THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. 2017-04527

BETWEEN

RASHEED BAKSH

Claimant

AND

BELGROVES FUNERAL HOME COMPANY LIMITED

Defendant

Before the Honourable Mr. Justice Robin N. Mohammed

Date of Delivery: Thursday 18 June 2020

Appearances:

Mr. Stefan Ramkissoon and Mr. Kiel Taklalsingh instructed by Ms. Ananda Rampersad for the Claimant

Ms. Christiane Prowell for the Defendant

DECISION ON DEFENDANT'S NOTICE OF APPLICATION FILED ON 12 OCTOBER 2018

I. Introduction

[1] On 15 December 2017, the Claimant initiated these proceedings by filing his Claim Form and Statement of Case. The Claimant sought against the Defendant, the following relief:

1. Damages for mental distress as a result of a breach of contract as assessed by this Honourable Court.
2. Further and/or in the alternative damages for mental distress suffered as a result of the Defendant's negligence.
3. Special damages in the sum of Seven Thousand Dollars ($7,000.00).
4. Interest at such rate and for such period as the Court may deem just.
5. Costs.
6. Such further and/or other relief as to the Court may deem just.

[2] On 28 December 2017, the Defendant entered its appearance indicating an intention to defend the Claim. The Defendant subsequently filed a Defence on 19 January 2018. The Claimant filed a Reply to the Defence on 11 June 2018.

[3] However, on 12 October 2018, the Defendant filed its Notice of Application, with no supporting affidavit, to have the Claimant's Claim dismissed pursuant to **Part 26.1(1)(k) of the Civil Proceedings 1998 ("the CPR")** and/or in the alternative that the Claimant's Claim be struck out pursuant to **Part 26.2(b) of the CPR *(sic)*[1]** as an abuse of the process of the Court and/or in the alternative that the Claimant's Claim be struck out pursuant to **Part 26.2(c) of the CPR *(sic)*[2]** as it discloses no grounds for bringing or defending a claim. In accordance with the Court's directions, on the said 12 October 2018, the Defendant filed its written submissions in support of its application.

[4] The Claimant filed his written submissions in response to the Defendant's application on 29 January 2019. The Defendant filed its Reply Submissions on 15 February 2019.

II. Factual Background

[5] On or about 29 November 2016, the Claimant contracted with the Defendant to arrange the funeral and interment services for the body of Aysha Mohammed, the Claimant's deceased mother. The cost of the arrangement was quoted at $17,758.13. The funeral was fixed for 1 December 2016. The funeral arrangements included a viewing of the body and prayer service at the former residence of the deceased in San Juan and

[1] **Part 26.2(1)(b) of the CPR**
[2] **Part 26.2(1)(c) of the CPR**

thereafter, cremation at the Defendant's Orange Grove Crematorium on 1 December 2016.

[6] The particulars of the contract/agreement were set out as follows:

(a) Professional services for the overall planning and directing of the funeral procession;
(b) Sanitation/Embalming;
(c) Refrigeration;
(d) Provision of a funeral coach for the transportation of the deceased throughout the funeral procession;
(e) Provision of a casket specifically chosen for the deceased;
(f) Provision of programmes;
(g) The cremation of the deceased, processing of the remains and provision of the urn.

[7] At around 9:00am on 1 December 2016, the Defendant's hearse arrived at the residence of the deceased for the funeral service. The casket was removed from the hearse and placed for viewing of the mourners. For approximately 30 minutes, the Claimant, as well as other mourners, grieved and offered prayers over the closed casket with the belief that they were paying their final respects to the deceased.

[8] However, after thirty minutes had elapsed, the casket lid was opened for the bereaved to have a final viewing of the deceased. It was at this time that the Claimant and the Defendant's representatives and/or agents and/or employees realised that the Defendant had delivered the wrong body to the funeral service ("the incident"). The wrong body was adorned in the clothing and jewellery of the Claimant's mother. The body was also laid in the casket, which the Claimant specifically designed and chose for his mother as her final resting place. This discovery resulted in an uproar.

[9] The Defendant and/or its agents and/or employees removed the wrong body from the residence and left the premises. Approximately, one hour and thirty minutes after the incident, the Defendant caused the casket containing the correct body (the Claimant's mother) to be presented at the funeral service. The Claimant allowed the Defendant to

continue with the funeral service of his mother. The Defendant completed the funeral services as contracted without further incident or complaint from the Claimant.

[10] On 2 December 2016 (the next day), the Claimant visited the Defendant's office in order to settle his outstanding charges for the funeral service. The Claimant paid a discounted sum of $7,000.00 to the Defendant and accepted the receipt for said payment.

[11] According to the Claimant, he was left in an indescribable state of shock, trauma and confusion as (i) he was uninformed of the whereabouts of his mother's body which was left in the Defendant's care and control; and (ii) he was left clueless as to whether the funeral services would be able to continue as the Defendant's representatives and/or agents failed to give him any answers.

[12] The Claimant averred that there was an implied term of the contract and/or duty of the Defendant to carry out all aspects of the contract with a view to ensuring that the Claimant was provided with consolation and a peace of mind. It was an implied term within the contract that the Defendant undertook to provide the Claimant with a proper and dignified funeral service. As a consequence of the Defendant's breach of its implied duties under the contract and/or negligence, the Claimant was robbed of a proper opportunity to celebrate the life and to honour the passing of his mother. The Defendant's conduct has further denied the deceased the proper send-off which she deserved as it caused the service to become a public spectacle.

[13] As a result of the incident, the Claimant was left shocked, outraged and emotionally distressed by the Defendant's actions. The humiliation, outrage and trauma faced by the Claimant and/or his family were aggravated for days after as they were bombarded with phone calls and unannounced visits at their residence from members of the media who wished to report on this ordeal. In addition to coping with the death of his mother, the Claimant continues to face grievous mental anguish and is deeply shaken and traumatized by the improper and/or undignified and/or unprofessional handling of his mother's funeral. The Claimant now suffers from lack of sleep and appetite, nightmares of the ordeal and inability to focus at his job and is in a constant state of depression.

[14] It is the Claimant's case that as a result of the Defendant's breach of the implied terms of the contract and/or its negligence, the Claimant has suffered damage in the form of mental distress, which was a reasonably foreseeable consequence.

[15] The Claimant set forth the particulars of the breach of contract as follows:

(a) Failure by the Defendant and/or the Defendant's employees and/or agents to carry out all aspects of the funeral service in a competent and respectful manner, in keeping with the highest possible professional standards;

(b) Failure by the Defendant and/or the Defendant's employees and/or agents to ensure that the correct body was dressed and placed in the correct casket;

(c) Failure by the Defendant and/or the Defendant's employees and/or agents to ensure that the correct body was delivered promptly and displayed at the funeral service;

(d) Failure by the Defendant and/or the Defendant's employees and/or agents to ensure the funeral service was conducted in a dignified, revered and respectful manner in order to deliver to the client a peace of mind.

[16] The Claimant particularised the aggravating factors resulting in mental distress as follows:

(a) The wrong body being placed in the deceased's casket that was specially chosen and designed by the Claimant as his mother's final resting place;

(b) The wrong body being dressed with the clothing specially chosen by the Claimant for his mother;

(c) A complete stranger's corpse being displayed at the funeral service;

(d) The deceased now forced to be buried in a used casket;

(e) The undignified and unprofessional manner the funeral service was conducted;

(f) The unjust delay of the funeral proceedings;

(g) The funeral service being reduced into a public spectacle;

(h) Mourners having to leave before the funeral service could be restarted;

(i) The Claimant being forced into a state of vulnerability and having no choice but to continue the funeral service;

(j) Members of media houses attempting to contact the Claimant and his family in order to report the story.

[17] The Claimant also set out the particulars of negligence on the part of the Defendant. Though somewhat similar to the particulars of breach of contract, they are as follows:

(a) Failure by the Defendant and/or the Defendant's employees and/or agents to take care in ensuring that the correct body was dressed and placed in the correct casket;

(b) Failure by the Defendant and/or the Defendant's employees and/or agents to ensure the prompt delivery of the correct body to the funeral services for viewing;

(c) Failure by the Defendant and/or the Defendant's employees and/or agents to take care in ensuring that the deceased's body, which was at all material times in their care and control, was properly tracked and respectfully handled;

(d) Failure by the Defendant and/or the Defendant's employees and/or agents to carry out all aspects of the funeral service in a competent and respectful manner, in keeping with the highest possible professional standards.

[18] The Claimant averred that the Defendant's manager offered discounted packages to him but he refused. However, after much expression of his outrage, the Claimant accepted to pay $7,000.00, the sum of which represented full and final settlement of the funeral services provided. According to the Claimant, no form of discounted funeral services offered by the Defendant can fully compensate him and his family for the undignified, improper, chaotic and traumatising funeral service that was conducted by the Defendant. The Defendant's improper and/or undignified and/or unprofessional manner of conducting the funeral service constituted a fundamental breach of the funeral service.

[19] The Claimant additionally sought special damages as a result of the Defendant's fundamental breach of contract for a full refund of $7,000.00 which reflects the full and final payment for the funeral services provided.

[20] In opposition, the Defendant averred that the Claimant was offered and elected to accept a compensatory settlement by way of discount of $10,758.13 on his invoice charges for the funeral services in full and final settlement of his claim to recover damages for the injuries alleged. As such, the Claimant is estopped and/or waived his

rights (if any) to bring and/or maintain this action for further damages and/or relief as alleged.

[21] The Defendant does not deny that the remains brought to the former residence of the deceased was removed and replaced with the remains of the deceased. However, the Defendant stated that it fully carried out, complied with and adhered to all of the funeral arrangements contracted by it for the deceased.

[22] At the time of the acceptance of the settlement, the funeral interment and the arrangement had been completed by the Defendant and accepted by the Claimant. Consequently, the Claimant represented to the Defendant that he was waiving his rights (if any) to further relief and compensation by his conduct in electing to permit the Defendant to continue with the funeral and cremation after the alleged breaches of contract and accepting the settlement.

[23] In his reply, however, the Claimant denied that the sum paid or the discount given was the Claimant's full and final settlement of his claim to recover damages for the injuries caused to him. The sum paid to the Defendant was for the full and final settlement of the funeral services provided by the Defendant. The acceptance of the discount of $10,758.13 is no way his acceptance of full and final settlement of his claim to recover damages for the injuries caused to him.

[24] According to the Claimant, at no time did the Defendant either expressly and/or otherwise state that the discount offered to the Claimant constituted a full and final settlement of the Claimant's claim to recover damages. The Claimant averred that he allowed the Defendant to continue with the belated funeral service in an attempt to salvage any remaining respect of his mother's funeral resting place.

III. Application

[25] By way of Notice of Application filed on 12 October 2018, the Defendant seeks an order that:

1. The Claimant's Claim be dismissed pursuant to **Part 26.1(1(k) of the CPR**;

2. Alternatively, the Claimant's Claim be struck out pursuant to **Part 26.2(b) of the CPR *(sic)*[3]** as an abuse of process of the Court;
3. Alternatively, the Claimant's Claim be struck out pursuant to **Part 26.2(c) of the CPR *(sic)*[4]** as it discloses no grounds for bringing or defending a claim;
4. The Claimant do pay the Defendant's costs; and
5. Such further and/or other relief as the Court in its discretion thinks necessary and/or just.

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

(i) There was an accord and satisfaction between the Claimant and the Defendant in relation to the incident that grounds the Claimant's Claim; and

(ii) The Claimant is therefore estopped from bringing this Claim against the Defendant.

[27] The Defendant, in its written submissions filed in support of its Application, submitted that as a result of the Claimant's acceptance of the discount "*in full and final settlement*", the Claimant is estopped from seeking further damages and/or compensation from the Defendant for any incurred losses. Ms. Prowell, counsel for the Defendant, relied on the case of **Marva Barrow & anor v Vanessa Shepphard & anor**[5] wherein Dean-Armorer J (as she then was) quoted Lord Denning MR in **Moorgate Mercantile Co Ltd v Twitchings**[6] as follows:

> "*Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and of equity. It comes to this. When a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so.*"

[3] **Part 26.2(1)(b) of the CPR**
[4] **Part 26.2(1)(c) of the CPR**
[5] CV2008-04220
[6] [1975] 3 All ER 314

[28] Ms. Prowell further submitted that Dean-Armorer J in **Marva Brown (supra),** cited with approval, the more modern, broader approach to the doctrine of estoppel reiterated in **Crab v Arun D.C.**[7] as follows:

> "…*which is directed to ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment*."

[29] It is the Defendant's contention that in the case at bar, the Claimant, by his encouragement and/or acquiescence, induced the Defendant to enter into a contract of accord and satisfaction ("the accord"). The Defendant assumed obligations under the accord to its detriment. Accordingly, the Claimant is estopped from pursuing a fresh claim and/or further damages from the Defendant for the incident. Ms. Prowell referred to the case of **Davindra Maharaj v Deorop Teemal & anor**[8] wherein Devindra Rampersad J cited the seminal case of **Day v McLea**[9]:

> "*The important point about accord and satisfaction is that it depends on the debtor establishing an agreement between the parties whereby the creditor undertakes the valuable consideration to accept a sum less than the amount of his claim. As with any other bilateral contract, what matters is not what the creditor himself intends but what, by his words and conduct, he has led the other party as a reasonable person, in this case, the debtor, to believe.*"

[30] Ms. Prowell submitted that the agreement established between the parties was that the Defendant undertook that it would accept $10,758.13 less than the amount due on its invoice. The Claimant accepted the discount of $10,758.13 from the Defendant. The Claimant made the payment of the outstanding sum of $7,000.00 to the Defendant, without reserving or indicating in any manner that he would be taking further action against the Defendant. Therefore, the only reasonable inference to be drawn from the

[7] [1975] 3 All ER 865
[8] CV2007-04373
[9] (1889) L.R.22 Q.B.D. 610 at paragraph 45

facts above is that the discount was in consideration of the Claimant not proceeding further against the Defendant and/or that the discount would represent the total liability (if any due) to the Claimant by the Defendant.

[31] Ms. Prowell contended that this accord, is a contract in and of itself that supersedes the contract for the funeral services by comprising and altering the respective obligations of the parties in the original contract for the funeral services. The accord, therefore, releases the Defendant from his liability (if any) for the incident, in consideration of the Claimant paying a lesser amount for the funeral services. Consequently, the Claimant is now implicitly asking to be relieved from his contractual obligations under the accord, and to be allowed to pursue a fresh claim against the Defendant.

[32] Ms. Prowell further submitted that the Defendant by entering into the accord with the Claimant acted to his detriment by accepting a lesser amount for its services. The Defendant gave the Claimant a discount that he would otherwise not be entitled to and/or that the Defendant could never recover because of the accord. It was submitted that the Claimant did not put the Defendant on notice at the time he accepted the discount that he wanted to pursue further action against him. Instead his silence and/or passing encouragement, influenced and led the Defendant to believe that the discount was in satisfaction of any liability the Defendant had to him for the incident.

[33] In considering what may constitute encouragement, Counsel for the Defendant relied on the case of **Marva Barrow (supra)** wherein Dean-Armorer J quoted Oliver J in **Taylor Fashions Ltd v Liverpool Victoria Trustee Co**[10] as follows:

> "*The fact is that acquiescence or encouragement may take a variety of forms. It may take the form of standing by in silence whilst one party unwittingly infringes another's legal rights. It may take the form of passive or active encouragement or expenditure or alteration of legal position on the footing of some unilateral or shared legal or factual supposition. Or it may, for example take the form of stimulating, or not objecting to, some*

[10] [1981] 1 All ER 914

change of legal position on the faith of a unilateral or a shared assumption as to the future conduct of one of other party."

[34] It was therefore submitted that the Claimant by his acquiescence and/or encouragement induced the Defendant to act to its detriment by entering into the accord. It would therefore be unjust and/or unconscionable to permit the Claimant to deny that he received full settlement for his liability (if any) from the incident and/or to allow him to go back on what he encouraged the Defendant to believe and/or to set aside the accord he has made with the Defendant. It was further submitted that at no time during this transaction, did the Claimant intimate to the Defendant that the discount was not accepted in full and final settlement of the incident either by the Claimant's words or his conduct.

[35] Ms. Prowell relied on the case of **Villa Medford v Motiram Dhanpath & anor**[11] where Kokaram J (as he then was) stated that-

"*As in all contracts hindsight is 20/20 and it is tempting for parties to reconsider their positions subsequently reflecting on the bargain after the cut and thrust of negotiations and compromise is over and the ink has dried on the contract. But to lightly set aside contracts because the contract for lack of a better expression is simply a "bad deal" for one party would throw the world of commerce in chaos. A Court must therefore exercise caution before setting aside such settlements balancing finely the policy interests of freedom of contract, finality of settlement and unconscionability. Unconscionability may be couched in various legal constructs such as estoppel and the law of mistake. However finality in the face of potential litigation is a cornerstone of the law. See Moore v Kensington Vestry 1895.*"

[36] Ms. Prowell, in conclusion, contended that in the circumstances of the case, the only reasonable conclusion to be drawn by the words and/or actions and/or conduct of the Claimant in his acceptance of the discount is that it was accepted in full and final

[11] CV2012-02796

settlement of any claims arising out of the incident which released the Defendant from any further liability for the incident. This release from liability, was relied on by the Defendant when the discount was effected to cause it to act to its detriment. The Defendant is therefore entitled to the finality of the accord and the Claimant is estopped from recovering any further damages from the Defendant for the incident.

[37] Counsel for the Claimant, Mr. Stefan Ramkissoon, submitted that the principle of accord and satisfaction was correctly stated in **Day v McLea (supra)** which has never been doubted in any of the authorities, including those cited by the Defendant. Counsel referred the Court to Bowen L.J.'s disposition in **Day v McLea (supra)** as follows:

> "*It seems to me, as a matter of principle as well as of authority, that the question whether there is an accord and satisfaction must be one of fact. If a person sends a sum of money on the terms that it is to be taken, if at all, in satisfaction of a larger claim; and if the money is kept, it is a question of fact as to the terms upon which it is so kept. Accord and satisfaction imply an agreement to take the money in satisfaction of the claim in respect of which it is sent. If accord is a question of agreement, there must be either two minds agreeing or one of the two persons acting in such a way as to induce the other to think that the money is taken in satisfaction of the claim, and to cause him to act upon that view. In either case it is a question of fact.*"

[38] Counsel referred the Court to the case **Maharaj v Teemal (supra)** which was also cited by the Defendant wherein Rampersad J referred to the statement of Bowen L.J.: "*there must be clear evidence of accord and satisfaction in order that such a finding might be made.*" He also cited Kokaram J in **Medford v Dhanpath (supra)** who referred to the principle set out in **Day v McLea** when determining the question whether a release is to be construed as an accord and satisfaction in which he said it is to be determined by a proper construction of the facts and circumstances surrounding the execution of the release. Mr. Ramkissoon submitted that the principle

of law in **Day v McLea** was confirmed by Jacob J in **Inland Revenue Commissioners v Fry**[12].

[39] Mr. Ramkissoon submitted that the essential elements of the plea of acquiescence, when advanced as an equitable defence are described in **Halsbury's Laws of England**[13] as follows:

> "*The term 'acquiescence' is, however, properly used where a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed; a person so standing by cannot afterwards be heard to complain of the act. In that sense the doctrine of acquiescence may be defined as quiescence under such circumstances that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct*."

[40] Mr. Ramkissoon also cited the case of **Goldsworthy v Brickell**[14], wherein Nourse L.J. described acquiescence in its proper sense as involving "*a standing by so as to induce the other party to believe that the wrong is assented to*".

[41] Mr. Ramkissoon submitted that the Defendant's statement of law of the principle laid down in **Day v McLea** at paragraph 9 of its submissions is plainly wrong. It was submitted that from the above authorities, it is evident that an agreement of accord and satisfaction between the Claimant and Defendant cannot be conclusive as a matter of law. The question of whether the Claimant accepted the discount in full and final satisfaction of a claim against the Defendant is a question of fact to be determined by the circumstances of the case. Therefore, the Claimant accepting the discount is not, as a matter of law, conclusive that there was an accord and satisfaction of the claim, but it is a question of fact on what terms the discount was given. In the circumstances,

[12] (2011) STC 1715
[13] 4th ed. reissue, Vol 16(2), Equity
[14] [1987] CH 378

Mr. Ramkissoon contended that there was no agreement between the Claimant and the Defendant for the Claimant to take the discount in satisfaction of any claim.

[42] Mr Ramkissoon further submitted that it is a fundamental part of any contract that there was a meeting of minds. This principle was succinctly explained by Jacob J in **Inland Revenue Commissioners v Fry (supra)**. Counsel contended that the Defendant never offered the discount as full and final settlement of a claim for damages at the time of discussing the discount packages. Therefore, the Claimant was never afforded an opportunity to accept or deny such an offer. In the circumstances, the Claimant could never have, by his word or conduct, indicated to the Defendant that the discount was accepted as full and final settlement of his claim. Furthermore, at the time of discussing discount packages, neither the Claimant nor the Defendant made mention of any future claim for damages. Therefore, there was no consideration by the Defendant nor the Claimant that the discount was given or accepted in full and final satisfaction of a claim for damages. In the circumstances, without consideration, it is submitted that an essential element for an accord and satisfaction is missing and no such contact could have been created.

[43] Counsel for the Claimant submitted that the receipt given to the Claimant does not express any agreement nor could one be implied. The receipt is thoroughly vague with the words "full and final payment" being ascribed at the bottom of same. It, therefore, offers no help as to whether there was agreement to abandon any further claim for damages. Instead, it merely represents the ex gratia payment made by the Claimant for the balance due on the funeral services provided.

[44] The Defendant, in reply to the Claimant's response, submitted that whether there was an accord and satisfaction can be a question of fact and law. Ms. Prowell submitted that the material facts are undisputed and that the law has determined that the relevant factor in these cases is not what the Claimant actually meant/intended to do but "*what he has led the other party as a reasonable person… to believe*". Accordingly, the Defendant does not need to prove what the Claimant's actual intentions were when he accepted the discount, but rather, what, as a reasonable person, it was led to believe by the Claimant's conduct in accepting the discount and remitting the balance to the Defendant. It was contended that any reasonable person would be led to believe that

the Claimant's acceptance of the discount, especially coupled with his subsequent payment of the balance to the Defendant, indicated that it was accepted in full and final settlement of any claims arising out of the contract.

[45] Counsel for the Defendant submitted that the case at bar is in line with the principle laid down in **IRC v Fry (supra)** where that case involved determining whether the banking of a cheque by a party was its acceptance of the amount in full and final settlement. However, in that case, it was held not to be since the banking party had no knowledge of the offer made in relation to the cheque. It was held that a reasonable observer would not conclude, in the absence of that knowledge, that banking the cheque amounts to acceptance. In the instant case, however, there is no dispute that the Claimant accepted the discount, even more so, the Claimant confirmed his acquiescence by paying the balance after the discount. Therefore, the only reasonable inference to be drawn from the Claimant's conduct is that the discount was accepted by him in full and final settlement of any claims under the contract.

IV. Issues

[46] The issues that fall for determination in this Application before the Court are as follows:

1. ***Should the Claimant's Claim be struck out pursuant to Part 26.2(1)(b) of the CPR as an abuse of the process of the Court?***
2. ***Should the Claimant's Claim be struck out pursuant to Part 26.2(1)(c) of the CPR as it discloses no grounds for bringing the Claim?***

It is to be noted that analysis of the both issues identified surrounds the consideration of the question as to whether an accord and satisfaction of the claim had been arrived at between the two parties.

V. Law and Analysis

Issue 1: Should the Claimant's Claim be struck out pursuant to Part 26.2(1)(b) of the CPR as an abuse of the process of the Court?

[47] **Part 26.2(1)(b) of the CPR** 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 –

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

[48] The term "*abuse of the court's process*" is not defined in **the CPR 1998** nor the English Counterpart nor any practice direction. Lord Bingham in **Attorney General v Barker**[15] albeit in a different context, explained "abuse of the court's process" as "*using that process for a purpose or in a way significantly different from its ordinary and proper use*". I am of the view that this is a fitting explanation for the concept of "abuse of the process of the court".

[49] The categories of abuse of process are many and are not closed. The Court has the power to strike out a *prima facie* valid claim where there is abuse of process. However, there has to be an abuse and striking out has to be supportive of the overriding objective[16]. Rajkumar J (as he then was) in the case of **Danny Balkissoon v Roopnarine Persaud & Another**[17] stated as follows:

"While the categories of abuse of the process of the court are many and depend on the particular circumstances of any case, it is established that they include: (i) litigating issues which have been investigated and decided in a prior case; (ii) inordinate and inexcusable delay, and (iii) oppressive litigation conducted with no real intention to bring it to a conclusion."

[50] From **The White Book 2013, Civil Procedure Volume 1, Part 3: The Court's Case Management Powers, under the heading, Power to Strike out a Statement of Case** and **Blackstone's Civil Practice 2016, Part H: Interim Applications, under the heading "Abuse of Process"**, the following categories of abuse of the process of the court have been recognised in case law: (i) vexatious proceedings; (ii) attempts to re-

[15] [2000] 1 FLR 759
[16] Rajkumar J (as he then was) in Danny Balkissoon v Roopnarine Persaud and another CV2006-00639
[17] CV2006-00639

litigate decided issues; (iii) collateral attacks upon earlier decisions; (iv) pointless and wasteful litigation; (v) improper collateral purpose; and (vi) delay.

[51] Ms. Prowell submitted that the Claimant is estopped from recovering any further damages from the Defendant on the basis that the Claimant's acceptance of the discount of $10,758.13 was in full and final settlement of any claims arising out of the incident. This acceptance released the Defendant from any further liability for the incident. The Defendant relied on this release from liability, which caused the Defendant to act to its detriment. Accordingly, the Defendant is entitled to the finality of the accord.

[52] The Court is of the opinion that if there is an accord and satisfaction between the Claimant and the Defendant in this matter at bar, the Claimant's Claim as brought before the Court is likely to amount to an abuse of the process of the Court. The reason is that the Claimant, having accepted the discount in full and final settlement of any future Claim, is abusing the process of the Court by bringing this Claim, which would be vexatious and ill founded. The Claimant, in pursuing his Claim before the Court, would be wasting the Court's resources as well as using the Court's process for an improper purpose since he would have already accepted a discount of $10.758.13 as full and final settlement of any future claim.

[53] The Court agrees with the principle of law as it relates to accord and satisfaction as expounded in **Day v McLea (supra)**. In that case, the plaintiffs made a claim against the defendant for a sum of money as damages for breach of contract. The defendant sent a cheque for a less amount (102£. 18s. 6d.) stating that it was in full settlement of all demands. The plaintiffs kept the cheque stating that they did so on account and brought an action for the balance of their claim. It was held by the Court of Appeal, affirming the judgment below that keeping the cheque was not, as a matter of law, conclusive that there was an accord and satisfaction of the claim, but that it was a question of fact on what terms the cheque was kept.

[54] As Lord Esher M.R. held in **Day v McLea**, the question of whether there has been an accord and satisfaction is one of fact. It is for the judge to decide whether the Claimant

agreed to take 102£. 18s. 6d. in satisfaction of their claim. The disposition of Bowen LJ merits repetition hereunder:

> *"It seems to me, as a matter of principle as well as of authority, that the question whether there is an accord and satisfaction must be one of fact. If a person sends a sum of money on the terms that it is to be taken, if at all, in satisfaction of a larger claim; and if the money is kept, it is a question of fact as to the terms upon which it is so kept. Accord and satisfaction imply an agreement to take the money in satisfaction of the claim in respect of which it is sent. If accord is a question of agreement, there must be either two minds agreeing or one of the two persons acting in such a way as to induce the other to think that the money is taken in satisfaction of the claim, and to cause him to act upon that view. In either case it is a question of fact."*

[55] In the case at bar, whether the Claimant's acceptance of the discount of $10,758.13 given by the Defendant amounts to an accord and satisfaction is, in this Court's view, a question of fact as to the terms upon which it was accepted. The Defendant, in essence, is asking the Court to accept that the Claimant has acted in such a way (accepting the discount and paying the sum of $7,000.00 to the Defendant) so as to induce the Defendant to think that the discount was accepted in satisfaction of any further claim by the Claimant which caused him to act upon that view. The Court is of the opinion that this is a question of fact for determination by the Court.

[56] However, the Defendant, in its application filed on 12 October 2018 to have the Claimant's Claim struck out, did not file an affidavit in support. Instead, the Defendant filed written submissions. ***Practice Direction 3A – Striking out a Statement of Case*** supplements **UK CPR Rule 3.4** which is similar to our **Part 26.2 of the CPR**. At paragraph 5.2 of the said Practice Direction, it was stated as follows:

> ***"5.2** While many applications under rule 3.4(2) can be made without evidence in support, the applicant should consider whether facts need to be proved and, if so, whether evidence in support should be filed and served."*

[57] The Court is of the view that the above direction is equally relevant in this jurisdiction and especially in this instant case. It is trite law that a Court can only make a determination on issues of fact based on the evidence as tendered. In an application made before the Court, evidence in support of an application is adduced in the form of an affidavit: **Part 11.8 of the CPR**. The Defendant is asking the Court to make a determination on a set of alleged facts as contended in its written submissions filed on 12 October 2018. The alleged facts as set out in paragraph [51] above are matters that need to be proved, therefore, the Defendant ought to have filed evidence in support of its application. This omission, therefore, in the case at bar, hampers the Court from making any determination on the preliminary issue of accord and satisfaction between the Claimant and the Defendant, as there is no evidence rightfully adduced before the Court.

[58] In that regard, the Court cannot conclude that there existed an accord and satisfaction between the Claimant and the Defendant to amount to an abuse of the process of the Court. Consequently, the Defendant is not successful on this ground of the Application.

Issue 2: Should the Claimant's Claim be struck out pursuant to Part 26.2(1)(c) of the CPR as it discloses no grounds for bringing the Claim?

[59] **Part 26.2(1)(c) of the CPR** 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 –*
>
> > *(c) that the statement of case or the part to be struck out discloses no grounds for bringing or defending a claim."*

[60] 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."

[61] The **White Book on Civil Procedure 2013** considers what constitutes a Statement of Case which discloses no reasonable grounds for bringing or defending the claim. At page 73, the 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.

[62] In **Brian Ali v The Attorney General**[18], 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 Wagg [2002] EWCA Civ. 594*** *surmised that appropriate cases that can be struck out for failing to disclose a reasonable ground for bringing a claim include:*

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*"(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 a matter of law."

[63] According to Potter LJ in **Partco Group Ltd v Wragg**[19], cases where striking out under **CPR, r. 3.4(2)(a)** [*our equivalent in **Part 26.2(1)(c) of the CPR***], is appropriate include:

(a) where the statement of case raises 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 Burdon [2000] CPLR 9**; and

(b) where the statement of case does not raise a valid claim or defence as a matter of law: **Price Meals Ltd v Barclays Bank plc [2000] 2 All ER (Comm) 346**.

[64] It is the Defendant's contention that as a result of the accord and satisfaction between the Claimant and the Defendant that the Claimant's acceptance of the discount of $10,758.13 in full and final settlement of any future claims, the Claimant's Statement of Case discloses no reasonable grounds for bringing the Claim.

[65] However, as concluded in paragraphs [57] and [58] above, the Court is hindered from determining whether there was an accord and satisfaction between the parties since there is no evidence properly adduced before the Court.

[66] In that regard, the Statement of Case as pleaded by the Claimant discloses some grounds for a cause of action, that is, as a result of the Defendant's breach of the implied terms of the contract and/or its negligence relating to the Defendant's failure to conduct a proper, dignified and professional funeral service, the

[19] [2002] EWCA Civ 594

Claimant has suffered damage in the form of mental distress. Consequently, the Defendant is also not successful on this ground of the Application.

VI. Disposition

[67] In light of the above analyses and findings, it is clear to this Court that the Claimant's Claim and Statement of Case ought not to be struck out and that the Defendant's application to strike out ought to be dismissed. Accordingly, this Court orders as follows:

ORDER:

1. **The Defendant's Notice of Application to strike out the Claimant's Claim and Statement of Case filed on 12 October 2018 be and is hereby dismissed.**

2. **The Defendant shall pay to the Claimant costs of the Notice of Application filed on 12 October 2018, to be assessed in accordance with Part 67.11 of the CPR, in default of agreement.**

3. **In the event that there is no agreement on the issue of costs, then the Claimant to file and serve a Statement of Costs for assessment on or before 25 July 2020.**

4. **Thereafter, the Defendant to file and serve Objections to the items on the Statement of Costs, if necessary, on or before 24 August 2020.**

5. **Decision on quantification of costs to be given without a hearing on a date to be announced.**

6. **This matter is fixed for a CMC on Wednesday 29 July 2020 at 10:30 am in courtroom POS 22.**

Robin N. Mohammed
Judge