REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
Port of Spain

Claim No: CV2016- 04093

Between

Ansa McaL Enterprises Limited
(trading as Abel Building Solutions)

Claimant

And
Quipcon Limited

Defendant

Before the Honourable Madam Justice Eleanor J. Donaldson-Honeywell

Delivered on 8th May, 2019

Appearances

Mr. Christian Brooks and Ms. Jessica Haider Attorneys at Law for the Claimant

Ms. Shobna Persaud Attorney at Law for the Defendant

Ruling

I. Introduction

1. The Claimant's application is for an order pursuant to Part 26(1)(c) of the Civil Proceedings Rules 1998, as amended ("CPR") that the Defendant's defence be struck out as it discloses no grounds for defending the claim. This contention is particularised as follows:
    i. That the Defendant has previously acknowledged the debt owed and has proposed a payment plan to the Claimant for full settlement of same;
    ii. At no time prior to the filing of the Defence was it ever claimed that the goods were supplied to the Defendant on consignment and/or that the

Claimant and the Defendant had entered into an agreement whereby the goods would be supplied on consignment;

iii. The Defendant has failed to provide a copy of any document and/or evidence to demonstrate the consignment agreement which is the basis for the Defence.

iv. The Defence is unhelpful as the Defendant has no proof that there was ever a consignment agreement;

v. Any claim that the goods were supplied on consignment can be negated by the fact that these goods were custom-built for the precise window design at Rousillac SDMS Hindu Primary School and were based on the Defendant's unique specifications as per architectural drawings provided to the Claimant.

vi. No reasonable grounds exist for believing that a fuller investigation into the facts would add or alter the evidence available to a trial judge.

2. The Claimant's affidavit attached to the Notice of Application, states at para. 2 that it is in support of the Claimant's Notice of Application for summary judgment and/or to strike out the Defendant's Defence.

II. Background

3. The instant claim was filed by the Claimant against the Defendant for the sum of $114,310.26 being the balance due and owing by the Defendant to the Claimant for goods sold and delivered by the Claimant to the Defendant, at the request of the Defendant. The background to the claims is outlined by the Claimant as follows:

4. In or around the period of 15 October, 2015 to 9 June, 2016, the Defendant purchased certain goods from the Claimant on credit, which were supplied and delivered by the Claimant to the Defendant.

5. The Claimant issued several invoices to the Defendant for the goods during this period which stated that payment was to be made within 30 days from date of issue. Delivery notes were also issued to the Defendant and signed by the Defendant's agents and/or servants. These invoices and delivery notes are annexed to the Claim. It is not in dispute that the Defendant received the goods.

6. The Defendant failed to make the payments and a pre-action letter dated 6 August 2016 was sent to and received by the Defendant. A letter attached to the Claimant's statement of case date 13 September, 2016 makes reference to an offer to settle being made by the Defendant. The letter indicated that the offer was not accepted by the Claimant.

7. The Defendant's defence is that the goods were delivered to it "on consignment" and that its obligation to repay was only in relation to goods that were actually utilised. The Defendant avers that that it utilised goods in the sum of $14,000 which was paid to the Claimant at the initiation of proceedings. The Defendant denies that it is obligated to pay the remaining sum of $84,840.86 as the goods were not utilised.

8. Pursuant to an order of the Court dated 12 November, 2018 further and better particulars were filed regarding the return of unused goods. The Defendant stated that it "did not obtain the opportunity to return the unused goods since contentious legal proceedings were instituted claiming the full sum without reference or regard to the arrangements and the defendant was thus constrained into holding the unused items".

9. The Claimant denies in its reply that the goods were supplied on consignment, stating that no such agreement was ever made, in writing or otherwise. The Defendant, itself, has not produced any written documentation of the agreement. The Claimant also explains in its reply that the goods could not have been supplied on consignment as there were custom-built for the Defendants, based on its unique specifications per architectural drawings provided to the Claimant. These drawings are annexed to the reply.

10. The Claimant also cites a meeting of the parties on 30 November, 2016 at which the Defendant's representative acknowledged the outstanding debt and proposed a payment plan for repayment. At this meeting, the Claimant also states that the representative verified that over 90% of the total goods supplied had been installed and that the balance was being held in a storage facility.

III. Issue

11. The issue to be determined is whether the Defendant's defence should be struck out as disclosing no grounds for defending the claim.

IV. Law and Analysis

12. In submissions the Defendant states that the Notice of Application is solely for the striking out of the defence under Part 26.2(1)(c) and that the Claimant's averment in its affidavit in support that the application is also for summary judgment is misconceived as no application for summary judgment is properly before the court.

13. The Defendant cites a Jamaican case which draws the distinction between the tests involved in each of these applications – **Victor Hyde v E. Phil & Son A.S. Ltd & AG of Jamaica Claim No. 2008 HCV 04410**. This is not challenged by the Claimant and its submissions are narrowed to the striking out of the defence under Part 26.2(1)(c).

14. In **Terrence Charles v Chief of the Defence Staff and the Attorney General CV2014-02620**, Justice Jones (now Justice of Appeal) stated as follows at paragraph 11:

> *"A decision made by the Court under Part 26.2 (1)(c), that the statement of case discloses no grounds for bringing the claim, amounts to a decision on the merits of the case. The burden of proof in this regard is on the applicant. At the end of the day the Defendants, as applicants, must satisfy me that no further investigation will assist me in my task of arriving at the correct outcome. That said the rule ought not to be used except in the most clear of cases. Where an arguable case is presented or the case raises complex issues of fact or law its use is inappropriate."*

15. Further, in **Beverley Ann Metivier v The Attorney General of Trinidad and Tobago and others H.C.387/2007**, Kokaram J at paragraph 4.7 and 4.8 stated as follows;

> *"4.7 Of course, the power to strike out is one to be used sparingly and is not to be used to dispense with a trial where there are live issues to be tried. A. Zuckerman observed: "The most straightforward case for striking out is a claim that on its face fails to establish a recognisable cause of action… (Eg. A claim for damages for breach of contract which does not allege a breach).* ***A statement of case may be hopeless not only where it is lacking a necessary factual ingredient but also where it advances an unsustainable point of law****".*
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> *4.8 Porter LJ in Partco Group Limited v Wagg [2002] EWCA Civ 594 surmised that appropriate cases that can be struck out for failing to disclose a reasonable ground for bring a claim include: "(a) where the statement of case raised 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 Burden [2000] CPLR 9; (b) Where the statement of case does not raise a valid claim or defence as matter of law"."* [Emphasis added]

16. The Defendant cites the **Blackstone's Civil Practice 2014** paras. 33.6-33.8 which outlines the factors to be considered when deciding whether or not a defence should be struck out as disclosing no grounds for defending the claim. This learning indicates that the discretion should be exercised "sparingly" and should be limited to "plain and obvious cases where there was no point in having a trial". It also cites the UK Court of Appeal decision of **Partco Group Ltd v Wragg [2002] EWCA Civ 594** which held that striking out was appropriate where the case is unwinnable, continuing the proceedings is without any possible benefit and would waste resources on both sides or where there is no valid claim or defence raised as a matter of law.

17. The Claimant in submissions makes several contentions based on the pleaded case, namely:

    i. That the Defendant has previously acknowledged the debt and proposed a payment plan;

    ii. That there was no agreement between the parties that the goods would be supplied on consignment;

    iii. That the goods were custom-built for the Defendant and this negates any allegation that they were supplied on consignment; and

    iv. That the goods were in fact 90% utilised as indicated to them by a representative of the Defendant.

18. However, as pointed out by the Defendant, at this stage there is no evidence of these factual allegations other than what is contained in the averments of the Claimant in its Statement of Case and Reply. There has been neither disclosure of documents nor filing of witness statements. These contentions by the Claimant have not yet been tested by the Defendant under cross-examination and the Defendant has not yet had an opportunity to bring its own witnesses of fact. There is no sustainable point of law that would render the Defendant's case hopeless at this stage.

19. The Defendant's failure to present any documentation of a consignment agreement, which could be vital to its defence, is not determinative of the case at this stage. Particularly due to the fact that an application could still be made by the Defendant to amend the Defence if necessary to add more particulars. Further, the Defendant's oral evidence of agreement may also be strong enough to satisfy the court as there is no written agreement produced on the Claimant's part either.

20. It is the Claimant's submission that the Defendant has plainly failed to provide a comprehensive response to the claim, comparing the defence to a general denial. However, the defence does state some basis for disputing the claim i.e. the alleged consignment agreement.

21. In relation to the costs of this application, however, there is a possibility that amended pleadings and/or evidence in support of the Defendant's case may not materialise. As it is there is a lack of particularity in the defence. As cited by the Claimant, the Court in **M.I.5 Investigation Limited v Centurion Protection Agency Limited Civil Appeal No. 244 of 2008**, stated that the reasons for a denial of allegations made in a statement of case "must be sufficiently cogent to justify the incurring of costs and the expenditure of the court's resources in having the allegation proved."

22. The Defendant's case remains viable as it may to be fully supported by factual allegations and possibly documentation. However, there is a possibility that the Defendant's filed defence and resistance to this application may be an attempt to prolong proceedings. This could delay payment of the amount claimed in a case where there may in fact be no provable defence. Accordingly, no costs will be awarded today on this application. Instead costs of this application will be in the cause.

V. Determination

23. The Claimant has not proven at this early stage that the Defendant failed to disclose in its defence any grounds for the defending the Claimant's claim. This is due to the possibility of evidence being led to support its case and also due to the availability of an application to amend pleadings. In light of the above considerations, the Claimant's application is dismissed. Costs of the application, in an amount to be assessed if not agreed, will be awarded in the cause.

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Eleanor Joye Donaldson-Honeywell Judge

Assisted by: Christie Borely JRC 1