COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

Common Law and Equity Division
2018/CLE/gen/00169

IN THE MATTER of an Agreement for Sale dated the 21 day of September A.D. 2016 and made between BAHAMAS SUPERMARKETS LIMITED PENSION PLAN LIMITED (as vendor) and AML FOODS LIMITED (as Purchaser) for the sale of the free hold property known as ALL THAT piece or parcel of land formerly lot numbers 6, 7, and 8 and a portion of a reserve on the plan recorded in the Department of Lands and Surveys as Plan Number 579 of New Providence containing the admeasurements six and fifty two hundredths (6.52) acres situate in the Soldier Road Industrial Site on Independence Drive in the Eastern District of the Island of New Providence one of the Islands of the Commonwealth of The Bahamas.

AND IN THE MATTER the law of Conveyancing and Law of Property Act.

BETWEEN

AML FOODS LIMITED

Plaintiff

AND

DENNIS WILLIAMS
ROSALIE McKENZIE
(Trustees of the Bahamas Supermarkets Employee Retirement Fund)
1st Defendants

AND

BSL RETIREMENT PLAN LIMITED

2nd Defendant

AND WHANSLAW TURNQUEST
(Representative of the Beneficiaries of BSL Profit Sharing Retirement Plan
3rd Defendants

AND

ABDAB PROPERTIES LIMITED

4th Defendant

Before:	The Hon. Madam Justice G. Diane Stewart
Appearances:	Mr. Marco Turnquest and Ms. Chizelle Cargill for the Plaintiff/Respondent Mr. Roger Minnis and Mr. Khalil Parker for the 1st Defendants/Applicant Mr. Desmond Edwards for the 2nd Defendant Mr. Rouschard Martin for the 3rd Defendants Ms. Judith Smith for the 4th Defendant
Hearing Date:	19th May, 2020
Ruling Date:	17th June, 2020

Civil – Strike Out – Reasonable cause of action – O. 18 r. 19 (1) (a) Rules of the Supreme Court ("RSC") – Court limited to considering Statement of Claim - Declaratory Relief – O. 15 r. 17 RSC – Declaratory relief is a cause of action - Duty of Trustees

RULING

1. By Summons filed 6th January, 2020 the First Defendants sought an Order pursuant to Order 18, Rule 19 (1) (a) of the Rules of the Supreme Court to strike out the Plaintiff's Statement of Claim filed 29th November, 2019 as against the First Defendants on the ground that there was no reasonable cause of action pleaded against the First Defendants by the Plaintiff **(the "Summons to Strike")**.

2. The Plaintiff objected on the ground that the alternative relief and prayer sought in its Statement of Claim filed 29th November, 2019 **("Plaintiff's SOC")** contained a reasonable cause of action and in addition the Plaintiff was seeking declaratory relief against the First Defendants which was sufficient to defend the Summons to Strike.

3. Therefore the issues for this Court to determine are:

   3.1 Whether the Plaintiff's claim against the First Defendants should be struck out if there is no reasonable cause of action against them in the Plaintiff's SOC; and

   3.2 If there is no reasonable cause of action, whether the Plaintiff's declaratory relief sought is sufficient to allow the First Defendants to remain a party to the action.

4. The Plaintiff's SOC contained inter alia, the following averments:

   1. **The Plaintiff, AML Foods Limited, is a public company duly incorporated under the laws of the Commonwealth of the Bahamas.**

   2. **The First Defendants, Mr. Dennis Williams and Ms. Rosalie Mckenzie, are Trustees of the Bahamas Supermarkets Employees Retirement Fund ("BSERF")...**

   6. **By a Deed of trust ("the Deed of Trust") dated 22 June 1977 and made between Kendal G.L. Isaacs and Cleveland W. Eneas as Trustees and Bahamas Supermarkets Limited as Settlor the Trustees, pursuant to recital (b) thereof, agreed to retain in trust such sums as, "are from time to time deposited with them as Trustees for the benefit of all of certain of the employees of Settlor and its subsidiary companies pursuant to an agreement or plan to be adopted by said Settlor at a future date and specifically for the benefit of such employees of settlor and its subsidiary companies who may be admitted to membership in the plan in accordance with the rules formulated in implementation of the said plan which shall be funded by means of contributions to the Trust constituted hereby (hereinafter called "The Trust Fund") to be made by Settlor as aforesaid, on behalf of and for the benefit of said employees of Settlor and its subsidiary companies as to whom the said agreement or plan shall be applicable according to the terms thereof."...**

   8. **By Section Eight of the Trust Deed it was provided that, "If either Trustee resigns or is unable to continue to act as Trustee, the settlor shall have power to appoint his successor Trustee. Any successor Trustee shall succeed as Trustee with like effect as though originally named as such herein, and all authority and power conferred on any Trustee hereunder shall pass to his successor Trustee."**

11. By a Deed of Appointment dated 16 January 2015 and made between Bahamas Supermarket Limited as Settlor, Christine Turnquest-Knowles and Constance Rolle as the retiring trustees, Mark Finlayson and Philip A. Kemp as the retired trustees and the First Defendants as the New Trustees ("the January 2015 Deed of Appointment") the First Defendants were appointed as the Trustees of BSERF created by the Deed of Trust to hold the Trust Fund i.e. the assets then comprised in the said Trust upon the trusts declared for the benefit of the employees of the Settlor in accordance with the terms of the plan adopted by the Settlor.

12. By reason of recital J. contained in the January 2015 Deed of Appointment and section 47 (1) (a) and (b), (3) and (5) of the Trustee At 1998 all the assets of whatever nature comprising the Trust Fund for the time being vested in the First Defendants on their appointment as Trustees of BSERF. Such assets, by reason of the matters set out below, included the Property.

13. Unless and until the First Defendants or either of them resigned or became unable to continue to act as a Trustee which did not occur at any time material to the matters set out in the Statement of Claim the Settlor had no power pursuant to section eight of the Deed of Trust or otherwise to remove or replace them or to appoint additional Trustees and any purported appointment was of no effect.

14. By an agreement in writing dated 21 September 2016 executed as a Deed the First Defendants agreed to sell the Property to the Plaintiff for the sum of $3,000,000.00 of which $150,000.00 being five percent of the purchase price was payable on the date of the Agreement.

15. By an indenture of conveyance dated 28 July 2017 ("the July 2017 Conveyance") and made between the First Defendants as Trustees of BSERF as vendors and the Plaintiff as purchaser in consideration of the payment of $2,437,757.57, receipt of which was acknowledged, the Vendors as Trustees conveyed the Property to the Plaintiff.

16. The July 2017 Conveyance recites the fact that:
(a) by two unrecorded indentures of conveyance referred to as "the Cellars Conveyance" and the ABDAB Conveyance") dated 16 January i.e. the date on which the First Defendants were appointed as Trustees, made between Christine Turnquest-Knowles and Constance Rolle being the Former Trustees of BSERF and, respectively, Cellars Property Holdings Limited and ABDAB Properties Limited, the Former Trustees purported to deal with various parts of the Property; and,

(b) By a consent order dated 16 June 2017 in CLE/GEN No. 00529 of 2017 in which the First Defendants were the Plaintiff and Cellars Property Holdings Limited and ABDAB Properties Limited were the Defendants, the Supreme Court of the Bahamas ordered that the Cellars Conveyance and the ABDAB Conveyances "be and are both set aside, declared to be null and void and are to be destroyed".

17. By an unrecorded and unstamped indenture of conveyance dated 1 May 2014 ("the 2014 Conveyance") which was not recited in the July 2017 Conveyance and made between Christine Turnquest-Knowles and Constance Rolle as the then Trustees of BSERF as vendors and the Second Defendant, BSLRPL, as purchaser, Christine Turnquest-Knowles and Constance Rolle purported to convey the property to BSLRPL in consideration of the issue of an unspecified number of ordinary shares in BSLPRL in the name of the said trustees of BSERF.

18. The 2014 Conveyance was not recorded or stamped and was void and further, has at all times been treated and accepted as being void and of no effect as confirmed by the execution by Christine Turnquest –Knowles and Constance Rolle as vendors, the vendors in the 2014 conveyance, of the two conveyances executed by them in

2015 and referred to in paragraph 15 above which they could not have done had the 2014 conveyance been effective. At the material time Constance Rolle was a Trustee of BSERF and a director of BSLRPL.

19. Further:
(a) In the 2014 the then Trustees of BSERF came up with a scheme whereby they would transfer the Property from the Trust to BSLRPL pursuant to an opaque arrangement whereby it was proposed that the beneficiaries of BSERF would exchange their interest in the Trust for shares in BSLRPL with each beneficiary receiving one common share in BSLRPL and preference shares would pay dividends to a maturity date which matched the beneficiary's 70th birthday;

(b) Whether to enter into the scheme or not was put to a vote of the beneficiaries;

(c) Purportedly, of the Trust's 299 beneficiaries, 148 voted to accept the scheme and 151 voted to remain with the Trust so that the vote was not carried;

(d) The Trustees were at all times under a duty to act in the best interest of the beneficiaries;

(e) In breach of that duty the then Trustees purported to implement the scheme including the execution of the of the 2014 conveyance;

(f) Having elected to seek the authority of the beneficiaries to enter into the scheme and having failed to obtain that authority the then trustees acted in breach of trust in implementing the same and executing the 2014 conveyance;

(g) Further by entertaining into the scheme the then Trustees were exchanging a certain interest in the Property of shares which had no value as BSLRPL had no assets until after it acquired the Property;

(h) The transaction did not provide, and could not provide, any benefits to the conveyance of the Property;

(i) On a true analysis of the conveyance no consideration was given for the conveyance of the Property;

(j) Phillip Kemp II executed the 2014 conveyance as President of BSLRPL and then subsequently witnessed the execution of the 2015 conveyances by the then Trustees whereby part of the same property purportedly conveyed by the Trustees to BSLRPL via the 2014 conveyance was conveyed again by the then Trustees to different purchasers; and;

(k) Further, the 2014 conveyance, if otherwise valid, would have been in breach of section 3 of the executory Trust Deed set out ta paragraph 7 above restricting the purpose of the Trust to providing benefits payable by way of pension to employees of the Settlor was at all material times Mark Finlayson and at all material times members of his family owned or controlled at least part of the shareholding in BSLRPL and the directors of the same were Mark Finlayson's father, mother and two sisters.

20. By reason of the matters set out above the Trustees of BSERF and BSLRPL have elected to treat the 2014 conveyance as void and are estopped by their conduct and by the execution of the 2015 conveyances from denying that the 2014 conveyance is void and of no effect.

21. By reason of the 2014 conveyance being void the Property never passed from the then Trustee to BSLRPL and remained vested at all time in the then Trustees at the

time of the January 2015 Deed of Appointment and vested in the First Defendants who were duly authorized and empowered to sell the Property to the Plaintiff.

22. By an unrecorded and unstamped indenture of conveyance dated 12th December 2017, the Second Defendant purported to convey 1.52 acres of the Property to ADBAD Properties Limited (the December 2017 conveyance".) By virtue of the 2014 conveyance being null and void as set out above, the Plaintiff avers that the December 2017conveyance is null and void.

23. By reason of the matters set out above the Plaintiff is entitled to:

(a) A declaration that the 2014 and December 2017 conveyances are void and of no effect.

(b) An order that Second and Fourth Defendants deliver up the original copies of the 2014 and December 2017 conveyances to the Plaintiff within seven days of the date of judgment for the purpose of enabling the Plaintiff to cancel the same by destruction thereof.

(c) A declaration that the July 2017 conveyance is valid and effective to transfer the Property to the Plaintiff.

(d) A declaration that no Trustee for the time being of the Trust nor any of the beneficiaries of the Trust was a foreign person for the purposes of the Immovable Property (Acquisition by Foreign Persons) Act 1981 or a non-Bahamian for the purposes of the International Persons Landholding Act 1993.

(e) An Order that the Defendants and each of them do all acts or things necessary to vest the Property in the Plaintiff;

(f) In the alternative, an order that Court do vest the said Property in the Plaintiff.

24. In the alternative, if, which is denied, the 2014 conveyance was valid and effective or, if, for some other reason, the July 2017 conveyance is not valid and effective, the Plaintiff is entitled to the return of the purchase price of $2,437,757.57 paid by it to the First Defendants together with interest thereon.

25. Further, the Plaintiff is entitled to and claims interest (compound, or in the alternative, simple) on the amount found due to the Plaintiff at such rate and for such period as the Court thinks fit pursuant to the equitable jurisdiction of the court or pursuant to the Civil Procedure Award of Interest Act 1992.

The Prayer seeks:-

"AND the Plaintiff claims"

1. A declaration that the 2014 and December 2017 Conveyances are void and of no effect.

2. An order that Second and Fourth Defendants deliver up the original copies of the 2014 and December 2017 Conveyances to the Plaintiff within seven days of the date of judgment for the purpose of enabling the Plaintiff to cancel the same by destruction thereof.

3. A declaration that the July 2017 Conveyance is valid and effective to transfer the Property to the Plaintiff.

4. A declaration that no Trustee for the being of the Trust nor any of the beneficiaries of the Trust was a foreign person for the purposes of the Immovable Property (Acquisition by Foreign Persons) Act 1981 or a

non-Bahamian for the purposes of the International Persons Landholding Act 1993.

5. An order that the Defendants and each of them do all acts or things necessary to best the Property in the Plaintiff.

6. In the alternative, an order that Court do vest the said Property in the Plaintiff.

7. In the alternative, in the event that the Plaintiff is not entitled to the declarations and the order set out above, an order that the First Defendants do pay to the Plaintiff the sum of $2,437,757.57 together with interest thereon.

8. Interest (compound, or in the alternative, simple) on the amount found due to the Plaintiff at such rate and for such period as the Court think fits pursuant to the equitable jurisdiction of the court or pursuant to the Civil Procedure Award of Interest Act 1992.

9. Such other accounts, enquiries or directions as may be necessary.

10. Costs.

11. Further or other relief."

5. Order 18, Rules. 19 (1) (a) and (2) provide:

"19. (1) 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 ground that —
(a) it discloses no reasonable cause of action or defence, as the case may be;
(2) No evidence shall be admissible on an application under paragraph (1) (a).

NO REASONABLE CAUSE OF ACTION

6. The First Defendants argued that there was no reasonable cause of action pleaded against them in the Plaintiff's SOC which made their Summons to Strike a plain and obvious case for the Court to exercise its summary power to strike under O. 18 r. 19 (1) (a) of the RSC. They further submitted that only the Plaintiff's SOC should be considered and that no evidence filed in the action be considered. They relied on **West Island Properties Limited v Sabre Investments Limited et al SCCivApp No. 119 of 2010** in which President Allen JA stated:

> **"15 In the case of Drummond-Jackson v. British Medical Association [1970] 1 W.L.R. 688, Lord Pearson determined that a cause of action was reasonable where it had some chance of success when considering the allegations contained in the pleadings alone. That is, beginning at page 695, he said the following:**
>
> > **"Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases.**
>
> **In my opinion the traditional and hitherto accepted view - that the power should only be used in plain and obvious cases - is correct according to the**

intention of the rule for several reasons. First, there is in paragraph (1)(a) of the rule the expression "reasonable cause of action," to which Lindley M.R. called attention in Hubbuck & Sons Ltd. v. Wilkinson, Heywood & Clark Ltd. [1899] 1 Q.B. 86, pp. 90 - 91. No exact paraphrase can be given, but I think "reasonable cause of action" means a cause of action with some prospect of success, when (as required by paragraph (2) of the rule) only the allegations in the pleading are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out. In Nagle v. Feilden [1966] 2 Q.B. 633 Danckwerts L.J. said, at p. 648:

> 'The summary remedy which has been applied to this action is one which is only to be applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process of the court.'

Salmon L. J. said, at p. 651: 'It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable.' Secondly, subparagraph (a) in paragraph (1) of the rule takes some colour from its context in subparagraph (b) "scandalous, frivolous or vexatious," subparagraph (c) "prejudice, embarrass or delay the fair trial of the action" and subparagraph (d) "otherwise an abuse of the process of the court." The defect referred to in subparagraph (a) is a radical defect ranking with those referred to in the other subparagraphs. Thirdly, an application for the statement of claim to be struck out under this rule is made at a very early stage of the action when there is only the statement of claim without any other pleadings and without any evidence at all. The plaintiff should not be "driven from the judgment seat" at this very early stage unless it is quite plain that his alleged cause of action has no chance of success. The fourth reason is that the procedure, which is (if the action is in the Queen's Bench Division) by application to the master and on appeal to the judge in chambers, with no further appeal as of right to the Court of Appeal, is not appropriate for other than plain and obvious cases.

...

That is the basis of rule and practice on which one has to approach the question whether the plaintiff's statement of claim in the present case discloses any reasonable cause of action. It is not permissible to anticipate the defence or defences - possibly some very strong ones - which the defendants may plead and be able to prove at the trial, nor anything which the plaintiff may plead in reply and seek to reply on at the trial."

7. The First Defendants contended that the Plaintiff's SOC is concerned with the validity of conveyances executed between the Plaintiff and the retired Trustees and not those conveyances executed between the Plaintiff and themselves as current Trustees. They additionally contended that the issues raised at paragraph 10 (4) of the Plaintiff's Submissions were not raised in the Plaintiff's SOC. Para 10 (4) of the Plaintiff's Submissions reads as follows:

> "10. Given the above, it is clear that there is a triable issue between AML and the Applicants over:
>
> 1.....
> 2.....
> 3.....
>
> 4. Whether the Applicants are liable to repay the purchase price to AML if the Property was not vested in them?"

They also disagreed with the Plaintiff's contention that the court should rely on filed Affidavits to support the position that there was a reasonable cause of action against the First Defendants and argued that the Plaintiff was estopped from using and relying on filed affidavits because of the ground on which the application was premised.

8. The Trustees also submitted that they were not estopped from applying to have the action struck out because they substantially did not participate in the proceedings and any participation which occurred was not a waiver of their rights. They submitted that:

   8.1 The Affidavit of Rosalie McKenzie filed 29th October, 2019 was in objection to adding the 3rd Defendant to the action;

   8.2 Upon conversion of the action to a Writ action, there was no order made which stated that the affidavits filed in response to originating summons would stand as pleadings;

   8.3 They did not participate in the preparation of the Agreed Statement of Facts and Issues filed 17th April, 2019.

   8.4 The Summons to Strike was filed at a very early stage in the action as there were no other pleadings between the First Defendants and the Plaintiff with the exception of the Summons to Strike and the Plaintiff's SOC as held in – Jackson v. British Medical Associate and other where Lord Pearson stated,

> **".....Thirdly, an application for the Statement of Claim to be struck out under this rule is made at a very early stage of the action when there is only the Statement of Claim without any other pleadings and without any evidence at all."**

9. They further maintained that:

   9.1 The Plaintiff would not be driven from the judgment seat because the Plaintiff had sufficiently pleaded causes of action against the remaining Defendants ;

   9.2 The issues raised by the Plaintiff were strictly between the Plaintiff and its conveyancing Counsel; and

   9.3 The First Defendants could not assist or provide the Plaintiff with the remedies sought by the Plaintiff.

10. The Plaintiff on the other hand submitted that there was a cause of action alleged specifically against the First Defendants at Paras. 23 through 25 of the SOC, and Paras. 3 of the Prayer as set out above.

11. The Plaintiff also raised the preliminary objection that the First Defendants' application should have been made promptly and as a result of not doing so, they have waived their right to apply to strike out the action. They maintained that the First Defendants were estopped because they had actively participated in the action by filing various affidavits

and participating in the trial of the action before the late Chief Justice Isaacs and at no time objected to being a party in the two years that the matter was alive.

12. The Plaintiff stated that it intended to rely on all filed Affidavits before the court in support of its position that it would be inappropriate to strike the First Defendants from the action based on the finding of Megarry VC in **Re Caines (deceased): Knapman v Servain and another [1978] 2 ALL ER 1** who stated:

> "Second, the prohibition in r 19(2) is expressed as being that evidence is to be inadmissible 'on' an application under r 19(1)(a). In other words, when an application is made under r 19(1)(a), the applicant cannot put in evidence to support his application, and the respondent cannot put in evidence to rebut that application. An application under the rule is not to be made into a preliminary hearing. But that ought not to enable a party to object to an affidavit that has already been put in for the purpose of supporting the originating summons; for such an affidavit is not truly evidence 'on' the application, but evidence which antedates the application and has been put in for a different purpose. In short, on an application under r 19 (1)(a) you must take the proceedings as you find them, though evidence to support or repel the application cannot be added. Views of this kind were, I understand, initially held by counsel for the plaintiff, though on reflection after the hearing before the master he resiled from them. I regard it as being important that the purpose to be discerned in the Rules of the Supreme Court should not be satisfied by an over-literal approach to their language."

13. The Plaintiff submitted that there was no dispute on the law governing Order 18 Rule 19 (1)(a) applications and referred to the English notes which defined what was a reasonable cause of action.

The notes under Order 18/19/10 state:-

"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 W.L.R. 688). So long as the statement of claim or particulars discloses some cause of action, or raise some question fit to be decided....the mere fact that the case is weak and not likely to succeed, is no ground for striking it out."

14. In **Drummond-Jackson v British Medical Association and others [1970] 1 WLR 68** Lord Pearson stated that the power should be exercised only in clear cases:-

> "In my opinion the traditional and hitherto accepted view – that the power should only be used, in plain and obvious cases – is correct according to the evident intention of the rule for several reasons. First, there is in paragraph 1(1) (a) of the rule the expression "reasonable cause of action," to which Lindley M.R. called attention in Hubbuck & Sons Ltd. v. Wilkinson, Heywood & Clark Ltd. [1899] 1 Q.B. 86 pp 90 – 91. No exact paraphrase can be given, but I think "reasonable cause of action" means a cause of action with some chance of success, when (as required by paragraph (2) of the rule) only the allegations in the pleading are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out.

Lord Salmon also said:-

> "It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable. "Secondly, subparagraph (a) in paragraph (1) of the rule takes some colour from its context in subparagraph (b) "scandalous, frivolous, vexatious," subparagraph (c) "prejudice, embarrass or delay the fair trial of the action" and subparagraph (d) "otherwise an abuse of the process of the court." The defect referred to in

subparagraph (a) is a radical defect ranking with those referred to in the other subparagraphs. Thirdly, an application for the statement of claim to be struck out under this rule is made at a very early stage of the action when there is only the statement of claim without any other pleadings and without any evidence at all. The plaintiff should not be "driven from the judgment seat" at this very early stage unless it is quite plain that his alleged cause of action has no chance of success. The fourth reason is that the procedure, which is (if the action is in the Queen's Bench Division) by application to the master and on appeal to the judge in chambers, with no further appeal as of right to the Court of Appeal, is not appropriate for other than plain and obvious cases. In Dyson v. Attorney General [1911] 1 K.B. 410, 419. Fletcher Moulton L.J. said:

> "Difference of law, just as differences of fact, are normally to be decided by trial after hearing in court, and not to be refused a hearing in court by an order of the judge in chambers. Nothing more clearly indicates this to be the intention of the rule than the fact that the plaintiff has no appeal as of right from the decision of the judge in chambers in the case of such an order as this. So far as the rules are [1970] 1 WLR 688 at 697 concerned n action may be stopped by this procedure without the question of its justifiability ever being brought before a court."

15. The Plaintiff additionally submitted that all parties should be before the Court in order for the Court to grant the declarations sought regardless of whether the parties agree to declaratory relief or not and relied on **Metzger v. Department of Health and Social Security [1977] 3 ALL ER 44** where Megarry VC stated,

> "The court does not make declarations just because the parties to litigation have chosen to admit something. The court declares what it has found to be the law after proper argument, not merely after admissions by the parties. There are no declarations without argument: that is quite plain."

16. The Third Defendant adopted the submissions of the Plaintiff and added that the First Defendants needed to remain a party to the action to address the funds received from the proceeds of sale which were distributed along with who would pay such funds if the Plaintiff's alternative claim was granted. It was also added that a freezing order was ordered against the First Defendants in the action which was not affected appealed or varied by them and underscored their agreement to remain in the action, and their waiver of their rights to make this application.

DECISION

17. Order 18 Rule 19 of the RSC provides:-

> "19. (1) 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 ground 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 of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
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> (2) No evidence shall be admissible on an application under paragraph (1) (a).
>
> (3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading."

18. In **Sandyport Homeowners Association Limited v. P. Nathaniel Bain SCCivApp & CAIS No. 289 of 2014**, the Court of Appeal discussed the role of a judge when

considering whether to accede to an application to strike pursuant to O 18 r. 19 (1) (a) of the RSC. Crane-Scott JA in delivering the judgment of the Court stated:

> "8. The scope and effect of the foregoing rule is succinctly explained in note 18/19/1 of the 1999 edition of the Supreme Court Practice in the following terms:
> "There are two jurisdictions pursuant to which the Court may impose sanctions for breaches of the rules of pleading, (1) under the provisions of this rule...and (2) under the inherent jurisdiction...Not every writ or pleading which offends against the rules will be subjected to sanctions. An applicant must show that he is in some way prejudiced by the breach...In applying this rule, it must be remembered that "it is not the practice in the civil administration of our Courts to have a preliminary hearing, as it is in crime." (per Sellers L.J., in Wenlock v. Maloney [1965] 1 W.L.R. 1238 at 1242." [Emphasis added]
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> 9. The following extract from Volume 36 of the Fourth Edition of Halsbury's Laws of England is also instructive as to how the discretion under Ord. 18, r. 19 ought to be exercised:
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> > "Although no evidence is admissible on an application invoking the rule, if the summons additionally invokes the court's inherent jurisdiction evidence may be filed, and all the relevant facts considered. The practice is not to consider the evidence until the question whether or not on the face of the pleadings some reasonable cause of action... is disclosed has been determined. In judging the sufficiency of a pleading for this purpose the court will assume all the allegations in it to be true and to have been admitted by the other party. If the statement of claim then shows on the face of it that the action is not maintainable or that an absolute defence exists, the court will strike it out. A pleading will not, however, be struck out if it is merely demurrable; it must be so bad that no legitimate amendment could cure the defect. The jurisdiction to strike out a pleading should be exercised with extreme caution and only in obvious cases; and where a question of general importance or a serious question of law would arise on the pleadings, the court will not strike out the pleading unless it is clear and obvious that the action will not lie." [Emphasis added]
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> 10. The "Strike-out application" in this case was instituted under Ord. 18, r. 19 on the sole ground that the indorsements of the appellant's Writ and Statement of Claim disclosed no reasonable cause of action against the respondent. As paragraph (2) of rule 19 clearly states, no evidence is admissible where the only ground on which the application is made is that the pleadings disclose no reasonable cause of action. See for example Republic of Peru v. Peruvian Guano Co. Ltd. (1886-90) All ER Rep 368 at 371."

She also continued:

> "14. Case law also shows that the discretion to strike-out a pleading should be exercised with extreme caution and only in clear and obvious cases. The discretion to strike may be exercised if it is clear and obvious on the pleadings that no reasonable cause of action is disclosed (meaning a cause of action with some chance of success) or if it is obvious that the pleadings are so bad that no legitimate amendment could cure the defect in its pleadings."
>
> "18. The authorities in the Annual Practice also show that 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. See Wenlock v. Moloney [1965] 2 All ER 871 discussed below."

19. The Court's power to strike is a draconian one and should only be used where there is clearly no cause of action pleaded or inferred. The Court must be careful not to dispossess a Plaintiff of its right to be heard where there is the possibility of a case however weak or strong against a Defendant. Likewise, if upon reviewing a pleading and the Court is satisfied that there is a cause of action, although not properly pleaded, the Court can exercise its discretion to grant leave to amend the pleading. At all times the power to strike should only be exercised where it is impossible to save the action by amendment. In **B.E. Holdings Limited v. Lianji (also known as Linda Piao-Evans or**

Lian Ji Piao-Evans) - [2017] 1 BHS J. No. 28 Charles J confirms this principle and speaks to the risk in acceding to their applications in all but obvious cases:-

> "7 As a general rule, the court has the power to strike out a party's case either on the application of a party or on its own initiative. Striking out is often described as a draconian step, as it usually means that either the whole or part of that party's case is at an end. Therefore, it should be taken only in exceptional cases. The reason for proceeding cautiously has frequently been explained as that the exercise of this discretion deprives a party of his right to a trial and his ability to fortify his case through the process of disclosure and other procedures such as requests for further and better particulars.
>
> 8 In Walsh v Misseldine [2000] CPLR 201, CA, Brooke LJ held that, when deciding whether or not to strike out, the court should concentrate on the intrinsic justice of the case in the light of the overriding objective, take into account all the relevant circumstances and make 'a broad judgment after considering the available possibilities.' The court must thus be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of claim is incurably bad; or that it discloses no reasonable ground for bringing or defending the claim; or that it has no real prospect of succeeding at trial."

20. The Summons to Strike does not invoke the Court's inherent jurisdiction so as to enable the court to consider any evidence except the Plaintiff's SOC and therefore I am bound by law to only consider the same.

21. By the Deed of Appointment referred to at Para. 11 of the Plaintiff's SOC, the First Defendants were made Trustees of BSERF. As Trustees the First Defendants executed the 28th July 2017 Conveyance presumably pursuant to the powers bestowed upon them either by law or the Trust Deed. Section Eight of the Trust Deed as stated in the Plaintiff's SOC provides that:

> "If either Trustee resigns or is unable to continue to act as Trustee, the settlor shall have power to appoint his successor Trustee. Any successor Trustee shall succeed as Trustee with like effect as though originally named as such herein, and all authority and power conferred on any Trustee hereunder shall pass to his successor Trustee".

22. This section is in conformity with section 47 of the Trustees Act which provides,

> "47. (1) Where by a deed a new trustee is appointed to perform any trust, then — (a) if the deed contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust or in any chattel so subject or the right to recover or receive any debt or other thing in action so subject shall vest in the persons who by virtue of the deed become or are the trustees for performing the trust, the deed shall operate without any conveyance or assignment to vest in those persons as joint tenants and for the purposes of the trust the estate, interest or right to which the declaration relates; and (b) if the deed is made after the commencement of this Act and does not contain such a declaration, the deed shall, subject to any express provision to the contrary therein contained, operate as if it had contained such a declaration by the appointor extending to all the estates, interests and rights with respect to which a declaration could have been made.

23. Trustees have a duty to apprise themselves of all of the property and assets of a trust under their control. Halsbury's Laws summarizes the duties of Trustees at paragraph 463:-

> "463. Duties of Trustees in general.

> **It is the duty of the trustees of a settlement to make themselves acquainted with the terms of the trust, to obtain possession of all trust property which should be under their control, to comply strictly with the provisions of the settlement, to keep proper accounts, to exercise in good faith any discretion conferred on them either by the settlement or by statute, to act impartially between the beneficiaries and, in the case of a settlement by deed, to inform the beneficiaries of their interest under the settlement."**

24. There is no suggestion that the First Defendants had a duty to the Plaintiff with respect to control and possession of the purported assets of the Trust. They had a duty to the beneficiaries to be informed of and to control the assets held by the trusts. The question which needs to be answered is whether the First Defendants had at the material time control over the property and consequently the power to convey pursuant to the Trust Deed. This is not addressed in the Plaintiff's SOC and can therefore not be considered at this time. If the First Defendants knew of the 1st May 2014 conveyance and that it was valid they could not convey the Property through the 28th July 2017 conveyance but if they did not know of the 2014 conveyance, then they ostensibly could convey the Property. This is a question which must be determined at trial! The Court need only determine and recognize that there is a cause of action or question to be determined against the First Defendants. Arguably, if the First Defendants had knowledge of the 1st May 2014 conveyance this would affect the validity of the 28th July 2017 conveyance to the Plaintiff as well as the 12th December, 2017 conveyance. I am satisfied that the Plaintiff would have a question to be determined against the First Defendants which would be whether the July 2019 conveyance of the Property to the Plaintiff was valid or not and if not whether there are any consequential issues and remedies which would flow from that determination.

DECLARATORY RELIEF

25. I turn now to consider the declaratory relief sought by the Plaintiff as against the First Defendants and whether it was an answer to the application of the 1st Defendants.

26. The First Defendants submitted that the Plaintiff should not be granted the declaratory relief sought and relied on **Financial Services Authority v. John Edward Rourke (Trading as J.E. Rourke & Co.) [2001] EWHC 704 (Ch)** in which Neuberger J stated,

> **"Accordingly, so far as the CPR are concerned, the power to make declarations appears to be unfettered. As between the parties in the section, it seems to me that the court can grant a declaration as to their rights, or as to the existence of facts, or as to a principle of law, where those rights, facts, or principles have been established to the court's satisfaction. The court should not, however, grant any declarations merely because the rights, facts or principles have been established and one party asks for a declaration. The court has to consider whether, in all the circumstances, it is appropriate to make such an order."**

27. Neuberger J also added that,

> **"...When considering whether to grant a declaration or not, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why or why not the court should grant the declaration."**

28. The First Defendants say that they support the declarations sought, hence there is no claim against their interest.

29. In turn, the Plaintiff submits that the declaratory relief sought is not susceptible to being struck out as allowed under Order 15 Rule 17 of the RSC and further that there was a cause of action as pleaded in their alternative at paragraph 24 of the SOC and in the relief sought in the prayer at paragraphs 7 and 8;

30. Order 15 Rule 17 of the RSC provides,

> **"No action or other proceedings shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding a declaration of right whether or not any consequential relief is or could be claimed."**

31. The Plaintiff referred to **Guaranty Trust Company of New York v Hanny & Company [1915] 2 K.B. 536** in which Pickford L.J. sought to explain Order 25 Rule 4 of the RSC which the Plaintiff submitted is in pari materia to Order 15 Rule 17,

> **"I think therefore that the effect of the rule is to give general power to make a declaration whether there be a cause of action or not, and at the instance of any party who is interested in the subject matter of the declaration."**

32. At pages 571 – 572, Bankes LJ continued,

> **".....It is the person, therefore, who is seeking relief or in whom a right to relief is alleged to exist, whose application to the Court is not to be defeated because he applies merely for a declaratory judgment or order, and whose application for a declaration of his right is not to be refused merely because he cannot establish a legal cause of action.**
> **It is essential, however, that a person who seeks to take advantage of the rule must be claiming relief. What is meant by this word relief? When once it is established, as I think it is established, that relief is not confined to relief in respect of a cause of action it seems to follow that the word itself must be given its fullest meaning. There is, however, one limitation which must always be attached to it, that is to say, the relief claimed must be something which it would not be unlawful or unconstitutional or inequitable for the Court to grant or contrary to the accepted principles upon which the Court exercises its jurisdiction. Subject to this limitation I see nothing to fetter the discretion of the Court in exercising a jurisdiction under the rule to grant relief, and having regard to general business convenience and the important of adopting the machinery of the Courts to the needs of suitors I think the rule should receive as liberal a construction as possible."**

33. Moreover, the Plaintiff submitted that the First Defendants needed to remain a party to the action because if the declaration sought was made, the First Defendants could be bound by it. In **London Passenger Transport Board v Moscrop [1942] 1 ALL ER 97 Viscount Maugham** stated at page 104 of the judgment that,

> **"I also think it desirable to mention the point as to parties in cases where a declaration is sought. The present appellants were not directly prejudiced by the declaration, and it might even have been thought to be an advantage to them to submit to the declaration; but, on the other hand, the persons really interested were not before the court, for not a single member**

> of the Transport Union was, nor was that Union itself, joined as a defendant in the action. It is true that in their absences they were not strictly bound by the declaration, but the courts have always recognized that persons interested are or may be indirectly prejudiced by a declaration made by the court in their absence, and that, except in very special circumstances, all persons interested should be made parties whether by representation, orders or otherwise before a declaration by its terms affecting their rights is made."

34. The Plaintiff submitted that the First Defendants have a true interest in the declarations sought as they are legally and/or equitably interested in the relief claimed in upholding the validity of the 28th July 2017 conveyance and opposing the 1st May 2014 and 12th December 2017 conveyances. Should the Declarations not be granted, they face potential liability and can be on the opposing end of the alternative claim.

35. The Plaintiff relied on **Bingham v. Bingham (1748) 1 Ves. Sen. 125** in support of its contention that the purchase price would have to be reimbursed by the First Defendants if the 28th July 2017 conveyance was not valid where the Court held that:

> "for though no fraud appeared, and the Defendant apprehended he had a right, yet there was a plain mistake, such as the Court was warranted to relieve against, and not to suffer the Defendant to run away with the money in consideration of the sale of an estate to which he had no right."

DECISION

36. In **Mond and another v MBNA Europe Bank Ltd [2010] EWHC 1710 (Ch),** Sir William Blackburne discussed the principles associated with the granting of declaratory relief pursuant to Rule 40.20 of the CPR which replaced Order 15 Rule 16 of the English Rules of the Supreme Court:

> "The court's jurisdiction to grant a declaration is undoubted: the present statutory basis for doing so is section 19 of the Senior Courts Act 1981 and CPR r40.20. The principles governing the exercise of this jurisdiction were recently summarised by Aikens LJ in *Rolls-Royce plc v Unite the Union* [2009] EWCA Civ 387; [2010] 1WLR 318 at 120:
>
> > "120 For the purposes of the present case, I think that the principles in the case can be summarised as follows.
> >
> > (1) The power of the court to grant declaratory relief is discretionary.
> >
> > (2) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant.
> >
> > (3) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question.
> >
> > (4) The fact that the claimant is not a party to the relevant contract in respect of which a declaration is sought is not fatal to an application for a declaration, provided that it is directly affected by the issue; (in this respect the cases have undoubtedly "moved on" from Meadows).
> >
> > (5) The court will be prepared to give declaratory relief in respect of a "friendly action" or where there is an "academic question" if all parties so wish, even on "private law" issues. This may particularly be so if it is a "test case", or it may affect a significant number of other cases, and it is in the public interest to decide the issue concerned.

(6) However, the court must be satisfied that all sides of the argument will be fully and properly put. It must therefore ensure that all those affected are either before it or will have their arguments put before the court.
(7) In all cases, assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised? In answering that question it must consider the other options of resolving this issue."

37. The new Rule 40.20 of the CPR extends the consideration of declaratory relief to a friendly action or where there is some academic question. The RSC regime, by which the courts of The Bahamas are governed does not allow a judicial officer such an extension. Accordingly, I must consider the principles for the granting of declaratory relief as governed by O. 15, r.17 of the RSC.

38. In **Newport Association Football Club Ltd and others v The Football Association of Wales Ltd [1994] Lexis Citation 1350**, Jacob J discussed whether or not a claim for declaratory relief could be considered a cause of action.

"(a) No cause of action.

"It is well settled that a contract or other arrangement in unreasonable restraint of trade is merely void and unenforceable. As such it creates no wrong, either to the parties to the arrangement or to third parties, see, for instance Boddington v Lawton [1994] ICR 478, where Sir Donald Nicholls V-C said (p 491):

"The law's attitude to an agreement in unreasonable restraint of trade is to decline to assist the parties to enforce it. The agreement does not give rise to legally- binding obligations, and in that sense it is void ..."

However it does not follow that there is no "cause of action" available to a party affected by such an arrangement. It is well settled that such a party can bring proceedings for a declaration that the arrangement is null and void, see for instance Eastham v Newcastle United [1964] 1 Ch. 413, [1963] 3 All ER 139 where Wilberforce J. said:

"In my judgment the cases .... establish that even though there is no cause of action apart from the rule under which declaratory judgments may be given (R.S.C. Ord. 25 r.6 [Now O.15 r.16]) and even though no consequential relief can be given, the court has ample power to grant a declaratory judgment."

Wilberforce J's language, "no cause of action apart from.", suggests that a claim for a declaration was regarded by him as a kind of cause of action. And so it is, using the words in their ordinary English meaning: a cause for an action in the courts to determine a disputed matter.

The expression "cause of action" has, of course, been considered many times. The White Book at para. 15/1/3 cites a number of judicial definitions. The words appear in the Rules of Court in many places, eg. Ord 15 r1. Diplock LJ in Letang v Cooper [1965] 1 QB 232, [1964] 2 All ER 929 at p 242 of the former report said that the words mean:

> "simply a factual situation the existence of which entitles one person to obtain a remedy against another person."

I see no reason why that definition should not apply to an entitlement by one person to obtain the remedy of a declaration against another person. In that sense the plaintiffs have a cause of action against the FAW."

39. In **Natural Resources Conservation Authority v Seafood and Ting International Ltd; Natural Resources Conservation Authority v DYC Fishing Ltd - (1999) 58 WIR 269**, the Jamaican Court of Appeal followed Jacob J's ruling in Newport Association Football Club. At page 290 of the judgment, Downer JA stated,

"Further, Jacob J said (at p 94):

> **'(e) *Injunction crucially dependent on grant of declaration***
>
> **'Once one recognises that a claim for a declaration is a cause of action, then I see no reason to say that the injunction can only be granted once the court had determined the claim. Where there is a cause of action for invasion of a right the court does not need to wait until trial – to find out whether the claim is good – before it has power to grant an injunction. It can do so before trial simply on the basis that the claim may be good. So also, in any judgment, where the claim is for a declaration of rights. The injunction, whether at trial or interlocutory, is in support of a cause of action in its widest sense.'"**

40. I am satisfied, without examining the merits of the claim, that there is a cause of action against the First Defendants in seeking declaratory relief as well as the alternative claim seeking the return of the monies received should the declaratory relief sought fail.

41. The application of the First Defendants is dismissed with costs to the Plaintiff and the Third Defendant to be taxed if not agreed.

Dated the 17 day of June, 2020

G. Diane Stewart

Justice