

IN THE EASTERN CARIBBEAN SUPREME COURT

COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. DOMHCV 2017/0041

BETWEEN:

DOMINICA AGRICULTURAL AND
INDUSTRIAL DEVELOPMENT BANK

Claimant

-AND-

[1] JEAMIE VIER LOCKART
[2] NOLA PAUL-LOCKHART

Defendants (Respondents)

-AND-

[3] STEPHEN ISIDORE,

(TRADING AS ISIDORE AND ASSOCIATES)

Defendant to the Counterclaim (Applicant)

Appearances:

Miss Saudia Cyrus for the Claimant
Mrs Heather Felix Evans for the Applicant
Mr David Bruney for the Respondents

2017: September
2018: April 17

RULING

[1] **Stephenson J.:** "Statements of case must be concise. They must plead only material facts, meaning those necessary for the purpose of formulating a cause of action or defence, and not background facts or evidence. Still less should they contain arguments, reasons or rhetoric. These basic rules were

developed long ago and have stood the test of time because they serve the vital purpose of identifying the matters which each party will need to prove by evidence at trial.”¹

- [2] This is an application filed on behalf of the Defendant to the Counterclaim ('The Applicant') for the Amended Counterclaim filed and served by the Defendants (The Respondents) to be struck out as being essentially non compliant with the provisions of The Civil Procedure Rules 2000 ('CPR 2000').
- [3] In February 2017 a Mortgage claim was filed against the Respondents by the Dominica Agricultural and Industry Development Bank. ('AID Bank'). On the 14th March 2017 the respondents filed a defence and counterclaim joining the Applicant and on the 16th May 2017 they filed an amended Defence and Counterclaim.
- [4] The Applicant contended that the Amended Defence and Counterclaim is not compliant with the requirements of CPR 2000 in a number of respects.
- [5] An application with affidavit in support was filed by the Applicant and submissions were filed by the Respondents. Counsel for the Applicant informed the court that she would rely on the averments of the affidavit in support of her application. The Respondents on the other hand did not file an affidavit in responses to the application; they however filed written submissions in opposition to the application.
- [6] Part 18.2 (2) of CPR 2000 states

“(2) Particulars of an ancillary claim must be contained in or served with the ancillary claim form in Form 9.”
- [7] The Applicant contended that the Respondents failed to file their claim on an ancillary form or on a form 9 in keeping with Rule 18.2(2) which they contended is imperative where the counterclaim joins anew party to the suit as is in the case at bar.
- [8] The Respondents contended that there is no breach of Part 18.2(2) in that their failure to file a form 9 with their counterclaim is not in breach of part 18.2(2). The Respondents submitted that when Part 18 is read in its entirety contemplates and makes provision for the Counterclaim to independent within the

¹ Vincent Aziz Tchenguiz et al –v- Grant Thornton UK LLP [2015] EWHC 405 (Comm.) per Mr Justice Leggatt at paragraph 1

species of an ancillary claim which does not provide for the counterclaim at inception to be commenced with the filing of form 9.

[9] Learned Counsel Mr David Bruney on behalf of the Respondents relied on the provision of Par 18.4 (1) to say that an irrepressible implication of independence. Mr Bruney further submitted that there a dichotomy drawn between an ancillary claim requiring the filing of a form 9 on commencement and a counterclaim filed with a defence.²

[10] The Respondents further submitted that 18.4 (1) (a) and 18.4 (1) (b) are unlike each other and create separate documentation and directs that the counterclaim should only be filed with the defence which necessarily negates and makes redundant the requirement for the filing of form 9 especially given the documents filed with the Defence and Counterclaim.³

[11] The Respondents submitted that having filed its Counterclaim with the Defence Form (Form 5) and a Form Acknowledgment of Service (Form 4) they have satisfied the requirements for notification and conduct requirements which are replicated in Form 9 and in the circumstances.

[12] The Respondents sought to rely on Part 18.4 (7) which they contended draws a dichotomy between ancillary claims which are counterclaims and ancillary claims which are of “any other” species of claims. Learned Counsel David Bruney further submitted that Part 18.4 (7) states:

“The Ancillary Claim is made in –

- a) The case of a counterclaim – when it is filed; and
- b) Any other case – when the court issues the ancillary claim form.”

Learned Counsel submitted that Part 18.4 (7) recognised a counterclaim an ancillary claim which has an independent status. That there is no specification for a counterclaim to be accompanied by a claim form as is the case where the ancillary claim is “any other case”.

[13] Mr David Bruney made further reference to Part 18.11(1) which stated

² Paragraph 6 of Respondents’ submissions

³ ibid

“A person on whom an ancillary claim form (other than a counterclaim) is served becomes a party to the proceedings if that person is not already a party.”

and submitted that the effect of Part 18.11 (1) and the interpretation of the phrase “other than a counterclaim” is to delineate and absolve the requirements for the ancillary claim form where a counterclaim is at issue.

[14] The Respondents also contended that if an ancillary claim which is in the form of a counterclaim is to be filed in the form of a form 9 then it was submitted that CPR would have made the express provision that the counterclaim should be filed in the form of a form 9.

[15] Learned Counsel Mr David Bruney further submitted that to read and interpret Part 18.2 in isolation would suppress the meaning and intent of the framers of CPR and give the Defendant to the Counterclaim the benefit of a skewed reading and interpretation of 18.2 (2)

[16] Learned Counsel also submitted that to file a form 9 with the Counterclaim would create a duplication of the Counterclaim which would in the circumstances would be burdensome and cumbersome in view of the fact that the counterclaim along with forms 5 and 4 have already been served and these forms do in fact serve to reflect form 9.

[17] A defendant to an existing claim can bring a claim against a third party. Part 18 of CR is usually invoked to pass the defendants liability on to a third party. It is a more convenient procedure to bring an Ancillary claim.

[18] CPR 18 (1) defines an Ancillary claim as “any claim other than a claim by a claimant against any person whether or not already a party, for contribution or indemnity or some other remedy.

[19] The issue to be determined by the court can be simply put. Is it necessary in the circumstances of the case at bar for the Respondents to file a form 9 as is required. If so whether their failure is fatal their purported claim against the Applicant?

[20] The Court of Appeal of the Eastern Caribbean Supreme Court in the **Indra Hariprashad Charles –v Bank of Nova Scotia**⁴ dealt with the issue of whether Defendant who files counterclaim with defence is also required to file ancillary claim form in Form 9 of CPR 2000. In that case the Defendant brought a counterclaim against the Claimant in her amended defence. The Claimant in that matter brought an application to have the counterclaim struck out *inter alia* on the ground that it did not comply with the provision of Part 8 of CPR since it failed to set out the Claimant's case.

[21] At first instance, the learned master found that the Appellant (the Defendant) had not complied with the requirements of Part 8, in that they failed to comply with rules 18.2(2) and 18.2(3) of CPR 2000 and accordingly struck out the counterclaim. The Learned Master found that although a Defendant may include a counterclaim at the end of a defence, since the counterclaim is an ancillary claim, it only commences with the filing of the ancillary claim form in Form 9 of CPR 2000.

[22] The Court of appeal allowed the appeal and set aside the Master's order and restored the Counter claim. It was held that a counterclaim is an ancillary claim and that generally, an ancillary claim must be contained in or served with the ancillary claim form in Form 9 of CPR 2000. However, a Defendant may file an ancillary claim by way of a counterclaim with the defence. When this is done, the ancillary claim is made when the counterclaim is filed.

[23] It was held that the Appellant's ancillary claim which was not filed in form 9 was properly before the court and that there was no need for the appellant to file an ancillary claim form in Form 9.

[24] Justice of Appeal Thom who delivered the judgment of the Court of appeal after quoting the relevant parts of Part 8 stated

“The conjoint effect of the above rules is that a counterclaim is an ancillary claim. Generally an ancillary claim must be contained in or served with an ancillary claim form in Form 9. However a defendant may file an ancillary claim by way of a counterclaim with the defence. When this is done the ancillary claim is made when the counterclaim is filed.”⁵

⁴ SLUHCVP2014/0015

⁵ Ibid at paragraph 10

[25] In view of the above pronouncement, which I adopt and apply to the case at bar I am unable to accede to the Applicant's prayer to strike the amended defence and counterclaim for failure to comply with Part 18.2(2) of CPR.

[26] I now turn to the next complaint brought by the Applicant. The Applicant contends that the Amended Counterclaim (statement of Claim) of the Respondents is in default of part 8.7 of CPR 2000. It was submitted by the Applicant that the paragraphs 24 and 28 offends this provision of CPR in that the said paragraphs contain argument and are prolix. Further that the numbering of the paragraphs in the amended statement of case is not sequential and or logical which has created an embarrassment to the Applicant in preparing his Defence, that this also affects his ability to properly prepare a defence to the ancillary claim and in the circumstances of the case is likely to obstruct the just disposal of the claim before the court.

[27] The Applicant in this case sought to persuade the court to act under the authority of Part 26 to either strike out the offending statement of case or issue an unless order that the said statements of case be amended to conform with the requirements of CPR 2000.

[28] In response Learned Counsel Mr David Bruney submitted that the paragraphs which allegedly offend and embarrass the Applicant within the Amended Counterclaim are clearly numbered and there is no ambiguity and or confusion with labelling and identifying the paragraphs which will not allow the Applicant to adequately respond. It was further contended by the Respondents that the paragraphs as identified by the Applicant do not contain arguments but that they contain facts which are critical to the Respondents' case and they specifically relate the factual conduct of the Applicant which created the conditions under which the Respondents were deprived of their lawful rights to their property.

[29] Part 8.7 of CPR 2000 deals with the Claimant's duty to set out case and states

“(1) The claimant must include in the claim form or in the statement of claim a statement of all the facts on which the claimant relies.

(2) The statement must be as short as practicable.

(3) The claim form or the statement of claim must identify any document which the claimant considers to be necessary to his or her case.”

[30] Part 26 of CPR 2000 provides for the court's power to strike out a statement of claim provides as follows:

"(1) In addition to any 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 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 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 requirement of Part 8 or 10."

[31] In the often quoted and applied case **Tawney Assets Limited v East Pine Management**⁶, Mitchell J stated that:

"The exercise of this jurisdiction deprives a party of his right to a trial and of his ability to strengthen his case through the process of disclosure, and other procedures such as requests for further information. The court must therefore be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of case is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial."

[32] These are the parameters within which a court will exercise its discretion to strike out a claim under this Part. It is a jurisdiction that is to be used sparingly and only in those plain and obvious cases.

[33] In the case of **Jacqui Quinn-Leandro and Others v Dean Jonas and Others**⁷ Rawlins CJ re-stated and adopted some of the basic principles on pleadings when he said

⁶ HCVAP 2012/007 Territory of the Virgin Islands

⁷ HCVAP 2010/018 (CA) Antigua and Barbuda

“As in civil cases, generally, the purpose of pleadings is to identify the issue or issues that will arise at trial. This is in order to avoid the opposing parties and the court taken by surprise. ... The pleadings must be precise and disclose a cause or causes of action. ...”

[34] In the Dominica Case of ***Ferdinand Frampton v Ian Pinard and Others***⁸ Justice Rawlings said

“...a person who institutes an action should plead sufficient material facts to create a cause of action. A respondent must know what the case against which he or she must defend.”

[35] It is well established law that statements of case have to be precise, specific and unambiguous so that an opposing party knows what case he or she has to meet. It is important in civil proceedings that parties to be given fair notice of the case which has to be met and to define the issues on which the court will adjudicate in order to define the matters in dispute between parties. A party must so state his case that his opponent is not taken by surprise.

[36] It is also a basic rule of pleading that every statement of case shall contain only a statement in a summary form of the material facts on which the party pleading relies. The question can be asked what constitutes material facts. It is accepted that the word “material” means necessary for the purpose of formulating a complete cause of action; a cause of action is the group of facts, or a ‘factual situation’ which, if proven, will entitle a party relying on those fact to obtain a remedy from the court against another person.

[37] So far as possible, pleadings are required to be concise under the regime of the CPR 2000 and the need for extensive pleadings has been reduced by the requirement that witness statements are exchanged: re: ***McPhilemy v Times Newspapers Ltd***⁹. In this case permission to amend was granted. An amendment should be permitted as an alternative to striking out only if there is a real prospect of establishing the amended case. **Re: Charles Church Developments PLC –v- Cronin**¹⁰

[38] When pleading it is the party’s obligation to put his or her case forward in a manner which does not involve the opposing party having to chase back and forth through the pleading and to make cross

⁸ DOMHCV2005/0149 at paragraph 62.

⁹ [1999] 3 AER 775

¹⁰ [1990] FSR 1

references to other paragraphs and parts of the pleading which can lead to confusion and lack of clarity about what the allegation is or what the case is. It is important that the statement of case or pleading properly and fairly identifies the claims being pursued in a way which can be reasonably understood or responded to by the other party. It must be borne in mind that Pleadings are intended to help the Court and the parties involved in the matter.

[39] That being said and in view of the Overriding Objective, the Respondents are seeking to make some serious allegations against the Applicant and the Applicant is entitled in this Court's view to be told simply and clearly what is the alleged case against him. I have reviewed the statement of case as presented by the Respondent and I do find them to be somewhat lengthy and awkward and this is not helped by the bad numbering.

[40] In the case at bar the Respondents are seeking to counterclaim against the bank and the added defendant (the Applicant). The claims appear to be somewhat prolix. Prolivity or setting out inconsistent claims or defences would be unlikely to result in striking out; this is an old principle of pleading which have withstood the test of time. **Re: Morgan**¹¹

[41] I do not find the Respondents statement of case to be hopeless and unmeritorious so as to be disallowed. Further I do not find the Respondents case to be in anyway fanciful. The claim as presented by the Respondents does appear to amount to a viable claim and is not beyond cure. I would therefore refuse to strike out the pleadings but permit the Respondents to amend their defence and counterclaim.

[42] I make it clear to the Respondents that they should undertake a serious review of what allegations could properly be made in their case and limit those allegations to matters which have a reasonable prospect of being established at the trial of this matter.

[43] In reaching my conclusion in the application at bar, I am also guided by the judgment of Rawlins J in **Robert Conrich v Ann Van Der Elst**¹² in which His Lordship stated that it is only where a statement of case does not amount to a viable claim, or is beyond cure that the Court may strike it out.

¹¹ (1887) 35 CH D 492

¹² AXA HCV 2001/0002

[44] The Court will allow a party to amend rather than strike out, but the power to amend will be exercised in accordance with the Overriding Objective. **Re: Finley –v- Connell Associates**¹³

[45] I will however make an order that the Respondents review and amend the amended defence to counterclaim so that it is properly numbered and I will also grant leave to the Respondents to further amend their amended defence and counterclaim not to introduce any further claim, but to amend it so that their case is better presented to allow the Applicant to file their defence.

[46] This amendment is to be done on within 21 days of today's date. Thereafter the Applicant shall file and serve his defence to the re-amended Defence Counter claim within 28 days of the service of the said re-amended Defence and Counterclaim on him. Thereafter the matter will take its normal course.

[47] Costs in the Cause

[48] As a short post script to this ruling, due to the unavailability of full court facilities to ensure the timely delivery and proper editing and presentation of this ruling, this Court apologises for the delay in delivering this ruling and for any errors which may appear herein. Further the original file was unfortunately destroyed in the passage of Hurricane Maria which ravaged Dominica in September 2017 hence there is uncertainty as to the date that the decision was reserved.

[49] The Court gratefully acknowledges the assistance of learned counsel.

M E Birnie Stephenson
High Court Judge

[SEAL]

By the Court

Registrar

¹³ (1999)The Times23 June 199