

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
IN THE HIGH COURT OF JUSTICE
CIVIL DIVISION**

GRENADA

Claim No: GDAHCV2021/0259

BETWEEN:

LLEWELLYN CUMMING

Claimant

-and-

ANSLEM CLOUDEN
trading as **GRENLAW CHAMBERS**

Defendant

Appearances:

James Bristol QC leading Marion Suite for the Claimant; and
Benjamin Hood for the Defendant.

2021: December 17;
24 – via email

DECISION
Defendant's application to strike out

[1] **PARIAGSINGH, M (Ag.):** - Before the Court is the Defendant's application to strike out this claim filed on July 12, 2021.

[2] In support of the claim is an affidavit of Christi Fraser filed on July 12, 2021. No affidavit in opposition was filed on behalf of the Claimant.

PRELIMINARY ISSUE:

[3] Counsel for the Claimant submitted that in an application to strike out there is no requirement to file an affidavit in support. For this reason, the Claimant did not file an affidavit in response to the affidavit filed on behalf of the Defendant in support of the application

[4] Pereira CJ in **Dr. Martin Didier v Royal Caribbean Cruises et al SLUHCVAP2014/0024** clarified any doubts which could have been entertained about the procedure to be followed in an application to strike out. At paragraph 24, the Chief Justice stated:

“[24] On the other hand, an application for a party’s statement of case to be struck out pursuant to CPR 26.3(1)(b) **is decided by the court solely on the parties’ pleaded cases before it. No additional evidence is adduced.** All facts pleaded in the statement of case are assumed to be true for this purpose..” **emphasis mine.**

[5] Applying that guidance to the facts of this case, I must agree with Counsel for the Claimant. There was no need to reply to the affidavit in support as there was no need for an affidavit in support.

[6] Even if I am wrong, I would attach no weight to the affidavit in support filed for the following reasons:

1. The deponent being the legal assistant of Counsel is in no position to depose to most of the facts asserted in the affidavit; and
2. Most of the contents of the affidavit are legal options and submissions.

[7] For these reasons, the affidavit of Christi Fraser in support filed on July 12, 2021 is struck out.

APPLICATION TO STRIKE OUT:

The law on striking out:

- [8] **Part 26 Rule 26.3 and 4 of the Civil Proceedings Rules 2000 as amended (CPR)** gives the Court the power to strike out a party's statement of case or any part of it. The exercise of this power is however, sparingly used unless it is pellucid that the statement of case or any portion of it is doomed to fail or is otherwise abusive.

The Court's approach to striking out:

- [9] Thom JA in **Agnes Danzie et al V Cecil Anthony SLUHCVP2015/0009** at paragraph 13 stated:

"13. It is a well-established principle that the court's power to strike out a statement of case should only be used sparingly (*Real Time Systems Limited v Renraw Investments Limited and Others* [2014] UKPC 6). Also, in *Salfraz Hussain v Birmingham City Council and Others* [2005] EWCA Civ 1570 the English Court of Appeal, in considering the exercise of discretion to grant relief from sanctions where judgment was entered in default, stated: 'it must be kept in mind that discretionary powers are not to be exercised in order to punish a party for incompetence—they must be exercised in order to further the overriding objective'. In exercising his discretion, the learned judge was required to consider what was the appropriate response having regard to all of the circumstances, including whether there were other alternatives available that would be just in the circumstances."

The grounds of the application:

- [10] The Defendant relies on the following grounds:

1. Contrary to the provisions of CPR 2(4) and the mandatory 3(13), the Claim Form that has been filed and served in this matter does not contain a Statement of Truth.
2. The Claim Form contains only the extent of the relief sought by the Claimant and has not disclosed any or any reasonable grounds for bringing the claim against the Defendant.
3. The Statement of Claim of the Claimant discloses no reasonable ground for bringing the claim and is bound to fail in that the claim is based on the sole allegation that

the Defendant failed to notice that the email address used to give instructions to the Defendant was an incorrect one and that the Defendant was contractually bound to notice the variation or was negligent in not recognizing the change.

4. The Claimant, during the course of correspondence with the Defendant, alleged that it was her email address that had been compromised and that she only knew of the occurrence after the loss.
5. Contrary to the contention of the Claimant, it was the duty of the Claimant to provide a safe platform for the safe transfer of her funds that had been obtained for her by the Defendant. In the premises, if there was any fault or blame to be cast, or any negligent conduct, it was clearly that of the Claimant. Further or alternatively, the claim herein is premature since it appears that there have been ongoing investigations in both the jurisdictions of Grenada and the United States regarding the loss of funds which have both been inconclusive,
6. (wrongly numbered 5 again on the application) The Claim Form and Statement of Claim are both an abuse of the process of the court and a violation of Part 8 of the CPR when viewed in the round, because:
 - a. In claiming for breach of contract no term of any contract has been identified, which was allegedly breached by the Defendant;
 - b. In claiming based on the tort of negligence no duty or standard of care has been identified as owed to the Claimant, that has been breached by the Defendant.
7. (wrongly numbered 4 on the application) The Statement of Claim is rambling and incoherent and does not at all establish any link between the set of facts and conclusions and any breach of a contractual term or duty of care alleged by the Claimant. In the premises, the Statement of Claim is prolix and does not comply with the requirements of Part 8 of the CPR.

The Statement of Claim.

[11] The Statement of Claim contains 30 paragraphs. I trust that Counsel would forgive me for paraphrasing it and grouping the paragraphs by the nature of the facts asserted.

1. Paragraph 1 describes who the Defendant is.
2. Paragraphs 2 and 3 describes the engagement of the Defendant by the Claimant.
3. Paragraph 4 sets out the terms of the judgment obtained by the Defendant in favour of the Claimant.

4. Paragraph 5 sets out what sums were to be retained by the Defendant and what sums were to be paid to the Claimant.
5. Paragraph 6 alleges that because of the wrongful acts, professional malpractice and neglect the sums were never received by the Claimant.
6. Paragraphs 7 to 28 set out a narrative of a series of communication between the Claimant and Defendant and an alleged fraudulent person. They also set out the facts leading up to the sums being allegedly transferred to a fraudulent account.
7. Paragraph 29 alleges that it was an implied term of the Claimant's engagement of the Defendant was that he would exercise all reasonable care and skill acting for the Claimant and alleges in the alternative that a duty was owed at common law.
8. Paragraph 30 alleges breach of contract and/or negligence by the Defendant in failing to act with all reasonable care and skill and sets out particulars 1 to 6. Paragraphs 1 to 6 alleges in very broad terms that the Defendant failed to confirm wire instructions with the Claimant, failed to recognize that the wire instructions were fake and failed to follow the instructions of the Claimant.
9. Paragraphs 31 to 35 set out that the Defendant's contingency fee and fee paid was conditional upon him recovering compensation for the Claimant. The Claimant not having received any part of the judgment contends that the Defendant is not entitled to keep his contingency fee of fees charged.
10. Paragraph 36 sets out the loss claimed.

ANALYSIS:

[12] At the hearing, Counsel for the Defendant indicated that Ground 1 of the application was not being pursued. A Certificate of Truth is attached to the Statement of Claim and this ground was properly abandoned at an early stage.

[13] Grounds 2, 3, 6 (wrongly numbered 5) and 7 (wrongly numbered 4) raises the allegation that the Statement of Claim discloses no grounds for bringing a claim, it is an abuse of process as it violates Part 8CPR and is prolix as it does not comply with Part 8 CPR. I propose to treat with the grounds together.

[14] The remaining grounds 4 and 5 (the first ground 5) I will treat with together.

Grounds 2, 3, 5 and 6:

[15] **Part 8 Rule 8.7CPR** imposes an obligation on the Claimant to provide a statement of all the facts on which he intends to rely. This statement must be as short as practicable and must identify or annex any document which the Claimant considers necessary to his case.

[16] Barrow JA in **East Caribbean Flour Mills Limited v Ormiston Ken Boyea Saint Vincent and the Grenadines Civil Appeal No. 12 of 2006** at paragraph 43 stated that a statement of case must:

“make clear the general nature of the case”.

[17] The English authorities have interpreted their equivalent CPR provision as imposing an obligation to inform the defendants in the simplest terms of the case the defendant has to meet, see **Adams v Thomson Holidays Ltd [2009] EWHC 2559**.

[18] The authorities have established that what needs to be pleaded are the material facts that provide the basis for leading evidence on each element of the cause of action. If a single essential allegation is omitted, the statement of case will be amenable to being struck out, see **Bruce –v- Odhams Press Ltd [1936] 1 KB 679**.

[19] The statement of case should generally contain material facts. It should not contain law, except where the case may be based on a point of law, or evidence. There is no need to particularize legal arguments in a statement of case as that is the function of skeleton arguments, see **Trader Publishing Ltd –v-Autotrader.com Inc [2010] EWHC 142 (Ch)**.

[20] General allegations are usually accompanied by particulars. The nature and extent of these particulars require the pleading party to ensure that the material facts to establish

the complete cause of action and for the Defendant to have a clear understanding of the case against him to be clearly stated.

Consideration of individual paragraphs of the statement of claim:

[21] I have first considered each paragraph of the statement of claim and whether it complies with Rule 8.7 CPR. Having done so, I am of the view that certain portions of the statement of claim ought to be struck out for the following reasons. In particular:

[22] Paragraph 9 last sentence which reads:

“This is inherently suspicious and should have placed the Defendant on clear notice that he was having problems with the integrity and security of his email system.”

[23] This is not a fact. This is a mixture of opinion and submission. This ought not to be in a pleading and is accordingly struck out.

[24] Paragraph 10 second sentence the words:

“... was inherently suspicious as it , and even more suspiciously”

[25] Again, these are not facts. They are the opinions and these words are struck out.

[26] Paragraph 14 the portion that reads :

“It is important to note that the Claimant in this email said nothing about being on vacation or being only reachable only by email. To the contrary, the Claimant specifically stated she was “at work” and should be called and provided a telephone number.”

[27] This is a submission. This portion of paragraph 14 is struck out.

[28] Paragraph 16 which states:

“This email is inherently suspicious as only five (5) hours early the Claimant specifically stated that she was “at work” (not “on vacation”), specifically requested that she be contacted by telephone regarding the wiring of funds, gave specific information on how she could be contacted at work by telephone giving specific instructions to the Defendant that she would be interrupted at work. Suspicion should have arisen immediately in the mind of anyone reading this fake email since the Claimant in her valid email sent just five (5) hours earlier, made no mention about “being on vacation” and being unreachable except by email”

[29] In addition to repeating facts already pleaded, this paragraph contains inferences and submissions. This entire paragraph is struck out.

[30] Paragraph 20 which states:

“This email is also inherently suspicious on its face. The Claimant has just gone to considerable lengths to verify her banking information, the routing number and been confirmed twice, and there is no indication why the information providing is “misleading”. It did not say that the author had changed her mind and wanted the money sent to another bank in another state. And it does not explain why the author is asking permission to send the Defendant the “correct” information. The author of this inherently suspicious and obviously fake email again signed the document misspelling the Claimant’s name and sent it from an email address different from the Claimant’s usual email address. The Claimant obviously did not send this email.”

[31] This is a mixture of opinions and submissions. This entire paragraph is struck out.

Consideration of the statement of claim as a whole:

[32] I now proceed to consider the remainder of the statement of claim.

[33] In my view, the crux of the Claimant’s case is stated in paragraphs 29 and 30 of the statement of claim. At paragraph 29, the Claimant alleges that it was an implied term of the Defendant’s engagement that the Defendant would exercise all reasonable care and skill acting for the Claimant. It is also pleaded in the alternative that the Defendant owed a coterminous common law duty of care.

[34] The nub of the Claimant's case as I understand it from the pleadings is that the Claimant is alleging breach of an implied term of the engagement of the Defendant. The term alleged to have been breached is that the Defendant would exercise all reasonable care and skill acting for the Claimant. The Claimant's alternative case is in negligence. She alleges that a duty was owed to the Claimant by virtue of the common law and that duty was breached resulting in damage. That is the Claimant's case. There is nothing ambiguous about it in my respectful view.

[35] The particulars of the general allegations of breach of contract and alternatively negligence are found at paragraph 30 sub paragraphs 1 to 6 under the heading "Particulars of Negligence/ Breach of contract of the Defendant"

[36] In the six particulars listed, the Claimant sets out what she alleges the Defendant failed to do. In summary, the Claimant says the Defendant failed to confirm the wire transfer instructions he received and that he failed to follow her express instructions.

[37] In respect of the sums deducted from the judgment obtained and fees, the Claimant's case is that the retention of these sums were conditional on the Claimant receiving the remainder. She alleges that she has not and so the Defendant is not entitled to keep the contingency fees and the fees he charged. That is her case.

[38] If the claimant is unsure about any aspect of the case, he has available to him the option to request further information under Part 34 CPR.

[39] All that the Court is concerned with at this stage is whether the claim makes an allegation of each element of the cause of action pleaded. In respect of the claim in contract the statement of claim discloses the elements of a claim for breach of contract. The Claimant has pleaded a contract between the parties, an implied term of that contract, breach of the term and her consequent damage suffered. In respect of the claim in negligence, the Claimant has pleaded, a duty, a breach of the duty, causation and damage.

Grounds 4 and 5 (the first ground 5):

[40] Ground 4 is not a ground for striking out. It simply recites a fact that is alleged by the Claimant.

[41] Ground 5 is that this claim was prematurely brought there being ongoing investigations both the jurisdictions of Grenada and the United States.

[42] In my view there is no merit in this ground. The fact that there are investigations do not operate as a restriction or bar to the Claimant instituting a civil claim to recover the sums she claims is due to her by a civil claim.

Extension of time to file a defence:

[43] The Defendant has asked in the alternative that he be given permission to file a defence within 28 days of the determination of this application.

[44] On June 18, 2021 the Defendant filed an acknowledgement of service in which he indicated that he was served with the claim on June 17, 2021. Time expired for the filing of a defence on July 15, 2021. Before time expired, the Defendant filed the instant application.

[45] In **Darrel Monthrope v The Attorney General of Saint Lucia, SLUHCVP201/2021** the Court of Appeal stated that an application to strike out operates as a stay pending its determination. This claim was therefore stayed on July 12, 2021 three (3) days before time expired for the filing of a defence. The Defendant's defence is therefore not out of time.

[46] In any event, as a consequence of my order striking out portions of the statement of case, the Claimant will be directed to file and serve an amended statement of claim.

Time will run afresh for the filing of a defence to the claim. This part of the application does not therefore arise for consideration.

DISPOSITION:

[47] The second sentence of paragraph 9, Paragraph 10 second sentence the words“.... was inherently suspicious as it , and even more suspiciously”, Paragraph 14 the portion that reads “It is important to note that the Claimant in this email said nothing about being on vacation or being only reachable only by email. To the contrary, the Claimant specifically stated she was “at work” and should be called and provided a telephone number.”, the entirety of Paragraphs 16 and 20 are all struck out.

[48] I hold that the statement of case, in the absence of the portions and paragraphs I have struck out, discloses reasonable grounds for bringing an action.

[49] I also hold that the statement of claim does provide adequate particulars of the general nature of the claim against the Defendant and the facts on which this claim is made and is not in breach of Part 8 Rule 8.7 CPR.

COSTS:

[50] Costs follows the event. The Defendant has not been successful in striking out the entirety of statement of claim but portions have been struck out. Nevertheless, the application fails in the main. For this reason, the Defendant must pay the Claimant’s costs of this application.

[51] Three portions of paragraphs and two entire paragraphs have been struck out. The statement of claim contained 36 paragraphs. Also I have taken into account that ground 1 was not pursued and grounds 4 and 5 were not proper grounds, only 3 of the 7 grounds of the application were proper grounds.

[52] As costs remains in the discretion of the Court, having regard to the partial success of the application to strike out I am minded to reduce the costs of the Claimants. I am of the view that a fair award would be 60% of her costs.

[53] At the hearing I invited both parties to address on the issue of costs. Counsel for the Claimant submitted that costs be assessed for lead counsel 4 hours and Junior Counsel 10 hours. The Defendant submitted that costs ought to be minimal and suggested \$350.00. I am of the view that the Claimant's estimation is too high and the Defendant's application is too low. This is having considered the factors set out in Rule 65.2 (3) CPR.

[54] I am of the view that a fair amount of hours to be allowed for lead counsel for this application is 2 hours and junior counsel 4 hours.

[55] Lead Counsel indicated that his rate is \$1,350.00 per hour and Junior Counsel indicated that her rate is \$800.00 per hour. This totals \$5,900.00

[56] 60% of the costs as awarded totals the sum of \$3,540.00.

ORDER:

[57] In the circumstances, it is hereby ordered that:

1. The Defendant's application to strike out the entirety of the statement of claim is refused;
2. The second sentence of paragraph 9, Paragraph 10 second sentence the words "... was inherently suspicious as it , and even more suspiciously", Paragraph 14 the portion that reads "It is important to note that the Claimant in this email said nothing about being on vacation or being only reachable only by email. To the contrary, the Claimant specifically stated she was "at work" and should be called

and provided a telephone number.”, the entirety of Paragraphs 16 and 20 are all struck out;

3. The Claimant shall file and serve an amended statement of claim reflecting term (2) above on or before January 17, 2022;
4. The claim is to thereafter proceed as provided for in the rules; and
5. The Defendant shall pay the Claimant’s costs of this application assessed in the sum of \$3,540.00.

**Alvin Shiva Pariagsingh
Master (Ag.)**

By the Court,

Registrar