



[2024] JMSC Civ. 167

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2007HCV01995

BETWEEN	MAXINE MARSH	CLAIMANT
AND	PAN CARIBBEAN MERCHANT BANK LIMITED	DEFENDANT

## NO. 2

HEARD ON PAPER

Miss Georgia Buckley instructed by Kathryn Phipps & Co appeared for the Claimant.

Miss Carlene Larmond K.C. and Miss Giselle Campbell instructed by Patterson Mair Hamilton appeared for the Defendant.

Heard: 22<sup>nd</sup> November and 19<sup>th</sup> December 2024

Civil Procedure – Court Making Orders On Its Own Initiative to Strike Out Statement of Case – Is there a prima facie case – Should the matter be transferred to the Commercial Courts – Civil Procedure Rules, 2002, 71.3

L. PUSEY, J

### INTRODUCTION

- [1] In the reasons for judgment in **Maxine Marsh v Pan Caribbean Merchant Bank Limited** [2024] JMSC Civ 89, delivered on the 18<sup>th</sup> day of October 2024, the Court sought to make orders on its own initiative and invited Counsel to proffer submissions in relation to these potential orders. The Court indicated that it would consider those submissions on paper and provide judgment on the 19<sup>th</sup> day of December 2019. This is the decision of the Court having heard from the parties on paper.
- [2] A comprehensive background of this matter can be found in the Court's earlier judgment. This is a continuation of that judgment and both are to be read together. Therefore, it is not necessary to detail this background again.

## **SUBMISSIONS**

- [3] The submissions of Miss Buckley for the Claimant, while simply put, if accepted, may push this matter towards a trial. She submitted that, despite the assertions of the Court, the Claimant has a prima facie case against the Defendant and “*should get her day in court.*” Miss Buckley argued that the Claimant is still in possession of the original Certificate of Deposit (“CD”). She submitted that based on the instructions on the reverse of the CD which states that the CD is to be surrendered when being redeemed, there is a strong presumption that the CD was not redeemed if the holder(s) of the CD retain the original CD. Miss Buckley argued that this is sufficient to establish a prima facie case that the Claimant nor her mother Miss Ruby Wallace redeemed the CD. She argues that having established this prima facie case, the Defendant must now prove that the CD was indeed redeemed. She relied on the case of **S&T Distributors Ltd & Anor v CIBC Jamaica Limited & Anor** (unreported) SCCA No. 112/04, Court of Appeal of Jamaica, delivered on 31 July 2007, specifically paragraph 29 thereof, in support of her submissions.
- [4] Miss Larmond provided submissions on behalf of the Defendant. I have reduced those submissions and no disrespect is intended in doing so. Miss Larmond argued that the rules do not contemplate the simultaneous strike out of the claim and the defence in the same proceedings. She argues that the proper way is to strike out the claim and if the Court is of the view that the defendant cannot properly defend the claim, then it may form the basis for making no orders as to cost and not entering judgment on behalf of the defendant.
- [5] Miss Larmond submits that though the Court has observed deficiencies in the Defendant’s case, it ought not to be determinative of the claim as the Claimant still has a duty to prove her case against the Defendant (which she argues that the Claimant has not done). Furthermore, if the Court is minded to proceed, the Defendant, though challenged by the antiquity of the matter and its organizational changes, could still be in a position to mount its defence.

- [6] Lastly, Miss Larmond submitted that whilst rule 15.6(1)(b) of the CPR makes explicitly provisions for the Court to strike out or dismiss the claim in whole or in part, there is no equivalent provision for the striking out of a defence. She argues, nonetheless, that the Court rightly observed that the matter cannot be disposed by way of trial. In light of this, the Court is properly positioned to strike out the claim and if the Court is of the view that the Defendant cannot properly defend the claim then it may have the basis to not enter judgment in the Defendant's favour and make no orders for costs.

## **DISCUSSION**

- [7] In the previous judgment, at paragraph [86], the Court made statements that may have given the impression that it intended to simultaneously strike out the parties' statements of case. However, this was not the Court's intention. The Court merely sought to emphasize that, due to deficiencies in both parties' cases each could potentially be struck out. On that basis, should the Claimant's statement of case be struck out, no orders regarding costs would be made. It appears that this intention was not sufficiently clear, and adjustments have now been made to the paragraph to eliminate any ambiguity.

### **Is there a prima facie case against the Defendant?**

- [8] Miss Buckley's submission is that, if the Claimant is in possession of the original CD, which bears instructions on the reverse indicating that it must be surrendered for redemption, this gives rise to a presumption that the CD has not been redeemed. The possession of the original CD, in this context, may create a prima facie case that the CD remains unredeemed, and this presumption must be rebutted by the Defendant. In other words, Miss Buckley is arguing that the Defendant carries the burden of disproving the inference that the CD was never redeemed.
- [9] However, Miss Buckley has relied on evidence that was not properly before the Court at the time of the hearing, and which remains absent from the record at the time of this judgment. The Claimant has submitted various documents in which the CD was attached, exhibited, or annexed, and this was done on at least four occasions. In each

instance, only the front of the CD was provided. Similarly, the Defendant has only produced a copy of the front of the CD. I raise this point to emphasize that neither party, in their submissions or documents, referred to the CD as the "original". Moreover, the pleadings do not indicate that the Claimant was in possession of the original CD; it was simply referred to as the CD.

- [10]** As the Court has only been provided with copies of the front of the CD from both parties, it was unable to determine whether either of the parties had the original and was not position to speculate on this matter. Furthermore, it is the duty of the Claimant to ensure that the relevant material is before the Court and that her pleadings accurately and adequately reflect its position.
- [11]** Should this evidence persuade the Court to resile from its position to strike out the claim despite not being properly before the Court? I am mindful that the Court must exercise caution when making orders on its own initiative and certainly orders which would strike out the claim.
- [12]** In general, courts have broad case management powers, which include the ability to strike out claims under specific circumstances (such as if the claim discloses no reasonable grounds for action). If a party introduces new evidence that is relevant to the case, the Court may decide to allow that evidence to be considered before proceeding with any order to strike out the claim. The introduction of new evidence may also lead the Court to reconsider its initial position or even adjourn the matter to allow both parties to address the new evidence.
- [13]** Moreover, if the evidence is significant enough to affect the outcome of the case or the fairness of the proceedings, the Court may determine that striking out the claim is not in the interests of justice. The Court's duty is to ensure that the proceedings are disposed of justly and fairly, and if the new evidence is relevant to that goal, it may be more appropriate to permit it to be considered, rather than dismissing the claim outright.

[14] The Court is of the view that whilst the reverse of the document is not before the Court, the evidence which Miss Buckley purports that it contains is not new or fresh evidence. In reviewing the file to deliver this judgment, the Court came across a single paged letter from the Defendant to the holders of the CD dated December 9, 1992. It is reflected as thus –

...

*Dear Mrs. Wallace &/or Mrs. Marsh*

*Enclosed is your **Certificate of Deposit as follows:***

**FCD No. 865 – US\$ 18, 818.18**

***Upon maturity of the said Certificate of Deposit please remember to attach your signature on the reverse side and remit same to our office for encashment.***

*Kindly sign and return the enclosed copy letter in acknowledgement of your receipt.*

*Yours sincerely,*

**PAN CARIBBEAN MERCHANT BANK LIMITED**

...

[emphasis supplied]

[15] The Court has to consider this evidence in light of Miss Buckley's submissions. A determination was made that there were no triable issues based on the Court's assessment of the evidence that was before it at the hearing of the summary judgment applications. This was done without realizing that there may be material on the reverse of the CD which could raise a triable issue. In these circumstances, the matter would need to proceed to trial.

[16] Having reached this conclusion, the Court finds it unnecessary to address Miss Larmond's submissions in detail. Miss Larmond has argued that, despite the challenges faced by the Defendant, they may still be able to mount a defence, particularly since evidence related to the CD could be presented through viva voce testimony. This could potentially lead to the inference that the Defendant is inviting the Court to conclude that the CD was, in fact, redeemed. The Court acknowledges that

this is a possibility, and as such, it will refrain from making any orders on its own initiative to strike out the Defence.

### **Should the matter remain in the general Civil Court?**

[17] This came into question for the Court when it considered the best way forward for the proceedings. Rule 71.3 of the Civil Procedure Rules 2002 sets out the type of matters which are considered to be “Commercial Claims” or for which “Commercial Proceedings” can be commenced. The Rule States:

*“71.3 In this part “commercial Claim” includes any case arising out of trade and commerce in general and any case relating to –*

- (a) admiralty proceedings*
- (b) contracts relating to ships and shipping;*
- (c) contracts relating to aircraft;*
- (d) the international carriage of goods by land, sea, air or pipeline;*
- (e) the exploitation of oil and gas reserves;*
- (f) insurance and reinsurance;*
- (g) banking, negotiable instruments, financial services and international credit;*
- (h) the purchase and sale of commodities;*
- (i) hire purchase transactions;*
- (j) the operation of international markets and exchanges;*
- (k) the construction and performance of business documents and contracts including agency;*
- (l) questions connected with or arising from commercial arbitrations;*
- (m) franchising agreements; and*
- (n) any other matter or any question of facts or law which is particularly suitable for decision by a judge of the Commercial Division.*

[18] Mangatal J in **Supreme Ventures Ltd v Camiele Bisseney (t/a Camiele’s One Stop)** [2013] JMSC Civ 71, at paragraph 6, indicated that in addition to that which is outlined above, the Court must look at the nature and of the dispute to determine whether:

- a. The parties are engaged in trade or commerce and the issue is one which arises out of a business dispute; OR*
- b. The dispute falls within one of enumerated category (a-m); OR*
- c. The substance of the matter is sufficiently specialized to justify being heard by a judge with expertise in that area (as contemplated by the umbrella clause at n).*

[19] The Court has reviewed this matter in accordance with the categories and criteria set out in **Supreme Ventures Ltd v Camiele Bisseny (t/a Camiele's One Stop)** *supra* and the CPR. The Court is of the view that this is an appropriate case for transfer to the Commercial Court. This conclusion is based on several factors, including, but not limited to, the need for the expertise of the judges in the Commercial Court (CPR 71.3(n)), the fact that the case involves banking practices related to CDs and concerns banking instruments (CPR 71.3(g)).

[20] Additionally, I adopt the views of Mangatal J, at paragraph 15 of her judgment in **Supreme Ventures Ltd v Camiele Bisseny (t/a Camiele's One Stop)** *supra* and apply them here. She stated –

*... I agree... that when interpreting Rule 71.3, the Court must have regard to the overriding objective of dealing with cases justly. This includes rule 1.1(e) which speaks to the Courts need to allocate an appropriate share of the Courts resources, whilst taking into account the need to allot resources to other cases. The Commercial Court should therefore not be used to secure a practical advantage for claims which bear no real commercial interest. If such matters were allowed to cloud the list, it would ultimately defeat the very essence of what the Commercial Court is to represent and the vital role it was designed to perform. However, the present matter in my judgment falls squarely within the meaning of commercial claim as set out in Rule 71.3 of the CPR... I see no harm, indeed it would be just, to deal with this matter by having it transferred to the Commercial List...*

## **ORDERS**

[21] In view of the foregoing and the findings of the Court, the following Orders are made:

1. This Claim is to be transferred to the Commercial List.
2. A sealed copy of the Claim Form filed on the 10<sup>th</sup> day of May 2007 is to be up-stamped and filed in the Registry of the Commercial Division.
3. No Orders as to Costs.
4. The Claimant's Attorney-at-Law is to prepare, file and serve the Orders herein.