BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Civil Suit No. CV1587 of 2017

BETWEEN:

CARIBBEAN LIFESTYLE DESIGN AND CONSTRUCTION LTD. **CLAIMANT**

AND

ADAM ZIVE **DEFENDANT**

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

2018: July 12
2019: August 14

Appearances:

Mr. Graeme Brathwaite of Delany Law, Attorneys-at-Law for the Claimant

Mr. Nicholas Jackman of Chancery Advocates, Attorneys-at-Law for the Defendant

DECISION

Introduction

[1] In an application filed on 5th March, 2018, the Defendant seeks an order that paragraph 3.2 of the Claimant's Reply to Defence and Defence to Counterclaim be struck out for non-compliance with **Part 8.5(3)** of the **Supreme Court** (**Civil Procedure) Rules, 2008**.

Background

[2] In this matter the Claim Form and Statement of Claim were filed on 24th October, 2017. The Claimant alleged that by an oral agreement between the parties, the Claimant was required to carry out certain

remedial construction work on the Defendant's property. A construction estimate was provided. The work started. The Defendant increased the scope of the work to be done by the Claimant and the latter provided an updated construction estimate. The Claimant carried out the work and the Defendant made three payments to the Claimant. In spite of numerous requests the Defendant refused to pay the outstanding balance. As a result the Claimant suffered loss and damage.

[3] In the Defence and Counterclaim which was filed on 17th November, 2017, the Defendant denied that he ever entered an oral agreement with the Claimant. He stated that the Claimant either failed to complete the remedial work or had defectively completed certain listed items of work in breach of the terms of the construction estimate. The Defendant admitted making three payments to the Claimant but claimed that the third payment was larger than the amount stated by the Claimant. He denied that the Claimant is owed any money.

[4] He stated that in spite of his requests for the Claimant to remedy the defects and complete the outstanding work it failed to do so. The Defendant was therefore obliged to carry out work to remedy some of the said defective and incomplete work and he suffered loss and damage as a result. He counterclaimed for this.

[5] The Claimant's Reply to Defence and Defence to counterclaim was filed on 6th February, 2018. The paragraph complained about was made in response to paragraph 2 of the Defendant's Defence.

[6] Paragraph 3 provides:

> "3. Paragraph 2 of the Defence is denied. In particular:
>
> 3.1. The Claimant repeats paragraph 3 and 4 of the Statement of Claim.

> 3.2. In further response to paragraph 2 it is misleading for the Defendant to deny that he entered into an oral agreement with the Claimant especially when the Claimant has done sufficient acts of part performance of the contract which in any event runs counter to paragraphs 4 and 5 of the Defendant's Defence."

[7] At paragraph 2 of the Defence and Counterclaim the Defendant said:

> "Paragraph 3 of the Statement of Claim is denied. The Defendant states that at no material time did he ever enter into an oral agreement with the Claimant."

[8] The Defendant's paragraphs 4 and 5 are as follows:

> "4. Save that the Claimant issued a further updated construction estimate via email on or around the 21st day of October 2016, paragraph 6 is denied and the Defendant avers that the Claimant has either failed to complete or has defectively completed the following items of work in breach of the terms of the construction estimate:
>
> 1. The supply and installation of special claw lock, namely….
>
> 5. Save for the sums of USD $12,500.00 and USD $16,478.20 paid to the Claimant on the 11th day of July and the 13th day of September respectively as partial payments, the Defendant denies paragraph 7. The Defendant stated that the third payment he made to the Claimant was the sum of USD $12,478.20 on the 30th day of August 2016."

The Submissions

[9] Counsel for the Defendant submitted that paragraph 3.2 of the Reply breaches **Part 8.5.(3)** of the **Supreme Court** (**Civil Procedure) Rules, 2008**. He argued that the Claimant was seeking to introduce new facts in the Reply and to make a legal conclusion instead of responding to the

Defence. He speculated that this was being done to set up the doctrine of part performance.

[10] He contended that the words "sufficient acts of part performance" were not founded on factual argument or allegations which were specifically pleaded.

[11] Mr. Jackman argued that to permit the Claimant to introduce a new pleading in the Reply and to make a legal conclusion on the merits of the new pleading would prejudice the Defendant who would be deprived of the opportunity to respond.

[12] He also stated that the Claimant did not plead the particulars of the Defendant's acts which allegedly constituted "sufficient acts of part performance." He speculated that this was done with the intention of proving that there was an oral contract. He was of the view that without specifically pleading the particulars of the Defendant's act in the Statement of Claim which constituted "acts of part performance" there was no factual basis for the Claimant to assert that there were "sufficient acts of part performance".

[13] He was of the view that the issue for determination was whether the facts in the Statement of Claim supported the pleading in paragraph 3.2 of the Claimant's Reply. He questioned whether an allegation not pleaded in the Statement of Claim could be pleaded in the Reply.

[14] Mr. Jackman was of the view that the pleading must be sufficiently clear to set up the doctrine of part performance. He cited ***Whitbread v. Brockhurst*** (1784) 1 Brown's Chancery cases 404 as supporting the view that mere introductory or ancillary acts did not constitute acts of part performance.

[15] Mr. Brathwaite queried whether the Defendant had properly invoked the court's jurisdiction in that the application did not state the rule under which it was brought. He cited ***MacIntosh v. J.P. Marketing Ltd. et al*** No. 870/2004 (BB 2007 HC 20) where in the High Court of Barbados **Crane-Scott J** stated, in a matter brought under the old Supreme Court Rules 1982, that it was incumbent on an applicant seeking to strike out proceedings to state what jurisdiction of the court is being invoked. He however added that in spite of this defect the court had the power to allow an amendment.

[16] He denied that the Claimant was in breach of **Rule 8.5.(3)** of the **Supreme Court (Civil Procedure) Rules (CPR)**. He submitted that a reply to defence is embodied in the definition of statement of case in **Rule 2.3** of the **CPR** and the reply is part of the proceedings. Therefore, once an allegation or factual arguments on which the Claimant relied were set out in the reply there could be no breach of **Rule 8.5.(3)**.

[17] **Rule 2.3** provides:

> In these Rules,
>
> "Statement of Case" includes
>
> > (a) an application, statement of claim, defence, counterclaim, third party (or subsequent) notice or other ancillary claim or defence and a reply to a defence;"

[18] Mr. Brathwaite also did not agree that the Claimant sought to introduce new facts. He referred to paragraphs 3 and 4 of the Statement of Claim where it was stated that there was an oral agreement made between the parties on or about 14th June 2016.

[19] Counsel also denied that the Claimant was making a new legal argument instead of providing a response to the Defence. He was of the view that in paragraph 3 of the Reply, the Claimant only provided "further averments in support of its position".

[20] He asked the court to concentrate on the "intrinsic justice of the case in light of the overriding objective". He stated that striking out should only be used when the claim is obviously unsustainable, could not proceed or was an abuse of process of the court. In this regard he cited a statement from **Pereira CJ** in ***Cedar Valley Springs Homeowners Association Incorporated v. Hyacinth Pestaina*** (ANUHCVAP2016/0009), a case from the Eastern Caribbean Court of Appeal, on striking out.

[21] He asked the court to consider the nature of the case in its totality. He stated that it was important for the court to determine on the pleadings whether there was an oral agreement between the parties. He cited ***Watson v. Ifill*** CV 1755/2005 from the High Court of Barbados where an oral contract for construction of a house was considered.

[22] Mr. Brathwaite asked the court to consider paragraphs 4 and 5 of the Defence where the Defendant said that the Claimant "failed to complete or has defectively completed…." and that the Defendant paid certain sums to the Claimant as "partial payment". He submitted that based on this the Claimant maintained that the Defendant's position that he did not enter an oral agreement with the Claimant to be totally misleading and wholly untrue.

[23] He also submitted that the central issue was the quality of work done by the Claimant and the extent of the defects which were identified by the Defendant.

[24] He denied that part performance was not properly pleaded. He stated that it arose on the overall reading of the Statement of Claim. He said that money passed between the parties in consideration of the work which was done and the Defendant was concerned about the standard of the work.

[25] In conclusion Mr. Brathwaite stated that there was no prejudice to the Defendant. He denied that a new pleading that set up new facts was introduced. He maintained that from the inception the Claimant said that there was an oral agreement between the parties and the Defendant had supported this position at paragraphs 4 and 5. He was of the view that striking out was unnecessary and disproportionate but in the event that the court agreed with the Defendant, an amendment would be appropriate. He asked the court to dismiss the application with costs to the Claimant.

Response

[26] Mr. Jackman did not agree with the submission that the court's jurisdiction was not sufficiently invoked. He dismissed the case of ***McIntosh v. J.P. Marketing Ltd.*** (supra) as a case under the old rules that was not relevant because striking out was not at the heart of the matter. He maintained that the pleadings must be sufficiently clear to set up the doctrine of part performance and this was not done. He said that part performance must be pleaded in the Statement of Claim. He also was of the opinion that whether or not there was an oral contract was a matter for trial and was not relevant at this stage.

Law

[27] ***Supreme Court (Civil Procedure) Rules, 2008***

> "**26.3 (1)** 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;

(2)….

(3) 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

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

(b) ….

(c) that the statement of case or part to be struck out is prolix or does not comply with the requirements of Part 8 and 10."

"**8.5(3)** The Claimant may not rely on any allegation or factual argument which is not set out in the statement of claim, but which could have been set out there, unless the courts gives permission."

Issue

[28] The issue to be determined is whether the Claimant is in breach of **Rule 8.5.(3)** of the **CPR**.

Discussion

Jurisdiction

[29] Though the issue of jurisdiction was not belaboured or vigorously pursued by the Claimant, I will briefly address it. Mr. Brathwaite did not dispute the fact that the court had jurisdiction to hear the application but he queried whether the Defendant had properly invoked the court's

jurisdiction. This query was promptly dismissed by Mr. Jackman, apparently satisfied that he had referred to the relevant rule in his written submissions.

[30] It is my view that even though the case ***MacIntosh v. Marketing Ltd. et al*** dealt with an application under the old **Rules of the Supreme Court 1982**, the principle is still relevant. I agree with Mr. Brathwaite that the rule pursuant to which the court was being asked to exercise jurisdiction should have been stated in the application.

Findings of Fact

[31] I wish to support the position advanced by Mr. Jackman in response to the submission by Mr. Brathwaite that the court ought to determine whether, on the pleadings, there was an oral agreement between the parties. This is clearly a matter to be determined at trial.

[32] I also agree with Mr. Brathwaite that on the pleadings, the quality of the work done and the extent of the alleged defects are important issues. However this too is not a matter to be considered now, it is a matter to be determined at the trial stage.

[33] Likewise whether the acts of the Defendant were merely introductory or acts of part performance, are not matters for consideration at this stage. Consequently the case of ***Whitbread v. Brockhurst*** (supra) can offer no assistance.

Part Performance

Is this a case about part performance?

[34] The Claimant's case is not complicated. As stated previously, the parties entered an oral agreement. The work was done but only partial payment was received. The Claimant is asking the court's assistance to compel the Defendant to pay the rest of the money. On these facts the Claimant has

alleged that the Defendant has only partially performed his side of the agreement. The Claimant's case is about performance.

[35] The Defendant, on the other hand, denied that there was an oral agreement, itemized the work that was not done or was defectively done and stated that he made certain payments to the Defendant as "partial payments". The Defendant has therefore justified his reason for making partial payments on part performance and non-performance by the Claimant.

[36] Based on the pleadings it is difficult to comprehend the Defendant's argument that in the Statement of Claim, it was incumbent on the Claimant to have pleaded "the particulars of the Defendant's acts which constituted sufficient acts of part performance". I agree with Mr. Brathwaite that part performance arose on the overall reading of the Statement of Claim.

Reply to Defence

[37] **Part 10.10** of the **CPR** deals with Reply to a Defence but it offers no guidance with respect to what should be included in it.

[38] Mr. Brathwaite is correct when he says that Reply to a Defence is included in the definition of statement of case and forms part of the Claimant's pleadings. However this in itself is not an answer to the question to be determined. A Defence is also included in the definition but the Statement of Claim, Defence and Reply to a Defence all have a particular purpose in the proceedings.

[39] The following commentary is helpful.

> "Conventionally, a reply may respond to any matters raised in the defence which were not, and which should not have been, dealt with in the particulars of claim, and exists solely for the purpose of dealing disjunctively with matters which

> could not properly have been dealt with in the particulars of claim, but which require a response once they have been raised in the defence. It has always been a cardinal principle of pleading (which has certainly not been altered by the CPR) that a claim should not anticipate a potential defence (popularly known as 'jumping the stile'). Once, however, a defence has been raised which requires a response so that the issues between the parties can be defined, a reply is necessary for the purpose of setting out the claimant's case on that point. The reply is, however, neither an opportunity to restate the claim, nor is it, nor should it be drafted as a "defence to the defence". Chapter 27.2 Blackstone's Civil Practice 2011.

[40] The denial that there was an oral agreement and the Claimant's failure to complete the work as well as defective work were raised in the Defence. These are not issues that the Claimant was required to anticipate in the Statement of Claim. These matters could not have been dealt with in the Statement of Claim therefore the Claimant is entitled to respond to these allegations in his Reply to Defence. It follows therefore that any allegations or factual argument in response to these issues would have to be set out in the Reply to Defence.

Prejudice

[41] I will now consider the issue of prejudice which was raised by the Defendant. While prejudice is not necessarily a ground for striking out under **Rule 26(3)(c)** it is an important factor to be considered where it is present.

[42] After reading the full text of the Statement of Claim and the Reply to Defence it is clear that the Claimant has not changed its position. It has not admitted that it failed to complete or defectively completed the work.

[43] The question therefore is what is the Claimant saying in paragraph 3.2 that is prejudicial to the Defendant? Counsel for the Defendant did not

share his interpretation with the court. However, in interpreting what is being said it is important to bear in mind that there is reference to paragraphs 4 and 5 of the Defence.

[44] The first part of the sentence is clear and needs no explanation but the second part is not so clear. The Claimant seems to be saying that it is misleading of the Defendant to deny that there was an oral agreement, after having set out a list of items that were either not done or defectively done in paragraph 4 and in light of the fact that the Claimant had performed sufficiently for the Defendant to make the payments stated in paragraph 5.

[45] On this interpretation I can find no prejudice and the Defendant has not demonstrated why it would be prejudicial to him.

[46] I will also reiterate that this is not an allegation or factual argument which could have been made in the Statement of Claim. It is essentially a response to and commentary on what was stated in the Defence.

Conclusion

[47] I agree that the pleadings must be sufficiently clear to set out the doctrine of part performance but there are no magic words to be used in doing so. I am satisfied that the Claimant is complaining about partial payment and that part performance arises on the facts of this case.

[48] As stated previously the Claimant was not required to anticipate the Defence but was entitled to respond to the issues raised in the Defence. In responding I do not consider that it has made an allegation or factual argument in the Reply which should have been put into the Statement of Claim. I also do not accept that new facts were introduced in the Reply and that a "legal conclusion" was made instead of a response to the Defence.

[49] In the Statement of Claim, the payments made and the dates on which they were made are set out. The Claimant also stated that numerous requests were made for payment and the Defendant has failed and or refused to pay. In these circumstances the argument that the Defendant's acts of part performance should have been pleaded cannot be sustained.

[50] The Defendant has not demonstrated that paragraph 3.2 of the Reply is prejudicial to him.

Striking Out

[51] Based on the foregoing I hold that the Claimant is not in breach of **Rule 8.5(3)** of the **CPR**. There is no basis for striking out paragraph 3.2. However, what the Claimant wants to communicate through the said paragraph needs to be put beyond doubt and speculation. It should have been more clearly expressed.

Disposal

[52] The Defendant's application to strike out is refused. In the interest of providing clarity, the Claimant is ordered to amend paragraph 3.2 of its Reply to Defence.

Ms. Deborah Holder, BSS
Master of the High Court