CL45/2021

IN THE SUPREME COURT

TURKS AND CAICOS ISLANDS

BETWEEN

DRAG HOLDINGS LTD.

First Plaintiff

PAPARAZZI LTD.

Second Plaintiff

-and-

THE PROPRIETORS, STRATA PLAN NO.57

Defendant

DECISION

Before:	**The Registrar**
Appearances:	**Mr. Craig Oliver for the Plaintiffs/Respondent**
	Ms. Monique Allan for the Defendant/Applicant
Hearing Date:	**30th May 2024**
Venue:	**Registrars Chambers**
Delivery Date :	**30th July 2024**

Striking out - Order 18 r. 19 – No Reasonable Cause of Action- Scandalous, Frivolous and Vexatious – Prejudice – Order 14A

Cases

Hubbuck v Wilkinson [1899] 1 Q.B

Wenlock v Moloney [1965] 2 All ER 871

Three Rivers District Council v Governor and Company of the Bank of England [2001] UKHL 16

Drummond-Jackson v British Medical Association [1970] 1 WLR 688;[1970] 1 All ER 1094, CA)

Davey v Bentinck [1893]

Moore v Lawson (1915) 31 TLR 418, CA; Wenlock v Moloney [1965] 1 WLR 1238, [1965] 2 All ER 871, CA)

McDonald's Corporation v Steel [1995] 3 All ER 615

M4 Investments Inc v Clico Holdings (Barbados) Ltd (2004) 68 WIR 65

Letang v Cooper [1965] 1 QB 232 at 242

Moore v Lawson (1915) 31 TLR 418, CA;

Wenlock v Maloney [1965] 1 WLR 1238; [1965] 2 All ER 871, CA)

Owen Sim Liang Khui v Piasau Jaya Sdn Bhd and Another [1996] 2 LRC 578

Bandar Builder Sdn Bhd v United Malayan Banking Corp Bhd [1993] 3 MLJ 36

CL 41/22 Mylande Alfred v Van's Auto Ltd

Fatima Cox v Gloria Cox and anor CL32/2021

Royal Bank of Scotland International Ltd v JPSPC 4

Turquand v Fearon (1879) 40 L.T 543

London Corp. v Horner (1914) 111 L.T 512

Castro v Murray (1875) 10 Ex 213

Siddell and another v Smith Cooper & Partners (a firm) Follows and another v Smith Cooper & Partners (a firm) DIG_98D761[1998] All ER (D) 761

Coulthard v Neville Russell [1998] PNLR 276

E (minor) v Dorset County Council [1995] 2 AC 685,

Lonrho plc v Fayed [1992] 1 AC 448at 469-470

Korso Finance Establishment Anstalt v John Wedge CA Transcript no. 94/387

E (A Minor) v Dorset C.C [1995] 2 A.C 633

Hiranand v Harilela and others 2000 3 ITELR 297

Microsoft Corporation v SM Summit Holdings Ltd [1999] 4 SLR 529

TSC Europe (Uk) Ltd v. Massey [1999] IRLR 22

X v Bedfordshire County Council [1995] 2 A.C 633

APPLICATION

1. By Summons dated 25th March 2024 the Defendant filed an application pursuant to Order 18 Rule 19 and Order 14A that the 1st and/or 2nd Plaintiffs' claim be struck out as follows:-
   a. *Pursuant to Order 18 Rule 19(1)(a) and/or (b) and/or (c) and/or (d) and/or under the inherent jurisdiction of the Court, the First and/or Second Plaintiffs' claim be struck out; further or alternatively,*
   b. *Pursuant to Order 14A, the 1st and/or 2nd Plaintiffs' claim herein be struck on the grounds that the claim is misconceived and bound to fail; and that the dismissal will dispose of the Plaintiffs' claim, or a substantial part of it, in its entirety; and*
   c. *There be such further or other relief as this Court thinks fit*

2. The application is supported by Affidavit of Richard Francis Celio.

BACKGROUND

3. The writ and statement of claim was filed on the 25th of April 2021. A first amendment was filed on the 9th of June 2021. A second amendment was filed on the 16th of December 2021.

4. The 1st Plaintiff is the registered proprietor of a property referred to as Building D forming part of the Queen Angel Luxury Condominium Resort (The Queen Angel) and the 2nd Plaintiff was at the material time owner of a business known as Paparazzi which operates from Building D. The Defendant (the Corporation) is the Strata Corporation and hence was at all material times the registered proprietor of the common property of The Queen Angel.

5. The 1st Plaintiff claims that the Corporation failed in its obligation to keep the exterior of Building D in a state of good and serviceable repair and that it failed to properly maintain same pursuant to the bye-laws of the Corporation. In order to maintain the aesthetics of the exterior of Building D the 1st Plaintiff sought the permission of the Corporation to arrange for the painting of the exterior of Building D, who through its Executive committee agreed to the painting of the exterior wall and directed that it be painted in white.

6. Based on this the 2nd Plaintiff on the instructions of the 1st Plaintiff hired Waves Realty Ltd to redecorate the exterior of Building D at the cost of $38,516.50 and which said sum was paid by the 2nd Plaintiff to Waves Realty Ltd. The 1st Plaintiff is now contractually indebted to the 2nd Plaintiff in the sum of $38,516.50 and seeks recompense from the Defendant for this sum which the Defendant denies is owed. The Defendant also denies that the exterior wall is considered common property.

7. On the 18th of February 2022 the Defendant entered its defence denying all claims and claiming a set off and counterclaim. It claims that as at 11th February 2022 the 1st Plaintiff was indebted to the Defendant in the sum of $19,543.39 with interest at the rate of 18% per annum. In the affidavit of Richard Francis Celio he states that as at 29th February 2024 the 1st Plaintiff was indebted to the Defendant in the sum of $22,489.16.

8. The 1st Plaintiff denies all claims in the Counterclaim and puts the Defendant to strict proof.

SUBMISSIONS

9. Ms. Allan for the Defendant submits that the external walls are the responsibility of the 1st Plaintiff and were not the responsibility of the Defendant.

10. Ms. Allan submits that the pleadings disclose no basis upon which the Defendant can be held to be indebted to the 2nd Plaintiff as the claim on its face discloses no reasonable cause of action against the Defendant and should be struck out pursuant to Order 18 Rule 19 (1) (a).

11. In respect of O. 18 r. 19 (1) (b), (c), (d) and the inherent jurisdiction of the court, Ms. Allan submits that the Plaintiffs claim is fatally flawed as their definition of common property is predicated on an error . She refers to paragraph 1.7 of the bye-laws which must be read together with the contents of the Strata Plan. "*The strata plan defines the boundary of a strata lot as the centerline of common wall and the outside of external walls. In the premises, the external surface of an external wall is part of a Strata lot"*. Therefore, the Plaintiffs are wrong to allege that external walls are common property and therefore there can be no obligation on the Defendant to paint them.

12. Ms. Allan submits that the action has no sound basis in law or fact and should be struck out on the alternative grounds that it is scandalous, frivolous or vexatious, it may embarrass or delay the fair trial of the action and is an abuse of process.

13. In respect of O.14A, Ms. Allan requests that the court exercise its jurisdiction to dispose of the claim on a point of law or construction.

14. Mr. Oliver for the Plaintiffs in response took the point that pursuant to Note 18/19/3 in the White Book a striking out application can be made at any time but should *"always been (sic) made promptly, and as a rule before the close of pleadings"*. He submits that the Defendant's application was not made promptly and should be dismissed.

15. Alternatively, Mr. Oliver submitted that as pleaded the Executive Committee of the Defendant Strata authorized the painting of Building D and that that expenditure would then be reimbursed, this fact is denied by the Defendants. Mr. Oliver therefore submits that this is *'clearly a dispute as to the facts… which should be dealt with at trial"*

16. He also submits that the Defendant avers the external walls of Building D are not common property whereas the Plaintiff argues that they are, therefore a factual dispute also exists concerning this point. He referred to note 18/19/10 which states: "*A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered. So long as the statement of claim disclose some cause of action, or raise some question fit to be decided by a Judge…. the mere fact that the case is weak, and not likely to succeed, is no ground for striking it out".*

17. Mr. Oliver further submits that the Defendant's counsel has not stated how the statement of claim is scandalous and furthermore that the ground of frivolous or vexatious is unsustainable, the court was referred to *Young v Holloway [1895] P 87.*

18. In response Ms. Allan submitted that there was no delay on the part of the Defendant instead it is the Plaintiffs who are guilty of delay as the Plaintiffs were totally inactive from 18th March 2022 to 15th March 2024. She further submitted that the Plaintiffs did not plead a representation that the Defendant

agreed to re-imburse the Plaintiffs. In respect of common property Ms. Allan submits that the "*court is therefore, respectfully, urged to find that the documents are clear that the external walls of a Strata Unit are the property of the owner of the Strata Unit."* She then submits that the *"alleged representation nor the definition of Common property raises a triable factual issue".*

19. Ms. Allan, in respect of the 2nd Plaintiff, submits that there is no pleaded relationship between the 2nd Plaintiff and the Defendant and therefore the claim discloses no cause of action against the Defendant as there is no issue fit to be decided by a Judge arising from the 2nd Plaintiff's pleaded case.

THE LAW

Order 18 Rule 19 1 a – discloses no reasonable cause of action

20. In *Hubbuck v Wilkinson [1899] 1 Q.B Lindley M.R* stated that this summary application is *"only appropriate to cases which are plain and obvious, so that any Master or Judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks".* In *Wenlock v Moloney [1965] 2 All ER 871* Danckwerts LJ said of the inherent power of the court to strike out "*this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way.*"

21. In *Three Rivers District Council v Governor and Company of the Bank of England [2001] UKHL 16* Lord Hutton extracted a passage from Note 18/19/10 with reference to r. 19(1) (a) " A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered (per Lord Pearson in *Drummond-Jackson v British Medical Association [1970] 1 WLR 688;[1970] 1 All ER 1094, CA*).So long as the statement of claim of the particulars (*Davey v Bentinck [1893]* disclose some cause of action, or raise some question fit to be decided by a judge or a jury, the mere fact that the case is weak, and not likely to succeed, is no ground for striking it out (*Moore v Lawson (1915) 31 TLR 418, CA; Wenlock v Moloney [1965] 1 WLR 1238, [1965] 2 All ER 871, CA*)" He continued that "if a plaintiff would be entitled to judgment if he were successful in proving the matters alleged in his pleadings, the statement of claim could not be struck out under r.19(1)(a) on the ground that he had no prospect of adducing evidence to prove

matters which he alleged instead a defendant could only strike out a statement of claim and obtain an order for dismissal under r. 19 1 (b) and or (d)". This is illustrated in the case of *McDonald's Corporation v Steel [1995] 3 All ER 615* where the Court of Appeal considered the correct approach to an application under Ord 18 r.19 (d) to strike out a pleading for abuse of process and held at p623 E-F that the power to strike out was a draconian remedy which was to be employed only in clear and obvious cases where it was possible at an interlocutory stage and before full discovery that a particular allegation was incapable of being proved.

22. In *M4 Investments Inc v Clico Holdings (Barbados) Ltd (2004) 68 WIR 65* the Barbados Court of Appeal with the panel consisting of Colin Williams CJ (Ag), Peter Williams JA and Moore JA (Ag) considered the issue of striking out under the Barbados RSC 1982 Ord 18, r 19 which is identical to the former English rules. They referred to the quote from Millett J in the Lonrho case [1991] 4 All ER 961 which states '*On an application to strike out a statement of claim under Ord 18, r 19(1)(a), on the ground that it discloses no reasonable cause of action, the truth of the allegations contained in the statement of claim is assumed and evidence to the contrary is inadmissible. This is because the court is invited to strike out the claim in limine on the ground that it is bound to fail even if all such allegations are proved. In such a case the court's function is limited to a scrutiny of the statement of claim. It tests the particulars which have been given of each averment to see whether they support it, and it examines the averments to see whether they are sufficient to establish the cause of action. It is not the court's function to examine the evidence to see whether the plaintiff can prove his case, or to assess its prospects of success. 'Where, however, the application is made under Ord 18, r 19(1)(b) or (c), or the inherent jurisdiction of the court on the ground that the claim is "vexatious" or an abuse of the process of the court, evidence is admissible to show that this is the case. But the test is a high one. A plaintiff is entitled to pursue a claim in these courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the court, it must be allowed to proceed to trial.*'

23. The Barbados Court of Appeal explained reasonable cause of action in these terms "'A cause of action is simply a factual situation the existence of which entitles one party to obtain from the court a remedy against another person' per Diplock LJ in *Letang v Cooper [1965] 1 QB 232 at 242"*.

24. They continued "We can best reinforce our decision by quoting from the judgments in *Wenlock v Moloney [1965] 1 WLR 1238*, in which Sellers LJ said:

> 'On the face of it, the writ and statement of claim did disclose a cause of action … If, as here, the only ground on which the action can be said to disclose no reasonable cause of action is that it is not one which is likely to succeed, then I doubt whether affidavit evidence was admissible. There have been cases where affidavits have been used to show that an action was vexatious or an abuse of the process of the court but not, as far as we have been informed or as I know, where it has involved the trial of the whole action when facts and issues had been raised and were in dispute. To try the issues in this way is to usurp the function of the trial judge ... Our practice is to have discovery and to hear the case on oral evidence subject to cross-examination. … It may well be a case which will fail and what has taken place may well discourage the plaintiff from continuing. But I feel no doubt that the procedure has been wrong and that the plaintiff's action cannot be stifled at this stage.'

25. In *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd and Another [1996] 2 LRC 578* Gopal Sri Ram JCA in writing the lead judgment stated the power to summarily strike out a pleading must be sparingly used, he referred to the judgment Mohamed Dzaiddin SCJ in *Bandar Builder Sdn Bhd v United Malayan Banking Corp Bhd [1993] 3 MLJ 36* at 44:

> 'This court as well as the court below is not concerned at this stage with the respective merits of the claims. But what we have to consider is whether the counterclaim discloses some cause of action and, likewise, whether the defence to counterclaim raises a reasonable defence. It has been said that so long as the pleadings disclose some cause of action or raise some question fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out (see Moore v Lawson (1915) 31 TLR 418 and Wenlock v Moloney [1965] 2 All ER 871, [1965] 1 WLR 1238).'

26. In *Siddell and another v Smith Cooper & Partners (a firm) Follows and another v Smith Cooper & Partners (a firm) DIG 98D761[1998] All ER (D) 761* Clarke LJ referred to *Coulthard v Neville Russell [1998] PNLR 276* and stated "*In giving the only judgment, with which Kennedy and Judge LJJ agreed, Chadwick LJ set out (at pp 288-289) the relevant principles as stated in this way by Sir Thomas Bingham MR in E (minor) v Dorset County Council [1995] 2 AC 685, where he said this (at p 693 H): It is clear that a statement of claim*

should not be struck out under RSC Order 18 rule 19 as disclosing no reasonable cause of action save in clear and obvious cases, where the legal basis of the claim is unarguable or almost incontestably bad. It was argued by Mr Ter Haar, for Richard, that his procedure was inappropriate in a case such as this, raising, issues which were novel and difficult. Relying in particular on Lonrho plc v Fayed [1992] 1 AC 448at 469-470, he urged the undesirability of courts attempting to formulate legal rules against a background of hypothetical facts and pointed to the potential unfairness to plaintiffs if their cases were finally ruled upon before they were able, with the benefit of discovery, to refine their factual allegations. If a summary procedure for determination of legal issues were to be adopted at all, it should (he submitted) follow joinder of issues on the pleadings and discovery, and should be by decision of an issue of law suitable for determination without a full trial under RSC, Ord 14A. The defendants answered that their applications do in effect raise an issue of law for decision by the court: if they cannot show the plaintiffs' claims to be plainly bad, then their applications must fail; but if they can show that, then it is preferable in the interests of all concerned that the claims should be dismissed now before the costs of a full trial are incurred. There is great force in both these arguments. I share the unease many judges have expressed at deciding questions of legal principle without knowing the full facts. But applications of this kind are fought on ground of a plaintiff's choosing, since he may generally be assumed to plead his best case, and there should be no risk of injustice to plaintiffs if orders to strike out are indeed made only in plain and obvious cases. This must mean that where the legal viability of a cause of action is unclear (perhaps because the law is in a state of transition), or in any way sensitive to the facts, an order to strike out should not be made. But if after argument the court can be properly persuaded that no matter what (within the reasonable bounds of pleading) the actual facts the claim is bound to fail for want of a cause of action, I can see no reason why the parties should be required to prolong the proceedings before that decision is reached."

27. After setting out that passage Chadwick LJ concluded his judgment in this way (at p 28l): "*In my view the liability of professional advisers, including auditors, for failure to provide accurate information or correct advice can, truly, be said to be in a state of transition or development. As the House of Lords has pointed out, repeatedly, this is an area in which the law is developing pragmatically and incrementally. It is pre-eminently an area in which the legal result is sensitive to the facts. I am very far from persuaded that the claim in the present case is bound to fail whatever, within the reasonable confines of the pleaded case, the facts turn out to be. That is not to be taken as an*

expression of view that the claim will succeed; only as an expression of my conviction that this is not one of those plain and obvious cases in which it could be right to deny the plaintiffs the opportunity to attempt to establish their claim at a trial."

28. In *CL 41/22 Mylande Alfred v Van's Auto Ltd* Hylton J as he then was in considering an application under O.18 r.19 referred to the case of *Fatima Cox v Gloria Cox and anor CL32/2021* explained "In order to succeed on an application to strike out an action on this ground, a defendant must satisfy the Court that even if the plaintiff proves all the pleaded allegations, the action would still fail. I must therefore proceed on the premise that if the action goes to trial, Fatima will be able to prove all the allegations in her statement of claim".

29. The learned Judge also referred to the Privy Council case of *Royal Bank of Scotland International Ltd v JPSPC 4* where the learned Law Lords summarized the law in this way "An application to strike out should not be granted unless the court is certain that the claim is bound to fail… a claim should not be struck out unless it is effectively unarguable, has no chance of succeeding and as such is a plain and obvious case". In Mylande (supra) the learned Judge ruled that the allegations of the Plaintiff were "not incredible on their face and on this application the court has to proceed on the basis that the Plaintiff might prove those allegations at trial.

30. In Bullen & Leake and Jacob's Precedents of Pleadings (12th Edn): *'The factual situation on which the plaintiff relies to support his claim must be capable of being recognized by the law as giving rise to a substantive right capable of being claimed or enforced against the defendant, and in this respect there is a close connection between the procedural law relating to the pleading of the statement of claim and the substantive law relating to what is recognised as a legally viable cause of action.'*

31. A claim can only be struck out if it discloses no reasonable cause of action. 'Reasonable' has been explained in the Supreme Court Practice 1999 at note 18/19/10 as follows: Principles – A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleadings are considered (per Lord Pearson in Drummond-Jackson v British Medical Association [1970] 1 WLR 688; [1970] 1 All ER 1094, CA). So long as the statement of claim or the particulars (Davey v Bentinck [1893] 1 QB 185) disclose some cause of action, or raise some question fit to be decided by a judge

or a jury, the mere fact that the case is weak, and not likely to succeed, is no ground for striking it out (*Moore v Lawson* (1915) 31 TLR 418, CA; Wenlock v Maloney [1965] 1 WLR 1238; [1965] 2 All ER 871, CA).'

32. The authorities above, all adopt a reserved and cautious approach to the grant of leave to strike out a claim. I have considered these authorities. They suggest that on the facts as pleaded if there is found to be a reasonable cause of action however minute or weak then the pleadings should not be struck out. Striking out can only take place in plain and obvious cases where a reasonable cause of action cannot be established. Three Rivers (supra) explained "reasonable cause" to mean some chance of success when only the allegations in the pleadings are considered. Drummond (supra) likened "reasonable cause of action" to the statement of claim disclosing some cause of action or raising some question to be decided by a Judge.

33. McDonald's Corporation (supra) found that striking out is a draconian remedy that should only be employed in plain and obvious cases where it is possible at an interlocutory stage and before full discovery that a particular allegation was incapable of being proved.

34. M4 Investments Inc. in reference to Lonrho plc (supra) said that the Defendant must show that the Plaintiff's claim is bound to fail. In support of this as stated in Bullen & Leake there must be a close connection between the procedural law relating to the pleadings and the substantive law related to the pleaded cause of action.

35. The Privy Council in Royal Bank of Scotland (supra) raised the bar with the requirements to succeed in a striking out. They ruled that it must be proven by the applicant, that the claim is bound to fail, it is effectively unarguable, has no chance of succeeding and as such is a plain and obvious case. In my view, the only instances in which these requirements can be satisfied are cases where the factual pleadings in respect of a specific cause of action are essentially non-existent. Cases of bad or weak pleadings in my view cannot fall within these requirements, as bad or weak pleadings can be amended.

Order 18 Rule 19 1 b – it is scandalous, frivolous and vexatious

36. This section refers to cases which are obviously frivolous or vexatious or obviously unsustainable. Note 18/19/16 provides that a judicial discretion must be used in determining whether the proceedings are vexatious Jeune P. in Young v Holloway (supra) states "the pleading must be so clearly frivolous that to put it forward would be an abuse of the process of the Court".

Order 18 Rule 19 1 c – ' tend to prejudice, *embarrass, or delay the fair trial of the action'*

37. Note 18/19/17states *"the rule is, of course... that the parties must not offend against the rules of pleading which have been laid down by the law; and if a party introduces a pleading which is unnecessary, and it tends to prejudice, embarrass and delay the trial of the action, it then becomes a pleading which is beyond his right"* see Knowles v Roberts (1888) 38 Ch.D 263. In Turquand v Fearon (1879) 40 L.T 543 Bramwell LJ stated "*mere proxility is not itself embarrassing, nor will a statement be struck out as embarrassing merely because the other party declares that it is untrue"*. In London Corp. v Horner (1914) 111 L.T 512 it is stated that a pleading is not embarrassing because the law stated or reasons alleged may be bad, unless it is clear on the face of allegations that they are irrelevant, they will not be struck out on that ground.

Order 18 Rule 19 1 d – abuse of the process of the court

38. In this context, the process of the court must be used bona fide and properly and must not be abused. In Castro v Murray (1875) 10 Ex 213 it was stated that: *"The Court will prevent the improper use of its machinery and will in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation*."

Inherent jurisdiction

39. Apart from all Rules the court has an inherent jurisdiction to stay all proceedings before it which are frivolous, vexatious or an abuse of its process, this includes striking out. This jurisdiction is exercised by judicial discretion and must only be applied where it is perfectly clear that the plea cannot succeed.

O. 14A – determine the meaning of law and construction – 14A to be used only where an issue can be heard summarily which would determine the proceedings summarily.

40. This Order allows the court to determine any question of law or construction at any stage of proceedings. The requirements are as follows:
    a. The Defendant must have given notice of intention to defend.
    b. The question of law or construction is suitable for determination without a full trial. This issue was considered in Korso Finance Establishment Anstalt v John Wedge CA Transcript no. 94/387 where the following principles were established:-
        i. An issue is a disputed point of fact or law relied on by way of claim or defence.
        ii. A question of construction is well capable of constituting an issue.
        iii. If the question of construction will finally determine whether an important issue is a dominant feature of the case, the court should proceed to determine the issue.
        iv. Respondents to an O.14A application are not allowed to contend that they should be allowed to hunt around for evidence.
    c. Such determination will be final as to the entire cause or matter or any claim therein
    d. The parties must have an opportunity to be heard on the question of law or must have consented to an order being entered.

41. In E (A Minor) v Dorset C.C [1995] 2 A.C 633 Sir Thomas Bingham M.R in considering the interrelation of striking out and O.14A expressed unease at *"deciding questions of legal principles without knowing the full fact"*. He continued however that *"If the legal viability of a cause of action is unclear… an order to strike out should not be made. But if after argument, the court can be properly persuaded that no matter what the actual facts are the claim is bound to fail, I see no reason why the parties should be required to prolong the proceedings."*

42. Hiranand v Harilela and others 2000 3 ITELR 297 concerned the existence of two wills both purportedly executed by the deceased Mr. Hiranand. The daughter-in-law (Appellant) argued the 1988 will was the valid will while the son (the beneficiary under the 1986 will) and the executors argued that the 1986 will was the valid will. The daughter-in-law sued the executors and beneficiary claiming the 1986 will was a forgery and that the 1988 will amounted to the creation of a trust. The respondents applied to the assistant registrar for determination of certain questions of law, he determined that the 1988 document was not valid for the purpose of creating a trust. The daughter-in-law appealed which was dismissed by the High Court. She appealed to the Court of Appeal.

43. One of the issues determined by the CA was whether the question was a proper one for determination under their O 14 r 12 which for all intents and purposes is the same as O 14A. They stated that in order to come within O14 r 12(1) the question must first be one suitable for determination without the need for a full trial. They continued *"The question here is a narrow one, and it is this—whether the 1988 document, being an unattested testamentary document and therefore invalid as a will, is in law capable of creating and/or evidencing a trust in relation to any property in the estate of the deceased. In considering this question we proceed on the assumption that what the appellant has pleaded is true, that is, that the 1988 document was executed by the deceased and is a genuine document. Our consideration of this question, therefore, does not entail any investigation of any facts. Hence, the absence or presence of other evidence capable of showing the existence of a trust in the estate of the deceased is completely irrelevant to this specific question."*

44. They also decided that O14 r 12 does not require that the determination will fully determine the entire cause or matter in the action and referred to the case of *Microsoft Corporation v SM Summit Holdings Ltd* [1999] 4 SLR 529.They ruled that " *the question whether the 1988 document is valid for the purpose of creating and/or evidencing a trust in the estate of the deceased is one suitable for determination under O14 r 12 (1) The determination of this question will fully resolve the issue as to whether an unattested testamentary document can in law create and/or evidence a trust in the estate of the deceased. On the basis of the pleadings that have been filed, this is clearly a disputed point of law involved."*

45. They ruled that there was no evidence submitted by the Appellant showing the existence of a trust and therefore dismissed the appeal.

46. In TSC Europe (Uk) Ltd v. Massey [1999] IRLR 22 one of the issues for determination was whether the court should decide under an O 14A application, as a matter of law, whether a contract is or is not in restraint of trade and if in restraint of trade, is it reasonable. In deciding on this issue the court firstly considered whether for the purpose of Order 14A the question of law to be determined under the Order has been stated in clear, careful and precise terms. The Judge came to the conclusion that there was a comprehensive factual basis for the issue to be determined and that there were no hypothetical or future facts. He referred to Korso (supra) and concluded that

the question of law is suitable for determination under Order 14A without a full trial of the action.

Discussion

47. The issues to be determined in this application are two-fold. Firstly whether the claim should be struck out under O18 r 19 and whether the claim is sufficient to be determined under O.14A.

Striking Out

48. The authorities suggest that to succeed under O18 r 19 1 (a) the Applicant must show that there is no reasonable cause of action and that the action is bound to fail. The burden of proving that an action should be struck is a high one. Where the pleadings disclose some cause of action or raise some question fit to be decided by a Judge, the mere fact that the case is weak and likely not to succeed at the trial is no ground for the pleadings to be struck out.

49. The main issues in this claim are whether the external wall of the Plaintiff's strata lot is considered to be common property and whether the Defendant promised to pay the 1st Plaintiff for any painting works to the said exterior wall. The claim is clearly an arguable one and I cannot say with certainty that it is bound to fail.

50. In addition to the striking out application, the Defendant has submitted that the 2nd Plaintiff's claim discloses no cause of action against the Defendant and should be struck out. The Plaintiffs claim that the 2nd Plaintiff is the owner of a business known as Paparazzi which operates from Building D which is owned by the 1st Plaintiff. For the purposes of this claim, the 1st Plaintiff hired the 2nd Plaintiff to arrange for the painting of the exterior wall of Building D. The 2nd Plaintiff hired Waves Realty Ltd at a cost of $38,516.50 which said sum was paid by the 2nd Plaintiff. The 1st Plaintiff now seeks recovery of that sum from the Defendant on the basis that it is common property and that the Defendant agreed to re-imburse the 1st Plaintiff for monies spent.

51. I do not find that any particulars were pleaded showing what if any claim exists against the Defendant by the 2nd Plaintiff. The pleadings do not reflect any contractual or other relationship between the 2nd Plaintiff and the Defendant. Therefore even though the burden to strike out is a high one, it has been satisfied in this case in relation to the 2nd Plaintiff's claim. There is no cause of

action between the 2nd Plaintiff and the Defendant and as a result has no chance of succeeding against the Defendant.

52. In respect of Order 18 Rule 19(1)(a) and/or (b) and/or (c) and/or (d) and/or under the inherent jurisdiction of the Court, this court is of the following views:-

    a. 19 (1) (a) - This court cannot say with certainty that the 1st Plaintiff's action will fail against the Defendant. Therefore considering the tests above and the pleadings there is a sufficient cause of action to allow this claim to proceed to trial.
    b. 19 (1) (b), (c) and (d) – I do not believe these grounds have been triggered and therefore cannot be used to strike out the 1st Plaintiff's claim.

Order 14A

53. The Defendant also filed an Order 14A application. Such application seeks the determination of a specific point of law. The Defendants application under Order 14A stated that "*Pursuant to Order 14A, the 1st and/or 2nd Plaintiffs' claim herein be struck on the grounds that the claim is misconceived and bound to fail; and that the dismissal will dispose of the Plaintiffs' claim, or a substantial part of it, in its entirety;*

54. Note 14A/2/7 of the White Book states that *"the summons should state in clear and precise terms what the question of law or construction which the court is required to determine…. The summons should also specify, with particularity if necessary, what judgment or order is being claimed upon the determination of the question of law or construction"*. TSC Europe (supra) stated "*that the question of law to be determined under the Order has been stated in clear, careful and precise terms*". The application as shown at paragraph 50 above did not make mention of any question of law to be decided neither were the questions of law clear, carefully and precisely stated.

55. During her oral submissions when this was pointed out to Counsel, she sought leave to amend her Summons to refer to paragraph 9 of her defence which states *"In the premises, the exterior of Building D is not Common Property. It is part of the strata lots owned by the First Plaintiff".* Even with this amendment, aside from the fact that the phraseology does not comport with that of a question, this statement is not sufficiently clear to make a

determination. Additionally, no indication has been given of what judgment or order is being claimed upon the determination of the question of law.

56. Assuming that it was made clear in the summons the exact question to be determined was whether the exterior wall was common property or not. In X v Bedfordshire County Council [1995] 2 A.C 633 it was said that "*where the law is not settled but is in a state of development it is normally inappropriate to decide novel questions on hypothetical facts*;" Therefore even if such a question was clear which is not the case, this court is of the view that the determination of this issue is one that should have the opportunity to be ventilated at trial.

57. Additionally, there are also two outstanding issues which includes the Plaintiff's claim for re-imbursement and the Counterclaim and Set Off filed by the Defendant. For this reason, I find that this matter is not suitable to be disposed of under O.14 A.

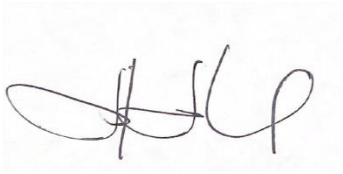
DISPOSITION

58. In the circumstances I find the following: -

a. that the threshold for striking out of the claim by the 2nd Plaintiff against the Defendant has been met. Therefore the 2nd Plaintiff's claim against the Defendant is struck out and the 2nd Plaintiff is struck out as a party to this action. The action continues with the claim of the 1st Plaintiff against the Defendant. Costs of the application to strike out the 2nd Plaintiff to be paid by the 2nd Plaintiff to the Defendant to be taxed if not agreed.

b. That this matter is not suitable to be disposed of under O.14A.

c. All other costs to be costs in the cause.



Registrar

30th July 2024