TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2020-04229

Between

LUCILLE BALKARAN

Claimant

And

TALAT ALI

Defendant

Appearances:

Claimant: Saajida Narine

Defendant: Shaheed Hosein

Before the Honourable Mr. Justice Devindra Rampersad

Date of delivery: 7 December 2021

RULING ON DEFENDANT'S APPLICATION TO STRIKE OUT

1. By pre-action protocol letter dated 31 January 2019, which was not disputed in any way by the defendant in his defence and counterclaim filed on 7 May 2021, the claimant called upon the defendant to admit liability and compensate the claimant for expenses incurred and loss of earnings suffered as a result of the breaches of the tenancy agreement which is the subject of these proceedings. The letter was responded to by letter dated 11 February 2019 written by the defendant's attorney-at-law denying liability.

2. On 4 December 2020 – almost 2 years later – these proceedings were begun and an appearance was entered on behalf of the defendant on 30 December 2020. Notwithstanding the pre-action protocol letter, which would have required the defendant to have given full instructions in order to deny liability as he did, the defendant was allowed an extension of time to 21 March 2021 to file and serve his defence and counterclaim.

3. Instead of doing so, the defendant filed an affidavit and application on 2 February 2021 seeking to strike out the claim on the ground that the claimant was not the owner and/or did not have any sufficient interest in the subject matter. The court notes that in the pre-action protocol letter mentioned above, the fact of the property not being owned by the claimant and all of the matters mentioned in the defendant's objection were clearly set out and referred to and therefore the defendant would have had notice of the ownership of the property. The letter in response from the defendant's attorney-at-law raised nothing about the locus of the claimant yet the application was brought and the court dismissed it on 29 April 2021 with costs.

4. Notwithstanding that ruling, along with the fact that a defence and counterclaim was filed on 7 May 2021, the defendant now has brought this other application to strike out portions of the statement of case that he has already either responded to or failed to so do thereby acceding to a deemed admission thereof.

5. The defendant objects to paragraphs 12, 14, 16, 17, 18, 21, 22, 24 and 25 of the statement of case.

6. The claimant raised a preliminary point of this application being an abuse of process. The court agrees with that since all of the facts in relation to the application to strike out on the ground of the claimant having no locus were available to the defendant at the pre-action stage and that was not questioned. The court having ruled in that regard, this application is now being brought despite the fact that a defence and counterclaim have been filed addressing those particular paragraphs.

7. There is absolutely no reason why the application could not have been made at the same time with the former one. It could have been made in the alternative but, again, the court repeats the fact that there was no prior contention in relation to the claimant's locus. Crucially, however, the tenancy agreement was made between the claimant and the defendant so that the essential basics of contract law required the claim to have been brought in contract between the parties who were privy to the contract. Necessarily, that was the claimant and the defendant. The defendant had no dealings with the claimant's daughter – the registered owner of the property – so that in any event, had she brought a claim, that may have been a ground for avoidance.

8. Now, this application, which could have been brought in the alternative, was not so done and the court bears in mind the overriding objective, which bears repeating in the circumstances:

> *"The overriding objective*
>
> *1.1 (i) The overriding objective of these Rules is to enable the court to deal with cases justly.*
>
> *(2) Dealing justly with the case includes –*
>
> (a) ensuring, so far as is practicable, that the parties are on an equal footing;
>
> (b) saving expense;

(c) dealing with cases in ways which are proportionate to-

(i) the amount of money involved;

(ii) the importance of the case.

(iii) the complexity of the issues; and

(iv) the financial position of each party.

(d) ensuring that it is dealt with expeditiously; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

Application by the court of the overriding objective

1.2 The court must seek to give effect to the overriding objective when it-

(1) exercises any discretion given to it by the Rules; or

(2) interprets the meaning of any rule.

Duty of the parties

1.3 The parties are required to help the court to further the overriding objective."

9. In dealing with cases justly, the court must look at the factors set out in the overriding objective which includes saving expense, dealing with matters proportionately, ensuring that they are dealt with expeditiously and allotting an appropriate share of the court resources. In this case, the court would have had to have perused the entirety of the pleadings and documents in support and opposition and therefore would have been in prime position to have dealt with the application as to locus along with an analysis of the contents of the pleadings, including the statement of case in particular. Now that the matter

has to be reheard in terms of this subsequent interlocutory proceeding, the court, and the parties, have to reallocate time and resources to look at the same documents and put valuable resources to work for a second time in the same area of factual content though not necessarily in law.

10. The overriding objective enjoins parties to help the court to further the overriding objective and that would have included the need to have brought all of the applications concerning the pleadings and their content at the same time in so far as it was possible. The court does not accept the defendant's position with respect to the possibility of the proceedings being dismissed as a result of the first application to strike out. As mentioned above, that application was clearly unmeritorious having regard to the law in contract. It must be noted that the court's decision of 29 April 2021 has not been challenged on appeal. That, to the credit of the defendant, is a clear acceptance of the hopelessness of challenge. So to suggest that the defendant was saving time and effort by challenging the locus of the claimant before bringing this application is flawed in its reasoning and is contrary to the overriding objective.

11. Obviously, the decision of the court in an interlocutory application is one that is possible of forming some sort of issue estoppel in the Henderson principle scenario which prohibits the raising of an issue later when it could have been addressed in earlier proceedings. Mendonca JA accepted this was possible in ***Trinidad And Tobago Society for the Prevention of Cruelty to Animals & Or vs. Sakal Seemungal***[1] when he considered whether the first instance judge dealing with an interlocutory application had dealt with and decided a point which was raised later on at the trial. At paragraph 27 of the judgment, the learned JA said:

> *"27. Diplock LJ in Fidelitas suggested that issue estoppel may extend to not only issues that were actually decided but to every point which properly*

[1] Civil Appeal No. 181 of 2007

belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time. This is best described as "Henderson abuse" which takes its name from Henderson vs. Henderson (1843, 3 Hare and is an authority for that proposition. However the scope of the ruling in Henderson was restated in Johnson vs. Gorewood and Company (a firm) [2001] 2 AC 1 where it was said that failing to raise a matter that could have been raised in other proceedings does not necessarily render the raising of it in a subsequent matter abusive. The Court should adopt "a broad-based merit approach" and there were rarely be a finding of abuse unless the Court regards the subsequent proceedings as unjust harassment of a party."

12. The point was dismissed by Mendonca JA in the case because there was no evidence of any finding in the interlocutory ruling that was being challenged in relation to the issue estoppel point.

13. In this case, however, the point is even more pronounced since these proceedings, unlike the one before Mendonca JA, fall to be decided under the CPR and the overriding objective. The courts are already inundated with proceedings and applications within proceedings in a very challenged virtual environment in light of the pandemic. There was absolutely no reason whatsoever why this defendant could not have raised the point earlier. He did not, and he now calls upon the court to review the very same proceedings, pleadings and documents that it had to previously. That is an abuse of the court's resources and of the resources of the parties involved.

14. The court notes the objection raised in relation to the fact that costs have not yet been paid on that application by the defendant and the court also notes that no figure has as yet been quantified in that regard. Therefore, the court is not minded at this stage to accede to the consideration of that failure as part of the factors that the court has to consider at this time. However, it will form part of the court's consideration in relation to any order that this court makes on this application.

15. In any event, however, the court is of the respectful view that the application is frivolous and without merit. This is especially so since the defendant has already responded to the allegations made in the statement of case.

16. Paragraph 12 of the statement of case, which is being challenged, talks about criminal charges being laid against the defendant. This is not irrelevant or immaterial at this stage and the court does not think it prejudicial. This is a fact that conditioned the responses of the parties thereafter – the request for the meeting and the eventual surrender of the tenancy and the conversations which followed as mentioned in paragraph 25 of the statement of case. In other words, this factual event pleaded was a catalyst for the events that followed. Obviously, that material fact may have impacted upon the defendant's ability to meet his commitments under the tenancy agreement. The fact was not denied in the defence and counterclaim and therefore is a deemed admission pursuant to Part 10.5 of the CPR.

17. Whether or not the plea is hearsay is, to my mind, premature because the court has not yet reached the trial of the matter to consider the evidence before it to prove the plea.

18. Paragraph 14 talks about the defendant's sister delivering up possession of the premises and a walk-through being conducted as a result of the defendant being incarcerated. That was admitted in the defence and counterclaim. The defendant objects to the use of the words relating to his incarceration. As mentioned, this is a material fact as it would obviously have had an impact on the fact of possession and the future payment of rent. It is therefore not irrelevant or immaterial. In any event, paragraph 14 was admitted in the defence and counterclaim.

19. In respect of the claim that this is hearsay, the court once again is of the respectful view that it is premature to allege this.

20. Objection was made to the lines 2 and 3 of paragraph 16 and lines 3, 4 and 5 of paragraph 18 of the statement of case which pleaded that the damages were irreparable. Again, this is a matter for the claimant to prove at the trial

and it is again premature to suggest that this is opinion evidence. The court will consider whatever evidence is presented in this regard at the trial once that evidence is then admissible.

21. Paragraph 21 sets out the material fact that the defendant had wrongly terminated the tenancy agreement and breached the terms of the tenancy as set out therein causing loss and damage. That is an obvious material fact for determination by the court at the trial after the hearing of evidence. Therefore the objection to this entire paragraph is without merit.

22. Paragraphs 22 and 24 talk about the claimant's circumstances and they are therefore relevant as a material fact going to the question of damages for breach of contract. Of course, the matter settled there have to be proven at the trial and must cross the threshold of foreseeability. Nevertheless, the claim that it is irrelevant and immaterial and is in any way prejudicial is rejected on the ground that it is wholly unmeritorious.

23. Paragraph 25 deals with what the claimant says transpired with the defendant after the fact and the matters set out therein are clearly material facts to be proven at the trial. There was no alternative account of this meeting provided by the defendant and therefore this is a deemed admission under Part 10.5 of the CPR.

Conclusion

24. Respectfully, the notice of application seems to have been geared towards an application for evidential objections after the filing of witness statements rather than for an application to strike out the statement of case. In any event, for the reasons given above, the court is of the respectful view that the application is an abuse of process and should be struck out. In any event, if even the court is wrong on that, the application is without merit in this court's respectful view and therefore would be struck out regardless.

25. The notice of application is therefore struck out and the defendant shall pay the claimant's costs of the application.

26. Having regard to what has transpired so far, and the continued delay of the matter by these applications, the court will quantify the costs on the defendant's two unsuccessful applications and will prescribe a firm date for the payment of the same.

27. The court quantifies the costs on each matter at $7,500 together with VAT. The costs are to be paid by 31 January 2022.

/s/ D. Rampersad J.