

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV No. 2015-02802

Between

CONTINENTAL CORPORATION LIMITED

Claimant

And

NORTH PLANT LPG CO-OPERATIVE SOCIETY LIMITED

Defendant

BEFORE THE HONOURABLE MR. JUSTICE ANDRÉ DES VIGNES

Appearances:

Mr. Rajiv Persad and Mr. Lee Merry instructed by Mr. Lionel M. Luckhoo for the Claimant

Mr. Avory Sinanan, S.C. and Mr. Kelvin Ramkissoon instructed by Mr. Nizam Saladeen for the Defendant

DECISION

APPLICATION

1. By Notice of Application filed on 11th October, 2016, the Defendant applied to this Court for an order striking out paragraphs 2 and 3 of the Claimant's Reply filed on 15th February, 2016 as well as costs of the application. This application was made pursuant to "*Part 26.2 and/or such other enabling provisions thereof and/or under the Court's inherent jurisdiction.*"
2. The grounds upon which the Defendant makes this application are as follows:

Striking out paragraph 2 of the Reply

- a. This paragraph and the report of Mr. Small – LPG Consultant, exhibited thereto, annexed as "D" is of no probative value as it amounts to the views of a writer purporting to be an expert and does not constitute facts and accordingly is contrary to **Part 8.6(1) of the CPR**;

- b. Expert opinion is restricted by the Court's powers under **Part 33.5 of the CPR** which provides that no party may call an expert witness or put in an expert's report without the court's permission;
- c. The Claimant has failed to comply with **Part 33.5 of the CPR** as it has not made an application to call an expert witness and put in such a report;
- d. Further and in the alternative, the exhibited report, attached as "D" to the Reply fails to comply with the requirements of **Part 33.2 and Part 33.10 of the CPR.**

Striking out paragraph 3 of the Reply

- a. This paragraph purports to respond to paragraph 19 of the Defence. However, it bears no rational and/or logical refutation of same. Further, it obscures rather than clarifies the issues which the court has to decide and is oppressive and/or an abuse of process; and
 - b. The "Further Particulars of Negligence" pleaded in the Reply forms the substratum of the Claimant's cause of action and ought to have been pleaded in the Statement of Case.
3. By way of affidavit in response filed on 31st October, 2016, instructing Attorney-at-Law for the Claimant, Mr. Lionel Luckhoo stated that this application should be dismissed on the basis that:
- a. At the Case Management Conference (CMC) held on 5th April, 2016, Counsel for the Defendant, Mr. Kelvin Ramkissoon, raised the issue that the said report annexed as D to the Reply was an expert report and Counsel for the Claimant, Mr. Lee Merry explained that the report was not being relied on as expert evidence but for the observation of the El Pecos gas cylinders that was recorded; and
 - b. Prior to the filing of this application on 11th October, 2016, the Defendant did not indicate that any part of the Reply was in issue or that it intended to make such an application.
4. On 11th November, 2016, instructing Attorney-at-Law for the Defendant, Mr. Nizam Saladeen, filed an affidavit in reply to that of Mr. Luckhoo. Therein, he stated that:
- a. This application arose when Mr. Avory Sinanan, S.C. was retained (in or about the 3rd week of September, 2016) and was filed after his review and consideration of the documents;

- b. The issue relating to the said report was raised frontally by Mr. Ramkissoon at the aforementioned CMC immediately after the filing of the Reply and no determination was made by this Court; and
- c. The Defendant has not delayed in filing this application since no trial date has been set and there is no prejudice suffered by the Claimant. It is in the interest of justice than this application be adjudicated upon. Further, the Court ought not to countenance any matter or pleading where the legal provenance is doubtful and where its process can be abused.

ISSUES

5. The issues that arise for determination in this matter are as follows:
 - a. Is the Defendant precluded from filing a striking out application at this stage of proceedings?
 - b. If not, should paragraphs 2 and/or 3 of the Reply be struck out?

DISPOSITION & REASONS

6. Having read the submissions of the parties, I am of the opinion that: (a) The Defendant is not prohibited from filing the application to strike out at this stage of proceedings; (b) Paragraph 2 of the Reply ought not to be struck out; and (c) Paragraph 3 of the Reply should be struck out. My reasons are set out hereunder.

The Defendant is not precluded from filing a striking out application at this stage of proceedings:

7. On 5th April, 2016, at a Case Management Conference (CMC), this Court gave the following directions:
 - a. Lists of documents on or before 20th May, 2016;
 - b. Statements of Issues to be filed and served 31st May, 2016; and
 - c. Witness Statements to be filed and exchanged on or before 30th September, 2016;
 - d. In default no evidence to be lead from any witness who has failed to file and serve a witness statement.
8. The matter was then adjourned to 24th October, 2016 for a pre-trial review (PTR). On 27th September, 2016, the parties filed a joint consent application for an extension of time to 14th

October, 2016, for the filing and service of their witness statements. This application was granted without a hearing on 3rd October, 2016. The current application was filed on 11th October, 2016 and was listed for hearing at the PTR.

9. By virtue of **Part 39.3 of the CPR** the Court's powers at a CMC apply equally at a PTR. Accordingly, at the PTR stage, a Court is empowered pursuant to **Part 26.2 of the CPR** to strike out a statement of case or part thereof.
10. The purpose of Part 39 is to enable the Court to deal justly with the proceedings and to give such directions as are necessary to ensure that the trial of the issues is conducted in a fair, expeditious and economic manner. Bearing this in mind, I am of the opinion that in the interest of furthering the overriding objective of dealing with matters justly, the Defendant ought not to be precluded from making this application.

Paragraph 2 of the Reply ought not to be struck out

11. Based on the guidance of the recent Court of Appeal decision in **Glasgow v Sooklal**,¹ I am of the opinion that this application (in respect of paragraph 2) is a premature one to the extent that it seeks to have certain portions of the Reply struck out on the basis that it contains opinion evidence and not facts. In **Glasgow** (supra), the Claimant had applied to strike out certain portions of the Defence on the basis that, *inter alia*, the Defendant had pleaded opinion and conjecture rather than fact. In his submissions before the Court of Appeal, Counsel for the Claimant argued that such a pleading on the part of the Defendant was contrary to **Part 10 of the CPR** which stated that a Defence must include all the “facts” upon which the Defendant relies. Counsel also argued that it was also an abuse of process and vexatious to plead in such a way. The Court of Appeal dismissed the appeal on this ground.
12. In **Glasgow** (supra) it was reiterated that the power of the Court to strike out a pleading pursuant to **Part 26.2 of the CPR** was discretionary and such discretion must be exercised in keeping with the overriding objective. The application was found to be premature and it would be more appropriate to make such an application at a later stage when witness statements had been filed. Further, it was held that the pleading did not have any prejudicial impact on the Claimant.

¹ Civ. App. No. 254 of 2016 (Transcript)

13. To my mind, if paragraph 2 is struck out as well as the report annexed thereto, it does not advance the Defendant's case in any way. In addition, if the paragraph remains it would not have any prejudicial effect on the Defendant's case. The fact is that the Reply forms part of the pleadings which must still be proved by way of evidence. This evidence must conform to the rules of evidence in order to be admissible, which is a hurdle that the Claimant must cross if it intends to rely on such evidence as pleaded in paragraph 2.

14. In the premises, I am of the opinion that paragraph 2 of the Reply ought not to be struck out.

Paragraph 3 of the Reply should be struck out.

15. It is trite law that in a Reply "*the Claimant should not introduce new claims or new causes of action...; if he wishes to do so, he should amend his particulars of claim*"² I disagree with the Claimant's submissions that "*paragraph 3 merely clarifies the particulars of negligence which take into account this particular defence.*" Upon an examination of paragraph 3 of the Reply the Claimant pleads that "*the Defendant, its servant and/or agent were negligent in the following additional respects*" and goes on to list what is described as "*further particulars of negligence of the Defendant its servant and/or agent.*"[emphasis mine]

16. In my opinion these pleadings are additional particulars not stated in the Amended Statement of Case and, are new claims being made against the Defendant in a Reply. In my opinion, to allow such a pleading to stand would be an abuse of process and as such, this paragraph ought to be struck out.

ORDER

17. In the premises, I hereby order that:

- a. Paragraph 3 of the Reply filed on 15th February, 2016 be struck out; and
- b. Each party to bear their own costs.

Dated this 29th day of March, 2017

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André des Vignes
Judge

² Bullen & Leake & Jacob's Precedents of Pleadings, Volume I, 17th ed. @ p. 29, para. 1-37. Also see Blackstone's Civil Practice 2014 at para. 27.2.