THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2017-03904

BETWEEN

MALABAR FARMS FOOD SERVICES LTD

Claimant

AND

DIANE BRATHWAITE

Defendant

Before the Honourable Mr. Justice Robin N. Mohammed

Date of Delivery: Friday 23 July 2021

Appearances:

Ms. Carrie-Anne Griffith for the Claimant

Mr. Ken Wright instructed by Ms. Mariella Cabralis for the Defendant

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DECISION ON CLAIMANT'S APPLICATION TO STRIKE OUT DEFENCE AND COUNTERCLAIM/SUMMARY JUDGMENT

I. Introduction

[1] On 2 November 2017, the Claimant initiated these proceedings by filing its Claim Form and Statement of Case. The Claimant sought against the Defendant the following relief:

(i) A Declaration that the Defendant is liable to account to the Claimant for the sum of **One Hundred and Twenty Five Thousand Dollars ($125,000.00)** or such other sum as the Court thinks fit on the ground of breach of fiduciary duty and/or breach of trust and/or fraud and conversion.

(ii) An order that the Defendant do pay to the Claimant **One Hundred and Twenty Five Thousand Dollars ($125,000.00)** or such other sum as the Court thinks fit.

(iii) Damages.

(iv) Interest.

(v) Cost.

(vi) Such further and other relief as the Honourable Court may think just in the circumstances.

[2] On 20 November 2017, the Defendant entered her appearance intimating an intention to defend the Claim. The Defendant filed her Defence and Counterclaim on 28 February 2018. The Defendant counterclaimed against the Claimant for the following relief:

(i) A Declaration that the Defendant is not indebted as alleged or at all to the Claimant in the sum of ***One Hundred and Twenty Five Thousand Dollars ($125,000.00).***

(ii) Further or in the alternative an account of all monies collected by the Defendant and deposited into the Claimant's bank account for the periods 2 March 2015 to 25 July 2017.

[3] However, on 6 July 2018, the Claimant filed and served its application to strike out the Defendant's Defence and Counterclaim pursuant to **Part 26.2(1) of the Civil Proceedings Rules 1998 ("the CPR")** and for summary judgment on his Claim pursuant to **Part 15.2 of the CPR**.

[4] The Court, thereafter, gave directions for the filing and serving of written submissions by the parties. The Claimant filed its submissions on 30 August 2018 and the Defendant filed hers on 28 September 2018.

II. Factual Background

[5] The Claimant is a company duly incorporated under the **Companies Act, Chap 81:01**. It is in the business of supplying foods and food services. At all material times, the Defendant was an employee of the Claimant for approximately two years. The Defendant was employed in the capacity of Sales Representative from about 2 March 2015 until her resignation on 25 July 2017.

[6] As a Sales Representative of the Claimant, the Defendant was authorized to sell goods and collect payments for same as well as deposit those payments into the Claimant's

bank account. Pursuant to the Claimant's sales policy, all sales representatives must issue receipts to all customers upon collection of funds with proper information. Furthermore, all funds collected from customers must be deposited into the Claimant's bank account within twenty-four hours of collection. According to the Claimant, any misappropriation of funds will result in the employee's immediate dismissal and police intervention where necessary.

[7] The Claimant averred that the Defendant was responsible for deposits of all her collections at the bank on the date of collection which included both cash and cheques. It is the Claimant's case that the Defendant worked and operated as a trustee of the Claimant and owed it a fiduciary duty of care by virtue of her position as a Sales Representative. The Claimant further averred that as a Sales Representative of the Claimant Company, the Defendant was a trustee of the Claimant's assets and property as they were in her control and possession.

[8] The Claimant contended that it contacted one of its customers, Canboulay Restaurant and Lounge which was under the Defendant's portfolio regarding its outstanding payments. However, the customer queried the outstanding balance stating that it had made more payments than the Claimant had accounted for. The Claimant requested that the customer submit proof of all its payments to substantiate its claim of payment.

[9] According to the Claimant, it embarked upon a customary exercise to rotate its Sales Representatives. Upon advising the Defendant that she was being reassigned to another district to serve different customers, she tendered her resignation. After leaving the company, the General Manager, Ms. Florence Abraham, contacted the Defendant requesting that she come in to assist in rectifying her accounts since the customer claimed that it had made more payments than the Claimant had recorded. The Defendant refused and instructed the General Manager to speak to her attorney-at-law.

[10] Upon receipt of the customer's proof of payments, the Claimant instructed its Administrative Supervisor, Mrs. Alana Boodram, to compare the documents received from the customer with the Claimant Company's files. As a result of an investigation undertaken and concluded by the Claimant, it was discovered, that the Defendant would issue receipts to its customers for the sums actually received but would alter

the figures on the receipts to be submitted to the Claimant to a lesser sum and retain the difference for her personal use and benefit. The Claimant further alleged that the Defendant would deposit the lesser sum of cash and not the sum that was collected from the customer on behalf of the Claimant. The Claimant alleged twenty-two separate occasions at paragraph 20 of the Statement of Case where the Defendant collected monies on its behalf but submitted a lesser sum, retaining the difference for her own personal use and benefit.

[11] It is the Claimant's case that as a trustee of the Claimant Company, the Defendant received and converted its assets in the total sum of $125,000.00 for her personal use and benefit in breach of her fiduciary duties.

[12] By her Defence, the Defendant disputed the Claimant's Claim. The Defendant contended that in accordance with the sales policy, the Defendant as a Sales Representative sold goods to customers and made bank deposits on the Claimant's behalf. The Defendant further contended that in each and every sale transaction, a receipt was issued to the customer upon collection of the cash or cheque which was signed by the Defendant.

[13] According to the Defendant, she was never any party to any investigation conducted by the Claimant and therefore, refute its findings. The Defendant denied that she retained any of the Claimant's money received from its customers for her own use and benefit and averred that she deposited all sums of money be it cash or cheques into the Claimant's bank account.

[14] According to the Defendant, in accordance with her duties as a Sales Representative, she was not privy to the internal accounting procedure and contended that the Claimant's officer would audit the Defendant's transactions on behalf of the Claimant and signed off on them. The Defendant further contended that the Claimant authorized an officer to audit the Defendant's book every week and also signed out on those transactions. The Defendant averred that on each sales transaction, she would follow the Claimant's sale policy in reference to taking the orders and the collection of monies thereto.

[15] The Defendant further averred that she did not collect the sum of $125,000.00 from the Claimant's customers and converted same to her own use and benefit. The Defendant made no admission to the exhibits marked M.F.2 to M.F.22 referred to in Paragraph 20 of the Statement of the Case. The Defendant denied that there were variations to the customer's files and those presented by the Claimant. The Defendant also denied falsifying the Claimant's documents in order to misappropriate its assets. The Defendant further denied that she was a trustee of the Claimant and that her position as a sales representative was not the subject of a trust or fiduciary obligation.

[16] The Defendant, in her Counterclaim, repeated the contents of her Defence and contended that the Claimant failed to provide an account of all deposits made into the Claimant's bank account by the Defendant during the period 2 March 2015 to 25 July 2017. The Defendant further contended that the Claimant has failed to provide the Defendant with audited accounts and financial statements showing the monies deposited into the Claimant's bank account by the Defendant on behalf of its customers.

III. Claimant's Application to strike out the Defence and Counterclaim and Summary Judgment on the Claim

[17] The Claimant's Notice of Application filed on 6 July 2018 seeks an Order that:

1. The Defence of the Defendant be struck out on the grounds that:
    a. The Defence discloses no ground for defending the Claim;
    b. The Defendant amounts to a bare denial of the Claim.
2. The Counterclaim of the Defendant be struck out on the grounds that:
    a. The Counterclaim discloses no cause of action;
    b. The Counterclaim has no realistic prospect of success.
3. That pursuant to **Part 15 of the Civil Proceedings Rules 1998** (as amended), there be summary judgment against the Defendant on the grounds that the Defendant has no realistic prospect of success on her Defence and/or Counterclaim to the Claim.
4. Costs pursuant to **Part 66.6 of the Civil Proceedings Rules 1998** that the Defendant do pay the Claimant for:
    a. The Application pursuant to **Part 67.11 of the CPR**;
    b. The Claim pursuant to **Part 67.5 of the CPR**;

c. The Pre-Action Protocol exercise pursuant to **Part 67.11 of the CPR**.

5. Interest pursuant to **section 25A of the Supreme Court of Judicature Act**; and
6. Such further or other relief as the Honourable Court may deem fit.

[18] The grounds of the Application are as follows:

(i) The Defence filed by the Defendant amounts to a bare denial of the Claim and discloses no grounds for defending same;

(ii) The Counterclaim filed by the Defendant discloses no cause of action;

(iii) The Defendant has no realistic prospect of success on her Defence and/or Counterclaim to the Claim.

[19] An affidavit in support of the Application, in the name of Florence Abraham, the General Manager of the Claimant, was filed by the Claimant on even date. Ms. Abraham deposed that the Defence contained nothing but bare denials to most of the allegations contended by the Claimant and provided no reasons for resisting same. Furthermore, the Defendant offered no explanation and/or alternate version of events in response to the allegations made. Ms. Abraham also deposed that the Defendant's Counterclaim does not contain a cause of action and that essentially there is no claim for the Claimant to answer. Ms. Abraham further deposed that the Defendant's Defence has no realistic prospect of success as it amounts to a bare denial of the Claim and discloses no grounds for defending same. Additionally, the Counterclaim has no realistic prospect of success as it fails to disclose a cause of action.

IV. Issues for Determination

[20] The issues that fall for determination in this Application are as follows:

1. **Should the Defendant's Defence and Counterclaim be struck out pursuant to Part 26.2(1) of the CPR? In this regard, the following factors come up for consideration, namely:**
    (a) Does the Defence comply with Part 10.5 of the CPR?
    (b) Does the Defence disclose a reasonable ground for defending the Claim?
    (c) Does the Counterclaim disclose a reasonable ground for bringing the Claim?

2. **Additionally or alternatively, has the Claimant established that Defendant has no realistic prospect of success on her Defence and Counterclaim?**

V. Law and Analysis

[21] The Court is empowered under **Part 26.2(1) of the CPR** to strike out a Defence or Counterclaim: (a) for failing to comply with a rule or practice direction or with an order or direction of the Court; (b) if it is an abuse of process of the Court;(c) if it discloses no reasonable grounds for bringing or defending a Claim; and (d) if it is prolix or does not comply with the requirements of **Part 8 or 10 of the CPR**. **Part 15.2(a) of the CPR**, on the other hand, empowers the Court to give summary judgment on the whole or part of the Claim if, on the application of the Claimant, it is shown that the Defendant has no realistic prospect of success on his Defence to the Claim, part of the Claim or issue. The tests, which the Court is to apply under the striking out rule and the summary judgment rule, are different. The question therefore arises as to which test should be applied first.

[22] In **University of Trinidad and Tobago v Professor Kenneth Julian and Ors**[1], Kokaram J (as he then was) summed up the difference in approach under the two respective rules in the following manner:

> *"6. There is of course a fundamental difference between the two tests under CPR rule 26 and rule 15. When invoked simultaneously by a party the Court is engaged in an exercise of testing and assessing the strengths of the Claimant's case on what I will term a "soft" and then a more rigorous standard. If a claim discloses some ground for a cause of action it is not "unwinnable" and should proceed to trial. It may be a weak claim but not necessarily a plain and obvious case that should be struck out and the claimant "slips past that door". The Court is however engaged in a more rigorous exercise in a summary judgment application to determine of those weak cases, which may have passed through the "rule 26.2 (c) door" whether it is a claim deserving of a trial, whether the evidence to be unearthed supports the claim and whether there is a realistic as*

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opposed to fanciful prospect of success. If there is none, the door is closed on the litigation and brings an end to its sojourn in this litigation."

[23] I agree with Kokaram J in **UTT v Kenneth Julien** case (supra) where he stated as follows:

"I agree with the observations made in Swain v Hillman [2001] 1 All ER 91 that there is an obvious relationship between CPR rule 26.2(1) (c) and rule 15. They are both summary proceedings that seek to bring a premature end to proceedings without the opportunity being given for the parties or the Court to fully investigate the facts and the law at a trial. The premise of both applications is that it would be a waste of the parties' and Court's resources to do otherwise and that further management to trial is an uneconomical, un-proportionate response to the nature of the case presented by the litigant. The approach maintains the equality of arms between a litigant spared the further expense of a hopeless or weak case and a Defendant's right not to be harassed by such cases. The assessment in both cases is an exercise of the Court's case management powers to give effect to the overriding objective. See CPR rules 1.2, 25.1 (a) (b) and (h). See also the judgment of Jamadar JA in Real Time Systems Ltd v Renraw Investments Ltd CA Civ. 238 of 2011. The Court makes a broad judgment after considering the available possibilities and concentrates on the intrinsic justice of a particular case in the light of the overriding objective. See Walsh v Misseldine [2001] CPLR 201. In examining the tests in a rolled up application one may look at the individual trees but then must step back to "look at the forest" in making an overall assessment of the case."

[24] In adopting this approach, I shall first deal with the application to strike out the Defence and Counterclaim. If the Claimant is not successful on this part of the Application, I will then consider whether the Defence and Counterclaim have a realistic prospect of succeeding if they go to trial.

Application to Strike out the Defence and Counterclaim

[25] The Court's power to strike out a Statement of Case (which includes a Defence and Counterclaim) is set out in **Part 26.2(1) of the CPR** which states as follows:

"26.2(1) The Court may strike out a statement of case or part of a statement of case if it appears to the Court –

(a) 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;

(b) that the Statement of Case or the part to be struck out is an abuse of the process of the Court;

(c) that the statement of case or the part to be struck out discloses no grounds for bringing or defending a claim; or

(d) that the Statement of Case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10."

The Claimant seeks to rely on limbs (c) and (d) of **Part 26.2 (1) of the CPR**.

[26] According to **Zuckerman on Civil Procedure Principles of Practice Third Ed. at page 373, para 9.36**:

"The full pre-trial and trial process is appropriate and useful for resolving serious or difficult controversies, but not where a party advances a groundless claim or defence or abuses the court process. There is no justification for investing court and litigant resources in following the pre-trial and trial process where the outcome is a foregone conclusion... In such cases the court has therefore the power to strike out the offending claim or defence and thereby avoid unnecessary expense and delay."

(a) Does the Defendants' Defence comply with Part 10.5 of the CPR?

[27] **Rule 10.5 of the CPR** sets out the Defendant's duty to set out his case if he intends to defend. It states that -

"1) The Defendant must include in his defence a statement of all the facts in which he relies to dispute the claim against him.

2) Such statement must be as short as practicable.

3) In his defence the defendant must say—

a) which (if any) allegations in the claim form or statement of case he admits;

b) which (if any) he denies; and

c) which (if any) he neither admits nor denies, because he does not know whether they are true, but which he wishes the claimant to prove.

4) Where the defendant denies any of the allegations in the claim form or statement of case—

a) he must state his reasons for doing so; and

b) if he intends to provide a different version of events from that given by the claimant, he must state his own version.

5) If, in relation to any allegation in the claim form or statement of case the defendant does not—

a) admit or deny it; or

b) put forward a different version of events, he must state each of his reasons for resisting the allegation.

6) The defendant must identify or annex to the defence any document which he considers to be necessary to his defence."

[28] Mendonça JA in the case of **M.I.5 Investigations Ltd v Centurion Protective Agency Ltd**[2] explained how a Defence should be drafted pursuant to **Part 10.5 of the CPR** as follows:

"In respect of each allegation in a claim form or statement of case therefore there must be an admission or a denial or a request for a claimant to prove the allegation. Where there is a denial it cannot be a bare denial but it must be accompanied by the defendant's reasons for the denial. If the defendant wishes to prove a different version of events from that given by the claimant he must state his own version. I would think that where the defendant sets out a different version of events from that set out by the claimant that can be a sufficient denial for the purposes of 10.5 (4) (a) without a specific statement of the reasons for denying the allegation.

[2]Civil Appeal No 244 of 2008

Where the defendant does not admit or deny an allegation or put forward a different version of events he must state his reasons for resisting the allegation (see 10.5 (5)). The reasons must be sufficiently cogent to justify the incurring of costs and the expenditure of the Court's resources in having the allegation proved."

[29] The effect of **Part 10.5 of the CPR** is adequately summarised in **Zuckerman on Civil Procedure Principles of Practice Third Ed at page 301, para 7.27** as follows:

"The old system of bare denials and "holding defences" was wasteful and no longer acceptable. Today, the function of the defence is to provide a comprehensive response to the particulars of claim so that when the two documents are read together one can learn precisely which matters are in dispute."

[30] It is critically incumbent on a Defendant to comply with the stipulations of **Part 10.5 of the CPR**, not only to do all that is necessary to advance the success of his defence but also to ensure that the Court's resources are not wasted on trivial reasons for resisting an allegation in the Statement of Case.

[31] Counsel for the Claimant, Ms. Griffith, submitted that the Defendant in her Defence denied the allegations put forward by the Claimant without giving any reasons. Ms. Griffith further submitted that the Defendant failed and/or refused to address claims made by the Claimant in its Statement of Case and failed and/or refused to provide any alternate version of events with respect to the Claim made. It was submitted that the Defendant made a bare denial of the Claim.

[32] Ms. Griffith relied on the case of **Thadeus Clement v The Attorney General of Trinidad and Tobago**[3] wherein Kokaram J stated that it is trite law that a bare denial under the CPR no longer constitutes a good defence and the CPR places an obligation on the Defendant to state all the facts on which he relies to dispute the Claim and that a simple denial is not sufficient. Ms. Griffith submitted that the Defendant did nothing other than say that she did not do it and that she provided no evidence to refute the

[3] CV2009-03208

Claimant's claim. Therefore, the Defence discloses no grounds for defending the Claim.

[33] Counsel for the Defendant, Mr. Wright, submitted that the grounds put forward by the Claimant as to why the Defence ought to be struck out are flawed. Mr. Wright submitted that it is clear from the Defence that the Defendant put forward more than a bare denial. The Defendant has sought to explain her version of events which took place between 2 March 2015 and 25 July 2017.

[34] The Court has examined the Defence as filed into Court. The overall tone of the Defendant's Defence is that she denies the several allegations made against her without offering alternative facts and/or her alternative version of events. In several instances in her Defence, the Defendant simply denied the assertions of the Claimant without more. This Court considers the claims made against this Defendant to be sufficiently serious to warrant a fuller explanation of version of events, or reasons by the Defendant.

[35] The Court is of the opinion that paragraphs 14 to 17 of the Statement of case were serious allegations levelled against the Defendant. Yet, the Defendant made no admissions or simply denied the claims as put forward by the Claimant without proffering reasons for so doing. Importantly, the Claimant at paragraph 18 of its Statement of Case claimed that the Defendant would issue receipts to its customers and would alter the figure on the receipts to be submitted to the company, retaining the difference in each case for her personal use and benefit. This is the core of the Claimant's case against the Defendant. It is also an issue which ought to have been addressed directly and head on by the Defendant who did not address the said paragraph 18 at all.

[36] Additionally, the Claimant, at paragraph 20 of its Statement of Case exhibited several bundles of documents which included deposit receipts from the bank, receipts issued by the customer, and those issued by the Defendant. Those receipts were signed by the Defendant who has not disputed her signature on same. Rather she has put the Claimant to strict proof of same without addressing the specific sub-paragraphs of paragraph 20. The effect of paragraphs 22 to 24 of the Defence is that Defendant

simply made no admission as to the exhibits referred to in paragraph 20 of the Statement of Case which is of crucial importance to this case.

[37] The Court is of the view that the Defence as filed amounts to a bare denial and fails to comply with **Part 10.5 of the CPR**. The Defendant simply denied the allegations made by the Claimant and failed to accompany the denial with her reasons for doing so. Furthermore, the Defendant did not put forward a different version of events from that set out by the Claimant which would have amounted to a sufficient denial for the purposes of **Part 10.5(4)(a) of the CPR** for which a specific statement of the reasons for the denial would not be required: [See ***M.I.5 Investigations***]. Moreover, the Defendant also failed to state her reasons for resisting the allegations made by the Claimant where she did not admit or deny the allegation or put forward a different version of events (**Part 10.5(5) of the CPR**). The Defence as filed does not provide a comprehensive response to the particulars of the Claim.

[38] In the above premises, the Court is of the view that the Claimant is successful on this ground of the Application to strike out the Defence. The Court finds that the Defendant's Defence does not comply with **Part 10.5 of the CPR** and ought to be struck out on this ground.

(b) Does the Defendants' Defence disclose a reasonable ground for defending the Claim?

[39] The **White Book 2013 Civil Procedure Volume 1, Part 3: The Court's Case Management Powers** states at para **3.4.2** as follows:

> *"Paragraph 1.6 of the Practice Direction – Striking Out a Statement of Case, para 3APD.1 that a defence may fall within r.3.4(2)(a) [equivalent to our **Part 26.2(1)(c) of the CPR**] where it consists of a bare denial or otherwise sets out no coherent statement of facts, or the facts it sets out, while coherent, would not even if true amount in law to a defence to the claim."*

[40] **Zuckerman on Civil Procedure Principles of Practice Third Ed at page 375, para 9.40** further stated that -

> *"… a defence may be struck out if it consists of a bare denial and sets out no coherent statement of facts, or if the facts it sets out could not amount*

in law to a defence to the claim. The most straightforward case for striking out is… a defence that discloses no grounds for resisting the claim."

[41] Though the Court has already determined that the Defendant's Defence ought to be struck out on the ground that it amounts to a bare denial, the Court is of the view that though the Defendant's Defence sets out some facts, even if alleged to be true, it does not amount in law to a defence to the Claim. Therefore, the Defence as pleaded does not disclose any reasonable grounds for defending the Claim and ought also to be struck out on this ground.

(c) Does the Counterclaim disclose a reasonable ground for bringing the Claim?

[42] Pleadings are 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: **McPhilemy v Times Newspapers Ltd**[4]. **Part 8.5(1) of the CPR** states:

"The claim form must –

(a) include a short description of the claim; and

(b) specify any remedy that the claimant is seeking (though this does not limit any power of the court to grant any other remedy to which he may be entitled)."

[43] The **White Book on Civil Procedure 2020** considers what constitutes a Statement of Case (which includes a Counterclaim) which discloses no reasonable grounds for bringing or defending the claim. The learned authors of **The White Book** state that Statements of Case which are suitable for striking out (on the basis that they disclose no reasonable grounds for bringing or defending the claim) include those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides.

[44] ***Paragraph 1.4 of the Practice Direction 3A – Striking Out a Statement of Case*** gives examples of what the Court may conclude that particulars of a claim fall within **Rule 3.4(2)(a)** [our equivalent is **Part 26.2(1)(c) of the CPR**] as follows (i) those claims

[4] [1999] 3 All ER 775 at p 792J

which set out no facts indicating what the claim is about; (ii) those claims which are incoherent and make no sense; and (iii) those claims which contain a coherent set of facts but those facts even if true, do not disclose any legally recognisable claim against the defendant.

[45] In **Brian Ali v The Attorney General**[5], Kokaram J explained as follows:

> *"12. The principles in striking out a statement of case are clear. A court will only seek to strike out a claim pursuant to* ***Rule 26.2(1)(c) of the CPR 1998*** *as amended on the basis that it discloses no ground for bringing the claim. The language and wording of our* ***Rule 26.2(1)*** *is very generous in that so long as the Statement of Case discloses a ground for bringing the claim, it ought not to be struck out. See* ***UTT v Ken Julien and ors CV2013-00212****.*
>
> *13. It is a draconian measure and is to be sparingly exercised always weighing in the balance the right of the Claimant to have his matter heard and the right of the Defendant not to be burdened by frivolous and unmeritorious litigation. The Court in the exercise of its discretion to strike out a claim must always ensure to give effect to the overriding objective. See:* ***Real Time Systems Ltd v Renraw Investment Ltd Civ. App. 238 of 2011****.*
>
> *14. It is for the Defendant to demonstrate that there is no ground for bringing the claim. The Defendant can demonstrate for instance that the claim is vague, vexatious or ill-founded.* ***Porter LJ in Partco Group Limited v Wragg [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 Bolton Burden [2000] CPLR 9****;*
>
> *(b) Where the statement of case does not raise a valid claim or defence as matter of law."*

[46] Ms. Griffith submitted that the Defendant's Counterclaim failed to establish a recognised cause of action and that on the face of it, the Claimant has no case to

[5] CV2014-02843

answer. Counsel further submitted that **Partco Group Limited v Wragg (supra)** is instructive and that the Counterclaim is without benefit and would essentially waste resources on both sides. Mr. Wright, in response, submitted that the Counterclaim clearly alludes to the fact that the Claimant has failed to provide evidence to substantiate its claim and as such serves its purpose of rebutting the claim made against the Defendant by the Claimant.

[47] In the Counterclaim, the Defendant repeated the allegations contained in paragraphs 1 to 34 of her Defence; by incorporating same by reference to the contents of the Defence. However, as concluded above, the Defence does not comply with **Part 10 of the CPR** nor does it disclose any reasonable ground for defending the Claim, thus it was struck out pursuant to **Part 26.1 of the CPR**. As a consequence, any reference to the Defendant's Defence in the Counterclaim ought to be struck out.

[48] Nevertheless, the Defendant in the Counterclaim contended that the Claimant failed to provide an account of all deposits made into the Claimant's bank account by the Defendant for the period 2 March 2015 to 25 July 2017. It was further contended that the Claimant failed to provide the Defendant with audited accounts and financial statements showing the monies deposited into the Claimant's bank account by the Defendant on behalf of its customers.

[49] The Court is of the view that the Counterclaim as pleaded does not disclose a legally recognizable claim against the Claimant. The Counterclaim, is in my opinion, not drafted so as to properly articulate the facts of the basis on which the Claim is being made against the Claimant. Furthermore, the Counterclaim as pleaded does not set out the Defendant's case in such a way so as to give the Claimant the opportunity to answer the Claim and defend the allegations made against it. In that regard, the Counterclaim as filed ought to be struck out pursuant to **Part 26.2(1)(c) of the CPR** since it discloses no grounds for bringing the Claim.

Application for Summary Judgment on the Claim

[50] Notwithstanding my earlier finding that the Defendants' Defence and Counterclaim ought to be struck out pursuant to **Part 26.2(1) of the CPR**, the Court will still

consider, for the sake of completeness, whether in any event, the Defendants' Defence and Counterclaim does not have a realistic prospect of success.

[51] **Part 15.2 of the CPR** provides as follows:

"The court may give summary judgment on the whole or part of a claim or on a particular issue if it considers that—

(a) on an application by the claimant, the defendant has no realistic prospect of success on his defence to the claim, part of claim or issue; or

(b) on an application by the defendant, the claimant has no realistic prospect of success on the claim, part of claim or issue."

[52] The fundamental principles of summary judgment are well established and settled in case law. The authority of **Western United Credit Union Co-operative Society Limited v Corrine Ammon**[6] which referred to the decisions of **Toprise Fashions Ltd v Nik Nak Clothing Co Ltd and ors**[7] and **Federal Republic of Nigeria v Santolina Investment Corp**.[8], is often cited for its comprehensive outline of the basic principles as follows:

"(i) The Court must consider whether the defendant has a realistic as opposed to 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 E.W.C.A. 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

[6]Civil Appeal No 103 of 2006 [3] per Judgment of Kangaloo JA
[7] 3 (2009) EWHC 1333 (Comm)
[8] (2007) EWHC 437 (CH)

documents: ED & F Man Liquid Products v Patel 2003 E.W.C.A. Civ 472 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 E.W.C.A 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 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 Pharmaceutical Co 100 Ltd 2007 F.S.R. 63."

[53] Lord Woolf MR in the case of **Swain v Hillman**[9] opined that the term "*no realistic prospect of success*" was self-explanatory and needed no further amplification. What the Court must determine is whether there was a *"realistic"* as opposed to a *"fanciful"* prospect of success. Accordingly, the Court is concerned with *whether the Defendant's Defence has a realistic prospect of success*. Although the Court is not tasked to conduct a mini trial, consideration of the evidence before the Court on the Application, including any contemporaneous documents, and the evidence that can reasonably be expected to be available at trial is important.

[54] Given that the Defence does not amount to a valid defence to the Claim, the Defendant would not be able to effectively resist the Claimant's Claim at trial and would have an unrealistic prospect of success as a result of having no reasonable ground to defend the Claim. Accordingly, apart from holding that the Defendant's Defence is to be

[9] [2000] 1 All ER 91

struck out, the Court must also go on to grant summary judgment on the Claim in favour of the Claimant.

Issue of Costs: Entitlement and Quantification

[55] On the question of costs of the Notice of Application filed on 6 July 2018, the general rule on the award of costs is that the Court must order the unsuccessful party to pay the costs of the successful party: **Part 66.6(1) of the CPR**. Although this general rule is now considered to be the starting point and that the Court must take into account all the circumstances including the factors set out in **Part 66.6(4), (5) and (6) of the CPR** before deciding where costs should be allocated, this Court can find no justification for departing from the general rule. Accordingly, the Court considers that the Defendant should bear the costs of the said Notice of Application to be assessed pursuant to **Part 67.11 of the CPR**, in default of agreement.

[56] Additionally, since being successful on the application for summary judgment would have determined both the Claim and Counterclaim, the Claimant will normally also be entitled to its costs of the Claim and Counterclaim on the prescribed scale to be quantified as at the stage at which the Claim and Counterclaim have been determined in accordance with **Part 67.5(1) of the CPR** and **Appendices B and C of Part 67**. This requires the "**value**" of the Claim to be determined, which according to **Part 67.5(2)(a) of the CPR**, in this case, is the "**amount ordered by the Court**" to be paid by the Defendant to the Claimant. However, taking into account that the Counterclaim did not really amount to a Counterclaim and was just a regurgitation of the Defence which itself was struck out, I do not propose to allow any costs on the Counterclaim on the basis that for the most part there was much overlap in the arguments and submissions in relation to striking out the Defence.

[57] I propose, however, to order the Defendant to pay prescribed costs of the Claim appropriate to the stage at which the Claim was determined.

[58] However, the Court must take into account all the circumstances including the factors set out in **Part 66.6(4), (5) and (6) of the CPR**. On the basis that the matter did not go the full distance, in that the Claim was determined on an application for summary judgment, the Court is inclined to reduce the costs of the Claim by 55% in accordance

with **Part 67.5(4)(a) of CPR** and **Appendix C of Part 67 of the CPR**. Although prescribed costs can be quantified now, I prefer to give the parties an opportunity to agree on a global figure for both bases of costs. In the event that parties are unable to agree on the quantum of costs, then prescribed costs on the claim will be quantified at the same time the Court is engaged in the assessment of costs of the Notice of Application filed 6 July 2018.

Claim for Interest

[59] The Claimant, in its Claim and Statement of Case, claimed interest simpliciter but gave no details of (i) the basis of entitlement; (ii) the rate; (iii) the period for which it is claimed; (iv) the total amount of interest claimed to the date of the claim; and (v) the daily rate at which interest will accrue after the date of the Claim, as provided for by **Part 8.5(3) of the CPR**. It is not sufficient to simply claim interest without providing such details as are now required under the CPR. The Claimant repeated its claim for interest in the Notice of Application to strike out and for summary judgment, this time seeking interest pursuant to **section 25A of the Supreme Court of Judicature Act**, but again, provided no details of the requirements stipulated by **Part 8.5(3) CPR**. Moreover, no arguments were made in the written submissions filed by the Claimant's attorney on the 30 August 2018 seeking to justify the claim for interest. In this regard, I consider that the claim for interest has not been substantiated or justified and therefore I do not propose to grant any interest on the sum awarded.

VI. Disposition

[60] In light of the above analyses and findings, the order of the Court is as follows:

ORDER:

1. **The Defendant's Defence be and is hereby struck out pursuant to Part 26.2(1)(c) and (d) of the CPR 1998 on the basis that it discloses no grounds for defending the Claimant's Claim and that it does not comply with the requirements of Part 10.5 of the CPR 1998.**

2. **The Defendant's Counterclaim be and is hereby struck out pursuant to Part 26.2(1)(c) of the CPR 1998 on the basis that it discloses no grounds for bringing a Claim.**

3. **Summary Judgment be and is hereby granted in favour of the Claimant on the ground that the Defendant has no realistic prospect of success on her Defence and Counterclaim to the Claim in the following terms:**
   (a) **A Declaration that the Defendant is liable to account to the Claimant for the sum of One Hundred and Twenty Five Thousand Dollars ($125,000.00) on the ground of breach of fiduciary duty and/or breach of trust and/or fraud and conversion.**
   (b) **An order that the Defendant do pay to the Claimant the sum of One Hundred and Twenty Five Thousand Dollars ($125,000.00).**

4. **The Defendant shall pay to the Claimant costs of the Notice of Application filed on 6 July 2018 to be assessed pursuant to Part 67.11 of the CPR 1998, in default of agreement.**

5. **The Defendant shall also pay to the Claimant prescribed costs on the Claim appropriate to the stage at which the Claim has been determined in accordance with the Scale of Prescribed Costs in Appendices B and C of Part 67 of the CPR 1998.**

6. **In the event there is no global settlement on the quantum of costs, the Claimant to file and serve a Statement of Costs for assessment on or before 30 September 2021 and the Defendant to file and serve Objections, if any, on or before 21 October 2021.**

7. **The Court shall thereafter deal with the assessment without a hearing and shall also quantify costs of the Claim on the prescribed scale as provided for in clauses 4 and 5 of this order.**

Robin N Mohammed
Judge