COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2018/CLE/gen/00884

BETWEEN

BENTECH LIMITED

Plaintiff

AND

FIRST CARIBBEAN INTERNATIONAL BANK (BAHAMAS) LIMITED

Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. V. Alfred Gray of V. Alfred Gray & Co. for the Plaintiff
Mr. Terry North and Ms. Wynsome Carey of Alexiou Knowles for the Defendant

Hearing Dates: 26 May 2021, 3 June 2021

Practice – Application to strike out – Rules of the Supreme Court Order 18 rule 19 and Order 31A rule 2(1) – Whether Statement of Claim discloses a reasonable cause of action and/or is frivolous and vexatious and/or an abuse of the court process – Whether the Request for Further and Better Particulars was helpful – Whether Statement of Claim is vague and deficient and ought to be struck out – Whether Statement of Claim is incurably bad

On 31 July 2018, the Plaintiff commenced this action against the Defendant, seeking damages for (i) breach of a mortgage contract, alleging the failure to apply payments to its loan account; and (ii) breach of contractual obligations pursuant to the Financial Transactions Reporting Act 2000.

On 1 October 2018, the Defendant made a Request for Further and Better Particulars. On 19 October 2018, the Plaintiff's attorney provided it.

The Defendant never filed a Defence but, on 2 November 2018, it filed a Summons to strike out the Statement of Claim pursuant to RSC O. 18 r. 19 and the inherent jurisdiction of the court on the grounds that the Plaintiff's Statement of Claim discloses no reasonable cause of action; is frivolous and vexatious; and is otherwise an abuse of the process of the Court. The Plaintiff challenges the application, contending that the Statement of Claim does disclose a reasonable cause of action and raises factual issues which can only be determined at a trial.

HELD: Finding that the Statement of Claim is not sufficiently particularised to allow the Defendant to respond with a Defence, the Court dismisses the striking out application but grants leave to the Plaintiff to amend its Statement of Claim within 14 days hereof.

1. The purpose of pleadings in civil cases is to identify the issue or issues that will arise at trial. This is in order to avoid the opposing parties and the court taken by surprise. The pleadings must be precise and disclose a cause or causes of action: **Montague Investments Limited v (1) Westminster College & Anor.** [2015/CLE/gen/00845], per Charles J. at para. 17.

2. The Statement of Claim, though vague and deficient as to details required by the Defendant to put in a proper Defence, does assert a cause of action.

3. As a general rule, the Court has the power to strike out a party's case either on the application of a party or on its own initiative. However, striking out of a party's case at an early stage may be regarded as draconian particularly if the statement of claim is not incurably bad and can be amended: **B.E. Holdings Limited v Piao Lianji** [2014/CLE/gen/01472] relied upon.

4. The conflicting evidence of the parties give rise to factual issues which the Court can only determine on the hearing of evidence.

RULING

Charles J:

Introduction

[1] Although there are three extant applications before the Court, it was agreed that the Court should only deal with the Summons to strike out filed on 2 November 2018 by the Defendant ("the Bank") ("the Striking Out application") for if the Bank is successful with the application, the two remaining applications filed by the Plaintiff ("Bentech") will automatically fall away.

[2] The Striking Out Application was made pursuant to Order 18 rule 19 (a), (b) and (d) of the Rules of the Supreme Court ("RSC") and/or under the inherent jurisdiction of the Court on the grounds that it discloses no reasonable cause of action, is frivolous and vexatious and is otherwise an abuse of process of the court. The First and Second Affidavits of Linda Bandelier filed on 9 September 2019 and 19 March 2021 respectively ("the Bandelier Affidavits") and the First Affidavit of Ashley Williams filed on 21 March 2021 ("the Williams Affidavit") support the Bank's Striking Out Application.

Factual background

[3] Bentech is a company beneficially owned by Dr. Glen Beneby. Dr. Beneby purchased a condominium complex at Lot 9, Sunrise Beach Estates, Eastern District, New Providence ("the Property") by way of a mortgage dated 9 February, 1994 whereby he mortgaged the Property for $600,000 to the former Barclays Bank PLC, now the Bank. An Assignment of Rents was executed between the parties on that same day and attached to the 1994 Mortgage. It entitled the Bank to any income from the leases of the Property in the event that the mortgagor defaulted on the mortgage.

[4] On 2 February 1998, a Deed of Further Charge was given by Barclays to Bentech for an additional $204,000. On 10 October 2003, Dr. Beneby executed a Guarantee. On 7 November 2003, a Second Further Charge was executed between Bentech and the Bank which was stamped to cover an additional advance of $498,505 over the Property.

[5] Sometime in 2011, Bentech was in need of funds to renovate the Property. It approached the Bank for an additional loan of $250,000. The existing loans were consolidated/refinanced and the Bank advanced an additional $25,000 for renovations. By commitment letter dated 17 June 2011, the Bank provided two loan facilities:

1. Facility A - A demand installment loan in the amount of $1,233,000.00 to assist with the repayment of the existing loan of $983,000 and renovations to the Property in the range of $25,000; and

2. Facility B – An installment loan in the amount of $37,000 to assist with full replacement value of insurance coverage over the Property.

[6] In or about 2018, Dr. Beneby believed that monies which he was paying towards the loan were not being applied. On the advice of his Counsel, he engaged Baker Tilly Gomez ("Baker Tilly") to commission an audit of the account. Their findings were that $167,000 was not accounted for.

[7] By email dated 30 August 2017, Dr. Beneby requested from the Bank the historical amortization with actual loan payment schedule for Bentech's account.

In response, the Bank provided Bentech with the loan payment history from 14 July 2011 to 23 August 2017.

[8] Bentech's position was (and remains) that the loan payment history provided by the Bank was an incomplete record of the loan, as it accounts for payments from 2011 and not 1994, when the initial mortgage commenced. The Bank responded stating its position – that it was not required to retain the records in respect of the paid off Ex-Barclays PLC loan from 1994.

[9] By email dated 27 March 2018, Dr. Beneby again requested a comprehensive complete review of the Bank's account from 1994 to March 2018. The Bank responded stating that the records were the full history of the loan, as the previous loans taken in 1994 and 2003 respectively have been closed when new terms and conditions in the commitment letter dated 17 June 2011 took effect and that the documents which were provided to Dr. Beneby constituted the full history of the existing loan. The Bank intimated that the statement which was provided in respect of the closed/refinanced loan in 2011 were provided as a matter of courtesy since the account had been closed more than 7 years ago and it is not required to retain those documents. With respect to the 1994 Barclays Bank loan, the Bank responded stating that that loan was satisfied in 2003 and there is no requirement to retain those documents either.

[10] By letter dated 16 April 2018, Counsel for Bentech presented Baker Tilly's findings to the Bank (which found that $167,000 could not be accounted for). The Bank responded stating that the findings were incomprehensible and inconclusive.

[11] On 31 July 2018, Bentech filed a Writ of Summons indorsed with a Statement of Claim. The Writ was amended on 10 August 2018 and, on 14 September 2018, a Statement of Claim was filed in this action.

[12] On 1 October 2018, the Bank requested Further and Better Particulars of Bentech's Statement of Claim. On 19 October 2018, Bentech's attorneys responded to the request.

[13] In January 2019, Thompson J (now retired) considered the Summonses. He did not proceed to hear the Strike Out Application since he was of the opinion that the application was premature. Instead, he ordered that Baker Tilly meet with Dr. Beneby with a view to reconciling the account and resolving their dispute. The parties are still unable to amicably resolve their dispute.

[14] Based on the information provided to Baker Tilly, the accountants reported that there were discrepancies with Bentech's account and that about $306,000 was not posted thus posting a balance of $847,696 when it ought to have been $541,285.

[15] By letter dated 29 July 2020, Bentech's attorney requested that the Bank provide statements from 2017 to date. By email dated 20 August 2020, the Bank's attorneys provided the requested documents.

[16] By letter dated 18 November 2020, Baker Tilly requested documents which it said were outstanding but were required. The Bank's position was that Bentech was already in possession of all the documents requested.

The Striking Out Application

(i) Purpose of pleadings

[17] In **Montague Investments Limited v (1) Westminster College Ltd and (2) Mission Baptist Church** [2015/CLE/gen/00845], Judgment delivered on 31 May 2020, this Court dealt with the purpose of pleadings. At paragraphs [15] to [18], it was stated as follows:

> **"[15] The purpose of pleadings in civil cases is to identify the issue or issues that will arise at trial. This is in order to avoid the opposing parties and the court taken by surprise. The pleadings must be precise and disclose a cause or causes of action. Evidence need not be pleaded, because that will come from the affidavits and cross-examination thereon or by oral evidence.**
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> **[16] In *Bahamas Ferries Limited v Charlene Rahming* SCCivApp & CAIS No. 122 of 2018, our Court of Appeal held that the starting point must always be the pleadings. At para. 39 of the judgment, Sir Michael Barnett JA (as he then was) stated:**
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> > **"The starting point must always be the pleadings. In Loveridge and Loveridge v Healey [2004] EWCA Civ. 173, Lord Phillips MR said at paragraph 23:**

> **"In *Mcphilemy vs Times Newspapers Ltd. [1999] 3 ALL ER 775* Lord Woolf MR observed at 792-793:**
>
> > **'Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader.' "[Emphasis added]**
>
> **[17] At paragraph 40 of the Judgment, Sir Michael went on to state:**
>
> > **"It is on the basis of pleadings that the party's decide what evidence they will need to place before the court and what preparations are necessary for trial."**
>
> **[18] Thus, pleadings are still required to mark out the parameters of the case that is being advanced by each party so as not to take the other by surprise. They are still vital to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader and the court is obligated to look at the witness statements to see what are the issues between the parties."**[Emphasis added]

(ii) Court's power to strike out

[18] RSC O. 18 r. 19(1) allows a party to attack the validity of its opponent's pleadings which may result in part or the whole of the pleadings being struck out. It provides:

> **"The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-**
>
> > **(a) it discloses no reasonable cause of action or defence, as the case may be; or**
> >
> > **(b) it is scandalous, frivolous or vexatious; or**
> >
> > **(c) it may prejudice, embarrass or delay the fair trial of the action; or**
> >
> > **(d) it is otherwise an abuse of the process of the court."**

[19] In addition, O. 31A r. 20(1) provide further grounds for striking out a pleading or part of a pleading. It states:

21. (1) In addition to any other powers under these Rules, the Court may strike out a pleading or part of a pleading if it appears to the Court –

(a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the Court in the proceedings;

(b) that the pleading or the part to be struck out is an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings;

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

(d) that the pleading or the part to be struck out is prolix or does not comply with the requirements of any rule."

[20] In **B.E. Holdings Limited v Piao Lianji** [2014/CLE/gen/01472], this Court set out the powers of the court to strike out at paras [7] to [11] as follows:

"[7] As a general rule, the court has the power to strike out a party's case either on the application of a party or on its own initiative. Striking out is often described as a draconian step, as it usually means that either the whole or part of that party's case is at an end. Therefore, it should be taken only in exceptional cases. The reason for proceeding cautiously has frequently been explained as that the exercise of this discretion deprives a party of his right to a trial and his ability to fortify his case through the process of disclosure and other procedures such as requests for further and better particulars.

[8] In *Walsh v Misseldine* [2000] CPLR 201, CA, Brooke LJ held that, when deciding whether or not to strike out, the court should concentrate on the intrinsic justice of the case in the light of the overriding objective, take into account all the relevant circumstances and make 'a broad judgment after considering the available possibilities.' The court must thus be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of claim is incurably bad; or that it discloses no reasonable ground for bringing or defending the claim; or that it has no real prospect of succeeding at trial.

[9] It is also part of the court's active case management role to ascertain the issues at an early stage. However, a statement of claim is not suitable for striking out if it raises a serious live issue of fact which can only be determined by hearing oral evidence: *Ian Peters v Robert George Spencer*, ANUHCVAP2009/016 - Antigua & Barbuda Court of Appeal - per Pereira CJ [Ag.] - Judgment delivered on 22 December 2009. [Emphasis added]

[10] The court, when exercising the power to strike out, will have regard to the overriding objective of RSC O. 31A r. 20 and to its

> **general powers of management. It has the power to strike out only part of the statement of claim or direct that a party shall have permission to amend. Such an approach is expressly contemplated in the RSC: see Order 18 Rule 19.**
>
> **[11] An application to strike out is essentially a summary procedure and it is not suitable for complicated cases which would require a mini-trial"** [Emphasis added]**.**

Discussion

[21] Learned Counsel for the Bank, Mr. North, ably assisted by Ms. Carey, advanced two discrete submissions in support of the Striking Out Application namely:

i. That the Statement of Claim is not sufficiently particularized for the Bank to mount a Defence; and

ii. That the Statement of Claim does not assert a cause of action that would be successful at trial.

[22] According to Mr. North, the Statement of Claim is predicated upon an alleged breach of contract but fails to demonstrate in its pleadings firstly, the existence of a contract, secondly the Bank's failure to perform the contract and thirdly, the damages resulting from the breach. He submitted that it is unclear whether Bentech relies on an implied or express term in the commitment letter or mortgage deed and that, throughout the Statement of Claim, Bentech failed to refer specifically to the contract which forms the basis of its claim of breach of contract. Mr. North further submitted that the Bank's Request for Further and Better Particulars is filled with responses from Bentech advising the Bank's attorneys to obtain record from the Bank, thereby rendering it useless.

[23] Paragraphs 1 and 2 of the Statement of Claim are in the following terms:

> **"1. Beginning February 1994, the Plaintiff entered into a mortgage contract with the Defendant and borrowed approximately $600,000.00 under that contract and $37,000 under a collateral agreement to pay insurance coverage, both repayable by monthly installments of $12,826.87 and $2,192.51 respectively from the personal account of the Guarantor, Dr. Glen Beneby. Since then, there were further charges which to date, total $1,233,000.00.**
>
> **2. It was always understood under the contractual obligations that the Plaintiff will pay the monthly sums payable on time as agreed and that the Defendant will accurately apply such payments to the principal and interest, to the said accounts on a timely basis."**

[24] The alleged breach and the alleged damage resulting therefrom are stated in paragraph 3 of the Statement of Claim as:

> **"During the life of the said mortgage and/or further charges, the outstanding balance on the said mortgage accounts after many years of paying, remained as much as the amount borrowed despite the Plaintiff never having missed any payments or ever been late in such payments at any time, thereby causing the Plaintiff to have to seek further advances from the Defendant in 2011 in order to facilitate repairs to its building because there was little downward climb of the loan balance."**

[25] I agree with Mr. North that the Statement of Claim is vague and deficient in that it lacks the particulars necessary to equip the Bank to defend the claims against it. The date of the mortgage is not specified and, as Mr. North correctly expressed, it is not clear whether the obligation that Bentech alleges to have been breached was an implied or express agreement. The vagueness makes it difficult for the Bank to put in a defence to the assertion. Notwithstanding, I do not accept Mr. North's submission that the Statement of Claim does not assert a cause of action. The foregoing paragraphs establish that Bentech asserts the existence of a contractual obligation (albeit unclear as to the source of the contractual obligation and whether the obligation was implied or express). It alleges a breach namely that the payments were not applied to the mortgage account and damage caused by the breach namely the Bank's failure to properly apply the mortgage payments to Bentech's mortgage account resulting in Bentech having to take the loan of $25,000 in 2011 for repairs to the Property.

[26] Mr. North argued that the Bank cannot answer the assertions raised by Bentech as to the amount of damages it claims because the Statement of Claim fails to outline the payments made by Bentech. He further argued that Bentech has not particularize or demonstrate how the $167,674.07 was ascertained which it says is the sum which it paid but was not applied by the Bank. When a request was made to clarify what it called "the discrepancies" in the audit of the mortgage account, Bentech provided a document which it says is from its auditors. The Bank's position was that it is inconclusive and incomprehensible. The Bank also alleges that the special damages are not specifically pleaded. Paragraph 3 of the "Particulars of the Accounting Discrepancies by the Forensic Accountant" states:

> **"Because of the discrepancies uncovered by the Auditors, the integrity of the present and/or re-negotiated balance of the mortgage accounts is called into question and the shortfall amounts occasioned by the misapplication or the non-application to the mortgage account by the Defendant, its servants or agents (in breach of its contractual obligation to keep accurate records) has resulted in $167,674.07 not having been applied to the mortgage account during the period under review (1994 to 2017), even though all of the bank statements as requested from the Defendant for the period under review, were not made available to the Plaintiff despite its best efforts to obtain same."**

[27] I agree that Bentech ought to have particularized the sum which it claims. The effect of what was produced in the Statement of Claim is that the Bank is unable to put in a defence to this unorthodox Statement of Claim. Mr. North correctly submitted that, special damages (the sum alleged not to have been applied) must be specifically pleaded.

[28] With respect to the completeness of the account records provided, the Bank's position is that the documents they produced to Bentech is the complete history of the loan; that the 1994 Barclays loan and the subsequent 2003 loan have been settled. On that footing, they say that the business relationship in respect of those loans has ended more than five years ago, thereby freeing them from the obligation under the Financial Transactions Reporting Act, 2000 ("FTRA") to retain the records in respect thereof. However, Bentech maintains that none of the loans were satisfied, therefore the documents which had been produced do not cover the entire period of the loan. It seems to me that the commitment letter in June 2011 may have incorporated the 1994 and 2003 loans (otherwise there may more than one loan subsisting). If the commitment letter did, then Bentech may have a very steep hill to climb given the provisions of the FTRA.

[29] The Bank also contends that Bentech's audit was inaccurate because the record on which it based its audit was incomplete, which is directly contradictory to the Bank's contention that they provided all of the records. But, I hasten to add that the Bank has consistently maintained that although the loan commenced in 1994, there had been subsequent re-financings over the years and therefore, the commitment letter dated 17 June 2011 is really the starting

point for Bentech's account (both the Bank and Bentech assert that they will rely on the commitment letter dated 17 June 2011).

[30] Learned Counsel Mr. Gray who appeared for Bentech, urged the Court not to strike out the Statement of Claim since the positions of the parties give rise to factual issues which the Court can only determine on the hearing of evidence. It is the law that a statement of claim is not suitable for striking out if it raises a serious live issue of fact which can only be determined be hearing oral evidence: see **B.E. Holdings Limited v Piao Lianji** (above).

[31] As the pleading presently stands, the positions of both parties are is sharp conflict. Mr. Gray submitted that in order to establish the breaches referred to in the Statement of Claim, evidence has to be led for the Court to determine whether the Bank breached its contractual obligation to Bentech, whether express or implied. He submitted that it is only after hearing such evidence that the Court can make a determination on whether the payments were applied or misapplied. I agree.

Conclusion

[32] As stated above, the Statement of Claim needs to be amended so that the Bank may be able to put in a proper defence. It lacks clarity and precision. However, the Court is ever so mindful that striking out any party's case at such an early stage is a very draconian step. Extreme caution ought to be exercised since its effect is to the drive Bentech from the judgment seat. As I stated, the Statement of Claim lacks clarify but it does disclose a reasonable cause of action. There are questions which arise from the Statement of Claim that can only be determined at a trial. It cannot be said that Bentech's Statement is incurably bad and has no real prospect of succeeding at trial.

[33] Consequently, I will not strike out the Statement of Claim as sought by the Bank. I will grant leave to Bentech to amend its Statement of Claim within fourteen days hereof.

Costs

[34] In civil proceedings, costs are always discretionary. A good starting point is

Order 59, rule 3(2) of the Rules of the Supreme Court ("RSC") which states:

> "**If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.**"

[35] Then, section 30(1) of the Supreme Court Act provides:

> "**Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge and the Court or judge shall have full power to determine by whom and to what extent the costs are to be paid.**"

[36] Order 59, rule 2(2) of the RSC similarly reads:

> "**The costs of and incidental to proceedings in the Supreme Court shall be in the discretion of the Court and that Court shall have full power to determine by whom and to what extent the costs are to be paid, and such powers and discretion shall be exercised subject to and in accordance with this order.**"[Emphasis added]

[37] As a general rule, the successful party is entitled to his costs. But that does not preclude a judge from departing from this normal practice. However, a judge ought to give reasons when deciding to make an unusual order as to costs: see **Eagil Trust Co Ltd v Pigott-Brown and Another** [1985] 3 All ER 119 at 122 - per Griffiths LJ.

[38] Similarly, when a court is exercising its discretion as to costs, it is useful to bear in mind the following principles as espoused by **Atkin LJ in Ritter v Godfrey** [1920] 2 KB 47 at page 48. They are as follows:

> **"In exercising his discretion over costs a judge should be guided by the following principles. In the case of a wholly successful defendant the judge must give him costs unless there is evidence (1)that the defendant brought about the litigation, or (2) has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense, or (3) has done some wrongful act in the course of the transaction of which the plaintiff complains."**

[39] Applying these principles, I am of the opinion that I should depart from the usual order for costs to Bentech, the successful party. I do so because the Statement

of Claim is woefully vague and even after a Request for Further and Better Particulars, it is very difficult for the Bank to put in a proper defence. Consequently, the Bank was left with no other alternative but to file the Striking Out Application. The Bank expended time and money to bring this application. Therefore, it ought to be compensated in costs. Counsel for Bentech diffidently agreed to costs in the sum of $5,000 to the Bank.

Order

[40] I will make the following order:

1. The Summons, filed on 2 November 2018 by the Bank, to strike out the Statement of Claim, is dismissed;
2. Bentech shall file and serve an Amended Statement of Claim by 29 June 2021.
3. The matter will take its natural course in accordance with the RSC;
4. Bentech shall pay costs to the Bank in the sum of $5,000.00.

Dated this 23rd day of June, 2021

Indra H. Charles
Justice