[2019] JMSC Civ. 172

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2006 HCV 03983

BETWEEN	**DORRET O'MEALLY JOHNSON**	**CLAIMANT**
AND	**MEDICAL AND IMMUNIODIAGNOSTIC LABORATORY LIMITED**	**DEFENDANT/1ST ANCILLARY CLAIMANT**
AND	**TIMOS TRADING**	**1ST ANCILLARY DEFENDANT/2ND ANCILLARY CLAIMANT**
AND	**DJH INC**	**2ND ANCILLARY DEFENDANT**

IN CHAMBERS – HEARD ON PAPER

Coleen Franklyn and Andrea Lannaman, instructed by Marion Rose Green & Co., Attorneys-at-Law, for the Claimant

Vincent Chen and Makenae Brown, instructed by Chen, Green & Co., Attorneys-at-law, for the Defendant/1st Ancillary Claimant

Jalil Dabdoub, instructed by Dabdoub, Dabdoub & Co., Attorneys-at-Law, for the 1st Ancillary Defendant/2nd Ancillary Claimant

2nd Ancillary Defendant was unrepresented and not present

Heard: January 19, 2018 and September 20, 2019

CLAIM FOR DAMAGES FOR NEGLIGENCE – OCCUPIERS' LIABILITY – APPLICATION TO STRIKE OUT CLAIM – APPLICATION FOR SUMMARY JUDGEMENT – ANCILLARY CLAIM – APPLICATION TO STRIKE OUT – DISTINCTION BETWEEN APPLICATION FOR SUMMARY JUDGMENT AND APPLICATION TO

STRIKE OUT CLAIM ON THE GROUND THAT THE CLAIMANT'S STATEMENT OF CASE DISCLOSES NO REASONABLE GROUNDS FOR BRINGING A CLAIM – DISTINCTION BETWEEN APPLICATION FOR SUMMARY JUDGMENT AND APPLICATION FOR DEFAULT JUDGMENT – ANCILLARY CLAIMANT'S STATEMENT OF CASE NOT VERIFIED BY A CERTIFICATE OF TRUTH – WHETHER ANCILLARY CLAIMANT'S STATEMENT OF CASE SHOULD BE STRUCK OUT FOR FAILURE TO VERIFY SAME WITH CERTIFICATE OF TRUTH – NEED FOR COURT TO SPARINGLY EXERCISE DISCRETION TO STRIKE OUT – CLAIMANT INJURED AS A CONSEQUENCE OF DEFECTIVE CHAIR ON THE DEFENDANT'S PREMISES

ANDERSON, K., J.

The Background

[1] On or about the 3rd of June, 2005, the claimant visited the premises of the defendant as a patient, for a medical diagnostic test to be done. Whilst in a building on the defendant's premises, the claimant sat on a chair, and subsequently, said chair collapsed beneath her, causing her to fall to the floor. As a result, she sustained injuries. On November 9, 2006, the claimant filed a claim in this court, seeking to recover damages for the injuries she sustained, alleging that those injuries were caused by the defendant's negligence, in that, the defendant had failed to discharge its statutory, common duty of care, owed to the claimant, pursuant to the **Occupiers' Liability Act**.

[2] The defendant, upon being served with that claim, filed its defence on February 20, 2007. In its defence, it denied responsibility for the claimant's injuries. For the purposes of the reasons herein, the most significant aspects of that defence (paras. 5 to 8 of the said defence) are hereafter set out, as follows:

> *'5. The Defence admits that it received a report of an incident on 3rd June 2005 as alleged in paragraph 5 but neither admits nor denies that the Defendant was lawful visitor and/or patient. The Defendant neither admits nor denies that the chair on which the Claimant was sitting was defective.*
>
> *6. The Defendant neither denies nor admits that the chair in question was defective and says that the defendant purchased the said chair from Timos Trading Ltd a company carrying on business as Azan's Supercentre, registered office at 15 Old Hope Road, Regal Plaza in the parish of St. Andrew on the 28th day of March 2003 and the chair was used in the normal way without any indication of any defect from*

the date its purchase to the date of the incident the subject of this claim.

7. *The Defendant neither denies nor admits that the claimant suffered serious or any injury or suffered loss and damage and incurred expenses as the defendant is unaware of what took place after the incident complained of.*

8. *The Defendant says that the chair in question showed no signs of defect and the Defendant its servants and/or agents were not negligent, nor in breach of any Statutory Duty nor are liable to the Defendant in regard to any common Occupiers' Liability duty of care. The particulars of negligence are denied and the Defendant says that it took all reasonable steps to ensure that its premises and the equipment, furniture and fixtures therein were reasonably safe.'*

[3] Subsequently, the claimant, on May 29, 2009, filed an application seeking: '*an order for summary judgment against the defendant herein or in the alternative, an order for the defendant's defence to be struck out and default judgment be entered herein.'* The grounds on which the applicant has sought that order, are as follows:

'1. Pursuant to the C.P.R. 15.2, the Defendant has no real prospect of successfully defending the claim.

2. *The Defendant has failed to set out a defence.*

3. *The claimant was a lawful visitor to the premises of the Defendant and pursuant to the Occupier's Liability Act; a duty was owed to her.*

4. *The Defendant will not be prejudiced if the matter is heard summarily.'*

[4] That application was supported by the affidavit of attorney Tania Mott, (as she then was), which was also filed on May 29, 2009. At paragraphs 13 to 15 of the said Affidavit, the following was stated in support of that application:

'13. The defendant admits in its defence that it received a report of the incident but it does not, in its defence, give any explanation as to what could have taken place on the day in question as it relates to the claimant and her sitting on the chair in question. In short, the defendant has failed to state any reason for its denying the claimant's allegations as set out in the Particulars of Claim.

14. Save and except for stating that the chair was purchased from Timos Trading Ltd, doing business as Azan's Supercentre, the defendant has in its defence failed to provide a

proper/reasonable/alternative explanation for the events that took place on the day in question.

15. *The defendant's defence fails to set out its version of the events that took place on the day in question.'*

[5] The defendant then, on December 13, 2010, filed in this court an ancillary claim against the 1st ancillary defendant seeking, an indemnity for any sum that the defendant might be found liable to pay the claimant. It is worthwhile for the purposes of these reasons, to set out, some of the particulars of the defendant's ancillary claim against the 1st ancillary defendant. That is hereafter done:

'1. At all material times Timos Trading Ltd. (Ancillary Defendant) carried on business as a dry goods merchant and is a company registered under the laws of Jamaica with registered office at 15 Old Hope Road, Regal Plaza, Kingston 5 in the parish of St. Andrew under the trade name as Azan's Supercentre.

2. *On the 28th March, 2003 the Defendant purchased goods from the Ancillary Defendant including the chair which is the subject of the Claim herein. Attached to this Ancillary Claim Form as Attachment 1 is a copy of the receipt for the said goods.*

3. *The Ancillary Defendant was a dealer in the said goods, which were bought from the Ancillary Defendant at its business place aforesaid.*

4. *The Ancillary Defendant carries on business as retailers of haberdashery and household items including but not limited to, chairs and tables for general use and are dealers in the same business. When the Defendant purchased the said chair it was one of three chairs which was purchased.*

5. *The Defendant purchased the goods from the Ancillary Defendant in the reasonable expectation that the seller knew that the Defendant intended to use the chairs to sit on or to permit its lawful visitors to sit on the said chairs and the Ancillary Defendant knew that the Defendant and other defendant to those chairs which were offered for sale in the Ancillary Defendant's store relied upon Ancillary Defendant's skill or judgment in selecting the chairs for sale in its store and that they were reasonably fit for such purpose.*

6. *The chairs were not purchased by the Defendant from the Ancillary Defendant under a patent or other trade name but the Defendant relied upon the fact that the chairs were offered for sale in the Ancillary Defendant's haberdashery store.*

7. *The Defendant relied on the skill and experience of the ancillary Defendant in the selection of the chairs but the defendant failed to take reasonable care in selecting them and acted negligently and without due care or recklessly in offering the said chairs for sale to the public when the Ancillary Defendant its servants or agents knew or ought to have known that they were unfit for the purpose and failed to give any warning to the Defendant.'*

[6] The 1st ancillary defendant subsequently filed its defence to that ancillary claim on January 28, 2011, denying any liability, on various grounds, which need not be set out, for present purposes. The 1st ancillary defendant thereafter, on August 22, 2012, filed an amended application to have the ancillary claim against it, struck out. The grounds upon which the 1st ancillary defendant brought that application, are that:

'1. Pursuant to Part 3.12(1) of the Civil Procedure Rules (2002) every Statement of Case must contain a Certificate of Truth.

2. Pursuant to Part 3.13 of the Civil Procedure Rules (2002), the Court may strike out a Statement of Case which has not been verified by a Certificate of Truth.

3. Pursuant to Part 15(2)(a) of the Civil Procedure Rules, the Ancillary Claimant has no real prospect of succeeding on the claim.

4. Part 26(3) of the Civil Procedure Rules (2002) provides that the court strike out a statement of the case if it appears that there has been a failure to comply with a rule or practice direction or order.'

[7] The 1st ancillary defendant, subsequently, filed an ancillary claim against the 2nd ancillary defendant, and has had judgment in default entered against the 2nd ancillary defendant. That particular ancillary claim, is not relevant for present purposes, and has only been referred to herein, for the sake of completeness.

The Hearing of the Applications

[8] The matters now for consideration are the two applications filed herein and mentioned above. Those are: (i) the claimant's application (mentioned at paragraphs 3 and 4 above), and (ii) the 1st ancillary defendant's amended application (mentioned at paragraph 6 above). Those applications came before

this court, on January 19, 2018, and at that hearing, it was ordered that said applications be heard on paper. The following constitutes my reasoning and conclusions.

Submissions

[9] It must be stated, as regards the specific submissions made by the parties' counsel, in writing, that I have considered all of same very carefully and to whatever extent I may not have addressed same, no disrespect to counsel was intended. Instead, that was due to my desire for brevity.

The original claim

[10] The claimant, has sought in her claim, it seems, based upon the inelegant framing of the claim, damages for negligence, alleging that the defendant breached its common duty of care owed to her, as a visitor to its premises, under the **Occupiers' Liability Act.** It must be stated, that a duty of care, under the law of negligence, cannot place a higher duty of care upon the occupier of premises, owed to visitors to its premises, than the duty owed by an occupier of premises, to visitors to that premises, which is a duty that is governed by statute in this jurisdiction, that is, the **Occupiers' Liability Act.** Guidance may be gleaned from the learned authors of Bennion on Statutory Interpretation (7th edn.), (2017), page 650:

> *'An appreciation of the ordinary rules and principles operating in the relevant area of law is therefore essential to understanding the meaning and effect of an enactment. As Lord Hope of Craighead said in Wisely v John Fulton (Plumbers) Ltd, Wadely v Surrey County Council*
>
> > *"As a general rule Parliament must be taken to have legislated against the background of the general principles of the common law. It may be found on an examination of the statute that Parliament has decided not to follow the common law. In that situation the common law must give way to the provisions of the statute. But an accurate appreciation of the relevant common law principles is nevertheless a necessary part of the exercise of construing the statute."*

In any event though, the duty of care owed by an occupier to a visitor to that occupier's premises is no higher or lower, at common law, than is set out in the relevant statutory provision. That will be examined, in more detail, further on, in these reasons, as it does not mean that the claim for damages for negligence cannot be pursued at all, but rather, it may mean that the negligence claim can only properly be pursued, in the alternative.

[11] In that context, I have chosen to treat with said claim, as a claim for reliefs, based on the alleged breach of the duty of care owed by the defendant to the claimant, pursuant to the provisions of the **Occupiers' Liability Act**, and in the alternative, for damages for negligence. Based upon the reasons which I have set out, further on, I am of the view that this may very well, be a claim which can only properly be pursued based upon the cause of action, of negligence. That issue though, if it is to be addressed at all, will have to be addressed, at a later stage.

The Claimant's Application for Summary Judgment

[12] The claimant, in her application, has sought that judgment in default be entered against the defendant, alleging that the defendant has no real prospect of successfully defending the claim. At this juncture, it is necessary therefore to assess the law relating to summary judgment applications.

[13] Before doing so though, it is to be noted that it is, in fact, summary judgment which is being sought by the claimant and not, default judgment. There is a distinction with a dfference, between a summary judgment application which is addressed by **Part 15 of the C.P.R.** and a default judgment application which is addressed by **Part 12 of the C.P.R**.

[14] **Part 15 of the Civil Procedure Rules** (hereinafter referred to as, **'the C.P.R.'**) empowers the court to determine a claim or a particular issue in a claim without a trial. Further, **Rule 15.2 of the C.P.R.** permits the courts to grant summary judgment on a claim, or on a particular issue of the claim, where the court considers

that the claimant has no real prospect of succeeding on that claim, or issue, or the defendant has no real prospect of successfully defending the claim or issue, as the case may be. **Rule 15.2 of the C.P.R.** states as follows:

> *'15.2 The court may give summary judgment on the claim or on a particular issue if it considers that –*
>
> *a) the claimant has no real prospect of succeeding on the claim or the issue; or*
>
> *b) the defendant has no real prospect of successfully defending the claim or the issue.'*

[15] Additionally, **rule 15.6 of the C.P.R.** outlines the court's powers in granting summary judgment. That rule reads as follows:

> *'15.6(1) On hearing an application for summary judgment the court may–*
>
> *(a) Give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end.*
>
> *(b) Strike out or dismiss the claim in whole or in part;*
>
> *(c) Dismiss the application;*
>
> *(d) Make a conditional order; or*
>
> *(e) Make such other order as may seem fit.'*

[16] In **Fiesta Jamaica Ltd. v National Water Commission** [2010] JMCA Civ. 4, Harris JA, at paragraph 31 stated:

> *'A court, in the exercise of its discretionary powers must pay due regard to the phrase "no real prospect of succeeding" as specified in Rule 15.2. These words are critical. They lay down the criterion which influences a decision as to whether a party has shown that his claim or defence, as the case may be, has a realistic possibility of success, should the case proceed to trial. The applicable test is that it must be demonstrated that the relevant party's prospect of success is realistic and not fanciful. In **Swain v Hillman** [2001] All ER 91, 92 at paragraph [10] Lord Woolf recognized the test in the following context:*

> *"The words 'no real prospect of being successful or succeeding' do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospect of success or, as, Mr. Bidder QC submits, they direct the court to the need to see whether there is a realistic as opposed to a fanciful prospect of success."*

[17] Further, at paragraph 34, Harris JA, referred to the House of Lords' judgment in the case: **Three Rivers District Council v Governor and Company of the bank of England** [2001] 2 All ER 513, where Lord Hutton, at paragraph 158, stated the approach a judge should adopt when dealing with the applicable test. Lord Hutton stated the following:

> *'The important words are "no real prospect of succeeding." It requires the judge to undertake an exercise of judgment. He must decide whether to exercise the power to decide the case without a trial and give summary judgment. It is a 'discretionary' power, i.e. one where the choice whether to exercise the power lies within the jurisdiction of the judge. Secondly, he must carry out the necessary exercise of assessing the prospects of success of the relevant party. If he concludes that there is "no real prospect," he may decide the case accordingly.'*

[18] The party opposing an application for summary judgment, is not required to adduce compelling evidence, but instead, may successfully oppose same by putting forward enough evidence to raise a real prospect of a contrary case: See **Korea National Insurance Corporate v Allianz Global Corporate and Specialty AG** – [2007] EWCA Civ. 1066. Where a respondent puts forward a prima facie case in answer, then the matter should ordinarily be allowed to continue to trial. Further, where the court is called upon to decide upon an application for summary judgment, the court must consider same, taking into account very carefully, the over-riding objective of dealing with the case justly.

[19] The issue then to be determined, is whether summary judgment, having regard to the above learning, may be properly entered against the defendant, on the basis that the defendant has no real prospect of successfully defending against the claimant's claim. The claimant in her claim has alleged that the defendant has breached its common duty of care owed to her as a visitor unto its premises, and as a result of that breach, the claimant has sustained injuries and incurred loss.

[20] The defendant, on the other hand, has alleged in its defence, that the chair showed no signs of defect, and that they took all reasonable steps to ensure that their premises, equipment, furniture and fixtures were reasonably safe for their expected purpose of use, by visitors to their premises, such as the claimant was, at the material time. In that regard, I reject the claimant's counsel's submission that the defendant has failed to put forward a proper defence to this claim, or anything other than a mere denial of the claimant's claim. The averment by the defendant, in its defence, that the defendant took all reasonable steps to ensure that its premises, equipment, furniture and fixtures were reasonably safe, to my mind does not constitute a 'bare denial' of the claimant's claim. To the contrary, although the defendant's defence was succinct, it was, to my mind, adequate for the purpose of placing before this court, a defence which averred that the defendant had taken all reasonable steps to ensure that its premises were reasonably safe, for its intended purposes – among which purposes would have been, the purpose that the claimant entered the premises for, that being to enable certain diagnostic tests to be carried out, on her person. I am of the view that, that is a sufficient averment for the purpose of the defendant's defence.

[21] Whilst it would be correct to state that more details, or details, as to the reasonable steps purportedly taken by the defendant to ensure that its premises were reasonably safe for the claimant's intended purpose there, at the material time, could perhaps have been provided by the defendant, it may be open to the defendant, to obtain such further details, or details, by means of a request for information.

[22] The law as regards the common duty of care under the **Occupiers' Liability Act,** as outlined at **section 3** of that Act reads as follows:

> *'(1) An occupier of premises owes the same duty (in this Act referred to as the 'common duty of care') to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor by agreement or otherwise.*

> *(2) The common duty of care is the duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.'*

[23] In **Adele Shtern v Villa Mora Cottages, et al** [2012] JMCA Civ. 20, Morrison, JA (as he then was), considered the common duty of care owed under **section 3 of the Occupiers' Liability Act,** by an occupier of premises to its visitor as a duty to *'…provide reasonably safe premises or show that the invitee accepted the risk with full knowledge of the dangers …'* Section 2(2) of the **Occupiers' Liability Act** provides that '…*the persons who are to be treated as an occupier and as his visitors are the same as the persons who would at common law be treated as an occupier and as his invitees or licencees.*' In the case: **Greenhalgh v British Railways Board** [1965] 2 QB 286, recorded at page 293:

> *'A person is a "visitor" if at common law he would be regarded as an invitee or licensee: or be treated as such, as for instance, a person lawfully using premises provided for the use of the public, e.g., a public park, or a person entering by lawful authority, e.g., a policeman with a search warrant.'*

[24] It is undisputed, in this claim, that the defendant was the occupier, under the Act, of the premises upon which the claimant sustained the injuries due to a defective chair that was not properly affixed to the said occupier's premises, but which was placed on the occupier's premises for intended use to sit on, by visitors to that premises. Further, it may also be deduced, from the undisputed facts of the claim, that the claimant visited the defendant's premises to obtain the benefit of a business service, which the defendant offered to the public, at that time, that being the service of conducting medical diagnostic tests. In that regard, the defendant was then under a common duty of care, as imposed by the **Occupiers' Liability Act**, to ensure that its premises were then reasonably safe for a visitor to that premises, to use same, for the intended purposes of that premises, as operated by the defendant.

[25] A question which ought to be carefully addressed by the parties' counsel and this court, at a later stage, is whether the claimant's claim for reliefs pursuant to the

Occupiers' Liability Act, can properly be pursued at all, since there exists, it seems, no evidence to even remotely suggest that at the material time, the chair whch was used by the claimant and which was defective, was affixed to the premises which was occupied by the occupier and as such, it may very well be, that as a matter of law, said chair was not, at the material time, part and parcel of that premises. See: **Wheeler v Copas** (1981) 3 All ER 405, especially at 408 and 409, per Chapman, J. I will state nothing more on that issue though, as it was not a specific issue raised for this court's consideration at, this juncture.

[26] Whether though, the said claim is a claim for reliefs founded upon the tort of negligence or the **Occupiers' Liability Act**, or both, I am of the view, that the defendant has set out a defence that cannot be considered as 'fanciful,' in that, it has averred that it has taken all reasonable steps to ensure that its premises were reasonably safe, and it has set out what those steps were, in respect of the defective chair, albeit that the defendant perhaps, has not provided as much details regarding same, as could have been provided. Be that as it may though, to my mind, that is sufficient for this case to be allowed to proceed to trial, so that the defendant can, at that trial, be challenged as to its evidence. of the steps that it took, to ensure the reasonable safety of its visitors. Upon that trial, I expect that such evidence will be vigorously tested and disputed. That is the proper process to be undergone, in the particular circumstances of this particular case, at that time. I am therefore of the view that, the claimant has failed to prove that summary judgment ought to be entered against the defendant, in the particular circumstances, of said claim.

[27] The claimant has also sought that the defendant's defence, be struck out, in the alternative. The claimant has placed reliance on the grounds for her application for summary judgment listed at paragraph 3 above, as the grounds for her application to strike out the defendant's defence. For the sake of convenience, I will, at this juncture, restate those grounds. They are as follows:

'1. Pursuant to the C.P.R. 15.2, the Defendant has no real prospect of successfully defending the claim.

2. The Defendant has failed to set out a defence.

3. The claimant was a lawful visitor to the premises of the Defendant and pursuant to the Occupier's Liability Act; a duty was owed to her.

4. The Defendant will not be prejudiced if the matter is heard summarily.'

[28] It is my view that, none of those grounds, other than ground 2, are proper grounds upon which one may base an application to strike out a defence. **Rule 26.3 of the C.P.R.** governs such applications, and consequentially, an applicant must ground a written application to strike out a party's statement of case, upon one of the other, or more than one, of the grounds as specified in **rule 26.3(1) of the C.P.R. Rule 26.3(1) of the C.P.R.,** states as follows:

> *'26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case 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 statement of case 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 statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or*
>
> *d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10.'*

[29] To reiterate, the proper course is that the applicant ought to have placed reliance on one of, or several of the above-stated grounds as the basis of the application to strike out the defendant's defence. The claimant placed reliance instead, on **rule 15.2 of the C.P.R.,** and that particular rule addresses applications for the

granting of summary judgment, and therefore, does not apply to applications to strike out a statement of case.

[30] Guidance on the distinction as between an application for summary judgment, and an application to strike out a statement of case under **rule 26.3(1)(c) of the C.P.R.**, may be gleaned from the case: **Gordon Stewart v John Issa**, SCCA 16/2009, where Morrison J.A. (as he then was) at para. 31-32, stated:

> *'An application to strike out under this rule raises what Gatley (Libel and Slander, 11th ed., paragraph 32.34) describes as 'a pleading point', in respect of which the authorities are clear that the court is required only to ascertain whether, as Dukharan JA put it in Sebol Limited and others v Ken Tomlinson and others (SCCA 115/2007, judgment delivered 12 December 2008), 'the pleadings give rise to a cause of action..." (paragraph 18)…The difference between the approach on an application to strike out and on a summary judgment application is neatly captured by Eady J. B v N and L [2002] EWHC 1692 (QB), in the following passage (at paragraph.21.22):*
>
> *21. I must focus on the claimant's pleaded case in first instance. That is all I am permitted to do for the purposes of the strike-out application. If I rule against the plea, then that would be the end of the matter.*
>
> *22. As to the Part 24 application, however, I can have regard also to the evidence for determining whether the claimant's case has no realistic prospect of success.'*

[31] By that authority, it is apparent that ground 1 of the claimant's specified grounds for her striking out application, is not a ground upon which said application, can properly be granted by this court.

[32] Additionally, grounds 3 and 4, are not at all, grounds upon which a striking out application can properly be founded. As regards ground 2, all that needs to be stated for present purposes, is that for the reasons already given, this court has rejected that ground. I will therefore refuse that application.

The 1st Ancillary Defendant's Amended Application to strike out the Ancillary Claim

[33] The 1st ancillary defendant, as stated above, filed an amended application seeking to strike out the entirety of the ancillary claim filed against it. It is true that, under

the rules of court (**Rule 3.12(1) of the C.P.R.**) every statement of case must be verified by a certificate of truth. Also, under **rule 2.4 of the C.P.R.** the *'statement of case'* also includes an *'ancillary claim.'* Also true, is that, a perusal of the ancillary claim, filed against the 1st ancillary defendant, reveals that it is not verified by a certificate of truth. Further, and also true, is that **rule 3.13 of the C.P.R.** states that: *'the Court may strike out a Statement of Case which has not been verified by a certificate of truth'* (Italicized for emphasis). It must be observed, however, that the sanction stated in this rule of court, has been stated, in discretionary terms, that is to say, this court has a discretion as to whether or not to strike out a statement of case, which has not been verified by a certificate of truth.

[34] As such **rule 3.13 of the C.P.R.** specifies a sanction which it is within this court's discretion to impose, or not to impose, in circumstances wherein, a party's statement of case, has not been verified by a certificate of truth. I am of the view, that this discretionary sanction must be sparingly exercised, and this court is obliged to take into consideration the probable implications of striking out the statement of case, and to balance those implications, with the ancillary claimant's legal right to pursue their ancillary claim, provided that said claim appears to be one which is viable in law and has a realistic propect of success. In that, regard see the dicta of Harris J.A, in **S. & T Distributors Limited and S & T Limited v CIBC Jamaica Limited and Royal and Sun Alliance,** SCCA 112/2004, where the following was stated at page 29:

> *'The striking out of a claim is a severe measure. The discretionary power to strike must be exercised with extreme caution. A court when considering an application to strike out, is obliged to take into consideration the probable implication of striking out and balance them carefully as against the principle as prescribed by the particular cause of action which is sought to be struck out. Judicial authorities have shown that the striking out of action should only be done in plain and obvious cases.'*

[35] It is my view therefore, as stated in **S. & T Distributors Limited and S & T Limited v CIBC Jamaica Limited and Royal and Sun Alliance** (op. cit), that the court's power to strike out must be used sparingly, and only as a last resort, *'in plain and*

obvious cases' (Italicized for emphasis). I am therefore of the view that a proper exercise of my discretion, in these circumstances, would be to allow the 1st ancillary defendant an opportunity to remedy the defect, failing which, its statement of case would stand struck out, and I am also not of the view that this case is one in respect of which, it is plain and obvious, that this claim is one, which ought to be struck out.

[36] The 1st ancillary defendant, also posited as a ground for its application to strike out the ancillary claim, that the ancillary claimant has no 'real prospect of succeeding on the claim' pursuant to **rule 15(2)(a) of the C.P.R.** For reasons already given, I reject that ground.

[37] In concluding, both the claimant's application and the 1st ancillary defendant's amended application, are refused. This court will exercise its case management powers as regards, requiring the defendant's ancillary claim to be verified by a certificate of truth. That will be a far more suitable and just measure to be taken by this court, in the particular circumstances of this particular case.

Orders

1. The claimant's application filed on May 29, 2009, and the 1st ancillary defendant's amended application filed on August 22, 2012, are refused.

2. Unless the defendant, by or before September 30, 2019, files an amended ancillary claim form, and an amended ancillary particulars of claim, both verified by certificates of truth, in accordance with **Part 3.12 of the C.P.R.,** then the defendant's ancillary claim, shall stand as struck out, without the need for any further court order.

3. Costs of both applications are awarded to the defendant, with such costs to be taxed, if not sooner agreed.

4. This matter with all pertinent parties, at that stage, shall proceed to mediation and if not resolved by that means, the Registrar shall schedule a case management conference to be held, with all pertinent parties.

5. The claimant shall file and serve this order.

……
Hon. K. Anderson, J.