



**IN THE SUPREME COURT
TURKS AND CAICOS ISLANDS**

**ACTION NOS. CL 85/21
CL 86/21**

BETWEEN:

CL 85/21

- (1) GULE YASMIN SHAH**
- (2) AALA SHAH-CHAUDARY**
- (3) SAMARA SHAH**
- (4) ALI SHAH**
- (5) MURTZA SHAH**
- (6) SALAR CHAUDARY (an infant)**
- (7) FAJR NOOR SHAH (an infant)**
- (8) NAADIR KHAN (an infant)**

PLAINTIFFS

-and-

- (1) THE PARROT CAY CLUB LTD.**
- (2) P.C. HOTEL MANAGEMENT LTD.**
- (3) CAICOS HOLDINGS LIMITED**

DEFENDANTS

CL 86/21

- (1) NAJAM MALIK**
- (2) MAQBOOL MALIK**
- (3) SALMAN MALIK**
- (4) AHMAD MALIK**
- (5) SAADIA MALIK**
- (6) MARIAM NOOR DAR (an infant)**
- (7) SAFIYA IMAN DAR (an infant)**

PLAINTIFFS

-and-

- (1) THE PARROT CAY CLUB LTD.**
- (2) P.C. HOTEL MANAGEMENT LTD.**
- (3) CAICOS HOLDINGS LIMITED**

DEFENDANTS

DECISION



Before: **The Hon. Mr Justice Anthony S. Gruchot**

Appearances: **Ms Monique Allan of Saunders & Co for the Plaintiffs**
Mr Jonathan Katan KC and with him Mr Mark Harvey of Miller, Simons, O’Sullivan for the Defendants.

Hearing Date: **21st February 2023**

Venue: **Court 5, Graceway Plaza, Providenciales.**

Background

1. These 2 matters are both claims brought under the Fatal Accidents Ordinance (Cap.4.10) in respect of the unfortunate drowning of Dr. Noor Shah and Mr Mohammad Malik (‘the Deceased’) which took place in the waters off Parrot Cay, Turks and Caicos Islands on 28th October 2020.
2. These are for all intent and purposes identical claims arising from the same incident and the Writs and Statements of Claim in both matters are identical save for the identity and personal characteristics of the Deceased. For simplicity, I will adopt the approach of counsel and refer only to the applications in CL 85/21 as the decision in that matter will follow through to CL 86/21.
3. The Plaintiffs in both matters are family members of and claim to be dependents of the Deceased.
4. Concurrent proceedings were issued in the Supreme Court in the State of New York, USA seeking similar relief against the same Defendants as in these matters, together with Como Holdings USA, Inc. Those matters were dismissed by the Supreme Court on 10th October 2023 on the principle of *forum non conveniens*.
5. The Deceased were guests staying at COMO Parrot Cay (‘the Hotel’) a hotel which is situated on Parrot Cay, a small island, part of the Caicos Islands to the east of the island of Providenciales. Parrot Cay is an island comprised exclusively of high-value

independently owned villa properties and the Hotel.

6. It is accepted that the 2nd Defendant, P.C. Hotel Management Ltd. is the company that manages/operates the Hotel, that the 2nd Defendant had a contractual relationship with the Deceased and further, that it owed the Deceased a duty of care in tort. It is denied that the 2nd Defendant was in breach of any contractual terms or breached its duty of care to the Deceased.

The Applications

7. There are 2 applications before the Court. The first is a summons for directions issued on 7th December 2023 by the Plaintiffs seeking *inter alia* to have the 2 matters heard together, (or consolidated) which is eminently sensible. The summons also seeks leave to amend the Writs and Statements of Claim to correct the omission of the requirement to have the Plaintiffs' addresses endorsed on the Writ and to remove the 4th Plaintiff in CL 85/21. The balance of the directions are to deal with the normal procedural steps to take the matters through to trial and are not substantively opposed save for fixing various dates. I do not need to deal with that summons further in this written decision.
8. The second summons is an application to:
 - a) Strike out the claims against the 1st and 3rd Defendants.
 - b) Strike out those parts of the Statements of Claim which refer to the names and addresses of the directors of the Defendants.
 - c) Strike out those parts of the Statements of Claim which refer to the fixed assets of the 1st and 2nd Defendant.
9. The Defendants also seeks further and better particulars of:
 - a) The specific meteorological conditions that allegedly existed on and prior to the 28th October 2020 which the Defendants should have warned Dr. Shah and Mr Malik about;

- b) The alleged rip and other dangerous currents that caused the deaths of Dr. Shah and Mr Malik of which the Defendants should have given warning; and
 - c) The alleged specific risks and dangers associated with walking on and between sandbars and the geological configuration of the same and of the beach at Parrot Cay in front of the villa where Dr. Shah and Mr. Malik were staying on the 28th October 2020.
10. It is these matters which are contested. I have before me:
- 1) The first affidavit of Taparahi Tibble, director of each of the Defendants sworn on 10th January 2023 together with a substantial exhibit;
 - 2) The first affidavit of Aala Shah-Chaudary, the 2nd Plaintiff sworn on 16th February 2023 also with a substantial exhibit.
11. There is also filed in CL 86/21 the first affidavit of Saadia Malik, the 3rd Plaintiff in that action, also sworn on 16th February 2023. That affidavit is in identical terms to that of Aala Shah-Chaudary (save for names) and has been filed with the same substantial exhibit. This duplication is unnecessary and is a waste of time and costs and should have been managed by making an appropriate application.

The Strike Out of the Claims against the 1st and 3rd Defendants

12. Mr Katan KC draws my attention to the fact that no distinction has been made with respect to the claims made against each of the Defendants and the same relief is sought against all 3 Defendants. Although not pleaded as such, the inference is that each of the Defendants are jointly and severally liable, or alternatively, the Plaintiffs do not know who is the proper defendant.
13. The basis of the claim is set out in paragraph 18 of the Statement of Claim which reads:

"The defendants and each of them owed Mr. Malik and Dr. Shah implied duties in contract and a duty of care in tort to exercise reasonable care and

skill, as the owners and operators of tourist and hospitality accommodation and services, to ensure the safety of Mr. Malik and Dr. Shah while they were guests of Parrot Cay, inter alia, by providing a safe environment in which to enjoy their honeymoon, and to warn them of any dangers in the surroundings so they could take steps to avoid inadvertently taking risks which might endanger their lives, health and safety.”

14. No express or implied contractual terms have been pleaded and I am left to discern the same from the alleged failings of the Defendants as pleaded by the Plaintiffs.

The 1st Defendant – The Parrot Cay Club Ltd.

15. Mr Katan KC submits that there is no suggestion that either of the Deceased entered into a contract with the 1st Defendant, Parrot Cay Club Ltd. and as such, any alleged liability must therefore be a breach of duty of care, in tort.
16. The Statement of Claim describes the 1st Defendant as “... a limited liability company, incorporated on 16 March 2000, in accordance with the laws of the Turks and Caicos Islands, limited by guarantee and not authorised to issue shares.” It goes on:

“The First Defendant is believed to be the owners’ association of which the proprietors of properties in the residential resort development located on Parrot Cay, Turks and Caicos Islands, are members. It is responsible for managing and maintaining the common areas which are believed to include the hotel, beach bar and restaurant, swimming pools, restaurant, and spa of Parrot Cay. It has no fixed assets. The Third Defendant is believed to be the controlling shareholder of the First Defendant.”

17. No explanation is provided as to quite how the 3rd Defendant can be the controlling shareholder of the 1st Defendant if the 1st Defendant is unable to issue shares.
18. The allegation that the common areas “... include the hotel, beach bar and restaurant, swimming pools, restaurant, and spa of Parrot Cay.” is denied by Mr Tibble who states that “... the Club is a homeowner’s association and has no involvement in the

operation of the COMO hotel, Parrot Cay where the deceased was staying.”

19. Mr Katan KC, supported by the affidavit of Mr Tibble, submits that the 1st Defendant is a company limited by guarantee and is not a trading entity. He quotes from its memorandum of association that it shall have the power:

“To control and manage the Development located at Parrot Cay as defined in the Restrictive Agreement (hereafter defined) which is or shall be registered against the parcels in the Development and any amendments thereto which may be made from time to time (“the Restrictive Agreement”) for the benefit and protection of all members of the Club¹.”

20. The ‘Development’ is defined in a restrictive agreement dated 15th December 2001 (‘the 2001 Agreement’) as being *“parcels 61201/37-52 (Incl.), 61201/54-72 (Incl.), 61201/92, 94, 97, 99 and 101-106 (Incl.), East Cays, Providenciales or such amended area from time to time under the Restrictive Agreement”*. A copy of this agreement was included in the exhibit to Mr Tibble’s affidavit.
21. A revised restrictive agreement was made on 21st September 2020 (‘the 2020 Agreement’). In that agreement, the ‘Development’ is defined as *“parcels 61202/41-52 (inc.) 54, 55, 92, 94, 99, 108, 112, 113, 118, 121, 123, 124, 126-129 (inc.) 131, 133, 134, 148-154 (incl.) (sic) East Cays, Providenciales Turks and Caicos Islands, which expression shall include any such further land on Parrot Cay which the Developer in its absolute discretion may from time to time deem and declare to be part of the Development ...”*. A copy of that agreement was included in the exhibit to Ms Shah-Chaudary’s affidavit.
22. Mr Katan KC submits that there have been some changes to the parcel numbers which form part of the ‘Club’ due to mutations² of the parcels. He further submits that the Hotel is primarily situated on parcels 61201/22 and 147.

¹ The ‘Club’ is defined as being The Parrot Cay Club Ltd.

² Combination or sub-division of the original parcels.

23. Ms Shah-Chaudary takes issue with respect to the parcels of land which comprise the Hotel ('the Hotel Site'). She states:

"The Defendants exhibited Replies dated 19 January 2022 refused our counsel's request for a copy of the map showing which parcels of land are "Hotel Site and "Development". She further complains that "Only parcel #22 features in the Defendants' lists of parcels comprising in the "Hotel Site". Parcel #147, which is the parcel on which the hotel is shown on the map and plan is not listed at all by the Defendants in their Defences. That parcel does appear in the 2021 (sic) RA."

24. The Plaintiffs suggest that there is some degree of *male fides* in the way the Defendants have put their Defence such as to try and 'disguise' the parcels on which the Hotel is situated. I do not agree.

25. The way that the non-provision of a map or site plan has been characterised is misleading. The 'Replies' to which Ms Shah-Chaudary refers are replies to a request for further and better particulars of the Defence. The actual response was:

"This is not a request for further and better particulars. Further and in any event, the Plaintiffs may obtain the block plan which is in the public domain showing this information."

This appears to me to be a perfectly proper response in the context in which it arises.

26. It appears to be the argument that the 1st Defendant is a proper defendant to the action because it controls and manages the 'Development' in accordance with the restrictive agreement.
27. The Hotel Site is defined in the 2001 Agreement as being parcels 61201/10, 21, 22, 36, 79, 87, 88, 89, 95 and 95/1.
28. The Hotel Site is defined in the 2020 Agreement as being parcels 61201/10, 21, 22,

36-40 (inclusive), 56-72 (inclusive), 79, 87, 88, 89, and 142-147 (inclusive).

29. Mr Katan KC submits with reference to copies of Land Register entries, that parcel 147 was a mutation of parcel 95. This was not challenged by Ms Allan. The villa in which the Deceased were staying is situated on Parcel 144, part of the Hotel.
30. What is obvious from the above is that the Hotel does not form part of the 'Development'. This is expressly confirmed in both agreements. I return to this issue below.
31. Ms Allan, in her written submissions, does not make any reference as to why the 1st Defendant is a proper defendant in this action and relies on the opinions expressed by Ms Shah-Chaudary in her affidavit.
32. In her oral submissions, Ms Allan suggests that the 1st Defendant is responsible for maintaining beach access and refers me to clause 8.8 of the 2020 Agreement which provides:

"The Developer shall allow and make provision for suitable beach access for the Members in accordance with the Plan. The Club and Members shall be allowed such free access to the beach as detailed herein without interference."

33. I do not see how this provision alone vests any responsibility in the 1st Defendant to maintain the beach access. The provision falls within the section of the 2020 Agreement which deals with easements and the like. The section is entitled "*Easements Wayleaves Grants and Reservations*". As set out above, the objects of the 1st Defendant are *inter alia*, "... to control and manage the Development...". This includes common areas into which a beach access may well fall, but there is no suggestion that the 1st Defendant failed to maintain any particular beach access, none being identified to me, and in any event, such access would be for the benefit of the 'Development' and as I have noted above, this does not include the Hotel.

34. Ms Allan suggests that the Hotel is part of the 'Development'. She refers to the definition of "The Development" set out in the 1st Defendant's Articles of Association which is "... *the area comprised in parcels 61201/37-52 (incl), 54-72 (incl)*". Ms Allan then suggests this should be compared to the definition of the Hotel Site in the 2 agreements³ where it can be seen that parcels 61201/56-72 appear in the latter definition.
35. This redefinition does not in my view, bring the Hotel Site within the definition of Development for the following reasons:
- a) The Hotel Site was specifically defined in both agreements as not being part of the 'Development'; and
 - b) The definition of "the Development" in the Articles of Association set out above continues "*or such amended area from time to time under the Restrictive Agreement*".
36. Mr Katan KC submits that the question which arises is:
- "... whether the Club had any duty of care in law either to (i) warn the deceased, as guests of COMO Parrot Cay hotel ("the Hotel") of the alleged risks or (ii) provide lifeguards/lifesaving equipment and/or flag system for the use/protection of guests of the Hotel."*

He submits it does not.

The 3rd Defendant – Caicos Holdings Ltd.

37. As with the 1st Defendant, there is no suggestion that the Deceased entered into any contractual relationship with the 3rd Defendant.
38. The Statement of Claim describes the 3rd Defendant as "*... a limited liability company, incorporated on 8 September 1994, in accordance with the laws of the Turks and Caicos Islands, authorised to issue 5,000,000 shares.*" It goes on:

³ See paras. 27 & 28 *supra*.

“The Third Defendant owns the land on which the hotel and all its facilities, including the beach bar and restaurant, swimming pools, restaurant, and spa are located. The Third Defendant is also believed to be the registered proprietor of all land on Parrot Cay, which has been designated for private ownership, but has not yet been sold to another private proprietor. It is believed the Third Defendant also operates a rental programme on Parrot Cay whereby privately owned properties in the residential resort development are rented out and managed by the Third Defendant. It is believed that the proprietors who wish to rent out their properties may only do so via the Third Defendant; the Third Defendant also sells hotel and resort services to persons who rent the privately owned properties.”

39. Mr Tibble states that the 3rd Defendant “... is a land holding company, which owns various parcels of land on the island of Parrot Cay including the Hotel Site/land from which the COMO Hotel Parrot Cay operates. It does not own the beach in front of the hotel.” He goes on to deny the operational allegations set out in the 2nd half of the preceding paragraph.
40. Mr Tibble states that the 3rd Defendant “... does not, and has not at any material time, had any part in the operation and management of the hotel; this is done by the 2nd Defendant, PC Hotel Management Limited.” He makes the observation that the Deceased were not staying in one of the “privately owned properties” but were staying at the Hotel.
41. Ms Shah-Chaudary makes the following assertion:

“I note that Mr Tibble on behalf of the First Defendant says it has no business licence. He says nothing about the Third Defendant. It is to be inferred from that and the e-mail dated 2 December 2022 from Mr Katan of MSO, who says that MSO are instructed to apply to strike out only the First Defendant from the proceedings, that the Third Defendant, of whom Mr Tibble is a director, does have one or more Business Licences. We do not know in what categories,

however.”

42. Mr Katan KC responds to this by submitting:

“Much is made of the suggestion CHL has a business licence. Unless it has a business license to operate the hotel, any business license it does have is not relevant to the issues in this case and the claim made by the Plaintiffs.”

43. Ms Shah-Chaudary makes the further assertion:

“I’m also informed by our attorneys that it is usual in developments of this nature for the landowner, here, the Third Defendant, to be paid a proportion of the revenue received by the tenant resort operator, here the Second Defendant. It is also usual for the landowner to be responsible to persons who are injured as a result of activities on his/her property, and to maintain insurance against such an eventuality. No documents evidencing arrangements of this nature have been disclosed by the Defendants.”

44. I am mindful that discovery has not yet taken place, but it appears to me that unless there was some kind of arrangement as hypothesised by Ms Shah-Chaudary or her attorneys, there would be no documents.

45. Mr Katan KC submits that this is not an occupiers’ liability claim and I note that the case is not pleaded as such. In any event, as Mr Katan KC points out, *“... the relevant activity which is the subject of these proceedings and gives rise to the claim for liability is swimming in the ocean, and activity which did not take place on CHL’s property.”* I make the observation that it appears that the 3rd Defendant in any event is not and was not in occupation of the Hotel Site. The 2nd Defendant appears to be.

46. Mr Katan KC puts the question that arises as:

“... whether CHL, as the owner of land next to an ocean, had a legal duty to guests of the hotel operator/its tenant of the alleged risks posed by the activity of swimming in the adjacent ocean and/or had a duty to provide

lifeguards or lifesaving equipment to prevent/mitigate such risks.”

He submits it does not.

47. Ms Allan has annexed to her written skeleton argument, what she describes as “*a few pages omitted from the Defendants’ evidence. The Plaintiffs say these are highly relevant to the documents governing operations on Parrot Cay.*” The 1st of these documents is page 53 of the 2001 Agreement which is the back sheet to the agreement. It is titled:

“RESTRICTIVE AGREEMENT by way of DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS, EASEMENTS AND RESERVATIONS FOR CAICOS HOLDINGS LIMITED in respect of THE PARROT CAY CLUB, PARROT CAY, TURKS AND CAICOS ISLANDS, BRITISH INDIES (sic).”

48. In respect of this Ms Allan submits that this page of the 2001 Agreement clearly identifies the 3rd Defendant as the Developer and beneficiary of Restrictive Agreements in force in 2002⁴. The suggestion that it has been omitted from the exhibit appears to be to infer that there has been some *mala fide* by the Defendants. I do not agree. The addition of this back sheet, adds nothing. It is just that, a back sheet and all the information set out above is included in the 1st page of the 2001 Agreement. That makes it clear that the 3rd Defendant is the ‘Developer’, but that is the developer of the ‘Development’ of which the Hotel does not form part.

49. Ms Allan then highlights that the 2020 Agreement contains additional clauses and in particular, a restriction on renting. Clause 5.23 of the 2020 Agreement provides:

“... and shall not be rented out save and accept the rental program (sic) then made available at the Development by the Developer or affiliate of the Developer.”

50. This, Ms Allan submits, shows that “*the Defendants have failed to provide full and*

⁴ The reason for the reference to 2002 is unclear but it seems that the 2001 Agreement would have been applicable in 2002.

frank disclosure of their operations ...” Ms Allan further submits that this is evidence that the 3rd Defendant is operating the rental management programme. I do not agree that such a conclusion can be reached. Clause 5.23 of the 2020 Agreement refers to a “*rental program that may be made available by the Developer or **affiliate of the Developer***”, clearly there is provision for some entity other than the 3rd Defendant to be operating the rental management company and it is admitted that the rental management programme is operated by the 2nd Defendant, an affiliate of the ‘Developer’, but in any event, the Deceased were not staying at a property within the ‘Development’.

Discussion

51. The summons to strike out the claims against the 1st and 3rd Defendants is brought pursuant to Ord. 18 r.19 which provides:

“The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the grounds that-

- a) it discloses no reasonable cause of action or defence, as the case may be; or*
- b) it is scandalous, frivolous, or vexatious; or*
- c) it may prejudice, embarrass, or delay the fair trial of the action; or*
- d) it is otherwise an abuse or an abuse of the process of the court; ...”*

52. Ms Allan submits that the strike out application is flawed for the following reasons:

- a) That it is made late. Ms Allan refers me to the chronology in the matter. She points out that pleadings closed on 20th December 2021 but the application was not made until 18th January 2023 and refers me to Note⁵ 18/19/3 which provides:

⁵ Notes to the The Supreme Court Practice 1999, England and Wales – The White Book, from which the Turks and Caicos Islands Civil Procedure Rules 2000 were extracted.

“Although the rule expressly states that the order may be made “at any stage of the proceedings”, still the application should be made promptly, and as a rule before close of pleadings.”

However, Note 18/19/3 goes on to say:

“The application may be made even after the pleadings are closed (per Brett M.R. in Tucker v. Collinson (1886) 34 W.L.R. 354) or the trial set down ...”

- b) That the application fails to identify under which part of Ord. 18 r.19 (1) it is brought and what it seeks to remove from the pleadings. Ms Allan referred me to Note 18/19/4 which provides:

“The application should specify precisely what order is being sought, e.g. to strike out or to stay or to dismiss the action or to enter judgment, and precisely what is being attacked whether the whole pleading or indorsement or only parts thereof and if so alleged offending parts should be clearly specified. The application may be made on any or all of the grounds mentioned in this rule, but such grounds must be specified. Moreover, the application may be, and frequently is, made both under this rule and under the inherent jurisdiction of the Court at the same time.”

- c) None of the matters in Ord. 19 r.19(b) exist. Ms Allan submits that the claims are not scandalous, frivolous or vexatious, and nothing amounts to an abuse of process. She refers to Note 18/19/6 which provides:

“It is only in plain and obvious cases that the recourse should be had to the summary process under this rule. It cannot be exercised by a minute and protracted examination of the documents and the facts of the case, in order to see whether the plaintiff really has a cause of action. If there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under

order 33 rule 3.

Where an application to strike out pleadings involves a prolonged and serious argument, the Court should as a rule decline to proceed with the argument unless it not only harbours doubts about the soundness of the pleading but, in addition, is satisfied that striking out would obviate the necessity for a trial or substantially reduced the burden of preparing for a trial...". (Authority citations omitted.)

53. Ms Allan submits that there is no material before the Court to suggest that the claims against the 1st and 3rd Defendants are bound to fail.

54. Mr Katan KC does not address the apparent defect in the form of the application. In his written skeleton argument he submits:

"The Plaintiffs' claim against the Club should therefore be struck out in full on the grounds set out in the Civil Rules [on] the basis it is obviously unsustainable and/or an abuse of process of the Court pursuant to Civil Rules 19(1)(b) and or (d)."

55. With respect to the 3rd Defendant he submits:

"The Plaintiffs seek discovery and witness statements. It is submitted that will simply incur unnecessary costs and, with respect to documents, will produce nothing of relevance as Mr Tibble has already disposed (sic). Continuing the proceedings against CHL would be, therefore, an abusive process of the Court."

56. This matter has progressed with prolonged and serious argument as evidenced by the detail set out in this decision and the 391-page bundle that was submitted. In resistance to the application, Ms Shah-Chaudray prepared a full affidavit dealing with all of the issues. She did not make any comment with respect to the form or timing of the application. That is perhaps not surprising as this issue is a matter of law and procedure and Ms Shah-Chaudary was giving lay evidence, but she did go

on to make substantial legal submissions in her affidavit, Ms Allan adopting 21 paragraphs of the affidavit into her skeleton argument.

57. The issue of the defect in the application was not raised in Ms Allan's written skeleton argument nor was it raised *in limini*. Ms Allan came prepared to argue the full application and allowed Mr Katan KC to close his submissions before raising the issue. I am mindful of Ord.2 which deals with non-compliance of the rules.

58. Ord. 2 r. (1) and (2) provide:

*"(1) **Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.***

*(2) Subject to paragraph (3) **the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1) and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.*** (My emphasis)

59. Given the time and costs that have been expended in this application and for the reasons set out herein I am not minded to dismiss the summons on the technical points raised and I exercise my discretion under Ord. 2.

60. The Plaintiffs' case against the strike out application is essentially put on the basis

that the Plaintiffs' do not know who the proper defendant(s) is/are. Ms Shah-Chaudary details that before the issue of proceedings the 3 Defendants herein were identified as operating on Parrot Cay. She goes on to detail efforts made to attempt to investigate what business licences have been issued to which of the 3 Defendants. She suggests that there has been a deliberate attempt by the Defendants to conceal what business licences are held by which company.

61. Ms Allan argues that it is not clear which entities operate the Hotel and that there is no evidence that makes it clear that 1st and 3rd Defendants do not have a role to play. I have set out above the arguments Ms Allan makes to tie in the 1st and 3rd Defendants into the action.
62. When asked by the Court with whom do the Plaintiffs say the Deceased contracted with, Ms Allan accepts that this was with the 2nd Defendant. In response to the question by the Court, what then was the cause of action in contract against the 1st and 3rd Defendants, her response was that the Plaintiffs do not know who was responsible.
63. The Court directed Ms Allan to Note 18/19/10 which is titled "No reasonable cause of action or defence". At paragraph 1 the Note provides:

"Principles – 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 or the particulars 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 ..." (Authority citations omitted.)
64. In deciding this application, I am mindful that I am not to go into an in-depth consideration of the facts, but I think there is some latitude in this matter. This is not a case where the Defendants are asking for the claim to be struck out in its entirety, something which undoubtedly would not succeed. What is being asked is

to strike out the claim against the 1st and 3rd Defendants on the basis there is no cause of action against them and hence, their inclusion is an abuse of the process of the Court.

65. Ms Shah-Chaudary says:

“In conclusion, I do not accept that the Plaintiffs were wrong to include the First and Third Defendants in the proceedings. Plainly, despite what Mr Tibble says, all three Defendants are inextricably involved in the operation of the Resort by virtue of the hotel operator, the homeowners association and ownership of the land on which the hotel operations are located.

I respectfully submit, therefore, that the potential liability of the First and Third Defendants for the deaths of my sister and her husband should not be determined on a summary application without full disclosure of their contractual documents, accounting processes and inter-relationship, and testing the veracity of that evidence at trial.

I submit that the potential prejudice to the Plaintiffs, if the First and Third Defendants are excluded from the action, exceeds any possible prejudice to the First and Third defendants if they remain in it as named defendants. I asked the court to dismiss the Defendants application.”

66. Ms Allan submits that a cause of action has been made out against the 1st and 3rd Defendants and repeats the plea that the matter should not be decided at this time i.e. summarily.

67. What is apparent, and as Ms Allan submitted, is that the Plaintiffs do not know what the relationship is between the 3 Defendants, but this has been explained by Mr Tibble. The approach to the matter has a feel of ‘shotgun’ litigation i.e. ‘let’s join in everyone we can as someone must be liable’, which would in my view be an abuse of the process of the Court. Note 18/19/18 in dealing with abuse of process provides:

*“Para 1(d) confers upon the Court in express terms powers which the Court has hitherto exercised under its inherent jurisdiction where there appeared to be an abusive process of the Court. The term connotes that the process of the Court must be used bona fide and properly and must not be abused. 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.” (My emphasis)*

68. The Plaintiffs’ attempts to tie in the 1st and 3rd Defendants are based on supposition and conjecture and not facts.
69. The Plaintiffs’ arguments overlook, or at least give little to no weight to the fact that the 2nd Defendant has conceded at the 1st opportunity that it owed duties to the Deceased, both in contract and tort. It therefore concedes that it is the proper defendant in this action.
70. The Plaintiffs raise the issue of prejudice suggesting that there is no prejudice to the 1st and 3rd Defendant if they remain in the action. Mr Katan KC submits otherwise, but in my view, prejudice is not something which falls to be considered. This is not a matter where the Court is concerned in a balancing of consequences. The question is whether bringing in the 1st and 3rd Defendants amounts to an abuse of process of the Court (by way of their inclusion being frivolous or vexatious or otherwise) and/or whether there is a cause of action against them with some chance of success.
71. Having read the affidavit of Mr Tibble, who has explained in detail, on oath, the functions and operations of the 1st and 3rd Defendants, I am of the view that the claims against them do not have any chance of success. Mr Tibble’s evidence is only challenged by Ms Shah-Chaudary to the extent that she says:

“... the flat denial by Mr Tibble about the inter-relationship of the companies, should not be considered as the proper basis to strike the Plaintiffs’ claim against the First and Third Defendants.”

72. Allowing the actions against the 1st and 3rd Defendants to continue in the hope that something might be gained under cross-examination of Mr Tibble would amount to an abuse of the process of the Court and extend the complexity and costs of the actions. No connection between the 1st and 3rd Defendants and the operations of the Hotel has, in my view, been established.
73. Accordingly, the claims against the 1st and 3rd Defendants are struck out.

References to the names and addresses of the directors of the Defendants

74. Mr Katan KC submits that the reference to the directors in the Statement of Claim is not relevant to any of the issues in the claim and should be struck out. He suggests that they have been included to cause them embarrassment, this being evidenced by Ms Allan's submission in her skeleton argument that 2 expert reports had been disclosed to the Defendants on a without prejudice basis "*... in the hope that the actions could be brought to an end without the exposure of a public hearing which the Plaintiffs believed erroneously it now appears, the Defendants might wish to avoid.*" and Ms Shah-Chuadary's affidavit where she says:

"As expressed in Miss Allan's e-mail on 17th October 2022 we had hoped that providing these on a without prejudice basis would assist in bringing the actions to a close on a negotiated basis rather than in the full glare of the publicity which is bound to follow a trial concerning the needless deaths of Noor and Mohammad."

75. With respect to this issue, Mr Tibble simply says that he has been informed by the Defendants' attorney that the inclusion of the names is irrelevant to the Plaintiffs' claims and asks that the references be struck out.
76. Ms Allan did not address the issue either in her written skeleton argument or her oral submissions.
77. There is no claim made against any of the directors in their personal capacity. Their identity is however not a secret as their names appear on the company searches

included in Ms Shah-Chaudary's exhibit, which searches can be obtained by anyone for the payment of a small fee.

78. The addresses of the directors are not explicitly set out in the Statement of Claim, just the countries in which they are recorded to reside in the company searches where the full addresses are shown.
79. As there is no claim against the directors personally, I do not see why they have been included, but I do not find the inclusion offensive. That said, there is an unopposed application before me to have the references stuck out and I therefore do so.

References to the fixed assets of the 1st and 2nd Defendant

80. Similarly, Mr Katan KC takes issue to references in the Statement of Claim to the fixed assets of the 1st and 2nd Defendants. He submits "*Providing discovery of the assets of any of the defendants who remain a party to the proceedings would simply add to the costs of the proceedings and is not relevant to any issue of liability, causation or quantum of the claims made.*"
81. Ms Allan did not address this issue and therefore there is again an unopposed application before me. I agree with Mr Katan KC that the asset holding of any particular Defendants does not go to the issues in the claim. In the circumstances, the reference to the assets of the 2nd Defendants is to be stuck out.

The Application for Further and Better Particulars of Claim

82. The Plaintiffs claim that the Defendants were in breach of contract and/or negligent in that, *inter alia*, they:
- a) failed to alert [the Deceased] of the risk posed generally by the geographical configuration of the beach and sandbars.
 - b) failed to warn [the Deceased] about the specific meteorological conditions that existed on and prior to 28 October 2020 which predicated the risk of rip

currents or other dangerous currents that cause their drowning.

- c) failed to warn [the Deceased] of the specific dangers associated with walking on and between sandbars.

83. The Defendants request further and better particulars of:

- a) The specific meteorological conditions that allegedly existed on and prior to the 28th October 2020 which the Defendants should have warned [the Deceased] about;
- b) The alleged rip and other dangerous currents which caused the death of [the Deceased] of which the Defendants should have given warning; and
- c) The alleged specific risks and dangers associated with walking on and between sandbars and the geological configuration of the same and of the beach at Parrot Cay in front of the villa where [the Deceased] were staying on 28th October 2020.

84. Both parties served lengthy requests for further and better particulars, the Plaintiffs' response extending to some 16 pages. Following receipt of the Plaintiffs' response, attorneys for the Defendants wrote to the Plaintiff's attorneys with respect to the matters set out in paragraph 82 above, in the following terms:

"Your clients' case as pleaded at paragraph 19 in each case makes various very specific positive assertions, in particular that:

There were specific meteorological conditions that existed on and prior to the 28th October 2020 which the Defendants should have warned Dr Shah and Mr Malik about;

In any event there existed, generally, supposed rip and other dangerous currents, which were the cause of the deaths of Dr Shah and Mr Malik, of which, again, the Defendants should have given warning; and

There were alleged specific risks and dangers associated with walking on and between sandbars and the geological configuration of the same and of the

beach.”

The letter goes on:

“Even on your clients’ cases there is no suggestion that on the date of the incident there were actually any dangerous or riptides nor meteorological conditions which would give rise to any such dangerous conditions...”

85. The reason for this letter was because in answer to the request for further and better particulars, the response was that these matters would be addressed by the Plaintiffs’ expert.
86. What then transpired was that it was agreed between the parties that the matters be stayed for a period of 3 months to allow the Plaintiffs to obtain expert evidence to substantiate the above pleadings. 2 reports were served on 16th September 2022 on a without prejudice basis as noted in paragraph 74 above.
87. Both reports are included in the exhibit to Ms Shah-Chaudary’s affidavit and as such are open documents in the litigation notwithstanding the earlier without prejudice disclosure.
88. The 1st report is authored by Dr. Shane Elipot, Research Associate Professor, The Rosensteil School, University of Miami, dated 15th September 2022 expressing his opinion *“on the type and strength of ocean currents that exist within the shores of the Turks and Caicos islands (TCI) and specifically in the area and at the time of the incident that led to the drownings and deaths of Mr. Malik and Dr. Shah”*. The 2nd report is irrelevant for the purposes of the application that is before the Court.
89. Mr Katan KC submits:

“Dr. Elipot makes no reference to ‘rip’ currents (paragraphs 19 c and e of the statement of claim) nor to any particular weather conditions on the day of the deceased’s death (again paragraph 19 c of the statement of claim). Particulars of the rip tides that are alleged to have existed must be disclosed

if the Plaintiffs continue to allege riptides existed.

Further the Defendants are entitled to know what particular (sic) what the specific meteorological conditions were alleged to have existed on and prior to the 28th of October 2020 so they know what the case they have to meet.

Finally Dr. Elipot makes no reference to sand bars nor the geographical configuration of the beach and sandbars (paragraph 19 b) of the statement of claim. Particulars of the alleged configuration are needed in order that the Defendants can meet the claim made by the Plaintiffs."

90. Ms Allan submits that the Plaintiffs' position is simply that they do not accept there is any failure to particularise adequately their claim in the statement of claim.
91. I cannot accept that submission. The reply to the request for further and better particulars was that the Plaintiffs' expert would be addressing the requests. It is implicit from that response that further particulars were required.
92. Ms Shah-Chaudary says:

"The Plaintiffs (sic) do not accept there was any failure to particularise adequately their claim as regards the allegations concerning the weather and sea currents which caused the deaths of Noor and Mohammed. However, in an attempt to be cooperative, we acceded to the Defendants' suggestion for a 3 month stay which ended on 16 September 2022."

She goes on:

"I respectfully contend that the two reports make it abundantly clear what the Plaintiffs contend with the numerous failures by the Defendants which led to my sister and her husband's death whilst on their honeymoon at parrot key."

93. I do not accept that the agreement to stay the proceedings to obtain expert evidence was *"in an attempt to be cooperative"* given that the Plaintiffs had already conceded

that they required such experts to respond to the request for better particulars. The reason for the stay was to give the Plaintiffs the opportunity to obtain the facts which they need to plead.

94. The issue is therefore whether Dr. Elipot's report adequately addresses the matters set out in paragraph 83 above. I have not been provided with a copy of the instructions given to Dr. Elipot.

95. I have considered the report in detail. Dr. Elipot concludes:

*"Because of the widespread nature of the tidal phenomenon, I conclude that such **strong tidal currents** have consistently existed throughout the lagoon in front of COMO Parrot Cay resort, creating a turbulent and hazardous environment unsafe for swimming. Non-professional swimmers and beachgoers will find themselves severely constrained by the tidal flow when attempting to move in the waters of the lagoon. Because of the periodic and repetitive nature of the tide, I assess with a reasonable degree of certainty⁶ that such **strong tidal currents** occurred at the time of the drownings.*

*In summary, based on my expertise, I conclude with the reasonable degree of certainty that strong, hazardous, and predictable **tidal currents** occurred at the time of the drownings that led to the deaths of Mr. Malik and Dr. Shah."*
(Emphasis added)

96. At section 4 of his report Dr. Elipot gives a general overview⁷ of Shoreline Currents as:

"The currents along the shoreline that are experienced by swimmers and beachgoers are the result of the superposition of several flows of different and independent natures. These currents are the sum of the coastal currents related to the general ocean oceanic circulation, ocean rip currents that are

⁶ Which he defines as meaning "more likely than not to be the case".

⁷ It is clear that the overview is not specific to the Turks and Caicos Islands as he goes on to deal with the Turks and Caicos Islands specifically later in the report.

related to the surface waves and swell that eventually break on the beach, and finally ocean currents that are due to ocean tides. This latter type of current is due to the repetitive and predictable motion of the ocean caused by gravitational forces of the Sun and the Moon.”

97. What I draw from the above passage is that there are different kinds of ocean flow or currents i.e.:
- a) General oceanic circulation;
 - b) Ocean rip currents; and
 - c) Ocean currents that are due to ocean tides (tidal currents).
98. Other than the above, Dr. Elipot makes no reference to any rip current. His report with respect to the Turks and Caicos Islands is confined to ocean and tidal currents and he makes no comment regarding:
- a) Any general risk posed by the geographical configuration of the beach on Parrot Cay near where the incident happened or as a result of there being sand bars.
 - b) Any specific meteorological conditions that existed on and prior to 28 October 2020 or indeed any meteorological conditions at all. Particularly, he does not tie his conclusion that tidal currents existed at the time of the drowning into any meteorological condition nor does he suggest that such currents can be predicted by any particular meteorological condition.
 - c) Any specific dangers that arise from walking on and between sandbars.
99. I find that the allegations pleaded in paragraphs 19 b, c, and d of the Statement of Claim are not sufficiently particularised and that this is accepted by the Plaintiffs, as evidenced by the response to the request for better particulars. If these allegations are to be maintained then the Plaintiffs must give full particulars as Dr Elipot did not address those alleged facts. I therefore allow the Defendants application.

Disposition

100. The claims against the 1st and 3rd Defendants are struck out.
101. The references in the Statement of Claim to the names and addresses of the directors of the 2nd Defendant are struck out.
102. References Statement of Claim to the fixed assets of the 2nd Defendant are struck out.
103. The Plaintiffs are to give further and better particulars of:
- a) The specific meteorological conditions that allegedly existed on and prior to the 28th of October 2020 which predicated the risk of rip currents or other dangerous currents.
 - b) The alleged rip and other dangerous currents (save for tidal currents) which caused the deaths of Dr. Shah and Mr Malik of which the Defendants should have given warning.
 - c) The alleged specific risks and dangers associated with walking on and between sandbars and the geological configuration of the same and of the beach at Parrot Cay in front of the villa where Dr. Shah and Mr Malik were staying on the 28th of October 2020.
104. I will hear counsel further with respect to the Plaintiffs' summons given the decision herein and with respect to costs.

2nd February 2024

The Hon. Justice Anthony S. Gruchot
Judge of the Supreme Court

