BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Civil Suit No: CV667 of 2015

BETWEEN

VERNON OLIVER SMITH	**CLAIMANT**
AND	
SIR MARSTON GIBSON	**FIRST DEFENDANT**
THE ATTORNEY GENERAL OF BARBADOS	**SECOND DEFENDANT**

Before The Honourable Madam Justice Pamela Beckles, Judge of the High Court

2016: September 7
2017: April 7

Appearances:

Mr. Edmund R. King, Q.C. in association with Mr. Hal Gollop, Q.C., Attorneys-at-law on behalf of the Claimant

Ms. Donna Brathwaite, Q.C., in association with Mr. Jared Richards, Attorney-at-law for the First and Second Defendants

DECISION

Introduction

[1] The history of these proceedings is as follows: the matter commenced by way of Fixed Date Claim Form on an application dated May 14,

2015 where the Claimant sought a declaration against the First Defendant who allegedly refused to grant him an audience and by extension the right to represent his client Branlee Consulting Services Inc. in the mater *CV0099 of 2015 Clico International Life Insurance Ltd. v Leroy Parris, Branlee Consulting Services Inc. and the Estate of David Thompson.*

The application was accompanied by the affidavit of equal date.

[2] On May 21, 2015, the Defendants filed an acknowledgment of service of the Fixed Date Claim Form filed on May 14, 2015 which indicated that they received the Claimant's Claim Form No. 667 of 2015 on May 15, 2015.

[3] On September 14, 2015, the Claimant filed an affidavit of service indicating that Harcourt Gill, writ server did on May 29, 2015 serve the First Defendant with the Fixed Date Claim Form, the Acknowledgment of Service and supporting affidavit of the matter commenced on May 14, 2015.

[4] The Defendants then applied for an order pursuant to Rule 26.3 of the CPR that the Claimant's statement of case filed on May 14, 2015 namely the Fixed Date Claim Form and affidavit of Vernon Smith be struck out and costs be awarded to the Defendants in any event – this was done on September 15, 2015.

[5] On January 12, 2016 the Claimant applied for an order that summary judgment be entered against the First Defendant.

The Claimant's Contention

[6] Counsel for the Claimant contends that as required by Part 10 Rule 10.3(1) of the CPR, the First Defendant failed, neglected and/or refused to file and serve a Defence within twenty-eight days after being served with the claim form and affidavit filed on May 14, 2015.

[7] Counsel further contends that the First Defendant refused to attend the first hearing of the claim which was scheduled for September 16, 2015, but instead on September 15, 2015, the attorney-at-law for the First Defendant filed and served on the Claimant an application on behalf of the First Defendant to strike out the Claimant's substantive application.

[8] Counsel also pointed out that the First Defendant at the date of the said application had not filed an acknowledgement of service.

[9] Thus, Counsel declared that the application to have the Claimant's substantive application struck out is null and void alleging that since the First Defendant had not filed an acknowledgment of service, the First Defendant has no standing in the matter relying on Rules 9 and 10 of the CPR to support this contention.

[10] He further contends that the application should be struck out since it does not contain a certificate of truth in accordance with Part 3.12 of the CPR and also that the affidavit filed by the attorney-at-law for the First Defendant does not contain a certificate of truth as required by Rule 3.12 and should be struck out pursuant to Rule 3.13.

[11] The Claimant also alleges that since January 12, 2016 an application for summary judgment was filed and served on the First Defendant. However as to date the First Defendant has not filed a Defence and neither has he attended court at any of the hearings of the action.

[12] It was also pointed out that the First Defendant has not filed written evidence nor served copies of such on every other party to the application as required by Rule 15.5 (1) and (2) of the CPR.

The Defendant's Contention

[13] In response to the above arguments, counsel for the First Defendant, Donna Brathwaite, QC deposed that both the application to have the Claimant's substantive application struck out and affidavit in support contained a certificate of truth.

[14] She also highlighted at paragraph 8 of her affidavit that on September 16, 2015 appearances were entered on behalf of the Defendants and an objection was taken to an appearance being entered on behalf of the First Defendant. She pointed out that she was

informed for the first time by counsel for the Claimant that an affidavit of service had been filed on September 14, 2015 which stated that the First Defendant was served on May 29, 2015.

[15] Counsel deposed that an acknowledgment of service was filed on behalf of the Defendant on September 16, 2015 and notice was given by letter dated September 17, 2015 pursuant to Rule 9 of the CPR that an acknowledgment of service was filed on the First Defendant's behalf and the Claimant was also supplied with a copy of the acknowledgment of service.

[16] Counsel submitted that pursuant to Rule 26.4 of the CPR, the court has a general power to rectify matters where there has been a procedural error. She further contends that the rule applies in relation to a matter where no order was sought or if sought had not been made under Rule 26.3 striking out a statement of case or part of a statement of case. Additionally, she submitted that in this case, orders have not been made under a Rule 26.3 application.

[17] It was also submitted that the court must be mindful of the overriding objective of the CPR which provides that dealing with cases justly includes ensuring that they are dealt with expeditiously and fairly. She also pointed out that Rule 25.1 provides that the court must further the overriding objective by actively managing cases.

[18] Counsel submitted that the Claimant was aware from as early as May 2015 that the Defendants intended to defend the Fixed Date Claim Form, in that acknowledgment of service was filed and notice was given pursuance to Rule 9; further, at the first hearing, appearances were entered on the Defendants' behalf.

[19] She also pointed out that the Claimant would not be prejudiced in that it cannot be said that the Claimant was unaware that the First Defendant intended to defend the Fixed Date Claim Form dated 14 May, 2015.

[20] Essentially, Counsel submitted that the procedural defects are not fatal to the proceedings and the court should exercise its discretion under Rule 26.4 and bear Rule 1 and 25 in so doing and allow the hearing of the Defendants application to commence.

Issue

Whether the court should in the circumstances make an order for summary judgment.

The Law

[21] Summary judgment occurs where the court determines a particular issue, or issues between litigants without a trial.

[22] The power of a court to make a summary order is contained in Part 15 of the Civil Procedure Rules 2008 (CPR). CPR 15.2 provides the grounds for summary judgment:

> "The court may give summary judgment against a party on the whole of a claim or on a particular issue if
>
> (a) It considers that
>
> (i) the Claimant has no real prospect of succeeding on the claim or issue; or
>
> (ii) the Defendant has no real prospect of successfully defending the claim or issue, and
>
> (b) there is no other reason why the case or issue should be disposed of at a trial."

[23] The applicable test is a two-pronged test which firstly requires consideration of whether the party against whom the court is urged to enter summary judgement has a real prospect of success and thereafter, a determination of whether there is any other reasoning why the case or issue should be disposed of at trial.

[24] To quote **Lord Woolf MR** in *Swain v Hillman [2001] All E.R. 91 CA*:

> "It is important that a judge in appropriate cases should make use of the powers contained in Pt 24 (our Part 15). In doing so he or she gives effect to the overriding objectives contained in Pt 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add,

> generally that it is in the interests of justice. If a Claimant has a case which is bound to fail, then it is in the Claimant's interests to know as soon as possible that that is the position.
> Likewise, if a claim is bound to succeed, a Claimant should know that as soon as possible...useful though the power is under Pt 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial...the proper disposal of the issue under Pt 24 does not involve the judge conducting a mini-trial that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily."

[25] **Lord Woolf** also opined that "the words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success...they direct the court to the need to see whether there is a 'realistic' as opposed to fanciful prospect of success."

[26] **Judge LJ** in the same case agreed with **Lord Woolf MR** adding the following:

> "To give summary judgment against a litigant on papers without permitting him to advance his case before the hearing is a serious step. The interest of justice overall will sometimes so require. Hence the discretion in the court to give summary judgment against a Claimant, but limited to those cases where, on the evidence, the Claimant has no real prospect of succeeding. This is simple language not susceptible to much elaboration, even forensically. If there is a real prospect of success, the discretion to give summary judgment does not arise merely because the court concludes that success is improbable. If that were the court's conclusion, then it is provided with a different discretion, which is that the

> case should proceed but subject to appropriate conditions imposed by the court."

[27] Where however there are disputes of facts, a court is unlikely to grant an order for summary judgment. In *Lyle v Lyle (2005) Supreme Court, Jamaica, No. HCV 02246/2004* **Sinclair-Haynes J** emphasized that summary judgment is inappropriate where they are important disputes of facts, and that accordingly, on an application for summary judgment, the Claimant must satisfy the court of the following:

> (a) all substantial facts relevant to the Claimant's case, which are reasonably capable of being before the court, must be before the court,
>
> (b) those facts must be undisputed or there must be no reasonable prospect of successfully disputing them,
>
> (c) there must be no real prospect of oral evidence affecting the court's assessment of the facts.

[28] *Bolton Pharmaceutical Co. 100 Ltd. v. Doncestion Pharmaceutical Groups Ltd. and Others [2006] All E.R.(D) 289 (May)* is an English Court of Appeal authority for the proposition that summary judgment in inappropriate where there are reasonable grounds for believing that a further investigation into the facts would add to or alter the evidence available to a trial judge and so effect the outcome of the case. At paragraph 17, **Mummery LJ** warned that:

> "It is well settled by the authorities that the court should exercise caution in granting summary judgment in certain kinds of cases. The classic instance is where there are conflicts of fact or relevant issues, which have to be resolved before a judgment can be given (see Civil Procedure Vol. 24.2.5). A mere trial on facts conducted under CPR Part 24 without having gone through normal pre-trial procedures must be avoided, as it runs a real risk of producing summary injustice."

[29] Even more to the point is the UK decision in *Munn v. North West Water Limited and Another – All England Official Transcripts (1997 – 2008); (2000 LTL 18/7/2000).* There the Defendant applied for summary judgment in a negligence claim and was successful at first instance. In reversing on appeal **Mantell LJ** observed that:

> "10. I well understand the thinking behind the recorder's decision but in my view, with respect to the recorder – although the rule contained in Part H para 2 is draconian in extent – it was never intended to drive a Claimant from the judgment seat where there were issues of facts which if determined in the Claimant's favour, might result in a successful outcome.
> That seems to be the position here on all the evidence which has been carefully reviewed in the argument presented to court today.
> So that where there are issues of facts which if decided in the Respondent's favour would result in judgment for the Respondent, it is inappropriate to enter summary judgment, even if there is substantial evidence in support of the Applicant's case." – ***Blackstone Civil Procedure, Part H, Chapter 34 at p. 388.***

[30] Based on the information before the court thus far, it would seem to me that there are issues of fact to be determined. For example (1) what transpired on the 14th day of April, 2015 when the Claimant

appeared before the First Defendant, then sitting as a presiding judge in the High Court Suit 99 of 2015; (2) was the Claimant refused audience in the said matter by the First Defendant; (3) if so, was the action of the First Defendant justified, and (4) if not justified, what are the consequences for such actions – these are but only some of the issues which arise in this matter and which in my judgment should go to trial on the evidence.

[31] However, putting that matter on one side, the Claimant is also requesting that summary judgment be entered in his favour due to the First Defendant's non-compliance with the provisions of the Supreme Court (Civil Procedure) Rules 2008 (CPR) as outlined above in his contentions and which he believes is fatal to the proceedings.

[32] Part 1.1 of the CPR provides that "the overriding objective of these Rules is to enable the court to deal with cases justly.

(2) Dealing justly with a case includes, so far as is practicable,

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate to

(i) the amount of money involved;

(ii) the importance of the case;

(iii) the complexity of the issues, and

(iv) the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

1.3 The parties are required to help the court to further the overriding objective."

So that while it is accepted that the CPR were drawn up to ensure that civil litigation was brought up to a higher degree of efficiency, one however "must not lose sight of the fact that the overriding objective of the new procedural code is to enable the court to deal with cases justly, and this means the achievement of justice as between the litigants whose dispute it is the court's duty to resolve..." per **Lord Justice Brooke** in *Pauline Hannigan v. Andrew Cooke Hannigan et al [2000] All E.R.(D) 693* at para. 36.

[33] With respect to striking out all or part of a statement of case where a party has not complied with a Rule, the court has a discretion to regard the defect in the proceedings as either an irregularity or a nullity of the proceedings. An irregularity can be cured by an amendment provided that no injustice would result to the opposing

party from the amendment whereas a nullity of the proceedings cannot be cured by any amendment because the consequences of the defect is so fundamental.

[34] Rules 26.3 of the CPR provides:

> "In addition to any other power under these rules, the court may strike out a statement of 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."

[35] Rule 26.4 speaks to the general power of the court to rectify matters where there has been a procedural error'. It states:

> "(1) This rule applies in relation to a matter in respect of which an order has not sought, or if sought has not been made under rule 26.3 striking out a statement of case or part of a statement of case.
>
> (2) An error of procedure or failure to comply with a rule, practice direction or court direction or order does not invalidate any step taken in the proceedings, unless the court so orders.
>
> (3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to rectify the error or failure.
>
> (4) The court may make such an order on or without an application by a party".

[36] In *Paradise Beach Limited and Paradise 88 Limited v Edgehill and Patel BB 2012 CA15*, the Court of Appeal laid down guidelines to be followed in an application for striking out a claim. It followed the

dicta of **Danckwerts LJ** in the case of *Wenlock v. Maloney and Others [1965] 2 All E.R. 871*, where he stated:

> "...This summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents of the case, in order to see whether the Plaintiff really has a cause of action.
> To do that, is to usurp the position of the trial judge and to produce a trial of the case in evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power."

[37] The court noted that to arrive at a just decision to strike out a claim of that particular nature before trial, regard must be given to the overriding objective that is the need to deal with cases justly. It was held that the master would have acted quite unjustly had he summarily struck out the claim in circumstances in which on the documents there were clearly issues to be tried.

Conclusion

[38] Recognizing that there has been a number of procedural defects both in the filing and preparation of the documents, the court finds that the complaints made by the Claimant's attorney are claims more about form rather than substance and that the failure to comply with the rules as stated above are not fatal at this stage of the proceedings and may be amended by the exercise of the court's power under Part 26 of the CPR.

[39] In taking into account the interests of the administration of justice, the factor which appears to be of paramount importance in this case, is that the Claimant knew that the Defendants intended to defend the action in that the acknowledgement of service was filed and notice given pursuant to the rules.

[40] The court can see no prejudice to the Claimant in exercising its power to amend the procedural errors at this early stage of the proceedings.

[41] To strike out the First Defendant's claim in these circumstances would be to this court, a totally disproportionate response to the errors that were made.

[42] In light of the circumstances of this case, in the interest of justice of and in keeping with the overriding objective to deal with cases justly, the Claimant's application for summary judgment is refused for the following reasons: –

> (1) there are issues which in my judgment should go to trial on the evidence;
>
> (2) the proceedings are not a nullity but are merely defective and can be cured by amendment; and
>
> (3) the court exercises its discretion under Rule 26.4 of the CPR to allow for rectification of these procedural errors.

PAMELA A. BECKLES
Judge of the High Court