TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2008-02876

BETWEEN

KENNETH MELLONI

Claimant

AND

BERKLEY PETROLEUM SERVICES LIMITED

Defendant

Before Master Margaret Y Mohammed

Appearances:

Ms K Subero for the claimant

Mr Shastri Maharaj for the defendant

DECISION

Introduction

1. There are 2 applications for determination. The claimant's application to strike out paragraphs 6 and 10 of the defendant's amended defence and the counterclaim and the defendant's application for summary judgment.

2. The claimant, in this action, was an employee of the defendant when he was injured during the course of his employment. He instituted the instant proceedings against his former employer for damages for his personal injuries and in response the defendant has denied responsibility for the claimant's injuries and instead has laid blame at the feet of the claimant. In addition, the defendant has counterclaimed for a

reimbursement of the sum of $47,196.00 which it had paid to the claimant as workmen's compensation, interest and costs on the basis that the said sum was paid in error.

3. The basis of the claimant's application is paragraphs 6 and 10 of the defendant's defence offends Part 10.5 of the Civil Proceedings Rules ("the CPR") and the counterclaim is statute barred and /or frivolous and/or an abuse of process. The issues with respect to the claimant's application are (1) should paragraph 6 of the amended defence be struck out for failing to comply with Part 10.5 of the CPR ; and (2) should the counterclaim be struck out on the basis that it is frivolous, an abuse of process and/or statute barred. Paragraph 10 forms part of the counterclaim and this paragraph is addressed under the challenge to the counterclaim.

4. The basis of the defendant's application is the claimant has no realistic prospect of success. The issue with respect to this application is whether the defendant should be awarded summary judgment on its counterclaim on the basis that the claimant has no realistic prospect of success.

5. I have decided against striking out paragraph 6 of the defendant's amended defence for the reasons set out hereafter. Paragraph 10 which forms part of the counterclaim and the counterclaim are struck out. Further, I have not been persuaded by the defendant that the claimant has no realistic prospect of success with his claim. As such the defendant's application for summary judgment is dismissed.

Should paragraph 6 of the amended defence be struck out for failing to comply with Part 10.5 of the CPR ?

6. I have decided not to strike out paragraph 6 of the amended defence since such a drastic step and will not further the overriding objective. The court's ability to limit the defendant from leading positive evidence and in cross-examining the claimant's witness on quantum in my view is an adequate sanction which is short of the draconian remedy of striking out.

7. Paragraph 6 of the amended defence states "The Defendant does not admit the matters, personal injuries and special damages pleaded in paragraph 8 of the

Claimant's Statement of Case and says further that even if they were true (which is denied and which the Defendant puts the Claimant to the strict proof of) the Defendant is not liable for these alleged damages by reasons of the matters aforesaid." Paragraph 8 of the statement of case sets out the claimant's date of birth, the nature of the injuries sustained, the medical reports relied on and the schedule of the claimant's special damages.

8. Part 26.2(1) (a) and (d) of the CPR allows a court to strike out a statement of case or any part thereof if it appears that there has been a failure to comply with a rule, practice direction or with an order or direction given by the court in the proceedings or if it is prolix or does not comply with the requirements of Parts 8 or 10.

9. In examining applications to strike out a pleading or part of a pleading Clarke LJ in **Asiansky Television plc v Bayer Rosin**[1] was of the view that " The essential question in every case is : what is the just order to make, having regard to all the circumstances of the case? As May LJ put it [in Purdy v Cambran [2000] CP Rep 67 at para 51] it is necessary to concentrate on the intrinsic justice of a particular case in the light of the overriding objective. The cases to which I have referred emphasize the flexible nature of the CPR and the fact that they provide a number of sanctions short of the draconian remedy of striking out the action. It is to my mind important that the Master or Judge exercising his discretion should consider alternative possibilities short of striking out."

10. Closer to home these sentiments were echoed by Abdulai Conteh CJ in **Belize Telemedia v Magistrate Usher**[2] who described the balancing act which the court engages in determining such applications when he noted: "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 other sides: why put the defendant through the travail of a 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?

[1] [2001] EWCA Civ 1792 at para.49

[2] (2008) 75 WIR 138 at para. 20

21. These are always important factors that perforce must attend any consideration in exercising the discretion to strike out or not to strike out a claim".

11. The authors of the **Caribbean Civil Court Practice 2011** summed up the 2 situations this provision seeks to address as "(1) where the content of a statement of case is defective in that, even if every factual allegation contained in it were proved, the party whose statement of case it is cannot succeed; or (2) where the statement of case, no matter how complete and apparently correct it may be, will fail as a matter of law."

12. In this jurisdiction Jones J in **Moonan Sooknanan v Development Innovations Ltd**[3] was of the view that "Part 26.2 (c) of the CPR provides the same remedy as Order 18 rule 19 did under the 1975 Rules of the Supreme Court where the court is empowered to strike out a pleading on the ground that it disclosed no or no reasonable cause of action. In my opinion the statement of case like a statement of claim under the old rules is required to contain a cause of action or grounds against a Defendant".

13. It is therefore clear to me that the court's power to strike out a party's claim or part thereof is a drastic step. The court is hesitant to shut out a party and it will exercise this discretion in cases where to allow the action to continue would be a waste of costs and the court's resources

14. In analysing the duty of a defendant in pleading his defence Jones J in **Andre Marchong v Trinidad and Tobago Electricity Commission and ors**[4] in following Mendonca JA in **M.I.5 Investigations Limited v Centurion Protective Agency Limited**[5] stated at paragraphs 9 and 10

" 9. The effect of Part 10.5 and 10.6 is that a defendant must by its defence, provide a comprehensive response to the claim and state its position on each relevant fact or allegation put forward in the claim in the manner required by the rules. In particular the defendant must (i) state those facts that are admitted; (ii) state those facts that are denied and (iii) state those facts which it neither admits or denies because it does not know whether they are true but

[3] CV 2005-00549 Jones J

[4] CV 2008-04045 at para. 9 and 10

[5] Civ Appeal 244 of 2008 at para. 7

wishes the claimant to prove. In a personal injuries case there is a further requirement a defendant is required in the defence to state whether it agrees with any medical report attached to the statement of case and where any part is disputed the reasons for so doing; Part 10.8 (2)

10.The rule therefore puts a duty on the defendant to deal with each fact pleaded against it by either admitting or denying the facts and will only allow a defendant to avoid that duty where that defendant has positively stated that he or she cannot do so because he or she does not know. Only in the latter case is the defendant allowed to put the claimant to proof of the facts relied on by the claimant. In my opinion it accords with the policy of full disclosure and an avoidance of litigation on issues which are unnecessary and a waste of resources. A defendant can no longer avoid dealing full frontally with facts by merely requiring them to be proved and may now only require proof where that defendant has stated positively and verified by a statement of truth that the facts cannot be admitted or denied because the defendant does not know whether they are true or not".

15. I do not agree with attorney for the defendant that paragraph 6 of the amended defence must be read together with paragraphs 3, 4 and 5 of the amended defence. Paragraphs 3, 4 and 5 of the amended defence deal with the defendant's position on liability. They set out the defendant's case that the claimant was the author of his own injury since it was his duty as headman on the rig to ensure that all equipment on the rig including the ladder from which he fell was properly installed.

16. Paragraph 6 denies the claim for quantum and fails to set out any alternative version on quantum or indicate why it cannot even set out an alternative version. Applying the learning in **Andre Marchong**, paragraph 6 cannot be a comprehensive response to the claimant's pleading for damages since it falls to set out any facts upon which it relies in order to (a) dispute the medical expenses (b) dispute the travel expenses (c) dispute loss of earnings or (d) state a position on the medical reports in support of the claimant's claim for personal injuries. Further, by failing to positively state that it cannot admit or deny the claim for damages since it does not know, now prevents the defendant from simply putting the claimant to the strict proof of the facts relied on.

17. However, while this is a very limited defence on quantum, it is still the defendant's position on quantum and to strike out this position is too drastic a step. In my opinion it is better to leave paragraph 6 in the pleading since the effect of such a blanket denial allows the court to treat the allegations in the Claim Form and Statement of

Case with respect to quantum as undisputed [6] and limits the defendant from being able to lead positive evidence with respect to the claimant's damages and to cross – examine witnesses on the issue of quantum[7]. Paragraph 6 of the defence is not struck out.

Should the defendant's counterclaim be struck out on the basis that it is frivolous and/or an abuse of process or statute barred?

18. The counterclaim is struck out since it is an abuse of process and/or statute barred. Paragraph 10 of the Counterclaim states "the defendant repeats and relies on paragraphs 2-8 of the Defence herein" and paragraph 11 sets out the defendant's counterclaim for the reimbursement of the sum of $47,196.00 paid to the claimant as Workmen's Compensation pursuant to section 4(1) (b) of the Workmen's Compensation Act Chapter 88:05 which it alleges was paid in error.

19. Part 26.2(1) (b) allows the court to strike out a statement of case or any part thereof if it appears to the court that it is an abuse of process of the court and 26.2 (1) (c) allows the court to strike out a statement of case or part thereof if it discloses no grounds for bringing or defending the claim.

20. It is undisputed that this accident occurred on April 18, 2006 and therefore any remedy associated with this action ought to have been filed within the 4 year period from that date. One exception for the postponement of the 4 year limitation period is where the action is for relief from the consequences of a mistake[8]. Therefore if the counterclaim is grounded in negligence it would not be statute barred. However the counterclaim is grounded under a previous claim for workmen's compensation which in my view has nothing to do with the action for negligence and therefore the exception does not apply. I therefore find that the counterclaim is statute barred.

21. Further, it is an abuse of process for the defendant to raise the issue of the payment of the workmen's compensation in the negligence action since it ought to have been

[6] Civ appeal No 244 of 2008 M.I.5 Investigations Ltd v Centurion Protective Agency Ltd

[7] CV 2008-04045 Andre Marchong v T&TEC

[8] Section 14(1) (c) Limitation of Certain Actions

properly raised in the claim for workmen's compensation. Additionally, the counterclaim for the reimbursement of the workmen's compensation paid as pleaded falls short of the requirement of the rule since it fails to set out with any clarity or sufficiency the particulars of the alleged "error".

Should the defendant be awarded summary judgment on its counterclaim on the basis that the claimant has no realistic prospect of success?

22. Having agreed with the claimant that the defendant's counterclaim must be struck out the defendant's application for summary judgment is now moot. However for completeness I will still examine the merits of the defendant's application.

23. The test to be applied in dealing with an application for summary judgment is set out in Part 15 of the CPR which allows the court to give summary judgment to the applicant if it is of the view that the claim or the defence has no realistic prospect of success. In considering an application for summary judgment Kangaloo JA in **Western United Credit Union Co-operative Society Limited v Corrine Ammon**[9] applied the principles of Beason J in **Toprise Fashions Ltd v Nik Nak Clothing Co Ltd, Nik Nak (1) Ltd, Anjum Ahmed** [10]which reproduced the following passage from **Federal Republic of Nigeria v Santolina Investment Corp[11]:**

"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

[9] Civ Appeal 103 of 2006 at para. 3

[10] (2009) EWHC 1333 (Comm) at para. 16

[11] (2007) EWHC 437 (CH)

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 the 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 the 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 grounds exist 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 Pharmaceuticals Co 100 Ltd [2007] FSR 63."

24. Applying the aforesaid principles, the defendant's application fails since the triable issue of fact is who was responsible for the ladder which caused the claimant's injury.

Order

25. Paragraph 6 of the defendant's defence is not struck out.

26. The counterclaim is struck out.

27. The claimant having succeeded with part of his application filed October 24, 2011 is awarded 50% of the costs of the application to be assessed.

28. The defendant's application for summary judgment filed November 2, 2011 is dismissed with costs to be assessed.

Dated this 13 March, 2012

Margaret Y Mohammed

Master (Ag)