

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

GRENADA
Claim No: GDAHCV2020/0092
BETWEEN:

RBTT BANK (GRENADA) LIMITED

Claimant

and

RICKY ANDERSON MC PHIE

Defendant

Appearances:

Shireen J. Wilkinson for the Claimant
Deborah Mitchell for the Defendant

2020: August 31 – Written Submissions
September 02 – Written Submissions
2021: June 08 – Decision

DECISION

(Defendant's application to strike out)

[1] **PARIAGSINGH, M (Ag.):** The Defendant has applied to strike out the Claimant's claim against him. The main ground of the Defendant's application is that the claim ought to be commenced by a Fixed Date Claim Form and not an ordinary Claim Form.

[2] The procedural history is relevant in determining this application. It is as follows:

- a. The Claimant filed a Claim Form and Statement of Claim on March 03, 2020.
The relief claimed is the fixed sum of \$76,094.25
- b. The Defendant filed an Acknowledgement of Service on March 11, 2020.
- c. The Defendant filed a Defence and Counterclaim on March 25, 2020 and also made a request for information on the same day.

- d. A response to the request for information was issued on April 21, 2020
- e. On April 29, 2020 the Defendant made a request for further information
- f. On May 18, 2020 the Claimant filed its Reply and Defence to the Counterclaim and also filed a response to the request for further information
- g. On June 18, 2020 after pleadings were closed and having issued a counterclaim, the Defendant then applied to strike out the claim.

[3] The power of the Court to strike out a party's statement of case and the circumstances in which that power ought to be exercised is now well settled. One of the more recent statements of the law is set out in the judgment of Thom JA in **Agnes Danzie et al V Cecil Anthony SLUHCVP2015/0009** at paragraph 13 where it is stated:

"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 *Salfray Hussain v Birmingham City Council and Others* 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."

[4] The ground of the application centers on whether the claim is a mortgage claim within the meaning of CPR Part 66 Rule (1)(1) and (2). The Defendant has also placed heavy reliance on the requirement to file affidavit evidence in support, in mortgage claims.

[5] The Claimant's case is that the Defendant mortgaged the subject property to secure a loan advanced to him. He defaulted on this loan and the security was sold under the statutory power of sale contained in the mortgage. Having applied the proceeds of sale

- to the debt, there is a balance due and owing to the Claimant. The Claimant's claim is to recover this sum. The Claimant claims a fixed sum and no other relief, except costs and interest.
- [6] It is important to note for the purpose of this application, a determination of whether the remainder of the debt is a mortgage claim or a simple claim for monies due and owing is not affected by limitation. Either which way the issue is resolved, the debt being a mortgage claim or being a monies due and owing claim, the Claimant is within limitation.
- [7] The Court accepts the Defendant's submission that the debt claimed is for all intent and purposes is a mortgage claim. This is clear from the authority of **Bristol & West Plc v Robert Wayne Bartlett & Anor [2002] 4 All ER 544** as applied by Thom J (as she then was) in **First Caribbean International Limited v TC Enterprises Limited & Ord, St Vincent & the Grenadines, High Court Claim No. 422 of 2009**.
- [8] In both **Bristol & West Plc** and **First Caribbean International Limited (Supra)** however, a determination that the debt was a mortgage debt was directly relevant to the Claimant's ability to pursue the claim because of the different limitation periods for both classes of cases. This is a material distinguishable feature of the facts of this claim.
- [9] The Defendant has submitted that the claim ought to be struck out in its entirety as mortgage claims must not only be commenced by a Fixed Date Claim Form but it must also be supported by affidavit evidence. Reference is made to CPR Part 66.4.
- [10] The question which arises is how is the Court to treat with the Defendant's conduct of these proceedings and its impact on this application.
- [11] Following the Defendant's argument, the claim is a nullity and as such it should be struck out. There is no doubt that such a point ought to be taken at the earliest possible opportunity. Support of this is to be found in CPR Rule 9.7 and CPR Rule 9.7A. These rules provide routes for jurisdictional issues including an application for the court not to

exercise jurisdiction to be made after an acknowledgement is filed and before a defence is filed. This rule is however not inflexible and does not mandate that an application to invite the court not to exercise jurisdiction has to be made before a defence is filed.

[12] Similarly, the rules does not provide a specific time for an application to strike out to be made. The obvious need for such an application to be made is in clear furtherance of the overriding objective. The overriding objective does not favour being served with a claim, making applications for further information, filing a defence, making a counterclaim and then applying to strike out the claim on the basis that the claim is a nullity because it was commenced by the wrong procedure. To submit to such an interpretation will be counter to the overriding objective.

[13] The Defendant has not denied the debt. The Defendant has stated in his defence that he is "...unable to admit or deny ...paragraph 15... since he does not know and puts the Defendant to strict proof of the contents thereof". Further, at paragraph 3 of this defence the Defendant raises a defence of set off of "his liability". This pleading at its barest minimum accepts some liability for the debt claimed.

[14] The Defendant has also filed a counterclaim. Whilst it is trite law that a counterclaim can survive a claim the practical effect of the counterclaim surviving the claim in this case has to be considered. If the Court strikes out the claim a defended counterclaim would be left. The counterclaim would become the substantive claim and very same mortgage debt and the sale by the Claimant of the security would still remain live issues before the Court.

[15] The issue of limitation not being a live issue for the Claimant if the claim was to be struck out, simply means that it would be open to the Claimant to commence another claim under CPR Part 66. This would undoubtedly lead to more expense and the allocation of more judicial resources. It may also lead to a delay, and, issues of consolidation may arise.

[16] When considered in the round and in particular, the lateness of the application to strike out, the conduct of the defendant, the non-denial of the debt owed to the Claimant and limitation not being an issue, the Court can see no prejudice in allowing this claim to continue as filed.

[17] Whilst the Court by no means encourages the non-compliance with the rules a practical approach to the substance of the case must be taken. In **Mathew v Dr. Ralph Gonzales, St Vincent and the Grenadines, Civil Appeal No. 9 of 2018**, Pereira CJ with whom Thom JA agreed coined this practical approach by looking at what is the true nature of the substance of the claim. In that case, a defamation case commenced by a Fixed Date Claim Form was treated as if it has been commenced by an ordinary Claim Form because that is what it was in substance.

[18] In the instant claim, the substance of the claim against the Defendant is a claim for monies due and owing. Whilst the categorization of the debt being a mortgage claim is relevant to the issues of limitation, as stated before, that issue simply does not arise here.

[19] Further, the Defendant's raising the issue of set off together with the issue of the property being sold at an undervalue, gives rise to factual disputes. If the claim was commenced by a Fixed Date Claim Form and an affidavit, directions would, more likely than not, have had to be given for the filing of statements of case having regard to the factual disputes on the Defendant's defence and counterclaim, which would have not been able to be resolved on affidavits.

[20] Apart from the above, I would have, in any event, been prepared to exercise my power under CPR Part 26.9 and simply directed that this claim be treated as though it were commenced by a Fixed Date Claim Form and permitted the Claimant the opportunity to file an affidavit, had I deemed that necessary. Surely, such an exercise of discretion would have no doubt saved time and costs and be consistent with the overriding objective.

[21] In all the circumstances, the application to strike out is dismissed.

[22] I will hear the parties on costs.

Alvin Shiva Pariagsingh
Master (Ag.)

By the Court,

Registrar