

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim Numbers: **BVIHCV2015/0143**

Between

Chiverton Construction Company Limited

Claimant

and

**(1) James Turnbull
(2) Marcus Welsh
(3) ONB Ridge Villas One LLC**

Defendants

Before: MASTER Ricardo Sandcroft [Ag]

Appearances: Ms. Nellien P. Bute of Counsel for the Claimant
Ms. Dancia Penn Queen's Counsel for the Defendants

**2020: January, 29th
2020: March, 4**

JUDGMENT

Introduction

[1] **R. SANDCROFT, M. [Ag]:** This is an application by the Defendants for the strike out and dismissal of the Claimant's case on the basis that the Claimant's case is an abuse of process. The application is strenuously resisted by the Claimant.

Background/Chronology

[2] The Claim Form and Statement of Claim were served on the Defendants on the 22nd day of November, 2015. The Defendants filed an Acknowledgement of Service on the 26th day of November, 2015, and a Defence and Counterclaim were filed on behalf of the 1st, 3rd and 4th Defendants on the 7th day of December, 2015.

[3] On the 24th day of December, 2015 an Amended Defence and Counterclaim were filed on behalf of the 1st, 3rd and 4th Defendants. The Claimant filed an Amended Claim Form and an Amended Statement of Claim pursuant to an Order of Master Agnes Actie, as she then was, on the 11th day of June, 2019 and after a full hearing on the 10th day of April, 2019.

[4] On the 15th day of July, 2019, the 1st, 3rd and 4th Defendants filed an Amended Defence and Counterclaim. It is to be noted that the foregoing was pursuant to the said Order of Master Actie.

Defendant's/Applicants' Submissions

[5] Attorney-at-Law for the Defendants, Miss Dancia Penn Q.C. argued that the manner in which the Claimant elected to and continues to deal with his Claim against the Defendants amounts to an abuse of the Court's process, and is a contravention of the Civil Procedure Rules, 2000 and the processes of the Court and the legal system as a whole. The manner in which the Claimant has been dealing with its case contravenes the letter and the spirit of the Overriding Objective of the Civil Procedure Rules. In particular, the manner in which the Claimant has dealt with the case at bar contravenes:

- (a) CPR 1.1 (1) which requires the Court to deal with cases justly;

- (b) CPR 1.1 (2) which prescribes what dealing with cases justly means;

- (c) the conduct of the Claimant has been such since it filed its Claim on the 28th day of May, 2015, that several of the factors prescribed in CPR 1.1 (2) have been and continue to be contravened. In particular, CPR 1.1 (b) which is saving expense; CPR 1.1 (d) which is ensuring that the case is dealt with in an expeditious manner, and CPR 1.1 (e) which requires the Court to ensure the allotment of a case for an appropriate share of the Court's resources, whilst taking into account the need to allot resources to other cases.

[6] Ms. Penn Q. C. also submitted that the Claimant had, by its sustained conduct, failed in its duty to the Court under CPR 1.3 to assist the Court to further the overriding objective. She also submitted that in the circumstances as they have evolved, and the Claimant's intractable approach to and handling of its Claim, there is no end in sight to this expensive and protracted litigation for the 1st, 3rd and 4th Defendants, save for the intervention of the Honourable Court and the grant of the Orders sought in this strike out application. According to Ms. Penn Q.C., the Claimant has resisted

and ignored the repeated admonitions of several different Judges and a senior mediator to seek to resolve the matter. All of this in the face of continued efforts of the 1st, 3rd and 4th Defendants through their own desire and volition and additional adherence to the guidance of the Court to settle the matter.

- [7] Ms. Penn Q.C. further submitted inter alia that the 1st and 4th Defendants reside in the United States and continue to incur substantial and other legal expenses to this unwarranted and expensive litigation. It was also submitted, that all of the Defendants had indicated their intention to pay the Claimant the sum originally claimed and some further amounts, and to withdraw their Counterclaim and Amended Counterclaim. It was further stated that the Claimant's response was to terminate the services of his lawyers and retain new counsel, causing the matter to continue at more time and added costs.

Claimant's/Respondent's Submissions

- [8] Ms. N. Bute for the Claimant, submitted that the Claimant, in refusing to accept an unreasonable offer by the Defendants after several discussions or his right to Counsel do not amount to an abuse of the Court's process and so warranting its Statement of case to be struck out. Ms. Bute also submits that there is not a shred of evidence to suggest that there was an abuse of the Court's process or any inordinate or undue delay as claimed by the Defendants.
- [9] Ms. Bute further submits that the overriding objective of the rules of the CPR (as amended 2000) is to ensure that cases are dealt with justly, ensuring that justice is done by all the parties involved, Ms. Bute states that if the Claim is struck out at this stage, the Claimant would be the one to be prejudiced, the Claimant would have been deprived of the right to a hearing on the merits of the case before the Court. The Claimant therefore submitted that the present Application be dismissed to further the overriding objective of the CPR, that costs be granted to the Claimant and that further directions be given for the matter to proceed to trial.

Issue

- [10] Whether this Court should strike out the claim and dismiss the claim on the basis of an abuse of process.

Court Analysis

[11] The Civil Procedure Rules rule 26.3 (1) provides:

“26.3(1) In addition to any other power under these Rules the court may strike out a statement of case or a part thereof if it appears to the court that –

(a) ...

(b) ...

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

(d) ...

[12] On rule 26.3(1) in **Baldwin Spencer v. The Attorney General of Antigua and Barbuda et al**¹ the Court of Appeal explained that the approach is not a factual investigation on the truth of the pleadings, but whether taken at its highest there is disclosed a cause of action. Byron JA said:

“This summary procedure should only be used in clear obvious cases, which it can be seen on the face of it, that the claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court. The court is not concerned at this stage with the truth or otherwise of the pleadings.”

[13] In the early days of **CPR 1998** in the United Kingdom, in **McPhilemy v. Times Newspapers Ltd.**

²Lord Woolf MR gave guidance upon the statements of case (and the Court dares to add similarly where an affidavit is used to support a fixed date claim instead of a statement of claim) under the CPR 1998 regime when he said:

¹ Antigua & Barbuda Civil Appeal No.20A of 1997

² [1999] 3 AER 775, p.792-793.

“The need for extensive pleading including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of the party’s witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader.”

[14] The court’s power to strike out statements of case is exercisable under its inherent jurisdiction and is also governed by rules of court. In **Biguzzi v Rank Leisure Plc** [1999] 4 All ER 934, the English Court of Appeal noted that the English Rules of Civil Procedure, 1999, confer a very wide discretion upon judges to strike out statements of case. According to Lord Woolfe MR:

“The fact that a judge has the power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of the case. The advantage of the CPR over the previous rules is that the Court’s powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out.”

However, the Court has frowned upon statements of claim or defence or parts therein that are frivolous and vexatious, that are likely to obstruct the just disposal of the proceedings.

[15] In **Blackstone’s Civil Practice, 2010**, the learned authors in commenting on Rule 3.4(2) (a) of the English Civil Procedure Rules, which is the equivalent of our CPR Rule 26.3(1) (c), state at paragraph 33.7 that:

‘Applications... may be made on the basis that the statement of case under attack fails on its face to disclose a sustainable claim or defence. Traditionally, this has been regarded as restricted to cases which are bad in law, or which fail to plead a complete claim or defence...’

[16] In discussing the court's power to strike out pleadings, the learned authors of Halsbury's, Laws of England, 4~ Edition, at paragraphs 430-435, stated, inter alia, that:

"... the powers are permissive...and they confer a discretionary jurisdiction which the court will exercise in light of all the circumstances concerning the offending pleading. . . Where a pleading discloses no reasonable cause of action... it would be ordered struck out or amended, if it is capable of amendment. . . No evidence including affidavit evidence is admissible on an application on this ground and since it is only the pleading itself which is being examined, the court is required to assume that the facts pleaded are true and undisputed. . . However, summary procedure... will only be applied to cases which are plain and obvious, where the case is clear beyond doubt, where the cause of action or defence is on the face of it obviously unsustainable, or where the case is unarguable. . Nor will a pleading be struck out where it raises an arguable, difficult or important point of law."

[17] In **Johnson v Gore Wood & Co (a firm)**, [2002] 2 AC 149, Lord Bingham of Cornhill indicated that the approach to be adopted in assessing abuse of process should be a broad, merits-based judgment which takes into account the public and private interests involved, as well as the facts of the case. He also stated [that it is not necessary before abuse is found, to identify any additional element, such as a collateral attack on a previous decision, or dishonesty, and noted that the presence of these elements will make the later proceedings more 'obviously abusive'.

[18] Lord Kilbrandon, in giving the advice of the Board in **Yat Tung Investment Co. Ltd. v Dao Heng Bank** [1975] AC 581 at 590, noted that the court has a duty not to deny a litigant his or her right to bring a claim before the court '**without scrupulous examination of all the circumstances**'.

[19] Striking out of a claim, should always be a matter of last resort and thus, should only be ordered by a court in plain and obvious cases: **Three Rivers District Council v Bank of England** (No. 3) – [2003] 2 AC 1, esp. at [96] – [97].

[20] In determining whether the claimant's statement of case constitutes an abuse of process, it ought to first be recognized that rule 26.3 (1) (b) gives this court the power to strike out a statement of case which is an abuse of the court's process. As stated in **Hunter v Chief Constable of the West Midlands Police, by Ld. Diplock** – [1982] AC 529, at 536,

this is a power, 'which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.'

[21] This court cannot though, at this stage of these proceedings, strike out the claimant's claim as being an abuse of process. That is so because, as stated by the authors, in the text – **Blackstone's Civil Practice, 2014**, at paragraph 33.12 – **'Applications to strike out for abuse of process should be made shortly after service.'**

[22] That was not what was done by the defendants in response to this claim, during the early stages thereof. Instead, they have applied to strike out on the ground that the claim constitutes an abuse of process, during the latter stage thereof. This matter has already proceeded through a pre-trial review and whereas the defendants' application, now under consideration by this court, was filed on December 13, 2019, the defendants filed a defence and counterclaim from as long ago, as December 7, 2015.

[23] In considering the issue of whether the present claim is an abuse of process, I am guided by the authorities which show that a litigant ought not to be denied his or her right to bring a claim before the court "without scrupulous examination of all the circumstances".

[24] Once the defendant has filed a defence and defended on the merits, he is taken as having acquiesced and it will then be too late to successfully pursue the defendant's contention that the claim is an abuse of process. In that regard, see: **Johnson v Gore Wood and Co.** – [2002] 2 AC 1 and **Coca Cola Co. v Ketteridge** – [2003] EWHC 2488 (Ch). In the circumstances, the defendants' application to strike out this claim on the ground of abuse of process, must and does fail.

[25] Wooding CJ in **Baptiste v. Supersad** 1967 12 WIR 140 p. 144, which was cited in the Montserrat case of **Kevin Weste et al v. Shamrock Industries Ltd.** by Redhead J stated:

“The law is not a game nor is it an arena. It is the function and duty of a judge to see that justice is done as far as may be according to the parties.”

Redhead J also said in that case that the attainment of true justice is **“over the highway of reality and not through the alley of technicalities.”**

[26] The CCJ in 2006, Saunders J in CCJ CD 2 of 2006 **G Watson v. Fernandes** at paragraph 39 said:

“Courts exist to do justice between litigants, through the balance of interest, an individual litigant against the interest of litigants as a whole. Justice is not served by depriving parties of the ability to have their cases decided on the merit because of a technical procedure breach committed by their attorney. With the greatest of respect to the court below we disagree that anything in the rules suggest that there is a time limit on the court’s ability to excuse non-compliance with the rules or permit to be remedied if the interest of justice so required. The Court retains that jurisdiction at all times.”

[27] In submissions that were made before me, orally, upon this claimant’s hearing of the defendants’ application to strike out this claim, defence counsel – Ms. Dancia Penn Q. C., contended that this claim should be struck out on the ground that the claim was issued after the expiration of the applicable limitation period for breach of contract claims, that being six (6) years.

[28] Even if that be so and this has not been determined by me, for present purposes, it will still not assist the defendants in respect of this effort to succeed on their application which is now under consideration. That is so because, whilst a claim that is issued after a limitation period has expired may be struck out on the ground that same constitutes an abuse of process, the same cannot be struck out on the ground that there exists no reasonable cause of action. In that regard, see: **Ronex Properties v John Laing Construction Ltd.** – [1983] QB 398.

[29] For reasons earlier given, the defendants are taken to have acquiesced to the pursuit of this claim even if it is that same was filed after the limitation period had expired. In order for that not to be taken as so, the defendants would have, at the very least, had to have raised that contention, as part and parcel of the defendants' defence. That though, is not something which the defendants have done. Since a limitation period defence is only a procedural one, it follows logically, that it can be waived by a defendant.

[30] Accordingly, by having failed to raise same earlier, prior to having filed their defence, or as part and parcel of their defence, the defendants cannot, properly, at this stage, successfully pursue that contention.

Discussion & Conclusion

[31] The Defendants are contending that the present claim is an abuse of the process of the court and that there are no reasonable grounds for bringing the claim. The court is therefore being asked to examine the conduct of the Claimant in filing the instant claim. The Claimant on the other hand is asking the court to consider that the issues raised in the claim have not been litigated.

[32] In considering the issue of whether the present claim is an abuse of process, I am guided by the authorities which show that a litigant ought not to be denied his or her right to bring a claim before the court "without scrupulous examination of all the circumstances".

[33] It is well established that striking out on the ground of abuse of process is a discretionary power, and that material consideration in exercising the discretion is the conduct of the parties so far. Ms. Penn Q.C. and the defendants may be of the view that to strike out the claimant's claim would be a

fair and just way to dispose of the claim, without this matter proceeding to trial. It would only though, be fair and just to do so, if this is a plain and obvious case, in respect of which, the claimant's claim should be struck out. However, I disagree with Ms. Penn Q.C.

[34] In conclusion, it is therefore not appropriate for present purposes, for this court to give any consideration to either the defendants' defence, or their counterclaim, or the respective parties' witness statements, for the purpose of determining whether the claimant's statement of case discloses any reasonable grounds for bringing the claim. It is either that the claimant's statement of case discloses reasonable grounds for bringing the claim, or it does not. The answer as to whether the same does so or not, must be found from a careful consideration of only that which is, to use a descriptive phrase, 'within the four (4) corners of the claimant's statement of case.'

[35] I wish to reiterate for emphasis at this juncture that where a statement discloses no reasonable grounds for bringing or defending it, it will be ordered struck out or amended, if it is capable of amendment. Rule 26.3 (1) (c) however, will only be applied to cases which are "plain and obvious, where the case is clear beyond doubt, where the cause of action or defence is on the face of it obviously unsustainable, or where the case is unarguable".

[36] In the final analysis, it is apparent to this court, that the Claimant's statement of case does disclose reasonable grounds for bringing this claim against the 1st, 3rd and 4th defendants. I have borne in mind that the Court should only exercise its power to strike out in "plain and obvious" cases. This power is to be exercised with caution, as striking out will have the effect of depriving a litigant of the opportunity to have his claim tried by the court: **Kwa Ban Cheong**, citing **North West Water Ltd v Binnie & Partners** [1990] 3 All ER 547 at 553. I am fully cognisant that the role of the Court at this stage is not to carry out a minute and protracted examination of the documents and the facts of the case: see **Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others** [1997] 3 SLR(R) 649 at [18] and **The "Osprey"** [1999] 3 SLR(R) 1099 at [6]. Otherwise, the Court hearing the striking out application would effectively be usurping the proper function of the trial court, and conducting a trial of the case in chambers on affidavits only, without discovery and without evidence tested by cross-examination in the ordinary way: see **Ko Teck Siang and another v Low Fong Mei and another and other actions** [1992] 1 SLR(R) 22 at [15], citing **Wenlock v Moloney**

[1965] 2 All ER 871 at 874. Instead, the correct question for the Court to ask is whether the commencement of the present suit constitutes a plain and obvious case of an abuse of the process of the Court.

[37] Additionally, I have considered, as Bingham and Millett LL stated in the case of **Johnson v Gore Wood**, that a court must hesitate, think deeply and carefully before turning away a litigant who has not had his claim heard on the merits. I therefore accept that striking out is a draconian measure which a court should be reluctant to take and should only take in the clearest of cases as the consequence is that a party who has had his claim struck out is barred from proceeding and I find that the Claimant's statement of case discloses some cause of action and raises some questions fit to be decided by the court and it therefore ought not to be struck out.

[38] I have also borne in mind that while the claim as filed are only allegations at this stage and could be completely cleared away at a trial, there is the need for a full hearing on the merits so it would be unwise to shut the Claimant out at this stage.

[39] The courts exist to adjudicate and determine disputes between parties and therefore litigants ought not to be denied the opportunity of having their issues decided on their merits by the court. In light of the fact that there was no trial in the first claim, I am of the view that it would be a draconian step to strike out the claim as being an abuse of process.

[40] In view of the foregoing I find that it would be unjust in all the circumstances to strike out the claim as being an abuse of the process of the court and on grounds that it discloses no reasonable cause of action.

[41] Having looked at the facts and circumstances of this case and examined the issues and allegations before the court in the claim, and having given careful consideration to the submissions of both Counsel, I will adopt the approach of the Court of Appeal in **Rudd v Crowne Fire Extinguishers**

Services, SCCA 48/89, unreported, delivered December 20, 1989, where Downer JA, while making reference to the case of **Dyson v The Attorney General**, stated, inter alia, that:

“Even if the case is not a strong one, it merits an examination of the law and facts...”

[42] Finally, I wish to thank learned Counsel for their submissions in this matter.

[43] The defendants’ application to strike out the plaintiff’s statement of case is not granted and these are the orders that follow:

[44] **Orders**

- (i) The defendants’ application to strike out the Claimant’s statement of case is refused and as such, the Claimant’s statement of case/Amended statement of claim stands.
- ii) The costs of the defendants’ application to strike out are awarded to the Claimant and such costs shall be taxed, if not sooner agreed.
- iii) The Claimant shall file and serve this order.

**Ricardo Sandcroft
Master [Ag]**

By the Court

Registrar