

AM/c

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2008HCV03821

| | | |
|---------|-------------------------|------------------|
| BETWEEN | VALDA ORMSBY | CLAIMANT |
| AND | WORLD WISE PARTNER LTD. | FIRST DEFENDANT |
| AND | NOEL STRACHAN | SECOND DEFENDANT |

IN CHAMBERS

Charmaine Patterson instructed by Charmaine Patterson and Associates for the claimant

Nicosie Dummett instructed by Townsend, Whyte and Porter for the first defendant

September 30, 2009 and January 22, 2010

APPLICATION TO STRIKE OUT CLAIM - BREACH OF CONTRACT
COMMENCED BY FIXED DATE CLAIM FORM - RULES 8.2, 9.6 (1), (2),
10.2, 26.3 (1), 26.9 (2) (3)

SYKES J.

1. The defendants have applied for the striking out of the claim against them. Both defendants say that the claim is in breach of rule 8 (2) of the Civil Procedure Rules ("CPR"). The second defendant specifically argues that the claim against him be struck because no claim is alleged against him. Both defendants also say that the action should have begun by claim form and not a fixed date claim form. The reason advanced is that the claim is likely to involve a substantial dispute of fact.

The facts

2. In this matter, the claimant, Miss Valda Ormsby, has brought a claim by fixed date claim form against, WorldWise Partners Ltd. ("WorldWise"), the first defendant, and Mr. Noel Strachan, the second defendant. The claim was supported by affidavit of Miss Ormsby.
3. In the fixed date claim form, Miss Ormsby is claiming damages for breach of contract and interest. She alleges that pursuant to a contractual arrangement with WorldWise she gave WorldWise three separate sums of money totaling US\$148,503.26 to invest. On April 24, 2008, she asked that the investment accounts be closed and her money returned to her. She alleges that WorldWise has only repaid US\$66,988.31.
4. On August 15, 2008, an order was made ordering both defendants to give an account for the outstanding balance owing within 14 days of the order. The defendants were ordered to provide proof that they are capable of paying the balance outstanding not later than August 29, 2008. The fixed date claim form was set for hearing on September 16, 2008.
5. On September 16 the claim was adjourned to September 23, 2008. It was further adjourned to September 26, then to February 2, 2009. Miss Ormsby claims that at some point WorldWise produced a document acknowledging the debt and that as of May 2008, the debt was US\$328,249.95. By August 2008, the debt was said to be US\$405,286.27.

The submissions

6. Miss Dummett submitted that the general rule is that claims are begun by claim form (see rule 8.1 (1) of the Civil Procedure Rules ("CPR")). She submitted that a fixed date claim form can only be used in the circumstances indicated by rule 8.1 (4) of the CPR. It was further submitted that the only applicable rule is rule 8.1 (4) (d) and that rule only applies where the case is unlikely to involve a substantial dispute of fact. Now that it has turned out, counsel submitted, that there will be substantial dispute as to fact, then the originating document was incorrect. She concluded by submitting that the only appropriate remedy is to strike out the fixed date claim form.
7. The basis for this remedy, according to Miss Dummett, is rule 26.7 (2) which states that "where a party has failed to comply with any of these Rules, ...

unless the party in default applies for and obtains relief from the sanction" the remedy is a striking out because the wrong originating process is incurably bad.

8. Miss Dummett also submitted that since the claimant has not applied for relief from sanction then there is no relief that can be granted by the court, that is to say, the court cannot order that the fixed date claim form be treated as if it were a claim form.
9. There is also a second aspect to this case. Miss Dummett submitted that the claimant has not alleged in her fixed date claim form or affidavit any actionable wrong against Mr. Noel Strachan. This point was conceded by Miss Patterson and accordingly the claim against him is struck out.

Response

10. There is no material, other than counsel's say so, that the case involves substantial dispute as to fact. This is not very satisfactory. Although it may be considered unusual to begin a claim for breach of contract by way of fixed date claim form, it is by no means prohibited by the rules. If the claimant has made a thorough assessment and formed that view then it appears that the rules do permit the action to be commenced by fixed date claim form.
11. The fact that the defendants have belatedly responded and indicated that there will be substantial dispute as to facts, cannot ex post facto, make the originating process incurably bad. The response of the defendants now mean that the court now has to examine the matter, in light of the information provided, and then decide how best the case should be managed.
12. The originating procedure in this case is not a nullity. The court is now empowered with wide case management powers to deal with the case justly so that the real matters in dispute can be identified. Barren procedural dispute are no longer encouraged. This is not to say that procedure is unimportant but the dispute in this case is not one capable of producing the result sought by the defendants.

Disposition

13. It is ordered that:

- a. Claim against second defendant struck out.
- b. The fixed date claim form be treated as if begun by claim form;
- c. The claimant to serve particulars of claim within 21 days of the date of this order.
- d. The first defendant to file a defence within 42 days after service of the particulars of claim.
- e. Costs of this application and costs thrown away to the claimant to be agreed or taxed.
- f. Costs to be determined on an indemnity basis.

14. I have decided to make the costs order that I have because an examination of the file shows that both defendants were represented by counsel very early in the day and appeared at chambers on at least two prior occasions and no issue was raised on the question of whether the claim should have commenced by claim form or fixed date claim form. In fact, one got the distinct impression that the defendants were accepting the allegations of the claimant. So much so that the Supreme Court made orders on previous occasions, against both defendants, when the matter was before the court and the defendants did not give any indication that they did not accept the jurisdiction of the court to make those orders. One of those orders was that the defendants were to provide proof that they could repay Miss Ormsby.

15. This application is quite late in the day. Miss Dummett justified this position by submitting that the defendants did not respond to the fixed date claim form because they were of the view that the matter was not properly commenced therefore, there was nothing to which they were to respond.

16. This position by Miss Dummett is at odds with the previous position taken by the defendants where they attended chambers and acquiesced in orders being made and they even made attempts to comply with the order. It would seem to me that this attitude to litigation taken by the defendants should be condemned in the strongest terms. It seems to me that this is an

appropriate case for the costs to be determined on an indemnity basis and I so order.