IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMERCIAL DIVISION
CLAIM NO 2010 CD 00011

IN CHAMBERS

BETWEEN	CAPITAL AND CREDIT MERCHANT BANK LTD	CLAIMANT
AND	ISAAC GORDON	DEFENDANT

Mrs M. Georgia Gibson-Henlin and Mrs Carissa Messado instructed by Henlin, Gibson-Henlin for the Claimant.

Mr Brian Moodie instructed by Samuda and Johnson for the Defendant.

Civil Procedure – Payment by instalments, application for - Claim for a specified sum of money – Acknowledgment of service filed denying all liability – Defence admitting a debt but disputing quantum – Whether application for payment by instalments appropriate - CPR rr. 14.6, 14.7, 14.8, and 14.9

Civil Procedure – Summary judgment, application for – Claim for a specified sum of money – Defence filed admitting a debt but disputing quantum –Defence not stating basis for dispute – Affidavit filed explaining the basis of the dispute – Whether defence reveals reasonable cause for defending the claim - Whether summary judgment appropriate – Whether judgment on admission appropriate - CPR rr. 2.4, 10.2, 10.5, 15.2 and 26.3

21 January and 25 May 2011

BROOKS, J.

On or about 25 July 2008, Capital and Credit Merchant Bank Ltd ("the bank") loaned Mr Isaac Gordon the sum of $3,000,000.00 to assist him with the purchase of certain equipment for the motor vehicle repair trade. Mr Gordon defaulted on the loan and the bank filed the present claim in order to recover $4,059,741.54, as being the sum due under the loan as at 5 February 2010. The bank also claimed interest on the outstanding principal of $2,730,151.10, from 5 February 2010 to the date of payment of the debt.

Mr Gordon filed an acknowledgement of service in which he denied liability. He, however, filed his defence out of time and the bank filed an application for summary

judgment. That application is the first of two, presently for consideration by the court. In the second, Mr Gordon has applied to pay "the amount due which is to be determined", by instalments.

The questions for determination are, firstly, whether Mr Gordon is entitled to have his application considered and secondly, whether his defence, as filed, has any real prospect of success. If it is found that the defence has no real prospect of success the court will then have to decide whether summary judgment should be granted or some other course of action taken.

The application to pay by instalments

Mr Gordon filed his acknowledgment of service later than the 14 days specified by rule 9.3 (1) of the Civil Procedure Rules 2002 (the CPR). In it, he stated that he wished to defend the claim. He did not admit the claim or any part thereof. Although he also filed his statement of defence late and without permission, that defect was cured, by an order of the court, during the course of the hearing of these applications.

Contrary to the indication given by the acknowledgement of service, the defence averred that Mr Gordon "does not deny liability but disputes the principal amount and the interest claimed on the basis that the said amounts are not owed". The defence went on to state that Mr Gordon wished "to cross examine the Claimant on the issue of quantum and to make submissions to the Court at the Assessment".

Counsel for the bank, Mrs Gibson-Henlin, submitted that Mr Gordon's application to pay by instalments cannot succeed, because it does not comply with the requirements of the CPR, concerning applications for payment by instalments. Mr Moodie, acting for Mr Gordon, did not seek to resist those submissions.

Mrs Gibson-Henlin is on good ground in respect of her submissions. The rules, under part 14 of the CPR, concern the entry of judgment where the defendant admits

liability in respect of the claim. Where the claim is for the payment of money, rule 14.9 stipulates that a defendant, who is an individual, may make a request for time to pay the amount claimed. Rule 14.9 (1) states:

> "A defendant who –
>
> (a) makes an admission under rules 14.6, 14.7 or 14.8; and
> (b) is an individual,
>
> may make a request for time to pay."

A request for time to pay includes a request to pay by instalments (see rule 14.9 (2)).

My reading of that rule is that it is **only** a defendant who makes an admission pursuant to rules 14.6, 14.7 or 14.8, who may apply for time to pay. Rule 14.6 applies to a defendant who admits the whole claim **in the acknowledgment of service**. Rule 14.7 applies where the defendant, **in his acknowledgment of service or in his defence**, admits liability **in respect of a specified sum of money or a specified proportion** of a **claim for an unspecified sum of money**. Rule 14.8 applies where **the amount of the claim is not specified** but the defendant admits liability **in the acknowledgement of service**.

The instant claim is only for a specified sum of money. As a result, rule 14.8 is excluded from consideration. Mr Gordon has, however, not brought himself within the provisions of either rule 14.6 or 14.7. This is because he has not admitted the whole of the claim in his acknowledgment of service (*per* r. 14.6); nor has he admitted a specified sum or a specified proportion of the claim, in ether the acknowledgment of service or his defence (*per* r. 14.7).

Having placed himself outside the purview of these two rules (rule 14.8 not being applicable), Mr Gordon is precluded from making any application for permission to pay by instalments. His application must, therefore, fail.

Whether summary judgment is available

The Relevant Law

Rule 15.2 of the CPR is the rule which guides the court in applications for summary judgment. It states, in part, that the court **may** give summary judgment on a claim if the defendant has no real prospect of successfully defending that claim. The rule has been considered by our Court of Appeal in *Stewart and others v Samuels* SCCA 02 of 2005 (delivered 18 November 2005). In that case P. Harrison JA (as he then was), at pages 6 – 7 of the judgment, stated:

> "The prime test being "no real prospect of success" requires that the learned trial judge do an assessment of the party's case to determine its probable ultimate success or failure. Hence it must be a "real prospect of success" not a "fanciful" one – *Swain v Hillman* [[2001] 1 All ER 91]. **The judge's focus is therefore in effect directed to the ultimate result of the action as distinct from the initial contention of each party.** "Real prospect of success" is a straightforward term that needs no refinement of meaning. The latter term should not therefore be equated to the "good and arguable" case concept as required to obtain the issue of an injunction. The "good and arguable case" or "a serious question to be tried" test, in the case of the grant of the injunction, is directed to a preliminary assessment of the party's contention in contrast to an ultimate result." (Emphasis supplied)

Panton JA (as he then was), in respect of the point, stated in part, at paragraph 11of his judgment in *Stewart*:

> "In *Swain* (*supra*) Lord Woolf, M.R. (as he then was) concluded that the civil procedure rules were "**not meant to dispense with the need for a trial where there are issues which should be investigated at the trial**"…This case and others…are saying that summary judgment ought not to be granted where a party has a real, as distinct from a fanciful, prospect of success in the matter which is before the Court. Where there are genuine issues to be tried, the trial should proceed." (Emphasis as in the original)

The burden of proof, in applications for summary judgment, lies on the applicant (*per* Potter LJ in *E.D. and F. Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472; [2003] All ER (D) 75 (Apr); [2003] CPLR 384, at paragraph 9).

In considering an application for summary judgment, the court must also bear in mind the words of Lord Judge in *Swain v Hillman*, cited above, that the grant of summary judgment is a serious step and that the judge hearing the application, should not embark on, what could be described as, a mini-trial of the claim.

Apart from the law concerning summary judgment, it is also necessary to make further examination of the some of the provisions of Part 14 as it concerns the steps which a defendant and the court may take, when a defendant seeks to be heard on the question on quantum. Rule 14.1 paragraphs (3), (4) (5) and (6) are relevant to these circumstances. They state, respectively:

> "(3) A defendant may admit the whole or part of a claim for money by filing an acknowledgment of service containing an admission.
>
> (4) The defendant may do this in accordance with the following rules-
>
> (a) rule 14.6 (admission of whole of claim for specified sum of money);
> (b) rule 14.7 (admission of part of claim for money only); or
> (c) rule 14.8 (admission of liability to pay whole of claim for unspecified sum of money).
>
> (5) A defendant may file an admission under paragraph (4) at any time before a default judgment is entered, but the claimant may apply for assessed costs if the admission is filed after the time for filing an acknowledgment of service has expired.
>
> (Rule 9.3 specifies the time for filing an acknowledgment of service, rule 65.8 deals with assessed costs.)
>
> (6) The court may allow a party to amend or withdraw an admission."

The relevance of rules 14.6, 14.7 and 14.8 has already been assessed above.

The next aspect of the law to be outlined concerns the requirements in respect of a defence. It is Part 10 of the CPR which is relevant. Rule 10.2 (4) is of particular significance. It requires a defendant who wishes to contest quantum to file a defence. It states:

> "In particular, a defendant who admits liability but wishes to be heard on the issue of quantum must file and serve a defence dealing with that issue.
>
> (Part 14 deals with the procedure to admit all or part of the claim.)"

Rule 10.5 stipulates that a defence "must set out all the facts on which the defendant relies to dispute the claim" (10.5 (1)). Although the defence must be as short as is practicable, certain aspects are required. Rule 10.5 (4) and 10.5 (5) state:

> "(4) Where the defendant denies any of the allegations in the claim form or particulars of claim-
>
> (a) **the defendant must state the reasons for doing so**; and
>
> (b) if the defendant intends to prove a different version of events from that given by the claimant, **the defendant's own version must be set out in the defence**.
>
> (5) Where, in relation to any allegation in the claim form or particulars of claim, the defendant does not -
>
> (a) admit it; or
>
> (b) deny it and put forward a different version of events, **the defendant must state the reasons for resisting the allegation**." (Emphasis supplied)

A defendant whose statement of defence which does not comply with these requirements, is at risk of having his statement of case, being struck out, pursuant to the case management powers stipulated in rule 26.3 (1) (c) of the CPR. A statement of defence may be said to be part of a party's statement of case and it may be possible to identify a defence even if it is not set out in the statement of defence. In rule 2.4 of the CPR "statement of case" is defined as meaning:

> (a) a claim form, particulars of claim, defence, counterclaim, ancillary claim form or defence and a reply; **and**
>
> (b) any further information given in relation to any statement of case under Part 34 either voluntarily or by order of the court;…" (Emphasis supplied)

In *Dixon v Jackson* SCCA 120 of 2005 (delivered 19 January 2006), Harrison P in a procedural appeal, held that the absence of a certificate of truth from a statement of

defence was not fatal to the defendant's case. This was because a witness statement, which contained a statement of truth, was consistent with the contents of the impugned statement of defence. The learned President, in upholding the decision of the first instance judge, held that in applying the overriding objective, there may be instances where striking out of a defence may be permissible; "in some circumstances it may be too extreme".

In *Biguzzi v Rank Leisure plc* [1999] 4 All ER 934 at pages 939j-941d, Lord Woolf MR opined that although a judge had the power to strike out a non-compliant statement of case, under the CPR, "the court's powers are much broader than they were [before]. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out" (see page 940 c). He advocated that courts should, where they can, seek to use means of sanction other than striking out, in order to produce a more just result. He pointed out that the creative use of orders as to costs may be useful alternatives.

These approaches are in line with the requirement that the court must seek to give effect to the overriding objective set out in rule 1.1. Where, however, there are clear express words in the rules, "the court cannot use the overriding objective 'to give effect to what it may otherwise consider to be the just way of dealing with the case'. Where there are no express words, the court is bound to look at which interpretation would better reflect the overriding objective" (*per* Kay LJ in *Totty v Snowden* [2001] 4 All ER 577 at para. 34).

I shall conclude this review of the relevant law by citing the difference in the court's approach between an application for summary judgment and an application to strike out a statement of case for failing to disclose a reasonable ground for bringing or defending the action. In the former, the court may make reference to affidavit evidence

while, in the case of the latter, it is the statement of case itself, which is examined. Mangatal J examined the point in *Eureka Medical Ltd v Life of Jamaica Ltd* 2003 HCV 1268 (delivered 12 October 2005). The learned judge, in my respectful view, correctly, stated the relevant law at page 4 of her judgment:

> "It would seem to me that in relation to Rule 26.3(1) (c), unlike Rule 15.2, the court is not permitted to have regard to anything but the statement of case and is to make its decision strictly on the terms and contents of the statement of case."

Application of the law to the instant claim

Having cited the relevant law, I now turn to its application to the instant claim. It is important to note specific factors:

1. The defence filed was terse; it merely stated that the defendant disputed the amounts claimed for principal and interest and that he wished to cross examine the claimant's witnesses and make submissions in respect of the issue of quantum. It did not state the basis for contesting the sum claimed by the bank;
2. In support of the application for permission to pay by instalments, Mr Gordon, in his affidavit, raised a number of issues which would, if allowed to be considered by a court, materially affect the issue of the amount due to the bank;
3. The statement of case, by definition, does not include the affidavit filed by Mr Gordon in respect of the applications in that it does not comprise information given pursuant to part 34 which deals with requests for information;
4. There is no application to amend the statement of defence.

The issues raised by Mr Gordon were confirmed, in part, to be more than a mere "flight of fancy" or excursion into Micawberism. In an affidavit filed in response to his,

Ms Olive Callender, representing the bank, confirmed that some of the equipment, which should have been part of the security for the loan, had been seized by the bank but had been returned to another person who had claimed them. Some had, however, been sold by the bank and apparently, some were still in its custody. Questions of the value of the equipment seized and of accounting for the proceeds of sale, arise as a result of those actions.

Mrs Gibson-Henlin submitted that the defects in the defence filed, were fatal to Mr Gordon's case. Learned counsel submitted that, where a defendant wishes to be heard on the question of quantum, he must, in compliance with rule 10.2 (4), file and serve a defence dealing with that issue. She argued that since the defence fails to set out the facts on which Mr Gordon relies, the defence had no prospect of success and, on that basis the court should grant summary judgment to the bank.

Mr Moodie, acting for Mr Gordon, submitted that the court has the jurisdiction to treat with the matter as a judgment on admission for a part of the money owed and to refer the disputed amount for damages to be assessed.

I agree with Mrs Gibson-Henlin that the statement of defence, filed by Mr Gordon, does not fulfil the requirements of rule 10.5 and consequently there has been no defence filed in compliance with rule 10.2(4). It has already been mentioned above, that Mr Gordon has not, so far, shown any compliance with the provisions of Part 14 of the CPR.

It is, however, not too late for him to bring himself within the provisions of rule 14.7(1). In light of the issues raised by his affidavit, which issues I find are not fanciful, I am of the view that he should be allowed to put his house in order. I shall therefore permit him time to file an amended defence.

Conclusion

Mr Gordon is not entitled to an order allowing him to pay the judgment by instalments. This is because his situation, at present, does not fall within the purview of either of the relevant rules concerning applications to pay by instalments.

There are issues raised by the parties concerning the seizure, partial return, partial retention and partial sale of equipment, which should have been security for the loan made to Mr Gordon. It is my view that the interests of justice require that those issues be dealt with at an assessment of the sum due by Mr Gordon. Mr Gordon must, however, file a defence which complies with rules 10.2(4), 10.5 and 14.7 of the CPR. There does not seem to be any rule which prevents me from allowing Mr Gordon time to amend his defence so as to comply with these rules. I am, therefore, inclined to afford him that time despite the fact that there has been no application to amend his defence.

For the reasons set out above, the orders are that:

1. The application for summary judgment is refused;
2. The application to pay by instalments is refused;
3. The defendant is at liberty to file and serve an amended defence on or before 8 June 2011, failing which the Claimant shall be at liberty to enter judgment in default of defence;
4. The claim is set for a Case Management Conference on 17 June 2011 at 9:00 a.m.;
5. Costs to the Claimant to be taxed if not agreed.