statement must be as short as practicable; and that 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] By the witness statement of Andrene Hazel filed on 19th January 2015, a copy of the said mortgage was attached. That statement was filed 10 days after the January 9th deadline by which the witness statements were ordered to be filed. The bank has not filed any application for extension of time to file the witness statement or for the witness statement to be deemed properly filed. It filed its List of Documents on 20th January 2015 and in it listed the mortgage dated 31st December 1996 and registered as number 180 of 1997 as one of the documents under its control and in its possession.

[21] It does not escape the court's attention that these filings were made over 7 years ago more than adequate time, in my opinion for Mr. Robertson and his co-defendant to acquaint themselves with the documents, conduct any research and undertake any inquiries necessary to enable them to respond to the suit in a timely manner. They did not complain about the absence of the mortgage from the claim form or supporting witness statement until after they had filed their Defence on June 4th, 2010, and their witness statements on January 9th, 2015, in which they denied owing the bank, in their response to the original claim form which has since been amended. The second defendant in his witness statement referred to the mortgage mentioned in the Amended Claim Form and averred that the Mortgage Deed is no longer enforceable.

[22] Being mindful of the referenced pronouncement of the Court of Appeal in the **Boyea** case it seems to me and I am satisfied that up to the date when the defendants filed their witness statements, they appeared on the face of their defence and intended evidence to have a full appreciation of the nature of the claim against them. While the court acknowledges that the strict letter of CPR rule 66.4(1)(a) was not complied with by the bank, it is clear that the complete spirit of that provision was substantially satisfied by the provision of the details of the mortgage in paragraph 2 of the Amended Claim Form and the disclosure of its existence and the full text of the mortgage as an attachment to Ms. Hazel's witness statement and in the bank's list of documents.

- [23] Any sympathy that the court may show to the defendants in respect of their belated complaint evaporates in light of the contents of their defence and witness statements. The word 'sympathy' is used here loosely not with respect to any human emotion which, is irrelevant for present purposes, but solely to mean inferentially 'merits of the defendants submissions.'
- [24] To my mind, if the defendants had filed this application between the date of service on them of the original claim form and the date of filing of their defence and witness statements, this court in such circumstances would have been hard-pressed to refuse their application to strike out the original claim form, which made no reference to a mortgage in that formulation. The intervening events of the filing of the defence and witness statements by the defendants and the subsequent filing by the claimant of an Amended Claim Form and witness statement of Andrene Hazel significantly destroys the defendants' contentions that the claim form is deficient in terms of signaling the nature of the claim.
- [25] The court has not lost sight of the tardy filing by the claimant (the bank) of a witness statement which foreshadows the evidence on which it intends to rely at trial. In my opinion, the length of time that this matter has proceeded in the court without application of this nature by the defendants does not assist their case on this application. I am satisfied that the defendants were provided with the Amended Fixed Date Claim Form and were aware of the witness statement of Andrene Hazel which they obviously had in their possession at the very latest when this application was filed.
- [26] For completeness, the Court reminds itself of the principle enunciated in **R v Immigration Appeal Tribunal ex parte Jeyanthan; Ravichandran v Secretary of State for the Home Department**¹⁰ to the effect that strict compliance with a statutory requirement is not necessary if the spirit of the law is substantially satisfied. I repeat, in the case at bar, I accept that the bank has not complied strictly with the letter of CPR 66.4(1). However, I am satisfied that the spirit of the provision has been substantially complied with by the inclusion in the claim form of the main terms of the mortgage, its attachment to Ms. Hazel's witness statement and disclosure of the mortgage, with the attendant opportunity for inspection.

¹⁰[1999] 3 ALL ER 231.

[27] Determination of this application involves the exercise of a discretion and consideration of the overriding objective to do justice between the parties as far as reasonably practicable. It would seem to me to be unjust and inequitable to impose the harshest sanction against the bank by striking out its claim for failure to attach the mortgage agreement to the claim form when the provisions of CPR 66.4(1) stipulates that it is to be attached to the affidavit or other document containing the evidence on which the claimant intends to rely. The Claimant failed to comply with the requirement in two respects, by not filing the evidence at the same time as the claim form and by not serving the evidence on the defendants within a reasonable time after filing of the claim form.

[28] Notwithstanding, on the peculiar facts of this case I am satisfied that no prejudice or very little prejudice has been caused to the defendants by such non-compliance. To grant this application would deprive the bank of the opportunity to present its case in court, which would be contrary to the overriding objective. On the other hand, no prejudice will be caused to the Robertsons if the matter proceeds to trial since they have had the mortgage deed since the service on them of Ms. Hazel's witness statement. Moreover, the bank has articulated in the amended claim form a cause of action known to the law. The application to strike out the claim form is accordingly dismissed. I hasten to add that this decision should not be interpreted as licence to claimants in the bank's position to disregard the clear language of CPR 66.4(1).

Issue 2 - Should Andrene Hazel's witness statement be struck out?

[29] The principles discussed earlier in respect of the application to strike out the claim form are applicable in relation to the application to strike out Ms. Hazel's witness statement. CPR rule 29.11 provides that a witness will not be permitted to give evidence at trial if no witness statement is served on his or her behalf. This is the sanction provided for failure to serve witness statements within the stipulated timelines. As it stands, Ms. Hazel will not be permitted to testify at the trial unless permission is sought and obtained from the court. I consider the nuclear option of striking out her witness statement to be too draconian in the circumstances and runs afoul of the overriding objective. For those reasons, no order is made striking out her witness statement at this time.

ORDER

[30] It is accordingly ordered:

1. The defendants' application to strike out the fixed date claim form and Andrene Hazel's witness statement is dismissed.
2. Mr. Emery Robertson Jnr. in his personal capacity and as representative of the estate of Emery Robertson Snr shall pay to bank costs to be assessed on application to be filed and served on or before July 12th, 2022, pursuant to CPR rule 65.11.

[31] I wish to express gratitude to learned counsel for their helpful written and oral submissions.

Esco L. Henry
HIGH COURT JUDGE

By the Court

Registrar