

COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
COMMON LAW AND EQUITY DIVISION  
2005/CLE/GEN/FP 00074

BETWEEN

COMMONWEALTH BANK LIMITED

Plaintiff

AND

KENDAL W. NOTTAGE

RUBIE M. NOTTAGE

and

JETHRO L MILLER

(Doing Business as Nottage, Miller & Co, a Firm)

Defendants

BEFORE The Hon. Mrs. Justice Estelle Gray Evans

APPEARANCES: Mr Edward Marshall for plaintiff

Mr Jethro L. Miller for defendant

HEARING DATES: 11 December 2014; 23 April 2015

**DECISION**

(Application to strike out)

## Gray Evans J.

1. This action was commenced more than ten years ago, on 20 April 2005, by a specially indorsed writ of summons in which the plaintiff, Commonwealth Bank Limited, claimed against the defendants, Kendal W. Nottage, Rubie M. Nottage and Jethro L. Miller (doing business as Nottage, Miller & Co., a Firm), damages for negligence and or breach of fiduciary duty, interest and costs.
2. Because of the nature of the application, I set out hereunder the pleadings in their entirety.
3. In its specially indorsed writ of summons filed on 20 April 2005 the plaintiff stated its claim as follows:
  - 1) The plaintiff is a bank carrying on business in The Bahamas which has at all material times as part of its business carries on the lending of money on the security of first demand legal mortgages of real property in the Bahamas.
  - 2) At all material times the defendants were a firm of Counsel and Attorneys practicing, inter alia, at Freeport, Grand Bahama in the Commonwealth of The Bahamas.
  - 3) By letter dated 1<sup>st</sup> July 1995, the plaintiff engaged the defendants to act on its behalf, inter alia, in respect of the grant by the plaintiff of loans to Pub on The Mall Limited ("Pub on The Mall") and a guarantee by Silvano's Italian Ice Cream Limited ("Silvano's") in favour of the plaintiff of debts of Pub on The Mall to the plaintiff. The obligations of Silvano's were intended to be secured by a first demand legal mortgage over Lot No. 5 East Sunrise Highway, Freeport Grand Bahama owned by Silvano's.
  - 4) By reason of such engagement the defendants had an obligation to act with all due and proper professional skill, diligence and competence in conducting affairs whilst so acting on the plaintiff's behalf including in particular:
    - (i) The duty to advise the plaintiff as to whether Silvano's had a good marketable title to Lot No 5 East Sunrise Highway, Freeport, Grand Bahama which was being offered as security for the mortgage loan;
    - (ii) To take all necessary steps to ensure that the plaintiff obtained a good and effective first Legal Mortgage as security for the debts of Silvano's to the plaintiff which would be created by the loans to be made by the plaintiff and that the plaintiff would be able to make a good title in the event that the plaintiff needed to enforce its security;
    - (iii) The duty to inform the plaintiff of any facts discovered in the course of acting which a reasonable competent attorney would realize might have a material bearing on evaluation of the lender's security or some other ingredient of the lending decision.
  - 5) As the defendant well knew by reason of the course of dealing between the plaintiff and the defendants and by reason of the said letter of the plaintiff to the defendants of the 1<sup>st</sup> July 1995 the plaintiff would not have made a mortgage loan to Pub on The Mall and/or accept the guarantee of Silvano's for the debts of Pub on The Mall in any case in which the defendants did not certify to the plaintiff that Silvano's had a good and marketable title to Lot No 5 East Sunrise Highway Freeport and that a first demand legal mortgage granted by Silvano's over Lot No 5 constituted a first demand legal mortgage and that the Bank's security was not subordinate to any prior encumbrance on the property by Silvano's.
  - 6) By letter dated the 4<sup>th</sup> July 1995 the defendants advised the plaintiff that Silvano's had good and marketable title to Lot 5, East Sunrise Highway and advised the plaintiff and they had prepared a mortgage of Lot No 5 by Silvano's in favour of the plaintiff and that the security of the mortgage by Silvano's was "intact" and subject only to a Debenture in favour of CIBC which would be satisfied out of the loan proceeds and the payment of the "closing costs and stamp duty to" the defendants.

- 7) By letter dated 6<sup>th</sup> July 1995, the plaintiff paid to the defendant the sum of \$12,054.00 in payment of that firm's statement of account including closing costs and stamp duty.
- 8) Although the defendants were aware of the fact, the defendants failed to advise the plaintiff that (a) that there was no conveyance of Lot No 5 to Silvano's; (b) Silvano's had mortgaged the said Lot No 5 to Lowenmill Construction Company Limited ("Lowenmill") by a debenture dated 26<sup>th</sup> August 1994 which debenture had been recorded in the Registry of Records on the 28<sup>th</sup> April 1995 and that the said mortgage in favour of Lowenmill had priority to the mortgage granted by Silvano's in favour of the plaintiff; and (c) that it was contemplated that the said Lot No 5 would be conveyed to Pub on The Mall and not Silvano's. In reliance upon the advice contained in the said letter of the 4<sup>th</sup> July 1995, the plaintiff loaned monies to Pub on The Mall. In addition, the plaintiff in reliance on the said letter accepted the guarantee of Silvano's of the debts (present and future) owed by Pub on The Mall to the plaintiff.
- 9) On the 7<sup>th</sup> October 1999, the plaintiff agreed to lend further monies to Pub on The Mall and by letter dated the 12<sup>th</sup> October 1999 requested the defendants to prepare additional security by way of a supplemental debenture in favour of the plaintiff over the said Lot No 5.
- 10) The defendants prepared a supplemental debenture by Pub on The Mall and purportedly charged the said Lot No 5 as security for the said loan, which said lot the defendants had previously advised was owned by Silvano's.
- 11) Pub on The Mall and Silvano's by its guarantee are indebted to the plaintiff in the sum of \$292,843.77 principal and \$2,134.15 interest as at the 19<sup>th</sup> April 2005.
- 12) The plaintiff is desirous of exercising its power of sale over Lot No 5 by virtue either of the mortgage granted by Silvano's in July 1995 or the supplemental debenture issued by Pub on The Mall in October 1999. However, on the 24<sup>th</sup> August 2004 the plaintiff discovered (a) that there is no recorded conveyance of Lot No 5 to either Silvano's or Pub on The Mall; and (b) that there is in existence of the debenture in favour of Lowenmill as referred to in paragraph 8 above.
- 13) As pleaded in paragraphs 5 and 9 above, the defendants knew that the plaintiff would rely on the defendants' advice and would not have agreed to lending monies to Pub on The Mall and/or accept the guarantee of Silvano's for the obligations of Pub on The Mall if the defendants had advised the plaintiff of the existence of the debenture in favour of Lowenmill or the non existence of any conveyance of Lot No 5 of the Silvano's and or Pub on The Mall.
- 14) The defendants acted negligently and/or in breach of their fiduciary duty to the plaintiff in giving the advice contained in the letters dated 4<sup>th</sup> July 1995 and 22<sup>nd</sup> October 1999.
  - (i) The defendants failed to disclose the absence of any conveyance to Silvano's and/or Pub on The Mall;
  - (ii) The defendants failed to disclose the existence of the debenture in favour of Lowenmill;
  - (iii) The defendants wrongfully advised that the plaintiff's security was subject only as mentioned in the letter dated 4<sup>th</sup> July 1995; and 22<sup>nd</sup> October 1999;
  - (iv) The defendants actually knew of the existence of the debenture in favour of Lowenmill, the defendants having prepared the debenture in August, 1994 less than one year earlier.
- 15) In giving its advice the defendants acted negligently and or in breach of trust in that they knew, or ought to have known, that the mortgage in favour of the plaintiff was of no value if there was no conveyance to Silvano's of Pub on The Mall and that any mortgage or debenture would be subordinate to the mortgage in favour of Lowenmill.
- 16) If the plaintiff had been informed of the absence of the conveyance or the existence of the debenture in favour of Lowenmill, it would not have lent to Pub on The Mall and/or accepted the guarantee of Silvano's for the obligations of Pub on The Mall to the plaintiff.

- 17) Pub on The Mall and/or Silvano's and each of them have failed to repay to the plaintiff the amounts due by them to the plaintiff with the result that the plaintiff has lost the amount due to the plaintiff by Pub on The Mall.
- 18) The plaintiff is unable to realize any money from the exercise of any power of sale under the mortgage given by Silvano's or the debenture given by Pub on The Mall to the plaintiff as (a) there are no conveyances to Silvano's and/or Pub on The Mall and (b) the amount of the debt owed by Silvano's to Lowenmill exceeds the value of Lot No 5, East Sunrise Highway, Freeport, Grand Bahama.
- 19) By reason of the matters aforesaid the plaintiff has suffered loss and damage being the amount of the debt owed by Pub on The Mall of the plaintiff.

AND THE PLAINTIFF CLAIMS:

- 1) Damages
- 2) Interest thereon pursuant to the Civil Procedure (Award to Interest) Act;
- 3) Costs;
- 4) Such further or other relief as deemed just.

4. In their defence filed 16 June 2005 as amended on 17 June 2005 the defendants aver as follows:

- 1) The defendants admit to paragraphs 1 and 2 of the statement of claim.
- 2) The defendants admit to receipt of instructions to prepare a first demand legal mortgage by the Pub on The Mall Limited but deny that such instructions were to include a guarantee from Silvano's Italian Ice Cream Limited (Silvano's); such a guarantee, by those instructions, were to come from Silvano Brutti only.
- 3) At the date of those instructions the defendants verily believe that the indebtedness by the Pub on The Mall Limited had already been incurred and the plaintiff was merely seeking to regularize its loans to the Pub on The Mall.
- 4) The defendants acknowledge its duties in accordance with paragraph 4 of the statement of claim but aver that it took reasonable steps to carry out its duties in an effort to comply with the instructions first referred to in paragraph 2 above.
- 5) The defendants deny the correctness of the statement set out in paragraph 5 of the statement of claim because Silvano's were never privy to or a party to the transaction and further if by 1<sup>st</sup> of July 1995 the Pub on The Mall was already indebted to the plaintiff it could not be said that certification by the defendants of good and marketable title by Silvano's was the primary or sole basis on which the loan was made to the Pub on The Mall Limited.
- 6) Paragraphs 6 and 7 are admitted but the defendants aver that it was during the investigation of title that the defendants became aware that the fee simple to the entirety of Lot 5 East Sunrise Highway had been recently conveyed to Silvano's which had erected an ice cream factory on the same Lot 5 adjoining to "the Pub on The Mall" and it was being contended by the principal owner, Silvano Brutti, that the interest of the two companies were separate. Notwithstanding the above the defendants advised the plaintiff that the first demand mortgage had to come from Silvano's which by then held the title to Lot 5.
- 7) Paragraph 8 is denied. Further the defendants advised that the conveyance was indeed from Freeport Commercial & Industrial Limited (one of the Grand Bahama Port Authority, Limited group of companies) to Silvano's. That conveyance was in the defendants' possession at the date of the plaintiff's instructions aforesaid but events, beyond the defendants control, subsequently occurred which led to the events set out in paragraph 8(b) of the statement of claim namely: (a) an internal debenture which was prepared at the behest of a company Lowenmill Construction Company and which was never intended to be perfected or recorded

and no professional fees paid thereon (since the principals of Silvano's and Lowenmill were partners in the ice cream business) was spirited out of the defendants office supposedly for safekeeping and never returned; (b) the conveyance to Silvano's of Lot 5 (a copy of which the defendants hold) appears to have been taken by Lowenmill as well but the diligent search at the Registry of Records did not produce the recording details.

- 8) Contrary to paragraph 8 (c) of the statement of claim, by July 1995, Lot 5 was not merely contemplated but had happened and the plaintiff was informed of this nonetheless Silvano's was not officially joined as a debtor by the plaintiff but was brought in as a volunteer by the defendants over the objections, initially, of the principal owner, Silvan Brutti, who contended that Silvano's had nothing to do with the Pub on The Mall's liability to the plaintiff. The sole reason the defendants posed for bringing in Silvano's was the fact that whereas The Pub on The Mall historically occupied Lot 5 as a lease holder under a 99 year lease the Pub had surrendered that lease so that the fee simple could be conveyed to Silvano's. Consequently the ice cream factory, owned by Silvano's and in which the plaintiff had no interest, and the Pub on The Mall which hitherto has been CIBC's security, were on the same property Lot 5.
- 9) Paragraphs 9 and 10 is [sic] admitted to the extent that it acknowledges [sic] receipt of the instructions to prepare a supplemental debenture in 1999 from the Pub on The Mall Limited but disagree that Pub on The Mall Limited had no interest capable of being charged. Save for the error of including the fee simple of Lot in the schedule, the supplemental debenture was capable of attaching to the fixed and floating assets of that company.
- 10) Paragraph 11 is neither admitted nor denied. In any event the plaintiff was only instructed to obtain a personal guarantee from Silvano Brutti which the defendant has delivered and verily believe that the loan is not in default and the plaintiff (in absence of a default) is unable or unwilling to call in or enforce the guarantee which it must do before seeking to cause the payment to be made by its solicitors which it purports to do by this action.
- 11) The defendants deny paragraphs 12 and 13 of the statement and will put the plaintiff to strict proof of the allegations contained therein with exception of the discovery of the debenture to Lowenmill aforesaid which Lowenmill, without the knowledge of Silvano's or the defendants, improperly placed on the record.
- 12) The defendants deny that it was negligent as alleged in paragraph 14 in light of the specific instructions in July 1995. To the contrary the defendants' advice was in good faith based on the information at the time including the fact that (a) the debenture to Lowenmill was a "book" transaction and the principal partners agreed that it was not to be perfected or registered nor professional fees and stamp duties payable thereon. Lowenmill did not have the defendants' permission to remove the same from the defendants' office (at a time when the resident partners were away attending to his then ill wife) and place it on the record. (b) the defendants were not obligated to disclose the debenture since it was not to be perfected or enforced.
- 13) The defendants deny that the mortgage to the plaintiff has no value. While the debenture to Lowenmill was improperly put on record the security to the plaintiff could have been enforced against the Pub on The Mall Limited and against SilvanoBrutti personally. In any case the defendants deny that it knew the plaintiff's mortgage would be subordinate to that of Lowenmill.
- 14) Paragraph 16 is not admitted and there is no admission that Silvano's does not have a conveyance of Lot 5. Such can be verified by direct contact with the Grand Bahama Port Authority, Limited and its group of companies. The defendants procured a personal guarantee from Silvano Brutti and as such complied with the instructions it received. Once the defendants became aware of the fact that Lowenmill had recorded a debenture it took steps to have Lowenmill subordinate it's debenture to that of the plaintiff but the direct intervention by one of the plaintiff's agents in contacting the wife of the now deceased principal owner of Lowenmill made it difficult for the defendants to convince Lowenmill to execute the deed of Subordination prepared.

- 15) Paragraph 17 is denied in its entirety. To the contrary Silvan Brutti and Pub on The Mall have continued to pay its obligation and is current with their payments. The defendants are advised by Brutti that he has arranged private funding to pay off the remaining balance to the plaintiff. This has been communicated to the plaintiff and that the payoff date is given as (4) four to (6) six weeks from May 31<sup>st</sup> 2005. Accordingly the allegation that the Pub on The Mall Limited, which continues to maintain accounts and make regular deposits with the plaintiff, has failed to make payments is plainly false.
- 16) The defendants aver that there appears to be a lack of trust between Silvano Brutti and Mr Walter Wells arising from the fact that Mr Wells was also the Account manager at the former CIBC Bank in Freeport, when difficulties arose between them resulting in a decision by Brutti to move the Pub on The Mall accounts to the plaintiff where Mr Wells, perchance, became the account manager or the plaintiff's agent responsible for these accounts.
- 17) The plaintiff knows or ought to know by proper enquiries that the value of Lot 5 including the Ice Cream Factory, the private residence, the deli, Silvano's Italian Restaurant, the Gourmet Diner and The Pub are together valued in excess of four (4) million dollars and accordingly the statement in paragraph [sic] is false.
- 18) The defendants deny the plaintiff has suffered any loss, the mortgage is not in default and as far as the defendants are aware the plaintiff's have taken no steps to enforce their security. Accordingly paragraph 19 of the claim is denied.

5. By a summons filed 14 July 2005, the plaintiff sought an order striking out the defendants' amended defence pursuant to Rules of the Supreme Court ("RSC") Order 18 rule 19 as well as under the inherent jurisdiction of the court, as disclosing no reasonable cause of action. That application was set down for hearing on 1 February 2006, but was adjourned, sine die, at the request of counsel.

6. The matter lay dormant for some time and by notice filed 14 November 2013, the plaintiff gave notice of its intention to proceed.

7. By another summons filed on 30 July 2014 the plaintiff renewed its application.

8. RSC Order 18 rule 19 (1) (a), (b) and (d) provide that the Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground, inter alia, 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 (d) it is otherwise an abuse of the process of the Court; and the Court may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

9. In addition to the powers under RSC Order 18 rule 19(1), the Court also has inherent jurisdiction to strike out proceedings before it which are obviously frivolous or vexatious or an abuse of its process. (See The English Supreme Court Practice 1995 vol. 1, p.346). Such cases include, inter alia, cases which are obviously unsustainable or spurious; hopeless proceedings and cases involving the improper use of the court's machinery. (See The Supreme Court Practice supra, pp.342-345).

11. Although no evidence is admissible on an application to strike out a pleading, or defence, on the ground that there is no reasonable cause of action or defence, evidence is admissible on the other grounds of RSC Order 18 rule 19, as well as under the inherent jurisdiction of the court. In that regard, the plaintiff relies on the affidavits of Walter Wells filed on 26 August 2005 and Aisha Stuart Smith filed on 23 October 2014 as well as the documentary evidence exhibited thereto.

12. In opposition to the plaintiff's application the defendants rely on the affidavit of Sylvano Brutti filed on 11 December 2014 in which he, for the most part, re-states the averments in the statement of claim.

13. The facts leading up to the commencement of this action as gleaned from the pleadings and the plaintiff's affidavits are set out hereunder.

14. In or about 1995 the plaintiff agreed to extend financing to The Pub on The Mall Limited as security for which the plaintiff required a debenture over the fixed and floating assets of The Pub on The Mall Limited as well as a first demand legal mortgage over Lot 5 East Sunrise Highway, Freeport, which the plaintiff believed was owned by that company.

15. By conveyance dated 18 April 1994, Lot 5 Block 0 aforesaid had been conveyed by Freeport Commercial and Industrial Limited to Silvano's Italian Ice Cream Limited ("Silvano's") which company had, by a fixed and floating debenture dated 24 August 1994 ("the 1994 debenture"), charged its assets, including the aforesaid property, to Lowenmill Construction Limited.

16. The plaintiff by letter dated 1 July 1995 gave instructions to the defendants in the following terms:

"Re: Proposed Mortgage First Demand Legal Mortgage Over Lot No 5  
East Sunrise Highway, Freeport and debenture Over Fixed and  
Floating Assets of The Pub on The Mall Ltd -- contact Silvano Brutti"

Please carry out your normal title and judgment searches, and provided the subject has good and marketable title, free from all encumbrances, to the property to be mortgaged, please prepare our standard Mortgage and Debenture."

...

At your earliest convenience, please return to this office a photocopy of the duly executed demand mortgage & debenture together with all supporting conveyances along with your opinion on title."

17. It appears from the copy letter exhibited to Mr Well's affidavit that receipt of that letter and instructions was acknowledged by the first-named defendant, Jethro L. Miller, on 3 July 1995.

18. By letter dated 4 July 1995, the defendants advised the plaintiff, inter alia, as follows:

"On your instructions and on the basis of the urgency attached by the present circumstances, we have updated our recent title searches relative to Lot 5 on which the Pub on The Mall is constructed, and can advise as herein set out.

Title to Lot No 5 Block O Central Area is now vested in Silvano's Italian Ice Cream Limited by virtue of a conveyance dated April 18<sup>th</sup>, 1994, from Freeport Commercial Industrial Limited to the latter named company also owned by Mr Brutti. Accordingly, the mortgage of that property was prepared in the name of Silvano's Italian Ice Cream Limited. I have confirmed that that company has good title to the land.

The Pub on The Mall Limited is the operator of the Pub on the Mall and has control over the business, as a licensee in good standing, subject only to the payment of any annual fee due and payable. I have accordingly, prepared the debenture over the company's assets and undertaking.

A personal guarantee by Mr Brutti has been completed and a copy of the same is attached together with the copy of the debenture and mortgage.

There are no judgments outstanding against the borrower and I am able to confirm that the plaintiff's security is now in tact subject only to the following:

- (i) The payment of a debenture in favour of CIBC which must precede our dating and stamping of the mortgage and debenture to you; and
- (ii) Payment of the closing costs and stamp duty to us.

In due course we will provide you with a stamped copy of the conveyance to Silvano's Italian ice Cream [sic] and a copy of the mortgage and debenture duly stamped and lodged for record.

We advise accordingly.

..." [underline added]

19. Notwithstanding the aforesaid advice, the true state of affairs on 4 July 1995 was as follows:

- (1) Lot No. 5 Block 0 Central Area had been encumbered by the 1994 debenture which had been lodged for record in the Registry of Records by the firm of DuPuch & Turnquest on 28 April 1995 and had been recorded in book 6388 at pages 348 to 364; and
- (2) Although the conveyance of Lot 5 Block 0 Central Area in favour of Silvano's had been executed, it had not yet been recorded.

20. Further, by letter dated 12 October 1999, the plaintiff wrote to the defendants instructing them to "up-stamp" the then existing debenture with The Pub on The Mall Limited to secure additional advances of up to \$25,000.00. A supplemental debenture by The Pub on The Mall Limited was prepared by the defendants, executed by the officers of that company, and dated 21 October 1999. The defendants notified the plaintiff by letter dated 22 October 1999 that the supplemental debenture had been executed. Along with that letter, the defendants forwarded their fee note, which included fees for stamping and recording the document. The supplemental debenture, although granted by The Pub on The Mall Limited, purported to give a fixed charge over Lot 5 Block 0 aforesaid which, in their 4 July 1995 letter, the defendants had advised the plaintiff was owned by Silvano's and over which they had prepared the mortgage dated 4 July 1995 in favour of the plaintiff. Moreover, the conveyance of that property had not yet been recorded, but that information was not reported to the plaintiff with the letter of 22 October 1999.

21. Indeed, the plaintiff pleads and the evidence is that the conveyance of Lot 5 in favour of Silvano's was, in fact, not lodged for record until 8 April 2005, and it appears from the backing sheet of the copy of that document exhibited to Ms Smith's affidavit that the same was lodged for record by Sean B. Callender.

10. It is accepted that in order for the amended defence to be considered "reasonable", it must disclose some defence or raise some question fit to be decided when only the contentions made therein are considered against the assertions in the plaintiff's statement of claim. See *Drummond-Jackson v British Medical Association* [1970] 1 ALL ER 1094 in which Lord Pearson made the following observation at page 1101:

"It has been firmly established by many authorities that the power to strike out a statement of claim [or a defence] as disclosing no reasonable cause of action [or defence] is a summary power which should be exercised only in plain and obvious cases" and "the order for striking out should only be made if it becomes plain and obvious that the claim or defence cannot succeed."

11. As for what constitutes a reasonable cause of action or defence, His Lordship opined that although:

"No exact paraphrase can be given...'reasonable cause of action' means a cause of action with some chance of success, when (as required by r 19(2)) 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. But the practice is clear. So, long as the statement of claim or particulars disclose some cause of action or defence 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."

22. The crux of the plaintiff's claim against the defendants, as I understand it, is that the defendants acted negligently and or in breach of their fiduciary duty to the plaintiff in giving the advice contained in letters dated 4 July 1995 and 22 October 1999 when they knew or ought to have known that the same was inaccurate; and that upon such advice the plaintiff advanced funds to The Pub of The Mall Limited, which funds the plaintiff has been unable to recover; and further that the plaintiff's security is defective as a result of which the plaintiff has not been able to enforce the same.

23. So, in order for the plaintiff to successfully prosecute its claim against the defendants, the plaintiff must establish: (i) that the defendants owed a duty to the plaintiff, in contract and/or tort, pursuant to its instructions contained in its letters dated 1 July 1995 and 22 October 1999; (ii) the extent and nature of the defendants' duty to the plaintiff; and (iii) that the defendants breached their duty to the plaintiff by failing to properly advise the plaintiff in connection with the aforesaid loan transactions to The Pub on The Mall Limited and the title to Lot No 5 aforesaid.

24. In that regard, the plaintiff in its statement of claim makes the following assertions:

- (1) In 1994, Silvano's mortgaged Lot No 5 Block 0 Central Area, Freeport, Grand Bahama, to Lowenmill Construction Company Limited by way of a debenture dated 26 August 1994 which was duly recorded in the Registry of Records on 28 April 1995 ("the 1994 Debenture"); **see paragraph 8 of the statement of claim.**
- (2) On 1 July 1995, the plaintiff instructed the defendants to prepare (i) a debenture ("the 1995 debenture"), in its favor, for the grant of certain loans by the plaintiff to The Pub on The Mall Limited; and (ii) a first demand legal mortgage to be executed by Silvano's in its favor pursuant to the said loans and secured by Lot No 5 ("the Mortgage"); **see paragraph 3 of the statement of claim.**
- (3) In carrying out the plaintiff's instructions, the defendants were obligated to, inter alia, (a) act with all due care and proper professional skill, diligence and competence; (b) advise the plaintiff as to whether Silvano's had good and marketable title to Lot No 5; (c) take all necessary steps to ensure that the plaintiff obtained a good and effective First Demand Legal Mortgage from Silvano's; and (d) to inform the plaintiff of any facts discovered in the course of acting which a reasonably competent attorney would realize might have a material bearing on the plaintiff's evaluation of its security interest or some other ingredient of its lending decision; **see paragraph 4 of the statement of claim.**
- (4) On 4 July 1995, the defendants advised the plaintiff that Silvano's had good and marketable title to Lot No 5, the mortgage had been prepared and that the security for same was "in tact" and subject only to a debenture made in favor of Canadian Imperial Bank of Commerce, which would be satisfied out of the loan proceeds, and the payment of closing costs and stamp duties to the defendants; **see paragraph 6 of the statement of claim.**
- (5) Notwithstanding, on or before 4 July 1995, the defendants knew that the 1994 debenture existed and that it purported to encumber title to Lot No 5. The defendants also knew on or before 4 July 1995, that the conveyance for Lot No 5 ("the Conveyance") had not yet been recorded; **see paragraph 8 of the statement of claim.**
- (6) In August of 2004, the plaintiff discovered the existence of the 1994 debenture and that there was no recorded conveyance for Lot No 5; **see paragraph 12 of the statement of claim.**
- (7) The defendants acted negligently and/or in breach of their fiduciary duty by (a) wrongfully advising the plaintiff that Silvano's had a good and marketable title to Lot No 5 in circumstances where the conveyance had not been recorded; (b) wrongfully advising the plaintiff that Lot No 5 was subject only to the CIBC debenture and the payment of certain costs to the defendants; and (c) by failing to disclose the existence of the 1994 debenture in circumstances where they knew of its existence by virtue of their having prepared it less than one year earlier; **see paragraphs 8 and 14 of the statement of claim; and**

- (8) The plaintiff has been unable to realize any money from the exercise of its power of sale under the terms of the mortgage as a result of the defendants' failure to properly advise it in connection with the status of the title to Lot No 5.

25. In response to the plaintiff's claim, in their amended defence, the defendants:

- 1) Admit that they received the plaintiff's instructions dated 1 July 1995; **see paragraph 2 of the amended defence;**
- 2) Accept that pursuant to the plaintiff's aforesaid instructions, they were obligated to act for the plaintiff in the manner set out in paragraph 4 of the plaintiff's statement of claim; **see paragraph 4 of the amended defence;**
- 3) Contend that in carrying out the plaintiff's instructions they investigated the title of Lot No 5 and that they took all reasonable steps to fulfill their duties to the plaintiff; that this included a diligent search of the Registry of Records which did not produce any recording details for the conveyance; **see paragraph 2, 4 and 7 of the amended defence;** and
- 4) Admit that on 4 July 1995, they advised the plaintiff that (i) Silvano's had good and marketable title to Lot No 5 subject only to, inter alia, the CIBC debenture, and (ii) that the plaintiff's security for the mortgage was "in tact", in circumstances where they were in possession of material facts which they were obligated to disclose to the plaintiff and which were contrary to the advice provided by them on 4 July 1995; **see paragraph 6 and 7 of the amended defence.**
- 5) Admit that in 1994 they prepared a debenture in favour of Lowenmill and that they were aware of its existence on 4 July 1995; **see paragraph 7 and 15 of the amended defence;**
- 6) Aver that on 4 July 1995 they were in possession of a conveyance from Freeport Commercial and Industrial Limited to Silvano's; **see paragraph 7 of the amended defence;** and
- 7) Aver that the plaintiff would require a deed of subordination from Lowenmill to enforce its security under, inter alia, the Mortgage at this time; **see paragraph 15 of the amended defence.**

26. Counsel for the plaintiff submits that when considering the aforesaid admissions, contention and averments made by the defendants in their amended defence against the assertions made in the plaintiff's statement of claim, it is plain and obvious that the defence being asserted by the defendants is not a reasonable one and that it cannot succeed. In that regard, counsel for the plaintiff makes the following observations and submissions:

- 1) In a nutshell, the plaintiff's case against the defendant's is one for breach of duty arising out of their failure to properly advise it in connection with its decision to make certain loans to Pub on The Mall Limited.
- 2) Because the defendants were aware of the 1994 debenture's existence at the time they provided their advice to the plaintiff on 4 July, 1995, it cannot, and ought not, be disputed by them that they breached their duty to the plaintiff by failing to disclose the existence of a fact which might have had a material bearing on the plaintiff's evaluation of Lot No 5 as its security and/or its decision to lend.
- 3) It is asserted that any reasonably competent attorney should have realized that the existence of a document that purported to encumber the title to a property their client contemplated using as a security for a loan would be a material consideration for that client's decision to lend, particularly in circumstances where (i) the document in question had allegedly been taken out of the attorneys' office without their permission; and (ii) in the circumstances where the debenture had been duly recorded and that a simple search of the Registry of Records would have revealed that fact.
- 4) In addition, the defendants cannot reasonably dispute that their failure to disclose the recording status of the conveyance, or lack thereof, to the plaintiff was also a breach of their

duty because, at the time they provided their advice to the plaintiff, they knew or ought to have known, that the conveyance was unrecorded and that as a consequence Silvano's was incapable of granting the plaintiff a first demand legal mortgage secured by Lot No 5.

- 5) The grant of a first demand legal mortgage by Silvano's, using Lot No 5 as a security, was a prerequisite to the plaintiff's decision to lend to Pub on the Mall and a reasonably competent attorney would have realized that Silvano's inability to grant the plaintiff a first demand legal mortgage would have had a material bearing on the plaintiff's evaluation of Lot No 5 as its security and on its decision to lend.
- 6) Based on the forgoing, it is plain and obvious that the amended defence fails to raise any questions of fact as to (i) whether or not the defendants owed the plaintiff a duty of care, in contract and/or tort; (ii) what the extent of that duty of care to the plaintiff was; or (iii) whether the defendants breached their duty of care to the plaintiff by failing to take all necessary steps to ensure that the plaintiff had good and effective first demand legal mortgage over Lot No 5 and by failing to inform it of certain facts that would have had a material bearing on its evaluation of Lot No 5 as its security and on its decision to lend.
- 7) In the circumstances, the amended defence is not a reasonable one and as a consequence it ought to be struck out.

27. In response counsel for the defendants makes the following observations and or submissions:

- 1) It must be remembered that this is an application to strike out a defence filed in response to their writ. The underlying history of this matter clearly removes this action from being amenable to the application of any of the sub-heads of rule 19.
- 2) The first indication that there is no summary solution to the defence can be derived from the fact that the plaintiff has invoked all of rule 19. If it was so clearly obvious from the defence that either or both were "clearly unsustainable" then this scatter gun approach would not be necessary. The fact that the entire rule was invoked leads one to suspect that the plaintiff hopes one or more will "stick".
- 3) The plaintiff will violate O.19 r(2) if it produces or attempts to introduce any affidavit.
- 4) These types of applications should be made promptly. See the Supreme Court Practice (1988) Edn Page 313. Where the defence is being attacked, the application should be made as soon as practical after the service of such defence or pleading.
- 5) The rule is more usually invoked where the attack is against the writ and statement of claim as opposed to the defence. See Supreme Court Practice [1988] supra. Pp 312-326.
- 6) To say the pleadings disclose no reasonable defence or cause of action, one must show that those pleadings have no chance of success; that no arguable defence was disclosed; and no issue or question fit to be tried was raised by the attacked pleadings.
- 7) The fact that this application, so late in the process, even if accompanied by detailed affidavit and possibly by submissions of the plaintiff, indicates that there are issues or facts in dispute or questions fit to be tried.
- 8) The Court should allow the joinder of all parties who might be affected by the decision or outcome "at any stage of the trial or hearing".
- 9) Under that principle alone and after examining the defence it is also prudent to add MrBrutti and Lowenmill Construction Company as parties. The principle being that circumstances have changed since the matter began and MrBrutti is still in possession. The pleadings show that Lowenmill took possession of a file document and recorded it knowing full well that it was never to be placed in front of the plaintiff's mortgage. No doubt Silvano Brutti can be called as a material witness.

- 10) The overriding consideration here is that the plaintiff seeks to deny the defendants a trial of the action. As such the established authorities dictate that this power should only be exercised in plain and obvious cases.
- 11) In this case there are factual disputes clear from the pleadings including the fact that there were no instructions to include Silvano's Italian Ice Cream Limited in the 1 July 1995 instructions as alleged in the affidavit of Wells. There are others. Since the power to strike out is only exercised in the plain and obvious cases, where there are factual disputes or issues the discretion is never exercised.
- 12) On the pleadings and (if permitted) on the evidence tendered by the plaintiff it cannot be said that there are no issues raised by the defence fit for trial. On a plain reading of the defence it cannot be said that there are no triable issues raised by the defendants. These are complex factual issues which ought to proceed unless resolved otherwise by the parties.

28. In addition to the aforesaid admissions, contention and averments therein, the defendants also aver at paragraph 13 of the amended defence as follows:

"13....To the contrary the defendants' advice was in good faith based on the information at the time including the fact that (a) the debenture to Lowenmill was a "book" transaction and the principal partners agreed that it was not to be perfected or registered nor professional fees and stamp duties payable thereon. Lowenmill did not have the defendants' permission to remove the same from the defendants' office (at a time when the resident partners were [sic] away attending to his then ill wife) and place it on the record; (b) the defendants were not obligated to disclose the debenture since it was not to be perfected or enforced."

29. So, clearly the defendants not only deny the allegations of negligence and or breach of fiduciary duty, but they also aver that they were not obliged to disclose the existence of the 1994 debenture to the plaintiff because of a purported arrangement between the parties to that debenture that the same was "a book transaction" and was not to be "perfected or registered", and, therefore, would not affect the plaintiff's security.

30. I am mindful of the admonition of Lord Pearson in *Drummond-Jackson v British Medical Association* supra that the power to strike out a pleading as disclosing no reasonable cause of action or defence is a summary power which should be exercised only in plain and obvious cases and that so long as the pleading discloses some defence or raises some question fit to be decided by a judge or jury, the mere fact that the case is weak, and not likely to succeed is no ground for striking it out.

31. Using that yardstick, then, I am not inclined to strike out the amended defence on the ground that the same discloses no reasonable defence.

32. However, as indicated, the plaintiff also applies to have the defendants' amended defence struck out under the Court's inherent jurisdiction as well as on the ground that the same is either scandalous, frivolous, vexatious or is otherwise an abuse of the process of the court, and although counsel for the defendants referred to the plaintiff's application as "a scatter gun" approach, there is no prohibition against an application to strike out being framed thus.

33. Counsel for the defendants also pointed out, correctly, that such applications are usually made in relation to the statement of claim and very early in the process. Again, however, there is no prohibition against an application to strike out the defence and the rule clearly provides that the same may be made at any stage of the proceedings.

34. In *The Bahamas Court of Appeal case of West Island Properties Limited v. Sabre Investment Limited and others* [2012] 3 BHS J. No. 57 Allen P., delivering the majority decision of the Court, on applications made pursuant to RSC 18 rule 19(1) (d) said:

30 Concerning Order 18; rule 19(1)(d) *R.S.C.*, both Bramwell B. and Blackburn J. in the cases of *Castro v. Murray* Law Rep. 10 Ex. 213; 218 and *Dawkins v. Prince Edward of Saxe-Weimar* 1Q. B.D. 499; 502 respectively, underscored the fact that the court possessed a discretion to stop

proceedings which are groundless and an abuse of the court's process. The discretion, as Mellor, J. in *Dawkins v. Prince Edward of Saxe-Weimar* indicated, must be exercised carefully and with the objective of saving precious judicial time and that of the litigant.

...

57 Lindley, L.J. in the leading Court of Appeal case of the Attorney-General of the Duchy of Lancaster v. London and North Western Railway Company[1892] 3 Ch. 274, considered a similar order which allowed pleadings to be struck out and dismissed on the ground of being frivolous and vexatious. The learned judge at page 277 said that:

"It appears to me that the object of the rule is to stop cases which ought not to be launched - cases which are obviously frivolous or vexatious, or obviously unsustainable"

35. Then Jeune P. in *Young v Holloway* [1895] P. 87 at 90 opined that the pleading must be "so clearly frivolous that to put it forward would be an abuse of the process of the Court." And in the case of *E.T. Mailen Ltd v Robertson* [1974] I.C.R. 72, cited with approval in *Ashmore v British Coal Corp.* [1990] 2 Q.B. 338, it was said that the expression "frivolous or vexatious" includes proceedings which are an abuse of the process. See Note 18/19/16 Supreme Court Practice 1999.

36. Counsel for the plaintiff submits that as the plaintiff's claim is one of negligence pursuant to the defendants' failure to provide it with accurate advice on 4 July 1995 and, the defendants have admitted that their advice to the plaintiff on 4 July 1995 was incorrect, in circumstances where they possessed the requisite knowledge to provide the plaintiff with accurate advice and knew that the plaintiff would rely on their advice, the amended defence is, on its face, hopeless and should be struck out as being frivolous and vexatious.

37. Counsel submits further that the amended defence is spurious and devoid of particulars. In that regard, he makes the following observations and or submissions:

- 1) Throughout the amended defence, there appear various contentions made by the defendants which are factually incorrect and which would require the support of untruthful evidence. For example, at paragraph 5 of the amended defence where the defendants deny that they had any knowledge that the plaintiff would have not have made the loans to Pub on The Mall, and/or accepted a guarantee of Silvano's, in circumstances where they did not certify that Silvano's had good title to Lot No 5.
- 2) However, upon a reading of the plaintiff's instructions to the defendants, it is evident that the plaintiff made it clear to the defendants that it would not proceed with the loan to The Pub on The Mall Limited if title to Lot No 5 was not good and marketable or it was encumbered. Thus, in order for the defendants to support this particular contention in their amended defence they would have to adduce untruthful evidence.
- 3) The amended defence is littered with such inaccuracies and it is asserted that the defendant will only be able to support those statements by adducing untruthful evidence, examples of which may be found in the paragraphs 6, 7, 8, 10, 11, 12, 13, 14 and 16 of the amended defence.

38. Furthermore, counsel for the plaintiff submits, the defendants' failure to properly particularize their amended defence constitutes an abuse of process which justifies it being struck out. In that regard, counsel makes the following observations and submissions:

- 1) The manner in which the amended defence has been pleaded by the defendants also constitutes an abuse of process which is likely to cause prejudice to the plaintiff and embarrassment to the defendants given the lack of particulars contained therein.
- 2) According to RSC Order 18 Rule 19 (12), any pleading must contain the particulars of any defence and the defendants have failed to plead with any specificity circumstances giving rise to the majority of the contentions made in their amended defence.

- 3) Although there are numerous assertions in the amended defence, the majority are not material to the plaintiff's claim and other than the contention that, in their view, the defendants were not obligated to disclose the existence of the 1994 debenture to the plaintiff because the parties thereto never intended for it to be perfected or recorded, the defendants do not provide any other reasons for their failure to advise the plaintiff in connection with facts that were in their possession and material to the plaintiff's view of Lot No 5 as its security or its decision to lend.
- 4) Moreover, in the absence of some evidence to the contrary, the parties to the 1994 debenture must be taken to have intended for it to be perfected and enforced, if necessary and this particular pleading should be dismissed by the Court out of hand should the defendants fail to adduce some evidence to support it.

39. The way I see it, the plaintiff by letter dated 1 July 1995, instructed the defendants to act on its behalf in the preparation of a debenture over the assets and undertakings, including Lot 5 aforesaid, as security for loans advanced or intended to be advanced by the plaintiff to The Pub on The Mall Limited. The plaintiff was of the view that Lot 5 was owned by The Pub on The Mall Limited. As it turns out, although The Pub on The Mall Limited had held a 99 year lease on that property, the lease had, by the date of the plaintiff's instructions, been surrendered to the landlord, Freeport Commercial and Industrial Limited, and the property conveyed by that company to Silvano's by conveyance dated 18 April 1994. Additionally, Silvano's had, by way of the 1994 debenture, charged its assets, including Lot 5 aforesaid, to Lowenmill Construction Limited, which debenture was also prepared by the defendants.

40. Notwithstanding their preparation of the 1994 debenture, the defendants did not disclose that information to the plaintiff. Instead, the defendants in their 4 July 1995 letter opined, inter alia, that the plaintiff's security was "in tact". By those words, the defendants advised its client, the plaintiff, that the title to Lot 5 was good and marketable and unencumbered and that its mortgage over that property was good security for the plaintiff's loans to The Pub on The Mall Limited.

41. There is no dispute that the defendants as counsel and attorneys owed a fiduciary duty to the plaintiff. The issue is whether the defendants breached that duty when they failed to disclose the existence of the 1994 debenture in their advice to the plaintiff? The plaintiff alleges that they did and the defendants say they did not. Indeed, as indicated, the crux of the defendants' defence set out at paragraph 13 aforesaid, is that they were not obligated to disclose the debenture because it was not to be perfected or registered or enforced and that it was "spirited away" from their offices without permission.

42. Notwithstanding the defendants' contention that the 1994 debenture was not to be "perfected" or "registered" or "enforced", the fact is that the plaintiffs plead and the evidence is that that document, had been lodged for record since April 1995, at least two months before the plaintiff's instructions to the defendants and the defendants' 4 July 1995 letter to the plaintiff, approving title to Lot 5 aforesaid and assuring the plaintiff that its security was "in tact". Consequently, even if, at the time of rendering their opinion on title, the defendants did not have actual knowledge that the document had been removed from their offices without permission, and stamped and recorded, they are deemed to have had constructive knowledge and, in any event, a diligent search at the Registry of Records ought to have revealed the recorded debenture.

43. It is, in my judgment, no defence to the plaintiff's claim that the document, although fully executed, was not to be "perfected" or "registered" or "enforced" or that it was "stolen" from the defendants' office and stamped and recorded without their knowledge or consent or the knowledge or consent of the plaintiff's borrower, The Pub on The Mall Limited and or Silvano's, or Mr Brutti, as pleaded in the defendants' amended defence. In that regard, I agree with counsel for the plaintiff that although that may be an issue between The Pub on the Mall Limited and or Silvano's and Lowenmill Construction Limited, the 1994 debenture holder, it does not provide a defence for the defendants to

the plaintiff's claim of negligence and or breach of fiduciary duty on the part of the defendants for failing to advise the plaintiff of the existence of the 1994 debenture.

44. In any event, the defendants were the ones who prepared the debenture in favour of Lowenmill Construction Limited so they had actual knowledge of its existence and, in my judgment, they had an obligation as the plaintiff's attorneys to disclose the information, including the fact that it was, as counsel for the defendants suggests, only a "book transaction" and not intended to rank in priority to the plaintiff's security.

45. At the close of his submissions, I put the plaintiff's pleaded case, as I understood it, to counsel for the defendant as follows:

"The plaintiff alleges that the defendants owed the plaintiff a fiduciary duty; that the defendants breached that duty by providing an unqualified letter of opinion, telling the plaintiff that the mortgagors had good and marketable title to the property over which the defendants were seeking to obtain a mortgage, in circumstances where they knew, either, because they had prepared the document, or ought to have known, because the document was recorded in the Registry of Records, that there was a debenture that would have ranked in priority to the plaintiff's security."

46. I then invited counsel for the defendant to say what in a nutshell would be the defendants' defence to that claim, to which he responded: "The defence is that particular item did not exist. Period."

47. Clearly the "particular item", the 1994 debenture, did exist. It was prepared by the defendants and it had been recorded in the Registry of Records for all to see. There is no allegation that it was a fraudulent document. Counsel for the defendants admits that it was executed, albeit the defendants say it was not intended to be used by the parties or to take priority over the plaintiff's security.

48. I agree with counsel for the plaintiff that had the defendants given the plaintiff the explanation they provide in their amended defence, then the plaintiff would have been in a position to make an informed decision, particularly, if, as Mr Miller suggested, the plaintiff had already advanced funds to the Pub on The Mall and was merely seeking to regularize its security documentation. In any event, the evidence is that the plaintiff agreed to make further advances to The Pub on the Mall in 1999 and again gave instructions to the defendants to prepare the necessary documentation.

49. Again, the defendants apparently provided the plaintiff with their opinion that all was in order. They prepared and had executed a supplemental debenture ("the 1999 debenture") by The Pub on The Mall Limited, in which they included a fixed charge over Lot 5 aforesaid. However, as indicated, that property was in fact owned by Silvano's who had executed a mortgage thereof in favour of the plaintiff in July 1995; that mortgage was also prepared by the defendants.

50. Furthermore, although the conveyance of Lot 5 to Silvano's was executed and dated in 1994, in 1999 that conveyance had still not been recorded. Indeed, the defendants' evidence is that that conveyance was also removed from their offices without permission. In any event, that information was not provided to the plaintiff who, it appears, only became aware of the true state of affairs in 2004 when it sought to enforce its security under the mortgage and debenture and even then the conveyance had not yet been recorded. In fact, the evidence is that the conveyance was not recorded until 2005 by Sean Callender, although it is unclear how the conveyance came to be in the possession of Mr Callender or on whose behalf he lodged the same for record or, for that matter, who now has the original conveyance.

51. However, I agree with counsel for the plaintiff that although the facts pleaded in the amended defence may explain the circumstances that gave rise to the defendants' breach of duty, they do not excuse such breach, and as such, when all is considered, is spurious and provide no real defence to the plaintiff's claim.

52. While I note Mr Brutti's comments in his affidavit of his willingness to pay the loan, and the averments in the amended defence to the effect that the loan is not in default, I am also mindful of the fact that the plaintiff's claim against the defendants is not for possession of the mortgaged premises or for payment of the moneys due under the mortgage and or debentures, rather the plaintiff's claim against the defendants is for damages for their alleged negligence and or breach of their fiduciary duty to the plaintiff. So, in my judgment, whether or not the borrower and or guarantors have defaulted on the loans to the plaintiffs not an issue that needs to be tried in relation to the allegation of negligence and or breach of fiduciary duty.

53. As for counsel for the defendants' complaint about the delay in making the application, I note from the file that a summons to strike out the defence was filed on 14 July 2005, approximately one month after the defence was filed, and was set down for hearing before Stephen Isaacs, J on 1 February 2006. It appears from the file notes that that summons was adjourned at the request of counsel because counsel, at the time, "intended to approach this matter from a different angle."

54. However, as I understand it, the parties were unable to resolve the matter without the intervention of the court and the plaintiff took out a fresh summons on 30 July 2014 resulting in the matter being set down and heard before this Court at this time.

55. In the circumstances, I do not see how the defendants can complain of a delay in the application being made when it appears that the delay was occasioned by the plaintiff seeking to resolve the matter otherwise.

56. Although the summary procedure of striking out is used for plain and obvious cases, where the court is satisfied that striking out would obviate the necessity for a trial or substantially reduce the burden of preparing for a trial, it will readily invoke its jurisdiction to strike out. (*Williams and Humbert Ltd v W. & H. Trade Marks (Jersey) Ltd.* [1986] A.C. 368).

57. And in *Three Rivers District Council and others v Bank of England (No. 3)* [2000] 2 All ER 513, Lord Craighead, at paragraph 95, said:

"...The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well recognized exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event, a trial of the facts would be a waste of time and money and it is proper that the action should be taken out of court as soon as possible."

58. In my judgment, this is such a case.

59. As I said, the plaintiff's chief complaint is that the defendants were negligent and breached their fiduciary duty by failing to disclose to the plaintiff the existence of the 1994 debenture which was an encumbrance on the title to Lot 5 aforesaid over which the plaintiff was also granted a mortgage, but which ranked in priority to the plaintiff's mortgage, when the defendants knew or ought to have known of its existence and the effect it had on the plaintiff's security; that such negligence and breach of fiduciary duty resulted in the plaintiff's inability to enforce its security, thereby causing the plaintiff loss and damages.

60. As indicated, the defendant's defence is simply that they were not obliged to disclose the existence of the debenture because, although executed by the parties, it was merely a "book transaction" and not supposed to have been recorded; that it was removed from their offices without consent and lodged for recording by someone other than their firm. To my mind, had the debenture not been recorded prior to the defendants' 4 July 1995 letter to the plaintiff opining that the plaintiff's

security was "in tact", the defendants' obligation in those circumstances may have been an issue. However, the fact is that the debenture had been recorded approximately two months before the aforesaid 4 July 1995 letter, so the defendants ought to have discovered it on a proper search at the Registry of Records. Moreover, the defendants had another opportunity in 1999 to discover the debenture and notify the plaintiff of its existence, but failed to do so and again opined that the plaintiff's loans to The Pub on The Mall Limited were secured. So, either the defendants were negligent and or in breach of their fiduciary duty by failing to conduct proper searches to discover the existence of the recorded debenture as well as the fact that the conveyance of Lot 5 to Silvano's had not yet been stamped and or recorded, or they had that information and, nevertheless, failed to disclose it to the plaintiff, as they were, in my judgment, duty bound to do.

61. So, notwithstanding a defence having been raised on the face of the pleadings, in my judgment it is obviously unsustainable. To my mind, no useful purpose would be served in having this matter proceed any further and to do so would, in my judgment, be an abuse of the process of the Court.

62. In the result, and in the exercise of the Court's discretion, the amended defence is struck out pursuant to the provisions of RSC Order 18 rule 19 (1) (b) and (d) as well as under the inherent jurisdiction of the Court on the grounds that, in the circumstances of this case, it is frivolous and or vexatious and otherwise an abuse of the process of the court.

63. The plaintiff is at liberty to enter interlocutory judgment on its claim for damages to be assessed by the Registrar, together with interest and costs, to be taxed, if not agreed.

DATED this 29<sup>th</sup> day of January A.D. 2016

Estelle G. Gray Evans  
Justice