BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

(Civil Division)

Claim No. 1677 of 2015

BETWEEN:

MICHELE BLACKMAN **CLAIMANT**

AND

APEX CONSTRUCTION INC. **DEFENDANT**

Before the Honourable Mr. Justice Cecil N. McCarthy, Judge of the High Court

Date of Decision: 2020 January 30th

Mr. Michael A. Koieman of Clarke Gittens and Farmer for the Claimant

Mr. Patterson K. H. Cheltenham Q.C. in association with Ms. Keren D. Prescott for the Defendant

DECISION

INTRODUCTION

[1] By application made under the Supreme Court (Civil Procedure) Rules, 2008 (the CPR) and filed on 5 May 2017 the claimant seeks an order for summary

judgment on the issue of liability and a direction for trial on the issue of quantum.

[2] The matter first came before me on 17 July 2018 and there were further hearings on 9 July and 12 December 2018.

[3] In support of her application the claimant submitted the following grounds:

> *"**1. The Claimant's claim is for damages for defective materials and/or workmanship which led to cosmetic (as opposed to structural defects) to the Claimant's home.***
>
> ***2. In previous correspondence, in the pre-action protocol correspondence and in the Defence the Defendant admits that its work caused cosmetic defects.***
>
> ***3. As such, the only issue to be decided by this Court is what reasonable sum would compensate the Claimant in respect of the said defects.***
>
> ***4. The Defendant therefore has no real prospect of successfully defending the claim as to liability and the Claimant knows of no other reason why the issue should be disposed of at a trial.**"*

[4] The claimant filed an affidavit in support of the application on 5 May 2017 in which, among other things, she asserted that:

> *"(a) her claim was for damages for defective materials and/or workmanship which led to cosmetic (as opposed to structural) defects to her house.*
>
> *(b) the defendant has consistently admitted liability for the said defects.*
>
> *(c) the only issue to be decided by the court is what reasonable sum would compensate her in respect of the defects to her home;*

(d) the defendant has no real prospect of successfully defending the claim as to liability and she knows of no other reason why the issue should be disposed of at the trial."

THE PLEADINGS

[5] An examination of the pleadings, or respective statements of case in the language of the CPR, reveals that there is a significant conflict in the facts which, depending on how it is resolved, will have a bearing on the outcome of the case.

[6] This divide in the pleadings is shown quite clearly in paragraphs 6 and 11 of the claimant's statement of claim and paragraphs 3 and 6 of the defence which respond to those paragraphs of the statement of claim.

[7] First, I set out paragraphs 6 and 11 of the statement of claim which provides:

"6. The Contract was performed and the Claimant went into occupation of the dwelling house on or about the 1st day of November, 2012. In or about 2 months extensive defects such as the following began to appear in the dwelling house.

(i) The sheets of Plycem began to bend away from each other causing bulging and unsightly cracks to the interior and exterior joints of the cement board.

(ii) Drainage problems occurred in the general shower area.

(iii) Cracks above the skirting boards.

(iv) Cracking of the interior moulding.

(v) Joints of moulding which were previously joined together are showing up.

(vi) Bulging of joints in the ceiling and side walls.

(vii) Vibration in the shower when shifting from the overhead shower to the tap below."

*"11. Following the said meeting the Defendant attempted a number of measures intended to repair the defects without replacing the Plycem sheets. The latest was the application of elastomeric paint. None of the measures was successful in addressing the problem. Photographs of the Claimant's dwelling house as at the 9th day of October, 2013 showing the unsightly cracks where the Plycem sheets meet even after the application of elastomeric paint are annexed hereto and served herewith marked **"F"**.*

[8] Secondly, I set out paragraphs 3 and 6 of the defence which states:

"3. Paragraph 6 of the statement of claim is denied. The issues identified at paragraph 6(ii) to (vii) which the Claimant alleges began to appear were rectified by the Defendant. The only issue to be resolved was the superficial cracks to the interior and exterior joints of the cement board. The Defendant made several requests to the Claimant to resolve that issue. However, the Claimant unreasonably refused the Defendant's request."

"6. Paragraph 11 of the statement of claim is denied. The Defendant did not attempt a number of measures intended to repair the defects without replacing the Plycem sheets. The Defendant initially thought that the issue relating to the Plycem sheets was a result of poor workmanship and consequently reapplied trowel plastic to the Plycem sheets. However, the superficial crack re-appeared.

Thereafter, the Defendant conducted research and discovered that elastomeric paint would rectify the issues. The elastomeric paint was effectively used on other homeowners' houses which had superficial cracks but the Claimant refused to allow the Defendant an opportunity to apply the elastomeric paint on her home. Further, some of the photographs relied upon in the statement of claim do not relate to the Claimant's home. In fact, they depict photographs of defects to homeowners' homes prior to the application of the elastomeric paint but the issues to those homes were subsequently satisfactorily rectified."

[9] Moreover, the defendant contends at paragraphs 10 and 11 of the defence that under the contract between the defendant and the claimant, the defendant was granted an opportunity to *"make good or cause to be made good any defects in the dwellinghouse arising due to the faulty materials or bad workmanship which shall arise within .... 180 days of the date fixed for completion."*

The Claimant's Submissions

[10] Pursuant to an order of Chandler J. the claimant on 31 January 2018 filed written submissions in support of the application for summary judgment.

[11] The substance of these submissions is found in paragraphs 7 – 12 of the submissions which are set out below:

"7. The Defence nowhere denies that defects were caused to the Claimant's house by reason of the use of the Plycem sheets.

8. The Defendant's only defence to the issue of liability is in reliance upon a clause in the agreement between it and the Claimant which it contends required the

Claimant to make her claim in respect of poor workmanship or faulty materials within 180 days.

9. *The Claimant submits that this clause merely provided for the Defendant to make good defects identified within the period. It did not expressly or impliedly exclude the Defendant's liability to the Claimant in damages after the expiration of the period.*

10. *However, even if the clause could have the meaning contended for by the Defendant it would be void being in contravention of section 50 of the Consumer Guarantees Act Cap 326E of the Laws of Barbados which provides:*

"50. (1) Subject to this section and to sections 40 and 49, the provisions of this Act have effect notwithstanding any provision to the contrary in any agreement; and any written term or acknowledgment that purports to negative or vary any of the guarantees set out in this Act or states that provisions of this Act do not apply or that in any way purports to limit, modify or abrogate any liability of a supplier for the failure of goods or a service to comply with any of those guarantees is void.

(2) Section 54 of the Sale of Goods Act shall be read subject to the provisions of this section.

(3) Every supplier and every manufacturer commits an offence who purports to contract out of any provision of this Act, and is liable on summary conviction to a fine of $2500 or a term of 6 months imprisonment or to both such fine and imprisonment."

11. By sections 6 and 8 of the Consumer Guarantees Act it is guaranteed that goods will be of acceptable quality and fit for purpose. Sections 29 and 30 guarantee that services would be performed with reasonable care and skill and be fit for the purpose for which they were commissioned.

12. As such the Claimant contends that judgment should be entered as to this issue leaving only the question of the assessment of damages which would then facilitate the resolution of the claims of the other homeowners of whom the Claimant has been appointed representative."

The Defendant's Submissions

[12] In his written submissions filed 2 March 2018, counsel for the defendant, Mr. Patterson Cheltenham QC opposes the application for summary judgment.

[13] First, he submits that the pleadings before the court are diametrically opposed. Counsel also attacks the claimant's pleadings as lacking in clarity. Counsel argues that having described her claim to be for "damages to be assessed in respect of defective work performed by the Defendant under a construction contract between the Claimant and the Defendant", the claimant fails to give particulars relative to her claim.

[14] Counsel at paragraph 12 refers to the well known decision of Lord Woolf in **McPhilemy v Times Newspapers Ltd. [1993] 3 ALL ER 775 at 993** where Lord Woolf MR. said.

"…Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules …"

[15] Mr. Cheltenham QC then specifically addresses the application in paragraphs 15, 16, and 17 of his submissions which state:

"(15) In relation to the application, Sinclair-Haynes J in ***Lyle v Lyle*** *[No.2246 of 2004 Jamaica High Court (unreported)] emphasized that summary judgment is inappropriate where there are important disputes of fact, and that accordingly on an application for summary judgment the Claimant must satisfy the court of the following:*

"***All substantial facts relevant to the claimant's case, which are reasonably capable of being before the court, must be before the court.***

(a) Those facts must be undisputed or there must be no reasonable prospect of successfully disputing them. (Emphasis supplied)

(b) There must be no real prospect of oral evidence affecting the court's assessment of the facts." (Emphasis supplied)

(16) The Defendant submits that having regard to the allegations made by the Claimant, the following are in issue:

(i) Whether the defects identified at paragraph 6 of the statement of claim were rectified by the Claimant other than any related to the Plycem sheets;

(ii) Whether the Defendant offered to remedy any defect in relation to the Plycem sheets but has not been permitted to do so by the Defendant;

(iii) Whether the appearance of the cracks in relation to the Plygem sheets was caused by defective work on the part of the Claimant;

(iv) Whether the Defendant has rectified the cracks which appeared in the houses of other homeowners referred to at paragraph 18 of the statement of claim;

(v) Whether the Defendant has repaired the cracks with elastomeric paint;

*(vi) Whether the photographs exhibited to the statement of claim and marked **"F"** and referred to by the Claimant in paragraph 11 are photographs of her dwellinghouse to which she refused to permit the Defendant to apply elastometric paint or photographs of dwellinghouses of other homeowners before the Defendant applied elastomeric paint;*

(vii) Whether the letter referred to by the Claimant at paragraph 12 of the statement of claim alleged that the application of elastomeric paint was used on or rectified the defects on the Claimant's dwellinghouse; and

(viii) Whether the Claimant's letter of April 24, 2014 referred to in paragraph 14 of the statement of claim was a general letter or was written with reference to the Claimant's dwellinghouse.

(17) The Defendant submits that there is a reasonable prospect of successfully defending the claim. It will adduce evidence to establish that:-

(i) The Defendant did not perform any defective work.

(ii) The cracks were as a result of the coefficient of expansion and provide no evidence that the Defendant performed defective work;

(iii) The defects identified at paragraph 6 of the statement of claim were rectified by the Defendant except for that relating to the Plycem sheets. The Defendant applied elastomeric paint to the houses of those homeowners who permitted it to do so. The application of elastomeric paint rectified the cracks but the Claimant did not permit the Defendant to apply the elastomeric paint to her dwellinghouse;

*(iv) The photographs referred to at Exhibit **"F"** are not photographs of the Claimant's dwellinghouse but are photographs of other homeowners' houses taken before the application of elastomeric paint."*

[16] Mr. Cheltenham QC also contends that the agreement for sale gave the defendants the right to remedy the defects. Counsel cites Hudson Building and Engineering Contracts Eleventh Edition Volume 1 at paragraph 5 – 050 which reads:

"*the maintenance obligation of the contractor essentially confers a right on the owner to call for his physical return to the site for a limited period after the owner has resumed possession in order to repair or make good defects." "…So the contractor may not only be seen as having the obligation but, in many cases, the right to make good at his own cost any defects which appear within the period."*

[17] Counsel also referred to the right of a contractor to mitigate damage caused by his breach. As a corollary to this right, counsel contends that the claimant must permit the defendant to return to her dwellinghouse to correct main defects.

[18] Paragraphs 24 and 25 of the defendant's submissions are worth reproducing here because they capture the essence of the divide between the contending pleadings.

[19] Those paragraphs state:

*"(24) The Defendant denies that it used defective materials as alleged by the Claimant or performed poor workmanship. It is also wholly untrue that **"the Defendant's only defence to the issue of liability is in reliance upon a clause in the agreement between it and the claimant."** as set out in the Claimant's submissions.*

(25) The Defendant's case is that it provided quality materials and performed proper workmanship on the claimant's dwellinghouse. However, as a consequence of the coefficient of expansion as identified in a letter from the Defendant to the Claimant's Counsel, superficial cracks resulted. These superficial cracks could

have been rectified with elastomeric paint which the Defendant contends the Claimant unreasonably refused the Defendant to apply. This precludes a finding of liability against the Defendant."

[20] Based substantially on the factors recited above, the defendant argues that it has a real prospect of successfully defending the claim and there are reasons why the claim should proceed to trial.

The Law with Respect To Summary Judgment

[21] Part 15 of the CPR sets out the grounds for granting summary judgment. It stipulates:

"15.2. 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."

[22] In **Aaron Truss v Windsor Plaza Limited Civil Appeal No 10 of 2015 (date of decision April 18, 2016)** the Court of Appeal discussed extensively how the summary judgment provisions of CPR 15.2 should be applied.

[23] The court observed that the word "may" confers on the Court a discretion whether or not to grant summary judgment.

[24] In the judgment of the court, delivered by Gibson CJ., the court at paragraphs 25 to 36 discusses how the summary judgment discretion is to be exercised:

[25] Gibson CJ. cited the leading cases on the subject of **Swain v Hillman [2001] 1 ALL ER 91**; and **Three Rivers District Council v Bank of England (No. 3) [2003] 2 AC1**, among others.

[26] The above cases are based on Part 24(2) of the UK CPR which is in substantially similar terms to Rule 15.2.

[27] The only difference between the provisions of the CPR and the UK CPR is that at 24.2 (b) the word "compelling" is inserted before reason so that 24(2) reads:

"there is no other compelling reason why the case or issue should be disposed of at trial."

[28] At paragraphs 25 and 26 of the judgment, Gibson CJ. refers to the following extracts from the judgment of Lord Woolf MR in **Swain v Hillman**.

[29] "**25** … Under **r 24.2**, the Court now has a very salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences

which have no real prospect of being successful. The words 'no real prospect of being successful or succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or … they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

26. However, his Lordship was equally clear in explaining, in a cautionary note at pp. 94-95, the proper approach of the judge on such an application:

*"It is important that a judge in appropriate cases should make use of the powers contained in **Part 24**. In doing so, he or she gives effect to the overriding objectives contained in **Part 1**. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no useful 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 this as soon as possible … Useful though the power is under **Part 24**, it is important that it is kept to its proper role. It is not meant to dispense with the need for trial where there are issues which should be investigated at the trial… [T]he proper disposal of an issue under **Part 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."*

[30] In arriving at a decision in this matter I also considered the words of Gibson CJ. at paragraph 36 of the judgment of the Court of Appeal in **Aaron Truss v Windsor Plaza**, supra:

*"Their **Lordships'** speeches all stress that the criteria governing summary judgment in the **UK CPR Part 24** (our **CPR Part 15**) are undergirded by the "Overriding Objective" of the **CPR** set out in **Part 1.1** which "is to enable the court to deal with cases justly." Moreover, as the **Three Rivers** speeches, and the dicta of **Lord Woolf MR** in **Swain**, make clear, it would be as unjust to set down for trial a case where the respondent's real prospects of success were largely fanciful based on a record and where there was no more evidence to be adduced as it would be to grant summary judgment to an applicant too hastily and thereby to foreclose a claim or a defence based on evidence still in the throes of being discovered and adduced. Hence, even the exhaustive report by no less a legal luminary than **Lord Bingham** in the **Three Rivers** case was not considered sufficient by the majority of their **Lordships' House** to justify the denial of a fact-finding trial of the issues relating to the collapse of the BCI Bank. As explained by **Lord Woolf MR**, whose brainchild the **CPR** largely was, "summary judgment is not meant to dispense with the need for a trial where there are still issues which should be investigated at the trial."*

[31] In addition to the very helpful discussion in **Aaron Truss and Windsor Plaza** supra, I have found the following guidance on the principles to be applied in determining whether or not give summary judgment to be useful. I refer to the judgment of Lewison J. in **Federal Republic of Nigeria v**

Santolina Investment Corporation et al [2007] EWHC 437 (Ch) where he observed at paragraph 4:

"The courts have now given guidance on the principles to be applied in deciding whether or not to give summary judgment. For present purposes I summarise the relevant ones as follows:

i) *The court must consider whether the defendant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91;*

ii) *A "realistic" defence is one that carries some degree of conviction. This means a defence that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];*

iii) *In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman;*

iv) *This does not mean that the court must take at face value and without analysis everything that a defendant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10];*

v) *However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust V Hammond (No 5) [2001] EWCA Civ 550;*

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable ground exists for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;"

[32] In **Doncaster Pharmaceutical Group Ltd. v Bolton**, supra **Mummery** L.J at paragraph 17 reiterated the injunction to be cautious when exercising the discretion to grant summary judgment. He remarked:

"17. It is well settled by the authorities that the court should exercise caution in granting summary judgment in certain kinds of case. The classic instance is where there are conflicts of fact on relevant issues, which have to be resolved before a judgment can be given (see Civil Procedure Vol 1 24.2.5). A mini-trial on the 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."

ANALYSIS

[33] Having carefully examined the respective statements of case, it seems clear that there is an issue that remains unresolved.

[34] While it is accepted that the work carried out by the defendant resulted in cosmetic defects to the claimant's home, whether the solution proposed by the defendant is capable of remedying the defects as permitted under the building contract is very much in dispute.

[35] The defendant contends that the contract of sale gave the defendant a right to remedy any defects; that the defects are remediable, and that the claimant has refused contrary to the said contract of sale to permit the defendant to apply elastomeric paint to remedy the defects. The defendant submits that the actions of the claimant amount to a denial of that right and precludes a finding of liability against the defendant.

[36] The claimant seems to have formed the view that the mere fact of cosmetic defects with respect to the Plycem sheets is enough to affix the defendant with liability.

[37] However, if indeed it is true as alleged by the defendant that the cosmetic defects can be rectified by the applicant of elastomeric paint and the claimant has in fact refused to permit the defendant to remedy the defects as

provided for by the contract it would seem that the claimant's refusal would have to be considered in determining the defendant's liability.

[38] Having regard to the pleadings it is clear that there are significant facts in dispute. These are captured in the defendant's written submissions and referred to in paragraph 15 of this judgment.

[39] Apart from the facts in dispute, I agree with the submissions of counsel for the defendant on the inadequacy of the claimant's pleadings in this case. Counsel makes the following submissions at paragraphs [10], [11] and [13] of his written submissions:

> *"(10) Before the Court are pleadings which are diametrically opposed. Noteworthy, is that the cause[s] of action of the Claimant against the Defendant is unclear. In the claim form, the Claimant sets out the nature of her claim to be "**damages to be assessed in respect of defective work performed by the Defendant for the Claimant under a construction contract between the Claimant and the Defendant…"***
>
> *(11) In the statement of claim, the Claimant gives no particulars relative to her claim. The Defendant submits that material facts are necessary to establish the cause[s] of action and the party's entitlement to any remedy claimed. Essentially, the Claimant ought to have set out a concise statement of the facts and allegations which, if proved, would entitle her to the remedy sought.*

(13) Further, the object of pleadings is to define with clarity and precision the issues or questions which are in dispute between the parties and fall to be decided by the Court. This, the Defendant submits, the Claimant failed to do. She has merely placed an evidential narrative in the pleadings as opposed to the essential ingredients of her claim and the particulars upon which she wishes to rely."

[40] Having read the claimant's statement of claim I agree with counsel for the defendant's submission that the claimant's cause of action is unclear.

[41] In this regard, "damages for defective work" is not a cause of action. To be specific there is no allegation of breach of contract, negligence or any cause of action (with the factual particulars) in the statement of claim. Furthermore, there are no particulars of claim specifically alleging liability of the defendant, if proved.

[42] In **Letang v Cooper [1964] EWCA Civ. 5** Lord Diplock defined a cause of action as "a factual situation the existence of which entitles one person to obtain from the Court a remedy against the other person." (see first paragraph of his judgment)

I consider that there is a lack of clarity in the claim pleaded.

[43] I am of the view that the state of the claimant's pleadings makes it difficult to grant the application for summary judgment.

[44] Furthermore, the burden of establishing that the defendant's defence has no prospect of success is on the claimant. Where there are substantial issues of fact to be determined there is a need for a trial for these matters to be investigated and determined. It is not my role to conduct a mini-trial. The fact that this appears to be the only way of resolving the matters in dispute is powerful evidence that this matter ought to proceed to trial. It is also evidence that the claimant has not established that there is no reasonable prospect of defending the claim.

[45] In my view, this is a case in which conflicts of facts on relevant issues must be resolved before judgment is given. To attempt to do so given the state of the facts and pleadings "runs the real risk of producing summary injustice".

CONCLUSION AND DISPOSAL

[46] Although, I support counsel for the claimant's efforts to speed up the resolution of this matter, I do not agree that this is a case for which summary judgment can be ordered. However, I support an early trial of the issues in dispute.

[47] Having regard to the foregoing, I make the following orders:

1. The application for summary judgment is dismissed.
2. The claimant must pay the defendant's costs to be assessed if not agreed.

3. The matter is adjourned to 20 February 2020 for further case management.

Cecil N. McCarthy
Judge of the High Court