

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Civil Suit No. CV1714 of 2013

BETWEEN:

PEARSON JERRY LEACOCK CLAIMANT

AND

REPUBLIC BANK (BARBADOS) LTD. DEFENDANT

Before Master Deborah Holder, BSS, Master of the High Court

2017: July 24

2019: April 24

Appearances:

Mr. Emerson Graham, QC, Attorney-at-Law for the Claimant

Mr. Michael Koeiman of Clarke Gittens Farmer, Attorneys-at-Law for the Defendant

DECISION

Introduction

[1] On 28th June 2016, the Defendant filed an Application in the following terms:

“The Defendant applies to the court pursuant to Rule 26.3 of the Supreme Court (Civil Procedure) Rules 2008 for the following order:

- (1) An Order that the Claimant’s Claim herein inclusive of his Claim Form and Statement of Claim filed on September 30, 2013 and his Amended Claim Form

and Statement of Claim filed on January 17, 2014 be struck out.

[2] The grounds of the Application are:

1. That the Claimant is in breach of an order made by Ms. Deborah Holder, BSS, the Master of the High Court on the 7th day of October 2014 (the 'Order'), has failed to file and serve his List of Documents, Witness Statements, Statement of Facts and Issues or Listing Questionnaire on the Defendant by the dates stipulated therein or at all.
2. The Defendant has complied with the said Order by filing its List of Documents on the 19th day of December 2014, Witness Statements of Darrell Wilson and Kaola Blackett (né Haynes) on the 1st day of April 2015, Statement of Facts and Issues on 12th day of June 2015 and Listing Questionnaire on the 26th day of June, 2015.
3. To date the Claimant has failed to comply with the said Order.
4. The Claimant's Claim fails to disclose any reasonable ground for bringing the Claim.
5. The Claimant's Claim for defamation fails to comply with the requirements of CPR 69.3".

History

- [3] On 13th September 2013, the Claimant's Claim Form and Statement of Claim were filed. The Defendant was served on 10th October 2013. The Acknowledgment of Service of Claim Form was filed on 15th October 2013 and the Defence was filed on 4th November 2013.
- [4] On 17th January 2014, the Claimant filed an Amended Claim Form and Amended Statement of Claim and on the 4th March 2014, the Defendant filed its Amended Defence.
- [5] In his Amended Claim Form the Claimant sought the following:

- “1. A Declaration that the Defendant by its servant and or agents defamed the Claimant in his profession as an Attorney-at-law in private practice in Barbados.
2. Breach of contract.
3. Damages to be assessed and awarded.
4. Costs.
5. Further and other relief this Honourable Court thinks fit.”

- [6] The Claimant also claimed \$150,000.00, Court fees of \$16,000.00, Attorney’s fixed costs on issue of \$2,000.00, the total amount being \$168,000.00.
- [7] In his Amended Statement of Claim, the Claimant also sought “An injunction to restrain the Defendant by itself, its servants, employees and/or agents or otherwise however from further publishing or repeating the said or similar words or any of them.”

Case Management Orders

- [8] On 7th October 2014 case management orders were given. List of Documents were to be filed and served by the 19th December 2014, inspection of documents was to be completed by 23rd January, 2015, Witness Statements were to be filed and exchanged by 31st March 2015, a Statement of Agreed Facts and Issues was to be settled and filed by 22nd May 2015 and, in the absence of agreement separate facts and issues were to be filed and served by 12th June 2015. It was also required that the Listing Questionnaire be returned to the Registrar on 7th June 2015 and pre-trial review was to be held during the month of July 2015.
- [9] On 16th December 2014, after case management orders were given and without leave of the court, the Claimant filed an “Affidavit in Response.” Counsel for the Claimant raised his objection to this.

- [10] On 11th August 2016, one year after the month for pre-trial review had passed and twenty-one months after the stipulated date, the Claimant filed his List of Documents. The Witness Statement of Pearson Leacock was filed on 5th October 2016.
- [11] On 23rd January 2017 when the Defendant's application came on for hearing, the parties were ordered to file written submissions. The Claimant asked for an extension of time to file his Statement of Facts and Issues. He was given until 24th February 2017 to file the same. This he filed on 27th February, 2017.

Amended Statement of Case (Summary)

- [12] The Claimant went to Barbados National Bank to withdraw \$700.00 from his chequing account. He waited in line and when his turn came he proceeded to the teller and told her what he wanted and he attempted to use his ATM card to access his chequing account.
- [13] She asked to see his identification card before permitting him to use the ATM card. He questioned why he needed to produce his identification card as he had done similar transactions at other branches and this request was not made. The teller loudly responded, within earshot of about ten customers as follows: "There are people getting other people's pin numbers and getting money from the bank by fraud."
- [14] He had to endure curious stares from other persons waiting in line and in the Bank in general. He then asked to see the Manager who came and reiterated the teller's position. He produced his Barbados Bar identification card but was told that only the Barbados identification card, passport or driver's licence were accepted. He told the Manager that the treatment was foolishness.
- [15] The Claimant then told the Manager that he was an Attorney-at-law and that he had two accounts at the Bank. The Manager told him that he could go outside and use the ATM machine "if he needed it so bad."

- [16] When he asked why, the Manager told him that they were not “comfortable with him.” At the time the Manager made that Statement, all of the people in the Bank as well as staff members were looking at the Claimant suspiciously. This was said within earshot of customers. The Claimant felt embarrassed.
- [17] The manager also threatened that if the Claimant did not leave the Bank he would become a trespasser and he would call the police for him. He felt embarrassed and humiliated.
- [18] The Claimant finally showed the teller his Barbados identification card and was allowed to swipe his ATM card, whereupon the teller gave him his cash and he left the Bank. Neither the teller nor the Manager apologised to the Claimant and he left the bank in shame.
- [19] The Claimant saw several persons whom he knew from his days as a member of the Royal Barbados Police Force and as an attorney-at-law including a named G4S Security Guard who was on duty at the Bank. The latter patted him on his back as he passed and said: “Don’t worry about it man.”
- [20] He was aware of the Bank’s policy to allow the use of his ATM pin number as a means of identification and had done this several times at other branches.
- [21] In the Amended Claim Form the **“Particulars of Defamation under Defamation Act”** are as follows:
- “The said words in their natural and ordinary meaning meant and were understood to mean:-
- (a) That the Claimant was in the habit of engaging in fraudulent conduct to obtain money from the bank.
 - (b) That the Claimant was in the category of persons who illegally obtain the pin

numbers of other persons and use them to get money from the bank by fraud.

- (c) That the Claimant was a thief.
- (d) That the Claimant could not be trusted on face value and he appeared to be a dishonest person whose identify needed to be established before allowing any transactions with the Bank.

Further and in the Alternative the said words meant:-

- (a) That the Claimant is a scammer.
- (b) That the Claimant engages in the criminal conduct of obtaining money from the Bank by fraud.
- (c) That the Claimant is a dishonest person who cannot be trusted to use his ATM card pin number as identification.

Particulars pursuant to Defamation Act (through its agent or servant)

- (1) The Defendant spoke the words which were defamatory of the Claimant directly to him in the presence of members of the public and other Bank staff.
- (2) The words spoken by the Defendant (through its agent or servant) were untrue and designed by the Defendant (through its servant or agent) to inflict maximum damage to the Claimant's character and reputation.
- (3) The words spoken by the Defendant (through its servant or agent) were defamatory of the Claimant and lowered the Claimant in the estimation of members

of the public and Bank staff in the Warrens branch of BNB Bank on that day.

- (4) In the premises, by reason of the publication of the words herein before pleaded at paragraph 4, the Claimant has been greatly injured in his credit, character and reputation and in his office as an Attorney-at-law and had been brought into ridicule and contempt.”

Amended Defence (Summary)

- [22] The Defendant had its own version of events. The pleadings and the Statements of its witnesses detailed its perspective.
- [23] The Defendant not only denied that any of the words complained of were used but that any words used by its servants or agents were defamatory or capable of bearing the meaning pleaded by the Claimant in its Amended Statement of Claim.
- [24] The Defendant also denied that the words had a defamatory meaning or were capable of referring to the Claimant. Further, even if the words were defamatory it was unlikely that the Claimant would suffer any harm to his reputation by the use of those words.
- [25] Moreover, the Defendant said that the words were true in substance and fact and that there were instances where persons used the pin numbers of others to fraudulently obtain money from the Bank. They intended to rely on such instances.
- [26] It was admitted that the Claimant was asked to produce his identification card in order to verify the cardholder with the account holder, before the transaction could be carried out.
- [27] Indeed the teller exercised her discretion to require production of the Claimant’s identification card because she did not know him. She only became aware that he was a lawyer when he told them so.

- [28] Both the Defendant's Manager and Teller denied that they spoke loudly to the Claimant and he was put to strict proof that the statements were made within "earshot" of persons in the Bank. However, the Claimant was accused of being disruptive, aggressive and loud towards the Defendant's employees. Consequently the Manager told him that if he continued in that vein he would be asked to leave, failing which they would seek the assistance of the police.
- [29] The Defendant admitted that the Claimant was referred to the Bank's automated teller machine where the transaction could be carried out without production of his identification card. The Defendant denied that the said machine was "outside" of the Bank as alleged by the Claimant but rather the said machine was located inside the Warren's branch.
- [30] The Defendant did not admit or deny whether persons were staring curiously or suspiciously at the Claimant but averred that if this were true it would have resulted from the Claimant's loud and aggressive behaviour toward its employees.
- [31] When the Claimant finally produced his identification card, he refused to let the teller touch it, pulled it back from her in a forceful manner and told her that she could only look at it.
- [32] The Defendant also denied the Claimant's assertion that it was the Bank's policy to use the ATM pin number as a means of personal identification and he was put to strict proof thereof.
- [33] The Defendant indicated its intention to rely on the definition of "PIN" in the contract. In the circumstances, the Claimant's use of the ATM pin number pursuant to the contract, related solely to the use of the Defendant's personal banking machines.
- [34] The Defendant also denied that it acted unreasonably or in breach of contract, that it intended to further publish or repeat words allegedly used and stated that the Claimant was not entitled to the injunction or indeed any

of the relief sought. He was put to strict proof of all allegations except those expressly admitted.

- [35] The Defendant maintained that its employees had no reason to apologise to the Claimant.

The Defendant's Submissions

- [36] (a) *Defamation*

Counsel for the Defendant argued that the Claimant's action in defamation could not succeed unless the statement complained of referred to the Claimant. He stated that the statement allegedly made referred to a class of fraudulent persons. He also stated that the teller needed proof of identity to establish whether the person before her was one of those persons or in fact Mr. Pearson Leacock. As such she could not have defamed the Claimant by making the statement.

- [37] Mr. Koeiman cited in support the following passage from "Commonwealth Tort Law," 5th edition at page 260 by Gilbert Kodilinye:

"The second requirement for a successful action in defamation is that the defamatory words must be shown to have referred to the claimant. In most cases the claimant will be mentioned by name but this is not a necessary requirement⁷⁷. It is sufficient for liability if he is mentioned by, for example, his initials or his nickname or if he is depicted in a cartoon, photograph or verbal description, or if he is identified by his office or post. It may also be sufficient if a particular group of which he is a member is mentioned. In all cases, the test is whether a reasonable person might understand the defamatory statement as referring to the claimant."

- [38] At footnote 77 the author stated:

"In cases where the claimant is not named, he should make clear in his particulars of claim, the basis on which he claims to have been identified as the subject of the words complained of, setting out the connecting facts which establish the link between himself and the words used, and demonstrating the

existence of persons who in fact linked him with the words by reason of their knowledge of those connecting facts: *Charles v. T & T News Centre Ltd* (2009) Court of appeal, Trinidad and Tobago, Civ App No. 26 of 2007 (unreported) [Carilaw TT 2009 CA5], *per* Mendonca JA, citing *Gatley on Libel and Slander*, 10th edition, para 26.25.”

[39] Mr. Koeiman argued that a defamatory statement was one that imputed a meaning which was harmful to the Claimant’s character. He said that the teller did not refer to the person before her as a fraud but merely asked him to confirm his identity. He stated that proof of identity was required to prevent fraud and therefore he did not consider that it could be defamatory to say this. He felt that this ought to be enough to dispose of what he characterized as a “hopeless and frivolous case.”

[40] Counsel argued that publication of the statement to a third party was an ingredient of the claim for defamation. He cited Gatley on Libel and Slander, 9th edition by Milmo and Rogers at paragraph 6.1. The excerpt read:

“General principles: publication. No civil action can be maintained for libel or slander unless the words complained of have been published. “The material part of the cause of action in libel is not the writing, but the publication of the libel.” In order to constitute publication, the matter must be published to (communicated to) a third party, that is to say, at least one person other than the plaintiff. “A cannot sue B for defaming him to A himself, or to B himself; that is to say where B reads to himself his libel on A and then locks it away. A must prove that B defamed him to C”. Defamation protects a person’s reputation and his reputation is not the good opinion he has of himself but the estimation in which others hold him. A defamatory statement about the plaintiff communicated to the plaintiff alone may injure his self-esteem but it cannot injure his reputation.”

[41] He felt that it was worth noting that the only witness statement produced by the Claimant was his own in which he alleged that the statement was

made loudly enough for others to hear. In these circumstances Mr. Koeiman argued that the Claimant could not discharge his onus of proof (on a balance of probability) without evidence that another person had heard the statement. He contended that the Claimant had not established that it was more probable than not that someone had heard the statement.

(b) Contract

- [42] Mr. Koeiman submitted that the claim for breach of contract had to fail and should also be struck out. He disagreed with the suggestion that it was a term of the Claimant's contract with the Defendant that his ATM card would be proof of identification.
- [43] He referred to the Flexiteller Regulations on which the Claimant relied and he emphasized that it was said that they "establish[ed] the terms of use of the automatic teller machine." He argued that the document clearly indicated that the aim of the flexicard was to enable the Claimant to use the automatic teller machine. Also, that there was nothing in the contract which dealt with the presentation of the flexicard to a live teller or that that a live teller would accept it as proof of identification.
- [44] He was of the view that the word "identification" in the definition of PIN in the Regulations was a number to identify the Claimant as distinct from other cardholders. He saw this as analogous to a national identification number.
- [45] He felt that the Claimant was relying on the flexicard to which the pin was allocated as proof of identify of the bearer.
- [46] He rejected the notion that the refusal by a live teller to allow the use of the flexicard card before production of the identification card, could be considered to be a breach of an agreement for the use of the card in an automatic banking machine.

[47] Mr. Koeiman also argued that even if the Claimant could establish breach of contract, he had not pleaded any loss and his witness statement made no mention of loss.

[48] Counsel referred the court to the following passage from Chitty on Contract, 13th edition Volume 1 at 26-008. It provided:

“**Nominal damages.** Wherever the defendant is liable for a breach of contract, the Claimant is in general entitled to nominal damages, although no actual damage is proved; the violation of a right at common law will usually entitle the claimant to nominal damages without proof of special damage. Normally, this situation arises when the defendant’s breach of contract has in fact caused no loss to the claimant, but it may also arise when the claimant, although he has suffered loss, fails to prove any loss flowing from the breach of contract, or fails to prove the actual amount of his loss. A regular use of nominal damages, however, is to establish the infringement of the claimant’s legal right, and sometimes the award of nominal damages is “a mere peg on which to hang costs.”

[49] Mr. Koeiman also stated that the Claimant was able to withdraw his money on production of his identification card. He added that the Claimant did not show what loss he suffered from the initial period of delay when he refused to produce his card and his eventual decision to do so.

(c) The Test

[50] Mr. Koeiman submitted that the test to be applied when the Court had to determine an application under Rule **26.3.(3)(b)** was stricter than that for a summary judgment application (which was whether there was as realistic as opposed to a mere fanciful prospect of success). Instead, the test was whether, assuming the facts asserted by the Claimant were true, the claim was doomed to fail as a matter of law.

[51] He added that where there were questions solely of construction of documents and/or interpretation of law, the court could do the analysis and determine the application.

The Claimant's Submissions

[52] Mr. Graham's concise submissions in response, on behalf of the Claimant, are now reproduced in their entirety. He submitted:

“The exercise of the discretion to “strike out” is used sparingly and the Courts have taken the position that there are “alternatives which will enable a case to be dealt with justly without taking the draconian step of striking the case out” per **Lord Woolf MR in Buguzzi v. Rank Leisure PLC (1999) 1 WLR 1926**; applied by the Jamaican Court of Appeal in **Dixon v. Jackson, Civil Appeal No. 120/2005**.

A court may allow a statement of case to be amended rather than strike it out if in doing so it accords with the overriding objective of the **C.P.R.**

In the decided case **Paradise Beach Limited Paradise 88 Ltd v. Edghill and Patel Civil Appeal No. 10 of 2011**, an appeal against the Order of Master Roberts given under Rule 26.3(3)(b) and (c) explained the relevant considerations to be taken into account when a Court considers applications to “strike out”. The Court found 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.”

My submission therefore is that the said words being defamatory of the Claimant by innuendo and the conduct of the Defendant's servants or agents constitute defamation of the Claimant's character in his calling as an Attorney-at-law. Further that the failure of the Defendant through its servants or agents to acknowledge the terms of the Claimant's contract with the Defendant where it specifically stated that the pin number shall be used as identification when using the ATM machines or other banking machines constitutes a breach of that contract. This occurred when the Defendant's servants or agents insisted on seeing the Claimant's Barbados

Identification Card before he was allowed to make a transaction despite him offering to use his pin number and ATM card.

In sum there are issues to be tried and the Defendant's efforts to strike out the Claim are frivolous and vexatious and should be dismissed with cost to the Claimant."

Reply

[53] Mr. Koeiman argued that the Claimant did not establish a basis for the court to amend as opposed to striking out. He reiterated his position that the claim had no legal or factual basis and stated that the facts were not capable of amounting to defamation.

[54] He stated that unlike the **Paradise Beach** case there were no issues to be tried. He said that the claim had no real likelihood of success it ought to be dismissed.

Discussion

Delay

[55] The Claimant undoubtedly has been guilty of chronic delay in carrying out the court's orders. He has failed to complete his work within the time limit that was set. He finally managed to comply albeit in his own time.

[56] The court is empowered by virtue of Rule **26.3(1)** of the **Civil Procedure Rules 2008** to strike out a statement of case for failure to comply with orders given. The courts however tend to be long-suffering and prefer to use alternatives or lesser penalties as opposed to striking out. The ultimate sanction of striking out will be used when it is considered that 'enough is enough.' See *Duggan v. Wood [2001] EWCA Civ 1942, LTL 22/11/2001*.

[57] In light of the fact that the Claimant's orders were completed, the Defendant has concentrated its efforts on grounds four (4) and five (5) of the Application. These two grounds will therefore be the focus of this discussion.

The Issue

[58] The issue is whether the Claimant's statement of case should be struck out for failure to disclose reasonable grounds for bringing the claim.

[59] The Defendant has the burden of demonstrating that the statement of case falls within Rule **26.3(3)(b)** of the **Civil Procedure Rules, 2008**.

[60] The parties provided the court with written submissions and they were offered the opportunity to make oral submissions as well but they were satisfied with their written submissions and declined the offer. However, it must be noted that the Claimant did not respond to any of the Defendant's submissions on defamation and breach of contract.

No reasonable ground for bringing or defending the claim

[61] **Rule 26.3(3)** of the **Civil Procedure Rules, 2008** provides:

“The court may also, in addition to all other powers under these Rules, strike out, at a case management conference or otherwise upon an application on notice, a statement of case or part of a statement of case if it appears to the court

(b) that the statement of case or part to be struck out discloses no reasonable ground for bringing or defending a claim; or

(c)”

[62] Mr. Graham cited the case *Paradise Beach Ltd. and Paradise 88 Ltd. v. Edghill and Patel, Civil Appeal No. 106 of 2011* where **Moore JA**, in the Court of Appeal of Barbados agreed with **Master Roberts'** decision and held that the disputed issues of fact and law were eminently suitable for resolution at a full blown trial before a judge.

[63] The court reaffirmed the position taken by **Danckwerts LJ** in *Wenlock v Moloney and others [1965] 2All ER 871* where it was said that the summary jurisdiction of the court was never intended to be exercised by minute and protracted examination of documents and facts of the case in order to see whether the plaintiff really has a cause of action.

- [64] The court was also clear that it was not appropriate to strike out a claim where the central issues were in dispute. Also, that in exercising the court's discretion to strike out, regard must be paid to the overriding objective in Rule **1.1** of the **C.P.R.**
- [65] The Court of Appeal in *Erskine Kellman and Irvin Kellman v. Granville Bovell, Civil Appeal No. 13 of 2015* examined the court's discretionary power to strike out a statement of case or part of a statement of case under Rule **26.3(3)** of the **C.P.R.** In so doing it provided much food for thought on this matter.
- [66] The court said that in dealing with an application to strike out the judge must always be mindful of the fact that to strike out a party's case is an extreme step which is not to be taken lightly. The court said that a strike out order should be made in two circumstances, firstly when it is necessary in order to achieve fairness and secondly when it is necessary to maintain respect for the authority of the court's order.
- [67] "Fairness" was defined as "fairness not only to the non-offending party but also to the other litigants who are competing for the finite resources of the court."
- [68] The court also referred to the pre **C.P.R.** case *Barbados Radiffusion Services Ltd. v. Asha Mirchandani, Ram Mirchandani and McDonald Farms Ltd. CCJ Appeal No. C.V. 1 of 2005* where the Caribbean Court of Justice set out factors to be taken into account in exercising the discretion to strike out. They reiterated the position that those factors were still applicable to cases under the **C.P.R.**
- [69] **Goodridge JA** said:
- "[63] According to the C.C.J. the correct approach required is a balancing exercise, taking into account all the relevant facts and circumstances of the case. In carrying out this exercise, a court must seek to give effect to the overriding objective, that is, to deal with cases justly: CPR 1.1(1)."

[70] **Goodridge JA** also stressed that the court’s power to strike out under the **C.P.R. 26.3** is part of the court’s general powers of case management under **Part 26** and that the court was empowered to make a number of orders before exercising its discretion to strike out under **26.3(3)**.

[71] She said:

“[70] In our opinion, the court’s power to strike out is in addition to all other powers under CPR and is a power which should be used sparingly.”

[72] **Goodridge JA** also referred to the case of *Belize Telemedia Ltd. and Boyce v. Magistrate Usher and Attorney General (2008) 75 WIR 138* where **Conteh CJ** in the Supreme Court of Belize “explained the logic behind the provision to strike out for failure to disclose reasonable grounds.”

[73] I will reproduce the said paragraphs:

“[19] The provision of the rules in Part 26.3(1)(c) which enables the court to strike out a claim because it discloses no reasonable grounds for bringing or defending the claim is undoubtedly a salutary weapon in the court’s armoury, particularly at the case management stage. It is intended to save the time and resources of both the court itself and the parties: why devote the panoply of the court’s time and resources on a claim such as to go through case management, pre-trial review and scheduling a trial with all the time and expense that this might entail, only to discover at the end of the line that there was no reasonable ground for bringing or defending a claim that should not have been brought or resisted in the first place? This provision in the rules addresses two situations:- (i) When the content of a statement of case is defective in that even if every factual allegation in it were proved, the party whose statement of case it is cannot succeed; or (ii) Where the statement of case, no matter how complete and apparently correct it may be, will fail as a matter of law. (See *The Civil Court Practice (2008)*, (The

Green Book), CPR 3.4[4] at p76, and The White Book 2005: Civil Procedure at paras 3.4.1 and 3.4.2.

[20] It is important to bear in mind always in considering and exercising the power to strike out, the court should have regard to the overriding objective of the rules and its power of case management. It is therefore necessary to focus on the intrinsic justice of the case from both sides: why put the defendant through the travail of full blown trial when at the end, because of some inherent defect in the claim, it is bound to fail, or why should a claimant be cut short without the benefit of trial if he has a viable case?

[21] There are always important factors that perforce must attend any consideration in exercising the discretion to strike out or not to strike out a claim – *Walsh v. Misseldine* (2000) CPLR 201 [2000] All ER.(D) 261, CA; cited in the *Caribbean Civil Court Practice* (2008) at Note 23.35; and generally, the White Book 2005, particularly at pp 88 to 92 at para. 3.4.1 and 3.4.2’.”

[74] Blackstone’s commentary on striking out in general and **Rule 3.4.(2)(a)** of the UK’s Civil Procedure Rules, which is the same as our **Rule 26.3.(3)(b)**, is also instructive. It is stated that:

“Cases where striking out under C.P.R., r.34(2)(a), is appropriate according to Potter LJ in *Partco Group Ltd. v. Wragg* [2002] EWCA Civ 594, [2002] 2 Lloyd’s Rep 343, at [46], include:

- (a) Where the statement of case raises an unwinnable case where continuing the proceedings is without any possible benefit to the respondent and would waste resources on both sides (*Harris v. Bolt Burdon* [2000] (PLR 9); and
- (b) Where the statement of case does not raise a valid claim or defence as a matter of law (*Price Meats Ltd. v. Barclays Bank plc* [2002] 2 All ER (Comm) 346)”

Blackstone's Civil Practice 2011 Chapter
33.8.

[75] Other useful pointers for consideration are itemized below:

- (1) The jurisdiction to strike out is to be used sparingly because the exercise of the jurisdiction “deprives a party of its right to a trial, and of its ability to strengthen its case through the process of disclosure and other court procedures such as requests for further information. Further, it has always been true that the examination and cross-examination of witnesses often changes the complexion of a case. It was accordingly the accepted rule that striking out was limited to plain and obvious cases where there is no point in having a trial.” Blackstone. Chapter 33.6.
- (2) Where there are issues to be tried, striking out must not be used to dispense with the need for trial. (*Swain v. Hillman* [2001] 1All ER 91 (a summary judgment case) Per **Lord Woolf MR.**
- (3) It is improper to conduct what is in effect a mini trial involving protracted examination of documents and facts in written evidence, (*Wenlock v. Moloney* [1965] 1 WLR 1238, but there are certain kind of cases where such a detailed analysis is appropriate. (*Morris v. Bank of America Trust*)
- (4) Traditionally the rule has been regarded as restricted to cases which are bad in law or which fail to plead a complete claim or defence. In practice the rule is regarded as a means of attacking cases which are weak on evidence. (*Freer v. Zeb* [2008] EWHC 212 QB, LTL 21/2/2005).
- (5) On hearing the application it will be assumed that the facts alleged are true. (*Morgan Crucible Co. plc v. Hill Samuel & Co. Ltd.* [1991] Ch 295 per **Slade LJ.**
- (6) In deciding whether to strike out the judge should consider the effect of the order. (*Watson v. Ian Snipe and Co.* [2002] EWCA Civ 298, LTL 21/2/2002.

- (7) Judges often apply the test of whether the claim is bound to fail, so that even a case ‘fraught with difficulty’ will not be struck out. (*Smith v. Chief Constable of Sussex* [2008] EWCA Civ 39, [2008] P1QC12; *K v. Central and North West London Mental Health NHS Trust* [2008] EWHC 1217 (QB) P1QRP19).
- (8) “Where the argument involves a substantial point of law which does not admit of a plain and obvious answer, it may be best not to have it determined on a striking-out application.” (Blackstone. Chapter 33.9)

(a) Defamation

[76] In *Three District Council v. Bank of England* (No. 3)[2001] UKHL 16, [2002] 2 AC1, Lord Hope of Craighead said that under r3.4 the court generally is only concerned with the statement of case which it is alleged discloses no reasonable grounds for bringing or defending the claim. (Blackstone. Chapter 33.1)

[77] Likewise, I will generally be concerned with the Amended Statement of Claim, but this application is being dealt with after full case management orders have been given. Consequently it is not appropriate to close one’s eyes to relevant matters arising therefrom. In addition, a mini trial will not be conducted but the document on which the Claimant bases his claim in contract as well as all pertinent facts and circumstances will be considered.

[78] At paragraph 3 of the Amended Statement of Claim the Claimant stated:

“On Friday 23rd December 2011, about 5:30 hrs the Defendant by its servants or agents defamed the Claimant by its actions towards him also in that it falsely and maliciously spoke of the Claimant in the way of his office as an Attorney at law in private practice in Barbados....”

[79] The insistence by the Teller and Bank Manager that the Barbados identification card be produced constitutes the “actions” complained about.

[80] The words allegedly spoken “within earshot” of others are as follows:

- (1) “There are people getting other people’s pin numbers and getting money from the Bank by fraud.”
- (2) The Manager’s statement that they “were not comfortable” with the Claimant and also that “if he needed it so bad he could go outside to the ATM.” The Manager also threatened to call the police for the Claimant.

[81] With respect to the first statement the Claimant contended that the words in their natural and ordinary meaning were understood to mean, among other things, that he was (a) in the habit of engaging in fraudulent conduct to obtain money from the Bank, (b) in the category of persons who illegally obtained the pin numbers of other persons and use them to get money from the Bank (c) a thief; etc. (See para [21] above).

[82] The Claimant has the burden of proving his case at trial. Apparently there was a single publication of statements to customers and staff of the Bank who were “within earshot” of what was said. The Claimant has to prove that the words were spoken, that at least one of the persons “within earshot” actually heard the words and that the said person reasonably understood that the statement referred to the Claimant.

[83] Since publication to the Claimant alone is not sufficient, he needs to file the statement of the witness or witnesses on whom he intends to rely. The Claimant ignored the time period which was given by the court to file his witness statements. And, after having taken as much time as he desired he has only filed his own witness statement.

- [84] It must be noted that even though reference was made to the security guard who patted the Claimant on the back and told him not to worry, it was never pleaded that he was “within earshot.”
- [85] I agree with counsel for the Defendant that the Claimant cannot prove publication without at least one witness.
- [86] It was also contended by the Claimant that the words were untrue and designed to inflict maximum damage to his reputation. In my view the Claimant has given himself a tall order to demonstrate that the first statement is untrue. It must be widely known that both nationals and non-nationals have been convicted in the courts of Barbados for such acts of fraud. Having presided over such matters I will take judicial notice of this.
- [87] As stated previously, the Defendant has denied that its employees made the statement but will rely on the defence of truth. (See **section 7** of the **Defamation Act** Chapter 199 and **Rule 69.4** of the **Civil Procedure Rules, 2008**).

Assumption of Truth

- [88] In spite of any difficulties that have been brought to light during the case management process, the matter will now be analyzed based on the assumption that the facts alleged in the Amended Statement of Claim are true. The words complained of are not complicated. These words would have been spoken to the Claimant but the question which arises is whether they are capable of imputing a meaning which is harmful to the Claimant’s character.
- [89] Mr. Koeiman argues that the words are not capable of defaming the Claimant.

“There are **people** (my emphasis) getting other people’s pin....”

[90] To my mind the statement is about **people** who are engaged in a specific type of criminal activity. Mr. Koeiman aptly describes it as referring to a class of fraudulent people. Is it reasonable to infer that these words in their natural and ordinary meaning can give rise to the meanings which are attributed to them by the Claimant in his Amended Statement of Claim? Another question for consideration is whether the “actions” and all statements made can give rise to defamation.

The Link

[91] I am persuaded by the argument that in his claim the Claimant must set out the basis on which he claims to have been identified as the subject of the words complained of. He has not set “out the connecting facts which establish a link between himself and the words used” nor has he demonstrated the existence of persons who linked him with the words by reason of their knowledge of the facts.

[92] The facts pleaded are straight-forward. The Claimant is a member of a group of persons known as attorneys-at-law. It has not been demonstrated that there is a connection between the words used and “his calling as an attorney-at-law” as argued by Mr. Graham. In addition there is no link between the Claimant and the category of “people” who are committing the fraudulent acts. The meanings attributed to the words by the Claimant cannot reasonably be accepted.

Cause of Action

[93] I previously referred to the dictum of **Potter LJ** in *Partco Group Ltd. v. Wragg* (supra) with respect to cases where striking out is appropriate. In my opinion the Amended Statement of Claim does not raise a valid claim in defamation.

[94] I will go even further and suggest that in the event that this claim can be considered valid in law, in the circumstances of this case the Claimant

cannot discharge the burden of proof which rests on his shoulders in a claim for defamation. I will also add that even if every factual allegation is proved, the Claimant cannot succeed. The words are not defamatory of the Claimant. In my estimation this claim will not pass the “bound to fail” test. It is difficult to see how a “full blown trial can “change the complexion” of this matter.

Rule 69.3

[95] The fifth ground of the Defendant’s application alleges that the Claimant’s claim for defamation does not comply with **Rule 69.3** of the **Civil Procedure Rules, 2008**. Mr. Koeiman has not elaborated on this. At any rate there is no merit in this assertion. The Claimant’s pleadings are clear that the words are defamatory in their natural and ordinary meaning.

“**69.3.** The Statement of Claim must, in addition to the matters set out in Part 8

- (a) state the precise words complained of and give sufficient particulars of the publication to enable it to be identified;
- (b) where the claimant alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, he must specify in the particulars of his claim, the defamatory meaning which he alleged the words or matters complained of conveyed
 - (i) as to their natural and ordinary meaning; and
 - (ii) as to any innuendo (that is to say, a meaning alleged to be conveyed to some person because of that person’s knowledge of facts extraneous to the words complained of);

- (c) where an innuendo meaning is alleged, the claimant must also identify the relevant extraneous facts.”

Innuendo

[96] Even though in submissions on behalf of the Claimant Mr. Graham states that the words are “defamatory of the Claimant by innuendo,” this has not been pleaded or demonstrated. The “relevant extraneous facts” must be identified.

[97] Section 4 of the **Defamation Act** Chap 199 provides:

“A claim in defamation based on a single publication and relying both on the natural and ordinary meaning of words and on a legal innuendo shall constitute separate causes of action”.

(b) Breach of Contract

[98] *Is there a triable issue?*

The Claimant alleges that the Defendant unreasonably and in breach of contract refused to allow him to use his PIN number as his personal identification, until he produced his Barbados identification card to the Defendant’s servants or agents.

[99] On the pleadings both parties agree that the Claimant wanted to withdraw seven hundred dollars from his account. He did not go to the automated teller machine, rather he waited in line, when his turn came he approached the teller and told her what he wanted. This was a teller assisted transaction.

[100] No amount of swiping of the flexicard at the counter could have produced the money for the Claimant. This was not an automated teller machine. The teller had to take the money from her drawer/till, count it and hand it over. I emphasize that this was a teller assisted transaction. The Claimant’s pleadings confirm this.

[101] It is agreed by the parties that the Defendant was asked to produce his Barbados identification card and after much ado he did produce it. It is also

agreed that the teller refused to allow the Defendant to complete his transaction until he produced his identification card.

[102] The Claimant was in possession of his Barbados identification card but he did not produce it immediately on request. He argued that he had done similar transactions at other branches and he had not been asked to produce his card. He asked to see the Manager.

[103] Counsel for the Defendant correctly pointed out that the Claimant had not pleaded the loss he suffered between the period when the request was made and when he eventually produced his card.

[104] In his statement of case the Claimant said at paragraph 17, that he was aware of the Bank's policy to use the PIN number as a means of identification and he had done this several times at other branches. He relies on the definition of "PIN" in a two paged document entitled "**Flexiteller Regulations for BNB 24-hour Banking Service.**" This document was issued to him along with his ATM card. The definitions to be applied are found at Regulation 1. It provides:

"1. For the purpose of these regulations, the following definitions shall apply:-

"Regulations" mean these Flexiteller Regulations....

"Card" means the BNB Flexicard in its original form issued to the cardholder or a subsequent card issued in substitution for or renewal of or additional to such card.

"Cardholder" means any person to whom the BNB Flexicard is issued and who is authorized by the Bank to hold a card.

"Personal Banking Machine" or "PBM" means the automated teller machine maintained by the Bank at its Branches or elsewhere for use by the cardholder for the

purposes of withdrawing cash, making deposits, obtaining balances and generally performing such transactions in relation to the Account of the cardholder as may from time to time be permitted by the Bank.”

“Flexiteller” is the name of the Personal Banking Machine service offered by the Bank to its customers.

“PIN” means the personal identification number allocated to the cardholder by the Bank to enable him to use the card in a PBM.”

[105] The above definitions are clear and therefore speak for themselves.

Nothing in these Regulations for a twenty-four hour banking service addresses what must be done in over the counter transactions, during normal Banking hours.

[106] These Regulations are not concerned with teller assisted transactions at all.

The personal identification number allows the card holder to use the card in the automated machine. The machines are available to customers for the entire twenty-four hour day.

[107] Nothing in the document prohibits the teller from exercising her discretion

to require a customer of the Bank to show his Barbados identification card before a transaction is done. Nothing in the document pronounces on the teller’s duties. Indeed, nothing in the document can lead one to reasonably infer that a personal identification number replaces the requirement for facial identification in teller assisted transactions.

[108] The facts pleaded with respect to the claim for breach of contract are not

complicated. The only document on which the Claimant relies is clear and unambiguous. There is no need for protracted examination of the said document and the pleaded facts. No “substantial point of law which does

not admit of a plain and obvious answer” has arisen. There are no disputed issues of fact and law that must be resolved at a full trial.

[109] The facts pleaded do not establish a cause of action. This aspect of the claim is not “fraught with difficulty”. It is unwinnable and bound to fail.

Conclusion

[110] The learned authors of Blackstone¹ state that there are relatively few occasions where immediate striking out as opposed to a lesser sanction or an imposition of an unless order is appropriate. Striking out is reserved for plain and obvious cases where there are no issues to be tried.

[111] Mr. Graham argues that there are issues to be tried but he has not elaborated in his written submissions.

[112] I accept the fact that the jurisdiction to strike out is part of the court’s general case management powers which must be used sparingly because it curtails a party’s right to trial. I also accept that a case can be strengthened by disclosure and that examination and cross-examination at trial can “change the complexion of a case.”

[113] In this regard however I note that for all intents and purposes the case management phase of this matter is at an end. Only this application is outstanding. Lists of Documents and the statements of witnesses have already been filed. Consequently it is not difficult to gauge the strength of this case.

[114] I am cognizant of the court’s duty to focus on the “intrinsic justice” of the case. To achieve this the court must involve itself in a balancing exercise where all relevant facts and circumstances are taken into account. What is most important is that throughout this process the overriding objective must be kept at the forefront.

¹ Blackstone’s Civil Practice 2011. Chapter 46.14.

[115] The Rules stipulate that dealing justly with a case, as far as practicable, includes saving expense, dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, ensuring that it is dealt with expeditiously and fairly and allotting to it an appropriate share of the court's resources while taking into account the need to allot resources to other cases.

[116] As stated previously a strike out order should only be made in two circumstances. (See *Erskine Kellman and Irvin Kellman v. Granville Bovell (supra)*). I have been guided by all the aforementioned principles.
Amendment

[117] Mr. Graham rightly submits that the court may allow an amendment to the statement of case if it accords with the overriding objective. Mr. Koeiman counters that no case has been made for amendment.

[118] In *Anise Ingrid Phillips v. Audley, Lynne and Jeremy Cronney* No. 514 of 2015, **Reifer J** referred to the court's reluctance to deny a Claimant access to the courts in pursuing a claim unless it could be demonstrated that the claim is bound to fail or is otherwise objectionable.

[119] She continued:

“[18]...if a claim has been established but it lacks particularity, then striking out is not the answer, but rather an order for better particulars to be filed. However, where it does not present a claim at all, then the action should be struck out.”

[120] I agree with counsel for the Defendant that no case has been made for amendment. It is not possible to say that this claim merely “lacks particularity”. For reasons previously discussed, I can find no basis for an amendment or for an order for better particulars.

Effect of Order

[121] I believe that a strike out order is warranted. The effect of such an order will be to achieve fairness. It will save costs, ensure that the court's scarce resources are not wasted. No substantial point of law has been raised either in defamation or in contract. This is a plain and obvious case. There are no issues of fact or law that require trial and there is no benefit in continuing this matter. The Claimant does not have a viable case and the Defendant should not be put through the "travail of full blown trial". This case should not have been brought in the first place.

Disposal

[122] The Claimant's Claim Form and Statement of Claim and his Amended Claim Form and Amended Statement of Claim are struck out.

[123] The Defendant is awarded costs, to be assessed if not agreed.

**Ms. Deborah Holder, BSS
Master of the High Court**