CL 80/2024

IN THE SUPREME COURT OF
THE TURKS AND CAICOS ISLANDS

BETWEEN:

DOUGLAS CRAWLEY

PLAINTIFF

AND

1. GR8 PROPERTIES ONE-BH LTD
2. WILLIAM BARISH

DEFENDANTS

DECISION

Before: The Hon. Registrar Narendra J. Lalbeharry
Appearances: Mr. Martin Green for the Applicant/Defendant
Mr. George Missick for the Plaintiff /Respondent

Hearing Date: 27th November 2024
Venue: Court 1 Supreme Court, Providenciales.
Handed Down: 24th January 2025

SUMMARY JUDGMENT - STRIKING OUT - ORD.14-ORD.18 R.19 - REMOVAL OF CAUTION -

Cases

Dunlop Pneumatic Tyre Company v New Garage and Motor Company [1915] AC 79
Parking Eye Ltd v Beavis [2015] UKSC 67
Stockloser v Johnson [1954] 2 WLR 439
Three Rivers District Council v Bank of England No. 3 [2001] UKHL 16
Hughes v Colin Richards & Co. [2004] EWCA Civ 266.
Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1998] AC 1
Beswick v Beswick [1968] AC 58
Cavendish Square Holding BV v Talal El Makdessi [2015 UKSC 67
American Cyanamid Co v Ethicon Ltd [1975] AC 396
S v Gloucestershire CC [2001] 2 WLR 909
Anglo-Italian Bank v Wells (1878) 38 L.T, 376
Roberts v. Plant [1895] 1 Q.B. 597, CA
Jones v. Stone [1894] A.C. 122.
Codd v Delap (1905) 92 L.T. 510 H.L
Doncaster Pharmaceuticals Group Ltd and Ors v Bolton Pharmaceutical Co 100 Ltd [2006] EWCA Civ 661
Swain v Hillman [2001] 1 AER 91
Hubbuck v Wilkinson [1899] 1 Q.B
Wenlock v Moloney [1965] 2 All ER 871
Drummond-Jackson v British Medical Association [1970] 1 WLR 688;[1970] 1 All ER 1094, CA).
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
Lonrho plc v Fayed [1991] 4 All ER 961
Letang v Cooper [1965] 1 QB 232 at 242.
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
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,
Mylande Alfred v Van's Auto Ltd. (CL 41 of 2022) [2022] TCASC 29 (26 August 2022)
Fatima Cox v Gloria Cox and anor CL32/2021
Royal Bank of Scotland International Ltd v JP SPC 4
Young v Holloway [1895] P 87
Holding Oil Finance Inc and Another v Marc Rich & Co AG and Others [1996] Lexis Citation 2672

Toumia v Evans (Secretary General of the Prison Officers Association) [1999] ALL ER (D) 262
Home and Overseas Insurance Co. Ltd v Mentor Insurance Co. UK Ltd (In Liquidation) [1990] 1 WLR 153
Dott v Brown [1936] 1 All ER 545
Jacobs v Booths Distillery Co. (1901) 85 L.T 262
Extraktionstechnik Gesellschaft fur Anlagenbau GmbH v Oskar [1984] 128 S.J 417
Casablanca Casinos Ltd. v Smith (CL 157 of 2008) [2009] TCASC 3 (14 September 2009)
Windsong Development Ltd. v Driscoll (CL 108 of 2007) [2012] TCASC 2 (16 July 2012)
Jermaine Jennings v Adlin Pierre (CL 21 of 2022) [2022] TCASC 25 (23 August 2022)
Gedeus v Selver (CL 51 of 2016) [2022] TCASC 28 (26 August 2022)
Sagicor Bank Jamaica Limited v Taylor Wright [2018] UKPC 12

BACKGROUND

1. By Writ and Statement of Claim filed on 10th July 2024 the Plaintiff claimed that by Agreements dated August 28th 2023 and September 15th 2023 the Defendants contracted with the Plaintiff for the purchase by him of parcel 60502/302 together with a unit constructed thereon ('the Property'), for the purchase price of $950,000.00. Between the period August 2023 and October 2023, the Plaintiff paid the sum of $200,000.00 towards the purchase of the Property.

2. By notice in writing dated November 21st 2023 the Defendants' Attorney purported to cancel the agreement pursuant to breach of certain terms in the September 15th agreement, forfeiting all sums paid by the Plaintiff. The Plaintiff claims that any failure to pay an instalment on his part was without intention to repudiate the agreement, he also alleges duress, without any supporting facts, against the Defendants.

3. The Plaintiff seeks specific performance of the Agreement. In the alternative he claims that the sum paid exceeds the deposit payable under the contract and therefore the total amount paid should not be seen as a penalty and therefore recoverable.

4. The Defendant avers that the Plaintiff did not pay the balance of $750,000.00 by 20th November 2023 as contracted, therefore breaching the contract which provided that time was of the essence. The Defendant avers that pursuant to the contract he is entitled to forfeit the deposit and treat the contract as terminated.

5. On the 27th November 2023 the Plaintiff registered a caution against the Property. The Defendants counterclaimed for the removal of the caution and damages pursuant to s. 129 (i) of the Registered Land Ordinance including exemplary damages.

6. In reply the Plaintiff asserts that the "time being of the essence" clause was waived by mutual agreement, therefore the failure to meet the 20th November deadline did not constitute a breach. He also asserts that the failure to pay was a result of unforeseeable delays in external financing which the 1st Defendant was aware of and that an extension of time was orally agreed.

7. In his Defence to the Counterclaim the Plaintiff avers that the caution was lodged to prevent the Property being dealt with in a manner adverse to the Plaintiff's interests, he also denies that the Defendant has suffered any loss or damage including exemplary damages.

THE APPLICATION

8. On 16th October 2024 the Defendants filed a summons applying for *"final judgment on its claim for removal of the caution and interlocutory judgment on its claim for damages and also its claim to strike out the statement of claim herein and dismiss the action on the grounds set out in the affidavit of the Second Defendant".* At a hearing on 14th November 2024 an issue was raised by the Court as to the content and form of the Defendants' application.

9. An amended summons was filed on the 26th of November 2024 seeking removal of the caution under s. 129 (i) of the RLO, and an interlocutory judgment under O.14 r.1 on the ground that the Plaintiff has no defence to the counterclaim. He also sought to strike out the Plaintiff's claim under O.18 (19) (a) and (b) on the ground that it discloses no reasonable cause of action and is scandalous, frivolous and vexatious.

10. In support of their application they rely on the affidavit of William Barish, the 1st Defendant. Mr. Barish states that the Plaintiff defaulted on the agreement signed on 15th September 2023 which made reference to two payments before the signing of the agreement. He also states that there was never any

agreement to extend time and that the Plaintiff was notified on 21 November 2023 that they had elected to forfeit the deposit.

11. Mr. Barish states that on 27 November 2023 his Attorney wrote proposing to extend the payment deadline retrospectively to 11th November 2023 in return for payment of interest, which Mr. Barish states was rejected. At paragraph 13 of his affidavit, he states *"On or about the 10th May the parties agreed to revive the sale"*. This date seems to be 1st May 2024. In any event Mr. Barish states that once again the Plaintiff failed to fulfil his obligations and as a result the agreement was terminated.

12. In response Mr. Douglas Crawley, the Plaintiff, by affidavit dated 22 November 2024 contends that there were two agreements one dated 28th August 2023 and the other 15th September 2023. He states that he paid the total sum of $200,000.00 towards the purchase of the Property. He also states on 21 November 2024 the Defendants through their Attorney cancelled the agreement and forfeited all sums paid. He states, he is ready and willing to carry out the terms of the agreement but the Defendant have refused to continue with the transaction.

13. He states that he seeks specific performance of the agreement or in the alternative relief against the forfeiture of the deposit paid *"as the forfeiture is inequitable and unfair".* He also states that alternatively if he is found in breach, he contends that *"the sum stipulated as a deposit is a penalty and irrecoverable (sic). It was not a genuine pre-estimate of the damage likely to be suffered, and the sum payable was grossly in excess of any loss the Defendants might suffer in the event of any breach".*

SUBMISSIONS

14. Mr. Green for the Defendant/Applicants applies for summary judgment of their Counterclaim and Striking out of the Plaintiff's claim. In respect of the counterclaim, Mr. Green refers to Practice Note 14/4/9 and submits that the applicant is entitled to judgment where the respondent fails to satisfy the court he has a fair or reasonable probability of showing a real or bona fide defence. Mr. Green summarizes the Plaintiff's position as follows
    a. That Mr. Crawley entered into a contract to buy land from GR8, the 2nd Defendant.
    b. He was required to make stage payments on which he defaulted.

c. The contract provided that in the event of such default the payments were to be forfeited to GR8.
d. The contract has been terminated for breach and the stage payments are retained as envisaged.

15. Mr. Green submits that the claim of duress is implausible, vague and no longer seems to be the Plaintiff's story. He also submits that the contention that an extension was granted, was not pleaded and no evidence was filed in support. In fact, Mr. Green goes further to submit that the Plaintiff concocted the contention of an extension being granted and he asks that the court find on a summary basis that the Plaintiff is lying.

16. In respect of such extension Mr. Green refers to a *"longstanding common law principle"* that a contract for the sale of land will only be enforced by a memo in writing pursuant the Statute of Frauds 1677 s.4. On this basis he submits that without a subsisting contract *"then all that is left is Crawley's claim for money … this cannot be the basis for a caution. The court is invited to give interlocutory judgment for GR8, removing the caution, with damages to be assessed".*

17. In respect of striking out, Mr. Green submits that the Plaintiff's action discloses no reasonable cause of action. He submits that the Plaintiff's alternative money claim is only triggered if the court finds that the contract has been terminated. He also submits that the only basis on which the money claim can be considered is if the forfeiture provision is seen as a penalty. On this point he referred to the case of *Dunlop Pneumatic Tyre Company v New Garage and Motor Company [1915] AC 79* where the test was said to be whether the sum provided for so doing was a *"genuine pre-estimate of loss"*. Sums which could not be so described were considered penalties and there unenforceable. He also referred to the case of *Cavendish Square Holding BV v Talal El Maldessi; and Parking Eye Ltd v Beavis [2015] UKSC 67* per Lord Neuberger where it was stated that "*The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance".*

18. Mr. Green also referred to the Turks and Caicos case of *Mylande Alfred v Vans Auto TC 2023 SC 31* where Gruchot J. in referring to *Stockloser v Johnson*

[1954] 2 WLR 439 and the statement of Denning LLJ who stated *"I have had the advantage of reading the Judgments which will be delivered by my brethren. My brother Romer comes to the conclusion that after rescission by the vendor relief would only be given if there were some special circumstance, such as fraud, sharp practice, or other unconscionable conduct, and that before rescission a buyer would only get relief if willing and able to complete. In other words, the only relief would be further time. I think the statements of the law in the cases to which I will refer indicate a wider jurisdiction. I think they indicate that the Court would have power to give relief against the enforcement of the forfeiture provisions, although there was no sharp practice by the vendor, and although the purchaser was not able to find the balance. It would, of course, have to be shown that the retention of the instalments was unconscionable, in all the circumstances."*

19. The learned Judge found in *Mylande (supra)* that there was nothing unconscionable in the Plaintiff relying on the terms of the Agreement. Based on this decision Mr. Green submits that the forfeiture of stage payments *"is not to be considered a penalty and that in absence of some unfairness or wrongdoing by the vendor, and none is seriously alleged here, then the money claim is also doomed to fail"*.

20. In respect of removal of the caution Mr. Green submits that a caution may be added only where there is an interest in land not where there is merely reasonable belief. He submits that a caution can only be registered where the vendor is threatening not to perform an existing contract. He further submits that the Plaintiff had no such contract when the caution was registered, therefore he did not have an interest in the Property. Mr. Green also submits that there was no valid contract after 21 November 2023, therefore after that date the Plaintiff was not entitled to a caution.

21. In response Mr. Missick submits that the Defendants' applications should be dismissed as the Plaintiff's case has a real prospect of success and there are compelling reasons for the case to proceed to trial. He submits that a Plaintiff can obtain summary judgment if the Defendant has no defence to a claim included in the writ, or to a part of such claim or has no defence to such a claim or part except as to the amount of any damages claimed. Mr. Missick submits that in respect of summary judgment, if there is an issue or question in dispute which ought to be tried, or if there is some other reason for trial, summary judgment should not be granted. He referred to the cases of *Three Rivers*

District Council v Bank of England No. 3 [2001] UKHL 16 and Hughes v Colin Richards & Co. [2004] EWCA Civ 266.

22. Mr. Missick also submits that the Plaintiff seeks specific performance of the sale agreement and relief from forfeiture both of which he asserts has a real prospect of success. In support of his specific performance claim he refers to *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1998] AC 1* and *Beswick v Beswick [1968] AC 58*. In respect of relief against forfeiture he referred to *Shiloh Spinners Ltd v Harding [1973] AC 691* on the principle that relief from forfeiture is based on equity and fairness.

23. He also submits that the Plaintiff argues that the forfeiture of the deposit amounts to an unenforceable penalty referring to *Dunlop* supra. Mr. Missick's argument is based on the premise that these areas of his claim require a fact-intensive inquiry and therefore not suitable for a striking out as seen in *Cavendish Square Holding BV v Talal El Makdessi [2015 UKSC 67*

24. Mr. Missick submits that the case involves complex legal issues, including the enforceability of the penalty clause and the equitable relief against forfeiture, which should be resolved at trial rather than summarily (*American Cyanamid Co v Ethicon Ltd [1975] AC 396*).

25. He also submits that the Court should consider the principle laid down by the Court of Appeal in *S v Gloucestershire CC [2001] 2 WLR 909* which set out the following guidelines in respect of summary judgment that the court must be satisfied of as follows:

> 1. All relevant facts reasonably capable of being brought before the court are before it.
> 2. There is no real prospect of disputing such facts.
> 3. There is no real prospect of oral evidence affecting the court's assessment of the facts.
> 4. There is no real prospect of gaps in the evidence being filled.
> 5. There is no real prospect of the claim or issue succeeding or of the defence or issue being successfully defended.
> 6. There is no other reason why the case should be disposed of at trial.

26. In respect of summary judgment Mr. Missick submits that on a review of the pleadings, the current case does not justify being disposed of summarily. He

referred to M.R. Jessel in *Anglo-Italian Bank v Wells (1878) 38 L.T, 376* where it was stated: *"When the judge is satisfied not only that there is no defence but no fairly arguable point to be argued on behalf of the defendant it is his duty to give judgment for the plaintiff"*. Mr. Missick further submitted that the purpose of O.14 is to enable a Plaintiff to obtain summary judgment without trial, if he can prove his claim clearly, and if the defendant is unable to set up a bona fide defence, or raise an issue against the claim which ought to be tried see *Roberts v. Plant [1895] 1 Q.B. 597, CA*. He continued that the power to give summary judgment under O.14 is *"intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment, and where therefore it is inexpedient to allow a defendant to defend for mere purposes of delay"* see *Jones v. Stone [1894] A.C. 122.*

27. He further submitted that as a general principle where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence, or even a fair probability that he has a bona fide defence, he ought to have leave to defend. Leave to defend must be given unless it is clear that there is no real substantial question to be tried see *Codd v Delap (1905) 92 L.T. 510 H.L.*; that there is no dispute as to facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment *Jones v Stone supra*.

28. Mr. Missick referred to the case of *Doncaster Pharmaceuticals Group Ltd and Ors v Bolton Pharmaceutical Co 100 Ltd [2006] EWCA Civ 661*, Mummery L.J. warned against "cocky claimants" that present the legal and factual issues as simpler and easier than they really are, and "*rubbishy defences"* designed to make matters look unsuitable for summary determination.

29. He also referred to Lord Woolf in *Swain v Hillman [2001] 1 AER 91* at pp 94 and 95 (approved by Lord Hope at para 93, Lord Hutton at para 134 – with whom Lord Steyn agreed at para 1 - *in Three Rivers v Governor and Company of the Bank of England [2003] 2 AC 1*): *"Useful though the power is under Part 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. As Mr Bidder put it in his submissions, the proper disposal of an issue under Part 24 does not involve the judge conducting a mini trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily."*

LAW

STRIKING OUT

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

30. 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."*

31. 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)"*

32. 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)".

33. 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.

34. Millett J in the Lonrho plc v Fayed [1991] 4 All ER 961 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."*

35. In Wenlock v Moloney [1965] 1 WLR 1238, 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."

36. 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)".

37. 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 in which it was 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".

38. In *Mylande Alfred v Van's Auto Ltd. (CL 41 of 2022) [2022] TCASC 29 (26 August 2022)* Hylton KC J.(Ag) (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* and 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"*.

39. The learned Judge also referred to the Privy Council case of *Royal Bank of Scotland International Ltd v JP SPC 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*".

40. 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 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.

41. *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.

42. The Privy Council in *Royal Bank of Scotland (supra)* raised the bar in respect of 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

43. This section refers to cases that 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* *[1895] P 87* states *"the pleading must be so clearly frivolous that to put it forward would be an abuse of the process of the Court".*

44. In *Holding Oil Finance Inc and Another v Marc Rich & Co AG and Others* *[1996] Lexis Citation 2672* Aldous LJ stated:

> *"It is well established that, upon an application under Ord 18, r 19, the court will not embark upon a trial upon affidavit evidence. It is also clear that affidavit evidence is admissible, save where the rule explicitly says to the contrary. The jurisdiction to strike out a pleading or part of a pleading, whether under that Order or under the inherent jurisdiction of the court, will only be exercised in plain and obvious cases (see Lonhro Plc v Fayed [1992] 1 AC 448, [1991] 3 All ER 303, at p 469 of the former report). If, however, it is clear that an action cannot succeed, it is frivolous and vexatious and amounts to an abuse of the process of the court and will be struck out. It follows that the English defendants, to succeed on this appeal, must show that, upon the evidence and without the need to resolve issues in the affidavit evidence, the claims made against them by the plaintiffs are plainly unsustainable. If they do so, the action against them will be struck out".*

45. In *Toumia v Evans (Secretary General of the Prison Officers Association)* *[1999] ALL ER (D) 262* Brooke LJ stated:

> *"As we have already said, the defendant's application was put on two principal bases. The first was that the particulars of claim should be struck out as disclosing no reasonable cause of action,*

and the second was that they were scandalous, frivolous and vexatious and an abuse of the process of the court. As to the first, the relevant principle was stated in the following terms by Sir Thomas Bingham MR in E (minor) v Dorset County Council [1995] 2 AC 685 , [1994] 4 All ER 640 at p.693H".

46. The Lord Justice continued :

"Under the second head the test is somewhat different. The court's power to strike out both under its inherent jurisdiction to prevent abuse, and under RSC Ord.18 r.19(1)(b) or (d) or CCR Ord.13 r.5(1)(b) or (d), should only be exercised in very exceptional circumstances and in plain and obvious cases: see Pt XXI of the judgment of the majority of this court in Three Rivers District Council v Bank of England (unreported, CAT 4 December 1998) at pp.87-90, following McDonald's Corporation v Steel [1995] 3 All ER 615, [1995] EMLR 527. These cases show that an action should only be struck out on these alternative grounds if the plaintiff's case is bound to fail on the material available at the time of the application, and also if there is no reasonable possibility that evidence which might be sufficient to support his case and to give it some prospect of success might become available to him in the future, whether by further investigation, discovery, cross-examination or otherwise".

SUMMARY JUDGMENT

47. Order 14, rule 1 provides:

Where in an action to which this rule applies a Statement of Claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that the defendant has no defence to the claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the court for judgment against that defendant.

48. In *Home and Overseas Insurance Co. Ltd v Mentor Insurance Co. UK Ltd (In Liquidation) [1990] 1 WLR 153* Parker L.J made it clear that the purpose of an O.14 application is to enable a Plaintiff, in this case a Defendant on a Counterclaim to obtain a quick judgment where there is plainly no defence to

the claim or in this case no defence to the counterclaim. If the Defendant's only suggested defence is a point of law and the court can see at once that the point is misconceived the plaintiff is entitled to judgment. However O. 14 should not be allowed to become a means for obtaining in effect an immediate trial.

49. It is stated at *Note 14/7/4* in the White Book that an O. 14 application must be supported by an affidavit. However the rule only confers a right as stated by Scott LJ in *Dott v Brown [1936] 1 All ER 545* *"on the ground that the defendant has no defence to a particular claim or part of a claim"*. This summary process therefore should be used only in proper cases and should not be employed for tactical purposes.

50. In response the Defendant must be able to show that on the merits he has a good defence to the claim. This is usually done by an affidavit by the Defendant showing exactly what the defence is and what facts are relied on to support it.

51. In *Jones v Stone [1894] A.C 122* it was stated that the power to give summary judgment is *"intended only to apply to cases where there is no reasonable doubt that a Plaintiff is entitled to judgment and where therefore it is inexpedient to allow a defendant to defend for mere purposes of delay"*. In *Saw v Hakim [1889] 5 TLR 72* it was stated *"as a general principle, where a Defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a bona fide defence, he ought to have leave to defend"*

52. In *Jacobs v Booths Distillery Co. (1901) 85 L.T 262* it was held that a complete defence need not be shown, rather the defence need only show a triable issue or question or that for some other reason there ought to be a trial. In *Extraktionstechnik Gesellschaft fur Anlagenbau GmbH v Oskar [1984] 128 S.J 417* it was held where *"there are unexplained features of both the claim and the defence which are disturbing because they bear the appearance of falsity and disreputable business dealings and questionable conduct, the Court should not make tentative assessments of the respective chances of success or the relative strengths of their good or bad faith, but should give unconditional leave to defend"*.

53. In *Casablanca Casinos Ltd. v Smith (CL 157 of 2008) [2009] TCASC 3 (14 September 2009)* Smith Williams J stated at paragraph 28:

> *[28]"What amounts to an unanswerable case under Order 14 and what suffices for leave to defend? The brief answer is that the Plaintiffs must be able to satisfy the court that the Defendant cannot have any bona fide answer to the Amended Statement of Claim. Thus, if David Smith can put forward facts which, if true, would constitute a prima facie defence, the Plaintiffs cannot take advantage of Order 14. Further, and for completeness sake, an arguable point of law may defeat the application. Also, for the purpose of Order 14, the Defendant's pleadings must be accepted as true except where they are contradicted by his own documents or are palpably false. Evidence of bad faith or of the defence being a sham or of suspicious circumstances surrounding it may negate its acceptance and justify conditional leave to defend. Leave to defend may be granted in the absence of an issue or question in dispute which ought to be tried if it appears to the court that "for some other reason there ought to be a trial." To express it even more succinctly, Order 14, as has been repeatedly said and applied is for cases where, there being plainly no defence and no other reason for trial, it would be unjust (and abusive of the process of the court) to permit a trial"*

54. In *Windsong Development Ltd. v Driscoll* *(CL 108 of 2007) [2012] TCASC 2 (16 July 2012)* the Plaintiffs brought an action against the Defendant in order to enforce a restrictive agreement which they allege was in place when the Defendant purchased her property from the Hemquists (the former owners) which were purportedly signed by the Hemquists and witnessed by Conrad Howell. The Defendant filed a counterclaim contending that the signature on the alleged Restrictive Agreement which are purported to be those of the Hemquists are in fact forgeries and the alleged Restrictive Agreement on which the Plaintiff relies is a nullity and applied for summary judgment on the counterclaim.

55. Ramsay-Hale CJ in her decision considered the affidavit evidence submitted in support of the application for summary judgment. She stated:-

> *[27] I am not satisfied that the Plaintiff reasonably or properly requires to cross-examine the Hemquists as to the circumstances surrounding the transfer. It is accepted that they did not sign the Deed of transfer. They have said that the entire transaction was conducted by Mr. Misick on their behalf, a claim that Mr. Misick does not contradict. The only purpose of a trial would be to permit*

the Plaintiff to test their assertion that they did not sign the alleged Restrictive Agreement, an assertion which is unlikely to change under cross-examination and to which the only answer is the evidence of Mr Howell which is not credible.

[28] I have also considered her [Monique Allan Attorney for the Plaintiff] submission that the Court should not grant summary judgment where there is an allegation of fraud and say that if the accusation of fraud were being levelled against the Plaintiff, I should certainly find the matter unsuitable for disposal without trial. However, neither the Plaintiff nor the Defendant were the original parties to the transaction and no allegation of wrongdoing by the Plaintiff is made or implied. It seems to me, if there is no real dispute as to fact, then summary judgment should be granted despite the fact that fraud is pleaded. The Defendant has produced clear evidence of forgery to which the Plaintiff can make no answer. I can see no other reason for this matter to proceed to trial.

[29.] In my judgment, there is no probability of the Plaintiff having a real defence to the forgery counterclaim. I grant the Defendant's application for summary judgment and declare that the Alleged Restrictive Agreement is a forgery and order that it be removed from the Register.

[30.] The Plaintiff's claim rests entirely on the validity and enforceability of the Alleged Restrictive Agreement. The Plaintiff's claim cannot stand and is struck out.

56. In *Jermaine Jennings v Adlin Pierre (CL 21 of 2022) [2022] TCASC 25 (23 August 2022)* Hylton J (Ag) (as he then was) on an application for Summary Judgment stated:

"[19] To succeed on this application, the Plaintiff would have to satisfy the Court at this stage that the Defendant has no defence to either the breach of contract or negligence claim, which has a realistic prospect of success. In Royal Bank of Scotland, the Privy Council also commented on the approach to an application for summary judgment. The courts have discouraged mini-trials in complex cases on disputed issues. The rule is designed to deal with cases that are not fit for trial at all.

> *[24] In their written submissions and at the hearing counsel for the Defendant did not set out the nature of the Defendant's defence and instead merely asserted that the Plaintiff's summons was "a last ditch attempt" by the Plaintiff to resist the striking out application and repeated that the Defendant had been unable to file a defence due to the Plaintiff's inactivity in providing further and better particulars. The Court therefore has no evidence of what defence the Defendant intends to rely on in response to the claim of breach of contract or negligence, which if proved, has a realistic prospect of success.*
>
> *[25]. The court must decide a summary judgment application on the basis of the evidence before the court when it hears the application. In this case the Defendant has not filed any evidence that discloses a good or even an arguable defence. In these circumstance there is no basis for the court to exercise its power under Order 14 rule 4 to give the Defendant leave to file a defence.*
>
> *[26]. The application for summary judgment on liability is therefore granted, with damages to be assessed."*

57. In *Gedeus v Selver* *(CL 51 of 2016) [2022] TCASC 28 (26 August 2022)* The Plaintiff's case was that the Defendant agreed to sell him a parcel of land for $26,000.00 and that he paid the Defendant $23,330.00. Further, that the Defendant did not transfer the Land to him and cannot do so as there was an existing mortgage to Meridian Mortgage Trust Company Ltd. The Defendant's affidavit does not dispute any of those allegations. Instead, it offered two defences to the claim: first, that the Plaintiff breached the agreement by defaulting in payment, and second, that Meridian breached its agreement with the Defendant by failing to transfer the Land to the Plaintiff. Hylton J. (as he was) stated:

> *"[27] There is no evidence or even suggestion that if the Plaintiff had paid the balance of the purchase price the Defendant would have been able to transfer the Land. Also, the Plaintiff was not a party to the alleged agreement with Meridian. The outcome of the Defendant's dispute with that company would not affect the simple issue in this case: The Plaintiff paid a sum of money to the Defendant to purchase a property that he could not then (and cannot now) transfer to the Plaintiff".*

58. The learned Judge referred to the observations by the Privy Council in *Sagicor Bank Jamaica Limited v Taylor Wright* [2018] UKPC 12 per Lord Briggs who said:

> *"[17] There will in almost all cases be disputes about the underlying facts, some of which may only be capable of resolution at trial, by the forensic processes of the examination and cross-examination of witnesses, and oral argument thereon. But a trial of those issues is only necessary if their outcome affects the claimant's entitlement to the relief sought. If it does not, then a trial of those issues will generally be nothing more than an unnecessary waste of time and expense.*
>
> *[21] The Board considers it axiomatic that, if a pleaded claim is met with a defence (whether pleaded or deployed in evidence) on a summary judgment application which, if true, would still entitle the claimant to the relief sought, then generally there cannot be a need for a trial.*

59. In *Gedeus supra* Justice Hylton granted the application for summary judgment.

60. The case *Mylande Alfred v Van's Auto Ltd.* (CL 41 of 2022) [2022] TCASC 29 (26 August 2022) referred to by the Mr. Green is quite similar in nature to the current case and seems to follow a similar path. The Plaintiff was the registered proprietor of a property registered as Parcel 61111/28, Long Bay Hills, Providenciales. In or about July 2020, the Plaintiff agreed to sell the Land to the Defendant. The purchase price was to be paid as follows:
    a. US$10,000.00 on the execution of the agreement;
    b. US$50,000.00 on or before 31st July 2020; and
    c. US$50,000.00 on closing, which was set for 7th December 2020

61. The 2nd payment due under the Agreement was paid late on 13th August 2020. The final payment was not made and the transaction did not close. On 30th December 2020, the Plaintiff served the Defendant with a notice to complete, requiring the default (payment of the closing monies) to be cured by 13th January 2021. The notice was sent by email

on 29th December 2020 and therefore gave 14 days to close the transaction.

62. On 24th January 2021 Mr Roper, on behalf of the Defendant, swore an affidavit in support of an application to lodge a caution over the property. That caution was registered on 2nd February 2021 as instrument number 242/21 and re-registered on 4th May 2021 as instrument number 1173/21. On 28th April 2021, closing still not having taken place, the Plaintiff served a notice of termination on the Defendant, forfeiting the monies paid, in accordance with clause 5.1 of the Agreement.

63. The Plaintiff commenced action by originating summons filed on 12th May 2022 seeking inter alia that the Defendant cease and desist immediately their trespass on the Property and removal of the caution registered by the Defendants.

64. The Defendant filed a Defence and Counterclaim, claiming the sum of $60,000.00; or alternatively, a fair and reasonable sum as the Court may judge fit; and damages.

65. The Defendant also filed a summons to strike out the action and/or to enter judgment in its favor. That application was effectively made on two grounds: that the originating summons does not disclose a cause of action, and that the plaintiff has exhibited correspondence which is subject to without prejudice privilege. Hylton J. (as he then was) ruled that the allegations raised in the Plaintiff's affidavit are *"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. This case is therefore plainly not unarguable, and I cannot say that the action is bound to fail."* The application to strike out failed.

66. Several issues were raised at the trial including a challenge on the notice of termination, removal of the caution, the counterclaim and consideration of the issue of forfeiture of the installments paid and whether it could be classified as a penalty. Gruchot J. dismissed the counterclaim, ordered the removal of the caution and found that it was not unconscionable for the Plaintiff to forfeit all monies paid under the contract.

THE ACTION

67. The Plaintiff in his claim, challenges the termination of the agreement by the Defendant, he also claims duress, wrongful forfeiture, and specific performance. The Plaintiff's case is premised on the fact that he is seeking specific performance of the contract, and in the alternative if the court finds that he breached the contract that the total amount paid should not be forfeited. In his reply and defence to counterclaim he pleads that time was not of the essence as an extension of time was granted by the Defendant amounting to a waiver of the "*time is of the essence"* clause by conduct and/or mutual agreement.

68. The Defendants avers that time being of the essence was a term of the contract and the Plaintiff through default in payments breached the contract. They also aver that it was a term of the contract that in the event of default the 1st Defendant was entitled to forfeit the sums paid and treat the contract as terminated. They deny the existence of any extension of time waiving the time of essence clause and duress.

69. The Defendants in their counterclaim, claim removal of the caution and damages including exemplary damages. They now seek summary judgment of their Counterclaim. In the Plaintiff's defence to the counterclaim it is denied that the caution was wrongful or made without reasonable excuse. The Plaintiff also denies that the caution has caused loss and damage and puts the Defendants to strict proof.

DISCUSSION

70. To obtain summary judgment on a Counterclaim the facts of the claim against the Plaintiff must be clearly and factually pleaded. The Defendants in their Counterclaim, claims removal of a caution and damages including exemplary damages. No evidence has been provided as to the loss suffered and the extent of same. The Plaintiff avers that the caution was lodged to protect his alleged interest and to prevent the Defendants from dealing with the Property in an adverse manner. The Plaintiff puts the Defendants to strict proof in relation to the claim for damages. The main issue arising here is whether the Plaintiff does in fact have an interest in the said Property. I am not of the view that such issue can be summarily determined, the Plaintiff in his defence avers that the caution was entered to protect his interests in the said property and this was accepted by the Registrar of Lands. The Plaintiff has

therefore fulfilled the requirement of having a defence and to have a triable issue determined.

71. An Ord. 14 application for summary judgment is for a party to obtain quick judgment where there is plainly no defence as stated in *Home and Overseas Insurance Co. supra. Saw (supra)* sets the standard slightly lower by requiring that the Defendant show that he has a fair case for defence, reasonable grounds for setting one up or the fair probability that he has a bona fide defence.

72. In the cases of *Windsong Development and Jermaine Jennings (supra)* after analysis of the pleadings it was clear that Respondent to the summary judgment claims did not have a defence nor were they able to show that there was a fair probability of a bona fide defence and the Applicants were able to prove this.

73. In the present case, summary judgment requires the removal of the caution granted by the Registrar of Lands. In his defence the Plaintiff avers that he has a registrable interest in the Property. The issue to be determined in order to remove such caution is for the Court to decide whether the Plaintiff does in fact have a registrable interest, only if the Court finds that no such interest exists can the caution be removed. In order to make such a determination all the facts of the case should be ventilated.

74. For the Defendants to be successful in their claim for summary judgment they must prove that the Plaintiff does not have a defence and by extension, a registrable interest in the Property, and therefore the caution must be removed. Such proof is clearly a trial issue and cannot be decided summarily. The Defendants have therefore failed to prove their application for summary judgment.

75. In respect of the striking out application the authorities show that the standard set is a high one and should only be granted in cases which are plain and obvious and where there is no chance of success. The Plaintiff has raised several issues both factual and legal which if successful would result in either an order for specific performance being granted or an order discharging the caution and forfeiture.

76. In *Mylande* (supra) where similar issues were raised, it was decided that sufficient issues existed to refuse a striking out and summary judgment application. At trial there were clearly both issues of fact and law to be decided before removing the caution and deciding that the Plaintiff is allowed to retain possession of all installments made as it was not unconscionable to do so.

77. It is my view serious and important issues of fact and law were raised by both parties in this case and it cannot be said with certainty that the Plaintiff's case could not succeed or that there is no arguable case. The Defendants have also disputed most of the claims raised by the Plaintiff. I am of the view that this matter should be disposed at trial. To do otherwise would result in this Court summarily deciding these issues without a forensic examination of the facts arising.

Disposition

78. The Defendants application for Summary Judgment on his Counterclaim is dismissed.

79. The Defendants application to Strike out the Plaintiff's claim is dismissed.

80. Costs to be paid by the Defendants to the Plaintiff, on the standard basis to be taxed in default of agreement.

Narendra J. Lalbeharry

Registrar

Supreme Court

Turks and Caicos Islands