

**BARBADOS**

**[Unreported]**

**IN THE SUPREME COURT OF JUDICATURE  
HIGH COURT  
CIVIL DIVISION**

**No. 1039 of 2010**

**BETWEEN:**

**JENNIFER JONES**

**CLAIMANT**

**AND**

**TURTLE BEACH RESORT LTD.**

**DEFENDANT**

**Before the Honourable Madam Justice Margaret A. Reifer, Judge of the High Court**

**Date of Hearing: 2014 July 16<sup>th</sup>**

**Date of Decision: 2017 January 12<sup>th</sup>**

**Appearances:**

**Mr. David Comissiong Attorney-at-Law for the Claimant**

**Ms. Faye Finisterre Attorney-at-Law for the Defendant**

**Ruling**

**Nature of Application**

[1] This is an application made pursuant to **Rules 24.2** and **24.3** and **Rule 26.3(1)** of the **Civil Procedure Rules (CPR)** in the following terms:

- “1. That the Claimant’s statement of claim be struck out entirely pursuant to Rule 26.3(1) of The Supreme Court (Civil Procedure) Rules 2008 (the “CPR”).
2. That the Claimant pay into court the sum of \$12,500.00 plus VAT of \$2,187.50 totalling \$14,687.50 (or provide a bond from an acceptable commercial bank in Barbados in favour of the Defendant to cover such security) as security for the costs of the Defendant in these proceedings pursuant to Rules 24.2 and 24.33 of the CPR.
3. That unless the Claimant pay into Court (or provide a bond from an acceptable commercial bank in Barbados in favour of the Defendant to cover such security) the security for the costs of the Defendant in these proceedings sought in paragraph 1 above within 14 days of the date of such Order, that these proceedings be stayed until such time as security for costs is provided pursuant to Rule 24.5 of the CPR.
4. That the costs of and occasioned by this application be the Defendant’s in any event.
5. Such further and other relief as this Honourable Court deems fit.”

[2] The parties are as follows: The Claimant is a national of the Republic of Trinidad and Tobago and resides there. The Defendant is a limited liability company, duly incorporated and registered under the **Companies Act, Cap. 308 of the Laws of Barbados**, with a duly registered office in this Island. It operates a hotel under the name “Turtle Beach Resort” located at Dover in the parish of Christ Church, this being the location of the tortious act and contractual breach alleged to have occurred in August 2007.

[3] The Claim is one filed on August 4<sup>th</sup> 2010, the Claimant being a hotel guest seeking damages arising from a cause of action in tort (negligence) and also in breach of contract. The female Claimant alleges the failure of the Defendant to keep her, her luggage and property safe and secure. As a result

thereof she alleges an assault upon her and the theft of her luggage and property from her hotel room.

- [4] There was an Acknowledgement of Service of the Claim Form filed September 1<sup>st</sup> 2010.
- [5] Nothing further occurred (on the record) until March 2014 when the Claimant's attorney gave Notice, calling on the Defendant to remedy its default by filing and serving its defence within 14 days of the Notice.
- [6] Thereafter on April 2<sup>nd</sup> 2014, the Defendant filed the subject Application together with the Affidavit in Support of Shauna Kissoon, Corporate Secretary of the Defendant.
- [7] The Claimant's attorney filed an Affidavit in Response dated June 10<sup>th</sup> 2014.

### **Orders Sought**

- [8] The orders sought raise two substantive issues as follows:
  - (i) The Application to Strike Out
- [9] In addition to the inherent powers of a Court to 'strike out', **Rule 26.3(1)** of the **CPR** expressly empowers the Court to strike out a statement of case in the following terms:

“**Rule 26.3(1)** In addition to any other power under these Rules, the court may strike out a statement of a case or part of a statement of case where it appears to the court that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings.”

[10] The Defendant submits that the Court should exercise its discretion ‘to strike’ as a consequence of the failure of the Statement of Claim to contain a Certificate of Truth.

[11] The relevant rules of the CPR provide as follows:

“Statement of case – certificate of truth

**3.12** (1) Every statement of case must be verified by a certificate of truth.

(2) The certificate of truth should be signed

(a) by the claimant, defendant or other litigating party, as the case may be; or

(b) in the case of a corporation, by an authorised officer having knowledge of the matter (to any of whom, in this rule, the expression “the litigating party” refers); and

(c) where several litigating parties sue or are sued jointly, by one of them in respect of a statement of case filed on behalf of both or all.

(3) Where it is impracticable for the litigating party to sign the certificate required by sub-rule (1) it may be given by a legal practitioner.

(4) A certificate of truth given by a legal practitioner must also certify

(a) the reasons why it is impracticable for the litigating party or any litigating party, as the case may be, to give the certificate; and

(b) that the certificate is given on the instructions of the litigating party or of both or all the litigating parties.

(5) Where a statement of case is changed under Part 20, the amended statement of case must be verified by a certificate of truth.

(6) Information given under Part 34, whether voluntarily or following an order of the court, must be verified by a certificate of truth.

(7) A certificate of truth given by litigating party must be in the following form:

“I [*name*] certify that I believe that the facts stated in this [*name document*] are true.”

(8) A certificate given by a legal practitioner for a litigating party must be in the following form:

“I [*name of the individual legal practitioner giving the certificate*] certify that

- (a) The [*claimant or as the case may be*] believes that the facts stated in this [*name document*] are true; and
- (b) this certificate is given on the [*claimant's or as the case may be*] instructions.

It is not practicable for the [*claimant or as the case may be*] to give a certificate of truth because [*state reason*]”.

“Failing to give certificate of truth

**3.13(1)** The court may strike out any statement of case which has not been verified by a certificate of truth.

(2) Any party may apply for an order under sub-rule (1).”

“Special requirements applying to claims for personal injuries

**8.7(1)** This rule sets out additional requirements with which a claimant in a claim for personal injuries must comply.

(2) The claim form or the statement of claim must state the claimant’s date of birth or age.

(3) Where the claimant intends to rely on the evidence of a medical practitioner, the claimant must attach to the claim form a report from a medical practitioner on the personal injuries alleged in the application.

(4) Sub-rule (3) does not restrict the right to the claimant to call other or additional medical evidence at the hearing.

(5) The claimant must include in, or attach to, the claim form or statement of claim a schedule of any special damages claimed.

[12] Counsel for the Defendant argued in her oral submissions that the Claimant’s Statement of Claim did not comply with the CPR; it does not contain a Certificate of Truth; does not comply with **Rule 7.2**; does not comply with **Rule 8.7(3)** because there are no supporting documents accompanying the claim.

[13] It was her further submission that the wording of the rules is mandatory and pointed out that the non-compliance was pointed out at an early stage to the Claimant (see Affidavit of S. Kissoon). Counsel relied on the following cases in support of her submission: **Dixon v Jackson, Civil Appeal No. 120/2005 (Court of Appeal of Jamaica); Poseley et al v Mariner International Bank, Civil Suit No. 300 of 2001 (High Court of St. Vincent and the Grenadines); Niguel Streete v Caricom Management Services 2009, Claim No. AXA HCV 2009/0014 (High Court of Anguilla).**

[14] The Claimant's attorney in his Written Submissions characterized the Defendant's application as frivolous and vexatious and an abuse of the process of the Court: he submitted that the Defendant had been supplied with the Claimant's medical reports (exhibiting his own Without Prejudice correspondence in support thereof) and that the Claim Form was filed with a duly signed Certificate of Truth attached to it. It is the Statement of Claim that is absent a Certificate of Truth.

(ii) The Application for Security for Costs

[15] In this regard, the Defendant submits that the Claimant should be ordered to pay into Court a sum representing Security for Costs. Counsel argued that this was necessary since the Claimant is non-resident and has no assets within the jurisdiction (see Affidavit of Shauna Kissoon).

[16] **Part 24.3** reads as follows:

“**Rule 24.3** The court may make an order for security for costs under rule 24.2 against a claimant only if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order and that

- (h) the claimant is ordinarily resident out of the jurisdiction;
- (i) the claimant is an external company;
- (j) the claimant, with a view to evading the court’s process or the enforcement of its orders;
  - (i) failed to give an address for himself in the application;
  - (ii) gave an incorrect address in the application; or
  - (iii) has changed his address since the proceedings commenced;
- (k) the claimant is acting as a nominal claimant, other than as a representative claimant under Part 21, and there is reason to believe that the claimant will be unable to pay the defendant’s costs if ordered to do so;
- (l) the claimant is an assignee of the right to claim and the assignment has been made with a view to avoiding the possibility of a costs order against the assignor;
- (m) some person other than the claimant has contributed or agreed to contribute to the claimant’s costs in return for a share of any money or property which the claimant may recover; or
- (n) the claimant has taken steps with a view to placing his assets beyond the jurisdiction or the reach of the court.”

[17] Counsel for the Claimant argued that the Defendant’s Application to be granted an order for Security for Costs is without merit and should be disallowed. It was his submission that the circumstances of this case fell outside the ambit of **Part 24.3** of the CPR for the making of an order for Security for Costs.

[18] In addition, counsel submitted that **Part 24.2 (2)** of the CPR stipulates that an application for Security for Costs should be made “without delay”; the

Claimant filed and served her claim in August 2010, and as such there has been a prolonged delay of almost 4 years in the making of the Application.

## **Discussion**

[19] The Barbados CPR treats the Claim Form and the Statement of Claim as separate documents usually filed at the same time, but which can be filed separately in prescribed circumstances (see CPR 8.3 and the definition of “statement of case” in the CPR).

[20] It is clear from these Rules that both the Claim Form and the Statement of Claim must be filed with a duly signed Certificate of Truth. It is also made clear by Part 3.13(1) that this Court has a discretionary power to strike out any Statement of case which has not been verified by a Certificate of Truth. Stated differently, the failure to file a Statement of Claim without a Certificate of Truth does not automatically render the same invalid: see **Dixon v Jackson** cited by counsel for the Defendant.

[21] The Court of Appeal of Jamaica spoke directly to that very issue in that case where there was an absence of verification of the defence by way of a Certificate of Truth. The Court recognized that in some circumstances the striking out of a defence is extreme. The Court adopted the words of **Lord Woolf M.R.** (as he then was) in **Biguzzi v Rank Leisure PLC [1999] 1 WLR 1926** where he stated as follows:

“In many cases there will be alternatives which will enable a case to be dealt with justly without taking the draconian step of striking the case out.”

[22] To strike out this Claim in the circumstances as outlined would indeed be draconian and contrary to the philosophy behind these Rules as outlined by the Overriding Objective. It would be more apposite and in keeping therewith to invoke the Court’s power to rectify procedural errors pursuant to **Rule 26.4** of the **CPR**.

[23] Such an approach was taken by **Edwards JA in Citco Global Custody NV v Y2K Finance Inc., BVIHCVAP 2008/022** where in considering the principles to be applied on an application to strike out a statement of case pursuant to **CPR 26(3)(1)** he stated as follows:

“14. Among the governing principles stated in Blackstone’s Civil Practice 2009 the following circumstances are identified as providing reasons for not striking out a statement of case: where the argument involves a substantial point of law which does not admit a plain and obvious answer; or the law is in a state of development; or where the strength of the case may not be clear because it has not been fully investigated. It is also well settled that the jurisdiction to strike out is to be used sparingly since the exercise of the jurisdiction deprives a party of its right to a fair trial and its ability to strengthen its cases through the process of disclosure and other court procedure such as requests for information; and the examination and cross-examination of witnesses often change the complexion of the case. Also, before using CPR 26(3)(1) to dispose of “side issues”, care should be taken to ensure that a party is not deprived of the right to trial on issues essential to its case. Finally, in deciding whether to strike out, the judge should consider the effect of the order on any parallel proceedings and the power of the

court in every application must be exercised in accordance with the overriding objective of dealing with cases justly.”

[24] My sister **Cornelius J.** adopted the same approach in **Callender v Barrow BB 2014 HC 57**, in a case where there was an application to strike out the Defendant’s defence on the basis that it disclosed no reasonable ground for defending the Claimant’s claim, it was an abuse of process of the court and the defence did not comply with the requirements of **Part 10** of the **CPR**. In that case, in refusing the application to grant summary judgment in favour of the Claimant the Court ruled as follows:

“It is clear to me that if I am to deal with this matter justly, the only appropriate course is to take charge of this matter using the Court’s case management powers and make appropriate directions. I am mindful of the major issues in this case which need to be resolved inclusive of the issues of the testatrix’s competence and any undue influence that might have been exerted on her.”

[25] A similar approach was taken in **Grantley Burnett v Da Costa Mannings Inc. High Court Suit No. 240 of 2011** in response to the issue of whether a statement of claim filed without a Certificate of Truth is a nullity. The Court, while affirming the importance of the Certificate of Truth (at paragraphs 18 to 21), ruled that it was not, and ordered the Claimant to file and serve a genuine Certificate of Truth within 14 days. See therein the Court’s reference and discussion of **Dennis O Poseley and Jeff Lewis (trustees of Sierra Foundation Management) v Mariner International Bank Limited Civil Suit No. 300/2001, (High Court, St. Vincent and the Grenadines,**

**unreported decision of December 5<sup>th</sup>, 2001); Komodo Holdings Ltd v VP Bank (BVI) Limited No. 72 of 2002 (British Virgins Islands, unreported decision of May 31<sup>st</sup>, 2002); and Anju Dhar and Kapil Dhar v Glenford David, Pamela Seraphine and International (BVI) Movers Ltd BVIHCV 384 of 2009 (unreported decision of July 19<sup>th</sup>, 2011).**

[26] This Court takes a similar approach to the submission concerning the Claimant's failure to comply with **Rules 8.7(2)** and **8.7(3)**, *vis a vis* the failure to state the Claimant's age or date of birth and the failure to exhibit the medical practitioner's report (special requirements in personal injury claims). It is without doubt a fact that this was not done, but in the exercise of its discretion under **Part 26.3** this Court takes into account that the Defendant does not dispute the Claimant's statement that these documents/information have been received by the Defendant's insurers pursuant to the parties' Without Prejudice settlement negotiations which began in 2007 prior to the filing of the claim.

[27] The making of an order for security for costs is at the discretion of the Court. It arises to address those situations where there is a significant risk or fear that a Defendant will suffer the injustice of having to defend proceedings whilst having no real prospect of recovering costs, if successful.

[28] The fact that this Claimant is resident outside of Barbados (in Trinidad and Tobago) is significant. It is the ground on which most orders for security for costs are given: see **Maragh v Comptroller of Customs (1994) High Court, Barbados, No. 760 of 1991 (unreported)**.

[29] In **Sir Lindsay Parkinson and Co. Ltd v Triplan [1973] 2 ALL ER 273, CA**, the English Court of Appeal listed the factors which the Court may take into account in exercising the discretion as follows:

- (a) Whether the Claimant's claim is *bona fide* and not a sham;
- (b) Whether the Claimant has a reasonably good prospect of success (although the court should not normally embark upon a detailed examination of the merits of the case);
- (c) Whether the Defendant has made any admissions of the Claimant's claim in his statements of case or elsewhere;
- (d) Whether the Defendant has made any payments into court or open offer of payment in settlement;
- (e) Whether the Claimant's lack of funds has been caused by the Defendant's conduct;
- (f) Whether the application for security is being made oppressively and in order to stifle a genuine claim; and
- (g) Whether there has been a delay in making the application (which should be made as early as possible).

[30] While in the majority cases (especially within the region) most courts rule in favour of an applicant where a Claimant resides outside of the jurisdiction, it is not always so: See **Lord Denning MR in Aeronave SPA v Westland Charters Ltd [1971] 3 All ER 531, at 533** where the order was upheld, the Court stressing where it is made that it was "because it is just to do so".

[31] See also **De Bry v Fitzgerald [1990] 1 WLR 352** where it is made clear from the language of the judgment by **Donaldson MR** that there is no presumption that an order for Security for Costs should be made based solely on the fact that Claimant resides in another country; it is the enforcing in the place where the assets are likely to be. The Court of Appeal set aside the order after holding that the simplicity of the improved rights of enforcement of judgments under the 1968 Convention was an important factor to take into account in deciding whether to order security for costs, and that in emphasizing the fact that the defendants might have to enforce an order for costs in France and in attaching importance to the difficulties of so doing the judge had misdirected himself.

[32] In **Wang Zhongyong et al v Union Zone Management Limited et al BV1 HC 0126 of 2011**, **Bannister J** refused a costs order, holding that the ability to enforce a costs order in another jurisdiction coupled with the ability to recover the costs of enforcement was sufficient in itself for him to dismiss an application for security for costs.

[33] See also the ruling in **Nasser v United Bank of Kuwait [2001] EWCA Cw 556** (referenced by **Bannister J.** above) where objective guidelines for the exercise of the Court's discretion such objective grounds relating to obstacles to, or the burden of enforcement in the context of the particular individual or

country concerned. The Court expressly noted that the exercise of the discretion on grounds of foreign residence should not be either automatic or inflexible.

[34] See also ruling of **Michel JA** in **Jong Darnideen et al v Millhawke Holdings Ltd SVGHC VAP 2014/2007** at **para 67** of the judgment where he states as follows:

“... the absence of reciprocal arrangements or legislation providing for enforcement of foreign judgments does not by itself justify an inference that enforcement would not be possible.”

[35] It is to be noted that the enforcement of foreign judgments by the courts of Trinidad and Tobago is usually dealt with through one of two avenues. Firstly, by way of registration under the **Judgments Extension Act Chap 5:02**; or secondly, by way of common law, that is by instituting an action in Trinidad and Tobago on the foreign judgment. The **Judgments Extension Act** provides a system of registration to facilitate the direct enforcement of judgments of specified commonwealth countries, which have similar reciprocal provisions, inclusive of Barbados. Once a judgment is registered under the Act, as at its date of registration, it is of the same force and effect as a judgment originally obtained in Trinidad and Tobago. Therefore, the Defendant if the need arises will have recourse for enforcement.

[36] While, this Claimant is indeed resident out of the jurisdiction and no assets are within this jurisdiction, it is the difficulty and the possibility of subsequent enforcement of a costs order that is a paramount. At present, there is nothing to suggest that will be a difficulty in enforcing any order made by this Court.

### **Ruling**

[37] In view of the above, this Court dismisses the Application to strike out the statement of claim and it declines to make an order for security for costs as having regard to all the circumstances of this case (and to the Overriding Objective of these Rules) it is of the view that it is not just to make such an Order.

[38] The parties are urged to resolve what is clearly a matter intended for settlement.

[39] However, in view of the fact that the Claimant is in technical default, the Claimant is ordered to remedy these technical defaults within 28 days of the delivery of this decision.

[40] In view of the circumstances, no order is made as to Costs.

**MARGARET A. REIFER**  
Judge of the High Court

