REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2016-03360

BETWEEN

ANTHONY AMOROSO CENTENO

Claimant/Applicant

AND

VICTOR JATTAN

K3G AUTO LIMITED

ALPHA MARINES WEST INDIES LIMITED

Defendants/ Respondent

Before the Honourable Mme. Justice Jacqueline Wilson

Appearances:
Mr. Ricky Pandohee for the Claimant

Mr. Bryan McCutcheon for the Defendants

JUDGMENT

1. By Claim No. CV2010-01240, the Claimant, Mr. Anthony Amoroso Centeno, instituted proceedings against the First and Second Defendants to enforce the payment of the sum of one million six hundred and sixty-three thousand four hundred dollars ($1,663,400.00) owed by the Defendants for the purchase of the Claimant's property.

2. The Defendants failed to enter an appearance, whereupon the Claimant sought and obtained judgment in default of appearance by order dated 19 December 2011, requiring the First and Second Defendants to pay the sum of one million five hundred and eighty-nine thousand, nine hundred and ten dollars and sixty cents ($1,589,910.60) for debt, interest and costs.

3. The judgment in default of appearance was not satisfied by the First and Second Defendants and on 6 October 2016 the Claimant brought the present proceedings seeking the recovery of the outstanding sum under the previous action together with accumulated interest in the sum of two million, two hundred and fifty-four thousand, seven hundred and thirteen dollars and eighty-six cents ($2,254,713.86).

4. On 16 March 2017 the Defendants filed their respective defences, with the First Defendant also issuing a counterclaim.

5. By Notice of Application dated 28 June 2017 the Claimant applied to the court for orders that the Defendants' defence and counterclaim be struck out pursuant to Parts 26.2(1)(b) and (c) of the Civil Proceedings Rules 1998 (the CPR) as an abuse of the process of the court and as failing to disclose grounds for defending the claim respectively.

6. The grounds of the application are that the First and Second Defendants, in their defence and counterclaim, raise matters that should have been raised in the previous action or which, having been adjudicated upon by a court of competent jurisdiction, are *res judicata* giving rise to an estoppel. As against the Third Defendant it is also alleged that the defence is a bare denial.

7. On 3rd October 2017 I gave directions for the parties to file and exchange written submissions on the application. In their written submissions, Counsel for the Claimant and the Defendants cited numerous authorities on the doctrine of *res judicata* and its application to this case, and I am indebted to Counsel for their industry and assistance.

8. The question that arises is whether the doctrine of *res judicata* applies to estop the First and Second Defendants (against whom a default judgment has been obtained) from pleading in their defence the matters that are now the subject of complaint by the Claimant.

The Claimant's Submissions

9. Counsel for the Claimant posits that the First Defendant, by his defence is raising matters that should have been raised in the earlier proceedings, namely, that he was not allowed vacant possession of the property, that he was enticed to purchase the property by the Claimant based on a loan owed by him to the Claimant, and that the building on the property was defective as a result of which the First Defendant alleges that he unable to sell the property in order to repay the loan owed to the Claimant.

10. Counsel for the Claimant invited the Court to apply the principles adumbrated by Wigram VC in *Henderson v Henderson* [1843] 3 Hare 100 and 115, which have been cited with approval by the courts in a plethora of cases,[1] that:

> "…where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

[1] Greenhalgh v Mallard [1947] 2 All ER 255; Yat Tung Investment Co Ltd v Dao Heng Bank Ltd [1975] AC 581; Johnson v Gore Wood & Co [2002] 2 AC 1

The Defendants' Submissions

11. Counsel for the Defendants' submitted that the burden on an applicant seeking to strike out a statement of case or defence was a heavy one and that striking out was a draconian measure to be exercised sparingly and only as a measure of last resort: *Balkissoon v Persaud & Another CV 2006-00639; Ali v The Attorney General of Trinidad and Tobago CV 2014-02843; Real Time Systems Ltd v Renraw Investments Ltd. Civ. App. 238 of 2011*.

No Grounds for Bringing or Defending Claim

12. Counsel for the Defendants submitted that appropriate cases for striking out on the ground of failure to disclose grounds for bringing or defending a claim included cases where the statements of case raised an unwinnable case, where continuance of the proceedings was without any possible benefit to the respondent and would waste resources on both sides or where a claim or defence was not valid as a matter of law: Kokoram J in *Brian Ali v The Attorney General of Trinidad and Tobago CV2014-02843.*

13. Counsel for the Defendants emphasised that the Court, in exercising its discretion to strike out under this head, must consider whether alternative possibilities exist short of striking out[2], such as ordering a party to supply further details within a specified period or to serve an amended pleading.[3]

Abuse of Process

14. As regards the principles applicable to striking out on the ground of abuse of process, Counsel for the Defendant quoted the dicta of Rajkumar J (as he then was) in the case of *Danny Balkissoon v Roopnarine Persaud & Another CV2006-00639* where the learned Judge stated that:

> "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)

[2] Asainsky television plc v Bayer [2001] EWCA Civ. 1792
[3] Real Time Systems Ltd v Renraw Investments Ltd [2014] UKPC 6

inordinate and inexcusable delay, and (iii) oppressive litigation conducted with no real intention to bring it to a conclusion…. Before considering these cases a few general comments on the court's power to strike out proceedings as an abuse of the process of the court may be pertinent.

First, it is clear that the onus of proof is on the party who is alleging the abuse. Second, under the CPR even the power to strike out proceedings as an abuse of the process of the court ought to be considered in light of the overriding objective and the function of the court to deal with cases justly.

Thus, even where there may be an abuse of process that does not mean that the only correct response is to strike out a claim or statement of case (or part thereof). Third, the jurisdiction and power of the court to strike out proceedings as an abuse of the process of the court it discretionary; and given the status of the constitutional right of access to the courts it would appear that striking out a claim should be the last option."

15. Counsel for the Defendants relied on the often-quoted dicta of Wigram VC in *Henderson v Henderson* above and the dicta of Lord Bingham in *Johnson v Gore Wood and Co [2002] 2 AC 1 at p. 31* cautioning that *"it would be wrong to adopt too dogmatic an approach to what…should be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case."*

16. Counsel for the Defendants submitted that default judgments should be treated as "special circumstances" which excluded the application of the principles of estoppel, there being no determination on the merits in such cases: *New Brunswick Rly Co. v British & French Trust Corporation Ltd [1939] 1 AC 1; Arnold and Ors v National Westminster Bank plc [1991] 2 AC 93; Swift v Charles Mc Enearney & Co. Ltd (1971) WIR 391.* Counsel submitted further that the true principle is that "the defendant would be estopped from setting up in a subsequent action a defence which was necessarily and with complete precision, decided by the previous judgment": *New Brunswick Rly Co. v British & French Trust Corporation Ltd (supra).*

Reasoning and Analysis

17. In order to succeed on this application, the Claimant must establish that the defence of the voidability of the sale of the Claimant's property on the grounds of fraudulent misrepresentation and deceit is bound to fail and that, having not raised those matters in the previous litigation, the First Defendant is now precluded or estopped from doing so, in light of the default judgment.

18. The principles to be applied in relation to the summary disposal of cases are well established. The objective of resolving issues at an early stage is to save time and costs, which is an important feature of active case management. In deciding whether to exercise powers of summary disposal, the court must consider whether the overriding objective of dealing with cases justly is better served by the summary disposal of a particular issue or by letting all matters go to trial so that they can be fully investigated and an informed decision reached: *Three Rivers District Council v Bank of England [2001] 2 All ER 513*. Although the above principles were adumbrated in relation to the summary dismissal of cases, the discretion to strike out is subject to similar considerations and, where the allegation involves the failure to disclose grounds for bringing or defending a claim, is exercisable where the claim is bound to fail on its merits or as a matter of law. An important consideration is that the court, when faced with an application to strike out, must consider whether the justice of the case militates against this nuclear option and requires a more proportionate response: *Real Time Systems Limited v Renraw Investments Ltd. [2014] UKPC 6.*

19. The authorities postulate that in many cases there will be alternatives which enable the court to deal with a case justly without taking the draconian step of striking it out, having regard to the armoury of powers available under the CPR, including the power to order a party to supply further details or to file an amended pleading within a specified time subject to conditions stating the consequences of non-compliance (which may also include striking out): *Asiansky Television Plc. v Bayer [2001] EWCA Civ. 1792; Real Time Systems Limited v Renraw Investments Ltd. (supra).*

20. In *New Brunswick Ry. Co v British and French Trust Corporation* the House of Lords endorsed the general principle laid down by Wigram VC in *Henderson v Henderson* and emphasized that the learned Vice-Chancellor was stating the rule in general terms, qualified by the exception of special circumstances or special cases. Lord Maugham L.C. cautioned that an estoppel based on a default judgment must be carefully limited, the true principle being that a *defendant is estopped from setting up in a subsequent action, a defence that was necessarily, and with complete precision, decided by the previous judgment."* Lord Wright further expounded that:

> "A judgment by default, if not set aside by the Court on a proper application under the Rules of Court, is binding on the parties (which term may in this as in other cases include privies) and constitutes res judicata in respect of the matter directly decided.
>
> …No authority has been produced in which a party has been held to be estopped from raising in a litigation an issue which he might have raised in a previous litigation in which he allowed judgment to go by default and omitted to raise the issue.
>
> …There are grave reasons of convenience why a party should not be held to be bound by every matter of fact or law fundamental to the default judgment. It is, I think, too artificial to treat the party in default as bound by every such matter as if by admission. All necessary effect is given to the default judgment by treating it as conclusive of what it directly decides. I should regard any further effect in the way of estoppel as an illegitimate extension of the doctrine, which in the absence of express authority I am not prepared to accept."

21. When examined against the backdrop of the above principles, the Claimant's application fails for the following reasons:

    i. The defence of fraudulent misrepresentation put forward by the First Defendant exists as a matter of law. Even if a defence may be considered as weak, and this is not to be construed as expressing an opinion on the matter, the authorities suggest that a weak case is not necessarily bound to fail as it may be fortified by evidence or adverse inferences: *Brian Ali v The Attorney General of Trinidad and Tobago, CV2014-02843 at p. 9.*

ii. The judgment in default of defence, having made no determination regarding the validity or otherwise of the agreement for sale, cannot be construed as a binding decision on the matter giving rise to an estoppel.

iii. If the Claimant is correct in the assertion that the First Defendant is estopped from raising a defence that should have been raised in the earlier proceedings, the same principles should serve to prevent the Claimant from re-opening the present claim, which was the subject of an earlier judgment by the court. The Claimant, therefore, cannot approbate and reprobate as regards the application of the principles of estoppel.

22. For the above reasons and upon an overall consideration of the matter, I am of the view that the Claimant has not established that the Defendants' defence should be struck out pursuant to Part 26.2(1)(b) and (c) of the CPR. I would therefore dismiss the application.

23. The Defendants' costs of the application are to be taxed by the Registrar in default of agreement.

Dated this 15th day of February 2018.

Jacqueline Wilson
Judge