

IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV2021/0157

BETWEEN:

FINANCE & DEVELOPMENT COMPANY LTD.

Claimant

-and-

DAVEN JOSEPH

Defendant

Appearances:

Ms. Talia DaCosta, Counsel for the Claimant

Mr. Hugh Marshall, Counsel for the Defendant

2021: January 13th;
February 17th.

DECISION

“Claimant’s application to strike out defence and further or alternatively for summary judgment”

- [1] **GARDNER-HIPPOLYTE, M.:** This is an application for the defence and counterclaim of the Defendant to be struck out pursuant to Part 26.3(1)(b) of the Civil Procedure Rules 2000 as amended (hereinafter referred to as “CPR”); and as stated in the application “and further or in the alternative that the claimant be awarded summary judgment in terms to be determined by the court pursuant to part 15.2(b) of the civil procedure rules.”

Background

- [2] The application for striking out will be considered first and thereafter if that application is not successful, then I will consider in the alternative, the application for summary judgment.¹

¹ Dr. Martin G C Didier et al v Royal Caribbean Cruises Ltd SLUHCVP 2014/0024 and 2015/0004 from paragraph 20-29

- [3] The Claimant is a company duly incorporated under the Laws of Antigua and Barbuda. The Claimant entered into a Bill of Sale agreement² with the Defendant for the purchase of a motor vehicle described as 2006 Grey Infinity Q45, Registration No. A 37226. The Bill of Sale is dated the 15th June, 2012 and it was agreed that the Defendant would pay the principle of \$128,000.00 together with the interest rate of 9% per annum in monthly instalments of \$2,657.07 over a period of 60 months. The Defendant defaulted and the Claimant wrote to the Defendant on two occasions. The Defendant having defaulted on the loan the vehicle was seized in October of 2017 and it was eventually sold in 2019.
- [4] The vehicle was sold for the sum of \$34,000.00 and the balance left due and owing on the loan as per the amended statement of claim is \$58,355.68. In his defence, the Defendant agrees that he purchased a vehicle and obtained a loan from the Claimant as described and secured by a Bill of Sale. However, he goes on to state that based on representations made by the representatives of Hadeed Motors Limited, he was induced to purchase the vehicle. That the representations included that Hadeed Motors Ltd would also organise all of the financing for the said vehicle, with financing from the Claimant Company. The defence also alleges that the company falls under the Hadeed Group of Companies.
- [5] The Defendant contends that inclusive of the representations was that the vehicle was in excellent condition and of exceptional value for money. However, after purchasing the vehicle he discovered it was not in good condition. The Defendant denies receiving any of the letters in June 2014 and May 2017 which the Claimant alleged it sent. Further he contends that he has had no further communication from the Claimant until filing of the claim.

² Exhibited in the Statement of Claim as "FDC 1"

[6] The Defendant also filed a counterclaim contending that the claim is statute barred and sues for breach of duty of care which he alleges was owed to him in the sale of the vehicle.

[7] I will now go on to substance of the application.

Application to Strike Out – CPR 26.3(1)

[8] The Claimant applied under CPR 26.3(1)(b). However, in the submissions filed on 17th December, 2021 the Claimant referred to rules 26.3(1)(a), (b) and (c) (and based on the submissions provided by the Claimant (d) is included). CPR 26.3(1) states 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 –

(a) there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings

(b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;

(c) the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings; or

(d) the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10.

[9] The Claimant therefore advances three arguments in their submissions, firstly that the defence does not conform to the requirements under 10.5 of CPR, that the defence does not disclose any reasonable ground for defending a claim and thirdly and very briefly the Claimant in the submissions states that having failed to satisfy part 10.5 this is an abuse of process and should be struck out.

The Defence does not Conform to the Requirements under Part 10.5 of CPR

[10] Part 10.5 of CPR states as follows:

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 not –

- (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.

(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 3.12.

[11] The Claimant has argued that the defence does not conform to the requirements as laid down in the rules. An analysis of the relevant paragraphs of the claim and defence as suggested by the claimant is as follows:

Statement of Claim	Defence
Paragraph 1	Admitted
Paragraph 2	Admitted
Paragraph 3	Admitted to an extent
Paragraphs 4	Does not admit, deny or require claimant to prove but asserts his version in paragraphs 3-5
Paragraph 5 -10	Does not admit, deny or require claimant to prove but asserts his version in paragraphs 6-11

- [12] The Claimant contends that the failure on the part of the Defendant to admit, deny or require the proof, in conformity with the rules means that the defence should be struck out. Additionally, the version put forward in the defence are unrelated to the statement of claim, in that it does not dispute that the Defendant **took a loan and failed to pay it, the vehicle was repossessed, sold and the Defendant has a balance to pay. (My Emphasis)**

- [13] In **M15 Investigations Limited v Centurion Protective Agency Limited** Civil Appeal Number 288 of 2008, the Court struck out a defence that was a bare denial saying that you must state reasons for the denial. The Court also stated: -

“where there is a denial it cannot be bare denial but it must be accompanied by the defendant’s reasons for the denial. If the defendant wishes to prove a different version of events from that given by the claimant he must state his own version. I would think that where the defendant sets out a different version of events from that set out by the claimant that can be a sufficient denial for the purposes of 10.5(4)(a) without a specific statement of the reasons for denying the allegation. Where the defendant does not admit or deny an allegation or put forward a different version of events he must state his reasons for resisting the allegation (see 10.5(5)). The reasons must be sufficiently cogent to justify the incurring of costs

and the expenditure of the Court's resources in having the allegation proved."

- [14] In this case the Defendant does not deny but sets out a defence to the sale of a vehicle, that is, it was not of good and merchantable quality or fit for the purpose, but it does not frontally address the claim itself. Additionally, it brings into view a party who is not part of the proceedings and there is no application before the Court to add a party to these proceedings.
- [15] Whilst the defence has failed to frontally address the claim, does such a failure automatically mean that the Court can strike it out as proposed by the Claimant? The law³ provides an alternative approach and gives an opportunity that if there is such a failure to comply with the rules the Court has the discretion to allow for amendments to be made.⁴
- [16] Accordingly, I will not strike out the defence for failure to conform with CPR 10.5.

That the Defence does not Disclose any Reasonable Ground for Defending a Claim

- [17] Under 26.3(1)(b) the Claimant has argued that the defence provided does not disclose any reasonable ground for defending a claim and in relation to the counterclaim – bringing a claim. The principles for this component of striking out is succinctly laid out in **Citco Global Custody NV v Y2K Finance INC**⁵. It is appropriate to strike out if it is incoherent, makes no sense and does not disclose a legally recognisable claim.⁶ That a trial judge should only look to the pleaded facts and assume that such facts are true. Additionally, reference is made to Blackstone's Civil Practice 2009⁷ where Edwards JA quoted a number of reasons for not striking out a statement of case.

³ CPR 26.1(2)(k) and (w)

⁴ Agnes Danzie et al v Cecil Anthony (Executrix of the estate of Emmanuel Gresham) SLUHCVP2015/0009

⁵ BVIHCVP 2008/022 at paragraphs 11-14

⁶ Ibid paragraph 12

⁷ At page 432 paragraphs 33.9 and 33.10

- [18] The Defendant has indicated that the financial institution is a part of the Hadeed Group of Companies, but has not provided any proof of this assertion. The Claimant alternatively has indicated that it is a separate entity regulated by the Eastern Caribbean Central Bank and in the pleadings there is no documentation on this point. This point could fall within an area referred to by Blackstone's where the strength of the case may not be clear because it has not been fully investigated.
- [19] Whilst I agree with Counsel for the Claimant that the points raised on representation do not provide a defence since it does not at this juncture connected to the Claimant, however it does not mean that the Court should automatically exercise a draconian measure and strike out the defence and counterclaim.
- [20] The issue of a duty of care was raised by the Defendant in the counterclaim as to the sale price of the vehicle. It is noted that the Defendant has inaccurately quoted in the defence that the vehicle sold for \$26,500.00 when it was sold for \$34,000 as per exhibit "FDC 4."
- [21] I agree with the submissions of Counsel for the Claimant that there is relevant case law on the point of a duty⁸ which in summary indicates:
- "I accept it to be the true position of the law that there is no absolute duty to advertise widely and what is proper advertisement depends on the circumstances of the case."
- [22] The bank was under no duty and cannot be expected to their detriment to sell the vehicle as required by the Defendant. The Court at this stage is required to only consider the pleadings and it is noted in the reply more particulars are given surrounding the circumstances of the sale.

⁸ Dominica Aid Bank v Athenia Henry DOMHCV2007/0190 Cottle J at paragraph 6 referred to Blenman J in Hauser et al v National Bank of Anguilla AXA HCV 2010/0025

[23] The issue of limitation raised by the defence is answered in the reply and indicates that the Defendant made payments towards the loan until 15th April, 2016 and a copy of the loan account summary is provided to confirm this point. Therefore, I agree with the submissions of Counsel for the Claimant that this point is a non-starter as section 29(5) of the **Limitation Act** is quite clear that the date of the last payment would become the date of the accrual of the cause of action.

[24] The Defendant has pleaded the following - a relationship between the Claimant and the company he purchased the vehicle from, representations as to quality of the vehicle, a duty of care by the Claimant and limitation of the claim. Since these issues are raised in 26.3(1)(b) of the striking out application, and on the face of the pleadings I am of the opinion that it would not be appropriate to strike out the defence under this head. The learning favours alternative options under CPR 26.3(1)(b),⁹ for example giving the Defendant an opportunity to amended their pleadings.

The Statement of Case or the Part to be Struck Out is an Abuse of the Process of the Court

[25] I have noted that there is a brief reference at paragraph 14 of the submissions that the defence is an abuse of process of the Court, but this argument has not been developed further and accordingly the Court is handicapped at this stage to consider it.

[26] I now turn to the application for Summary Judgment.

Application for Summary Judgment – CPR 15.2 (b)

[27] Part 15.2(b) of CPR states:-

⁹ Real Time Systems Limited v (1) Renraw Investment Limited (2) CCAM and Company Limited (3) Austin Jack Warner [2014] UKPC 6; Tawney Assets Limited v East Pine Management Limited BVIHCVP 2012/007;

15.2 The court may give summary judgment on the claim or on a particular issue if it considers that the –

- (a) claimant has no real prospect of succeeding on the claim or the issue; or
- (b) defendant has no real prospect of successfully defending the claim or the issue.

[28] The test to be applied for summary judgment is different to a striking out application and the Court can now receive affidavit evidence that would form the basis of the legal test that the Court has to apply.¹⁰ The learned Chief Justice at the time Pereira JA stated that

“the court would essentially consider the legal issues in the case, determine, on a balance of probabilities and in light of the affidavit evidence adduced by the parties, whether one party or the other has no real prospect of succeeding on the claim and enter judgment accordingly. This will be a judgment on the merits.”¹¹

[29] The Claimant provided two affidavits in support of the application for summary judgment and the Defendant also provided an affidavit. In determining whether the Defendant has no real prospect of successfully defending the claim, the legal issues for the Court to consider put forward in the defence are as follows:

- (a) the representations made by Hadeed Motors about the state and quality of the car and the issue of the suggested relationship between Hadeed Motors and the Claimant;
- (b) the gross under selling of the vehicle for \$26,500.00 and lack of care; and
- (c) The issue of limitation - section 7 of the Limitation Act 1997.

Representations made and Suggested Relationship

[30] The representative of the Claimant, Jason Weste in his affidavit at paragraph 5, articulates that the Claimant and Hadeed Motors Limited are two separate

¹⁰ Dr. Martin Didier *ibid* above at 1, paragraph 22

¹¹ *Ibid* at paragraph 23

companies. At paragraphs 6-7 he further establishes that there is no connection with the two companies as being suggested by the Defendant. In the Defendant's affidavit at paragraph 3 he states "I was reluctant and they told me that they would arrange financing. Though I assumed it would be their affiliate company, the Applicant, I did not know for sure as I never approached the Applicant for any financing directly." The Defendant now indicates in the affidavit that he assumes it would be their affiliate company.

[31] I have also noted the Bill of Sale agreement and the sworn statement of Denise Marshall – solicitor of the Eastern Caribbean Supreme Court who indicated that before Daven Joseph signed the Bill of Sale she "fully explained to the defendant the nature and effect thereof." The Defendant also had a Bill of Sale explained to him by a solicitor. The Defendant would have appreciated what his responsibilities were and he then chose to enter into the Bill of Sale agreement. The Defendant received legal advice explaining the nature and effect of the agreement by a solicitor of the Supreme Court. Therefore, on a balance of probabilities I am satisfied that the Defendant entered into a Bill of Sale agreement with the Claimant and that this relationship of "Borrower and Bank" is not connected to Hadeed Motors Limited, or any of the representations they would have made.

The Gross under Selling and Duty of Care

[32] The Claimant in his affidavit at paragraphs 8-9 clarifies that the vehicle was sold for \$34,000.00. The affidavit also states that based on the value of the vehicle in 2017 which was \$43,000.00, a depreciated value after two years would have been \$34,400.00. The depreciated amount of the vehicle is comparable to the amount received for the sale of the vehicle and it comes within the ambit of case law on the same point.¹² The Defendant on the other hand in his affidavit states that he is not aware of any active steps taken to sell the vehicle, he has sustained losses and he also is entitled to interest at

¹² Ibid at 8

11%. Based on the affidavits provided by the Parties and on a balance of probabilities I find that the Claimant has provided sufficient information for me to find in their favour. Therefore, I agree that the Defendant has no real prospect of successfully defending on this point.

Section 7 of Limitation Act

[33] The **Limitation Act** sets out the period for the claim to have been brought as the period of six years. The Claimant asserts,¹³ that the defendant paid his loan in 2016 and references a copy of the account summary which is attached at “JW 3”. The account summary shows a payment made on the 15th April, 2016 for the sum of \$8,000.00. The Defendant on the other hand denies making any payments in the six years preceding the bringing of the action.

[34] With the passage of time the documentation provided by the Claimant allows the Court to say that on a balance of probabilities the account summary is an accurate reflection of the account and the last payment was made in April 2016. I therefore agree with the submissions of the Claimant that the date of the last payment is when the cause of action would accrue, therefore on a balance the Defendant has no real prospect of successfully defending the claim.

[35] Having determined that the Defendant has no real prospect of successfully defending the claim and the counterclaim is based on the same issues, I am also of the opinion that the counterclaim has no real prospect of succeeding.

Conclusion

[36] For the above-mentioned reasons the Order of the Court is as follows:

1. The Claimant's application to strike out the defence and counterclaim is refused;

¹³ Paragraph 11 of the claimant's affidavit

2. The Claimant's application for summary judgment to be entered on the defence and counterclaim is granted;
3. The Defendant shall pay the Claimant the sum of \$58,355.68 together with contractual interest as agreed on the bill of sale on the debt at the rate of 9% from today's date until the debt is liquidated;
4. The Defendant having been unsuccessful in the application shall pay costs to the Claimant in the sum of \$5,252.01 - the application having brought the claim to an end the Claimant is entitled to 60% of the prescribed costs of the value of the award;
5. The Claimant to draw, file and serve this Order.

Charon Gardner-Hippolyte
High Court Master

By the Court

Registrar