REPUBLIC OF TRINIDAD AND TOBAGO

In the High Court of Justice

Claim No. CV2018-03558

Between

NATIONAL INSURANCE BOARD OF TRINIDAD AND TOBAGO

Claimant

And

QUALITY SECURITY BODY GUARD SERVICES LIMITED

Defendant

Before the Honourable Mr. Justice R. Rahim

Date of Delivery: November 5, 2020

Appearances:

Claimant: Mr. R. Heffes-Doon instructed by Ms. T. Carter

Defendant: In person

DECISION ON APPLICATION FOR SUMMARY JUDGMENT

1. By application of June 24, 2020 the claimant seeks an order pursuant to Part 15.2(a) of the CPR for summary judgment or alternatively an order pursuant to Part 26.1(1)(k) and/or (w) of the CPR or an order that paragraphs 1 to 6 of the defence be struck out pursuant to Part 26.2(1)(c) CPR and that judgment be entered against the defendant. Part 26.1(1)(k) sets out the general power of the court to dismiss or give judgment on a claim after determination on a preliminary issue and Part 26.2(1)(c) treats with the power of the court to strike out a defence on the basis that it discloses no grounds for defending a claim.

2. As a matter of historical context, it must be mentioned that this court has previously determined an application in relation to the limitation period and the cause of action. On July 22, 2020 the claimant filed an amended claim form and statement of case but to date there has been no amended defence filed and no application to extend the time for filing same. Also, by order of October 7, 2020, the court ordered that then Attorney at law on record for the defendant do cease to act for the defendant. By that date, the said Attorney had in fact already filed an affidavit in opposition on behalf of the defendant and the time was extended for the defendant to file and serve submissions. Full submissions were filed by the defendant on October 22, 2020.

<u>Striking out a defence</u>

3. Part **26** CPR reads;

> **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;

4. In relation to the striking out of a defence, in ***M.I.5 Investigations Limited v Centurion Protective Agency Limited***[1] Mendonça J.A. noted at paragraph 7 that:

> *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 … he must state his own version*.

5. Part 10.5 (3) and (4) of the CPR sets out the information which the defendant must include in its Defence. It reads:

> *10.5 (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 so doing; and*
> *(b) if he intends to prove a different version of events from that given by the claimant he must state his own version.*

[1] C.A.CIV.244/2008

6. Further, in ***Brian Ali v The Attorney General*** CV2014-02843, Kokaram J set out the following:

> "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:
>
> > "(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."

7. The principles set out above are of equal applicability to a defence as it is to statement of case.

Summary Judgment

8. The burden of proof in an application for summary judgment rest upon the claimant. The legal requirements for the grant of summary judgment in this case is set out in **Part 15**.2 (a) CPR.

15.2 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

9. In ***APUA Funding Limited & another v RBTT Trust Limited,***[2] Mendonça J.A. cited with approval the dicta of Lewinson J. at paragraph 4 in the Federal Republic of Nigeria v Santolina Investment Corporation and Ors. [2007] EWHC 437. Mendonça J.A. stated the following principles to be applied in deciding whether or not to give summary judgment:

(a) The court must consider whether the defendant has a "realistic" as opposed to a "fanciful" prospect of success: ***Swain v Hillman*** *[2001] 1 ALLER 91, [2000] PIQR p. 51;*

[2] Civil Appeal No. 94 of 2010

(b) A "realistic" defence is one that carries some degree of conviction. This means that is more than merely arguable: ***ED & F Man Liquid Products v Patel*** *[2003] EWCA Civ. 472 at 8.*

(b) In reaching its conclusion the court must not conduct a "mini trial": ***Swain v Hillman****;*

(c) 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 documents: ***ED&F Man Liquid Products v Patel*** *at 10;*

(d) 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] EWCA civ. 550 [2001] Lloyd's Rep PN 526;*

(e) 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 Pharmaceutical Co. 100 Ltd. *[2007] FSR 63;*

(f) Although there is no longer an absolute bar on obtaining summary judgement when fraud is alleged, the fact that a claim is based on fraud is a relevant factor. The risk of the finding of dishonesty may itself provide a compelling reason for allowing a case to proceed to trial, even where the case look strong on the papers: ***Wrexham Association Football Club Ltd. v Crucialmove Ltd.*** *[2006] EWCA Civ. 237 at 57."*

10. In ***Matias Bienenwald vs Jose Marina***, CV2015-00984, Kokaram J (as he then was) provided guidance at paragraph 2 on how the court exercise its discretion in deciding whether or not to grant summary judgment.

> *….In a summary judgment application, the Court is now engaged in a thorough examination of the facts as presented in a claim where factual discrepancies may not need the expense and resources of a trial to resolve. To determine whether the Claimant's prospect of success is real, the Court must be satisfied that the claim advances grounds which are more than arguable and the chances of succeeding on the propositions advanced are not speculative nor fanciful but deserves fuller investigation*.

The Claim

11. The claimant filed its claim form and statement of case on October 4, 2018 in which it claimed the sum of $8,214,320.65 for outstanding contributions, penalty and interest and by amended claim form and

statement of case filed July 22, 2019, the claimant sought the following relief:

i. An order that the defendant pay to the claimant the total sum of $8,355,059.04 inclusive of outstanding contributions, penalty, interest as at July 17, 2019.
ii. Costs;
iii. Further or other relief as the Honourable court deems fit.

12. The claimant avers that under section 39A of the NIA the money (contribution) due and payable to by the defendant to the claimant is deemed to be held on trust for the claimant by the defendant and the defendant is therefore in breach of that statutory trust.

13. The claimant also submits that the non-payment of contributions due attracted penalties and interest in accordance with section 39B of the Insurance Act[3]. Further, the claim for 100% penalty for the periods set out below accrued five years after the date upon which the payment of contributions fell due. As such, the defendant is indebted to the claimant for the following periods:

    i. **Period 1, September 3, 2012 to December 31, 2012**;
        a. $401, 793.01 in respect of contributions.
        b. $401,308.23 in respect of 100% of the outstanding sum accrued 5 years after.

[3] "39B. Where any employer fails to pay the amount of contributions payable by him to the Board under the provisions of this Act by the fifteenth day after the due date, he shall be liable to pay— (a) a penalty of twenty-five per cent of the outstanding sum; or (b) penalty of one hundred per cent of the outstanding sum, where the period for which the contributions were retained, is in excess of five years; and (c) interest on the entire sum (penalty and outstanding sum at the rate of fifteen per cent per annum from the sixteenth day of the following month until payment)".

c. $494,426.25 in respect of interest and penalty at the rate of 15% per annum.

ii. **Period 2, January 7, 2013 to December 31, 2013;**

a. $1,041, 024.78 in respect of contributions.
b. $1,039,774.02 in respect of 100% of the outstanding sum accrued 5 years after.
c. $1,072,027.66 in respect of interest and penalty at the rate of 15% per annum.

iii. **Period 3, January 6, 2014 to June 30, 2014;**

a. $442, 100.91 in respect of contributions.
b. $441,532.56 in respect of 100% of the outstanding sum accrued 5 years after.
c. $356,581.93 in respect of interest and penalty at the rate of 15% per annum.

iv. **Period 4, July 1, 2014 to December 31, 2014;**

a. $446,235.42 in respect of contributions.
b. $111,558.86 in respect of 100% of the outstanding sum accrued 5 years after.
c. $386,558.23 in respect of interest and penalty at the rate of 15% per annum.

v. **Period 5, January 5, 2015 to December 31, 2015;**

a. $704, 017.35 in respect of contributions.
b. $176,004.34 in respect of 100% of the outstanding sum accrued 5 years after.
c. $519,549.01 in respect of interest and penalty at the rate of 15% per annum.

vi. **Period 6, January 4, 2016 to March 31, 2016;**

a. $170, 916.93 in respect of contributions.

b. $42,729.23 in respect of 100% of the outstanding sum accrued 5 years after.

c. $104,380.32 in respect of interest and penalty at the rate of 15% per annum.

14. The pleaded case is that the claimant wrote what appears to be a "without prejudice" demand letter dated August 18, 2016 to the defendant setting out the debt to the National Insurance Board for the period September 3, 2012 to March 31, 2016 and demanding immediate payment. Two similar letters followed on June 1, 2017 and February 22, 2018.

15. The defendant responded by letter dated August 26, 2016 indicating that they received verbal notification of liability to the Board and that the claimant's figures did not reconcile with the defendant's records. The defendant requested a statement pertaining to the claimant's audit.

16. On July 2018, the claimant sent a pre- action protocol letter to the defendant demanding payment for unpaid contributions, penalty and interest.

17. The defendant responded in writing on July 23, 2018 admitting that there was indebtedness but disagreeing with the figure of $6,886,225.81.

<u>The defence</u>

18. The defendant has denied that it is indebted to the claimant in the amount claimed and avers that the claimant failed to provide it with the requested statement of the contributions allegedly due. Further, although the

defendant met with the claimant on May 17, 2017, the defendant avers that no agreement was made as to the amount owed to the claimant. The defendant has not pleaded a figure as to what it says it owes to the claimant.

Should the defence be struck out

19. It is convenient to treat with this limb of the application firstly. On a striking out application the court considers only the pleaded case and the adequacy of the defence, in other words whether reasonable grounds for defending the claim are disclosed within the walls of the pleaded defence.[4]

20. In essence the defence of the defendant is that of an acceptance that it has not paid all of the contributions that it ought to have paid but it has not averred the amount that it in fact owes. It has, in the light of having no pleading as to what it says it owes, challenged to authenticity of all of the documents attached to the statement of case and requires the claimant to prove the documents. It admits paragraphs 1, 2 and 3 of the statement of case, namely the formal averments of the identities, roles and duties of the parties.

21. The defendant has not amended its defence to deny the averments at paragraphs 3A and 3B of the amended statement of case (filed since July 22, 2019 after the instant application) in which the claimant avers the names and insurance numbers of the employees of the defendant and the effects of section 39(B) of the NIA (interest and penalties payable on default) so that the defendant is deemed to have admitted those matters.

[4] See Zuckerman on Civil Procedure (3rd edn) at para 9.74

22. It denies paragraph 4 of the statement of case namely that it is indebted to the claimant on the sum of $8,211,750.65 and puts the claimant to strict proof thereof. It does not say what its case is on the issue, the basis for the denial and its version of events or the amount that it alleges that it in fact owes.

23. Further, at paragraph 3 of the defence it avers that "it ought to have effected payment to the defendant on or before the due date". It does not aver that it in fact did so effect payment.

24. At paragraph 4, it admitted receipt of the letter from the claimant of August 18, 2016 setting out the sums owing and demanding payment. It avers that it responded to the letter by its own letter of August 26, 2016 in which it claimed that the figures provided by the claimant did not reconcile with the records of the defendant in respect of contributions made up to August 2016 and requested a statement of account to reconcile its records and determine its outstanding liability. It also proposed to submit a payment plan. Further, the claimant did not provide the information requested. That letter which is attached to the amended statement of case does not provide a figure which the defendant alleges is or admits owing.

25. Finally, it agreed that there was a meeting on May 17, 2017 as pleaded at paragraph 7 of the statement of case and it accepts that it responded to the pre action protocol letter by letter of July 23, 2020 in which it disagreed with the figure claimed but provided no basis for so saying. It also promised to settle the debt in that letter.

26. The defence therefore is that the defendant owes contributions but it does not know how much contributions it owes and is not willing to accept the

figure averred by the statement of case. No basis or reason has been provided in the defence for disputing the figures claimed by the claimant and no alternative sum has been set out by the defendant. The defence appears therefore to be simply one of the defendant sitting back and saying yes I owe you, I have no basis for saying that your figures are incorrect neither will I say how much I owe you so I will simply have you prove it. This is quite improper in the scheme of the CPR as relates to pleadings and in these circumstances the defendant is deemed to have accepted the version set out by the claimant in the absence of an alternate version. It has also been deemed to have accepted the averment that interest and penalties are chargeable.

27. It must be underscored that the pleaded answer of the defendant is not that it is unable to accept or deny the sum pleaded and requires the claimant to prove same but its case is that it denies the sum but has not set out the sum which it claims to owe. Under part 10.5 (3) where a defendant makes such a denial he must state his reasons for so doing and if he intends to prove a different version he must state his own version. So that it has denied, has given no reason for so doing and does not intend to prove a different version of events.

28. The court also therefore accepts the submission of the claimant that paragraph 3 of the defence is insufficient and bad in law under the principles set out above by Mendonca JA in the ***M.I.5.*** case.

29. There are therefore no facts that need be determined at trial and to permit the defence to stand would be to permit the waste of judicial time and resources as the defendant has disclosed no grounds for defending the claim.

30. Finally, while not strictly applicable to the striking out application, the defendant filed an affidavit in opposition on August 8, 2020 sworn to by a Director of the company named Kurtis Samuel. In that affidavit he deposed for the first time that the company misplaced its pay records and other documents for the period 2009 to March 2016 after same had been seized by the claimant and returned to the defendant in 2016. He also deposed that up to the time of filing the defence they still could not be found. Nowhere is this stated in the pleaded defence or in any of the correspondence attached to the pleading. The contents of the affidavit in that regard appear to be an attempt to raise an explanation which ought to have been included in the defence. The effect of that information even if present in the defence would in any event have not put the defendant in a better place in light of its clear denial of the sum claimed by the claimant.

31. For these reasons the court would strike out the defence and award judgment for the claimant without consideration of the application for summary judgment, the defence having disclosed no ground for defending the claim.

Disposition

32. It is ordered as follows;

    a. The defence of the defendant filed on March 29, 2019 is struck out.

    b. There shall be judgment for the claimant against the defendant on the claim as follows;

i. The defendant shall pay to the claimant the sum of $8,352,519.04 inclusive of outstanding contributions, penalty, and interest as at July 17, 2019.

ii. The defendant shall pay to the claimant interest payable on the penalty and outstanding sum pursuant to section 39B(c) of the National Insurance Act Chap 32:01 from the date of judgment to the date of payment.

iii. The defendant shall pay to the claimant 45% of the prescribed costs of the claim.

iv. The defendant shall pay to the claimant the costs of the application of June 24, 2020 in the sum of $3,500.00.

Ricky N. Rahim

Judge