COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2018/CLE/gen/01500

BETWEEN

PETRONA RUSSELL

First Plaintiff

AND

PETULA RUSSELL

Second Plaintiff

ANTHONY THOMPSON
(carrying on the practice of Counsel and Attorney under the name Anthony Thompson & Co)

First Defendant

AND

CLEOPATRA THOMPSON

Second Defendant

Before:	The Honourable Madam Justice Indra H. Charles
Appearances:	Mrs. Sophia Rolle-Kapousouzoglou and Mr. Valdere Murphy for the Plaintiffs
	Mr. Joseph D'Arceuil for the First Defendant
	Mrs. Darnel Taylor for the Second Defendant
Hearing Date:	17 February 2020

Practice – Application for judgment in default – Application to file defence out of time – Application to strike out – Rules of the Supreme Court Order 3 rule 4, Order 18 rule 19 and Order 31A rule 2(1) (b) (c)

Negligence – Professional negligence by attorney – Implied retainer –Declarations and Orders

Striking out – Whether draft defences consist of bare denials and disclose no reasonable cause of defence - Whether draft defences are scandalous, frivolous and vexatious and an abuse of the court process –Whether draft defences should be struck out

On 21 December 2018, the Plaintiffs commenced this action against the Defendants, seeking damages against the First Defendant, an Attorney-at-Law, for breach of contract, breach of fiduciary duty and negligence arising from legal services provided by the First Defendant to the Plaintiffs in relation to the attempted sale of their Property. The Plaintiffs also seek a declaration that the purported sale of the Property to the Second Defendant be declared null and void and that the Conveyance of Equity of Redemption be rescinded on the basis of non-compliance and due to the dishonour of the Promissory Note on the part of the Second Defendant, who accepts that she has defaulted in making and/or continuing the mortgage payments notwithstanding that she has been in possession of the property since May 2017.

The Defendants failed to file their respective Defences in time in accordance with the Rules of the Supreme Court. On 26 March 2019, the Plaintiffs applied for leave to enter Judgment in Default as against both Defendants.

On 13 November 2019, the Second Defendant filed a Summons seeking an extension of time and leave to file and serve her draft Amended Defence out of time. On 20 November 2019, the First Defendant purportedly apply for an extension of time to file his Defence out of time through an Affidavit and his draft Defence.

On 4 February 2020, the Plaintiffs filed a Summons to strike out both the Summons of the Second Defendant and the purported application of the First Defendant on the grounds that:

(i) the draft Amended Defence exhibited to the Affidavit of the Second Defendant for an extension of time and leave to file Defence out of time consists of bare denials and that it discloses no reasonable cause of defence, is scandalous, frivolous and vexatious and it may prejudice, embarrass and delay the fair trial of the action and is otherwise an abuse of process of the Court and;

(ii) the purported application of the First Defendant for an extension of time and leave to file and serve his draft Defence out of time (i) is not properly before the Court and (ii) the draft Defence consists of bare denials and discloses no reasonable cause of defence, is scandalous, frivolous and vexatious and it may prejudice, embarrass and delay the fair trial of the action and is otherwise an abuse of the process of the Court.

HELD: Leave to extend time to file the draft defences of the First Defendant and the Second Defendant is refused. Both draft Defences are struck out pursuant to RSC O. 18 r. 19 (1) (a), (b), (c) and (d) and RSC O.31A, r. 2(1)(b) and (c). The Plaintiffs are

granted leave to enter default judgment as against both Defendants. Costs to the Plaintiffs to be taxed if not agreed.

1. Even if an application is defective and/or irregular, the Court still retains the inherent power to remedy such defects particularly at an early stage of the proceedings: **Texan Management Limited v Pacific Electric Wire & Cable Company Limited** [2009] UKPC 46 and RSC O. 3 r. 4 applied.

2. On a Summons for judgment in default of defence, if the defence has been put in, though irregularly, as in the present case, the Court will not disregard it, but will see whether it sets up grounds of defence which, if proved, will be material, and if so, the Court will deal with the case in such manner that justice can be done: **Gibbings v Strong** [1884] Ch.D. 66 applied.

3. Although there was no express retainer, one was implied by the conduct of the parties: **Blyth v Fladgate** [1891] 1 Ch. 337 applied. See also: **Alan Crawford & anor v Donna Dorsett Major (Trading as Dorsett Major & Co., a firm** [2015/CLE/gen/00765].

4. In light of the pleadings and the documentary evidence presented thus far, the Court finds that there was an implied retainer based on the conduct of the parties and that the First Defendant was the Plaintiffs' attorney. The draft Defence of the First Defendant which substantially denies the attorney/client relationship is therefore scandalous, frivolous and vexatious and it may prejudice, embarrass and delay the fair trial of the action and is an abuse of the Court's process. It also does not disclose any reasonable cause of defence. The First Defendant's Counterclaim naturally falls away since the time for filing a defence and counterclaim is refused.

5. The Second Defendant acknowledged and accepted that she has defaulted in making and/or continuing the mortgage payments after being in possession of the property since May 2017.The draft Amended Defence of the Second Defendant is therefore scandalous, frivolous and vexatious and it may prejudice, embarrass and delay the fair trial of the action and is an abuse of the Court's process. More than one-half of the draft Amended Defence consists of bare denials and putting the Plaintiffs to strict proof along with the untenable arguments of common mistake and waiver with respect to the Promissory Note and Conveyance of the Equity of Redemption.

6. Leave to extend time to file the draft Defences of both Defendants out of time is refused. Both draft Defences are struck out under RSC O. 18 r. 19 (1) (a). (b), (c.) and (d) and RSC O.31A, r. 2(1)(b) and (c). The Plaintiffs are granted leave to enter default judgment as against both Defendants.

RULING

Charles J:

Introduction

[1] There are three applications before the Court namely:

1. An application by the Second Defendant, Cleopatra Thompson ("the Second Defendant"), filed on 13 November 2019 for an extension of time and leave to file and serve her Defence out of time;

2. A purported application of the First Defendant, Anthony Thompson (carrying on the practice of Counsel and Attorney under the name Anthony Thompson & Co) ("the First Defendant") for an extension of time to file and serve his Defence out of time.

3. A Summons on behalf of the Plaintiffs filed on 4 February 2020 pursuant to RSC O. 18 r. 19 (1) (a), (b), (c) and (d) and RSC O.31A, r. 2(1)(b) and (c) for the following orders ("Plaintiffs' Summons to strike out"):

    a. An Order setting aside the Summons filed on 13 November 2019 on behalf of the Second Defendant for an extension of time and leave to file and serve her Defence out of time on the following grounds:

        (i) That the Draft Amended Defence exhibited to the Affidavit of the Second Defendant filed on 13 November 2019 in support of the Summons consists of bare denials.

        (ii) That the Draft Amended Defence discloses no reasonable cause of defence, is scandalous, frivolous and vexatious and it may prejudice, embarrass and delay the fair trial of the action and is otherwise an abuse of the process of the Court.

b. An Order setting aside the purported application on behalf of the First Defendant for an extension of time and leave to file and serve his Defence out of time on the following grounds:

(i) That there is no extant Summons before this Honourable Court filed on behalf of the First Defendant seeking an extension of time pursuant to RSC Order 3, Rule 4 and as a result the Court has not been properly moved;

(i) That the Draft Defence exhibited to the Affidavit of the First Defendant filed on 20 November 2019 consists of bare denials.

(ii) That the Draft Defence discloses no reasonable cause of defence, is scandalous, frivolous and vexatious and it may prejudice, embarrass and delay the fair trial of the action and is otherwise an abuse of the process of the Court.

c. That the First and Second Defendants do pay the costs of and occasioned by this application.

d. Such further or other relief as the Court may deem necessary.

[2] An Affidavit of Al-Leecia Delancy **(**"the Delancy Affidavit"**)** filed on 10 February 2020 (together with 20 exhibits) supports the Plaintiffs' application.

[3] In the case of the First Defendant, he did not file a Summons for an extension of time to file his Defence but he filed an Affidavit and a Draft Defence and Counterclaim on 20 November 2019. The Second Defendant filed a Summons dated 13 November 2019 supported by an Affidavit of the same date and a draft Defence. She also filed a Supplemental Affidavit on 5 December 2019 attaching a draft Amended Defence.

Some facts

[4] This is an unfortunate case. The Plaintiffs are twin sisters. They are the owners of Condominium Unit No. 7, located at Country Club Estates Condominium Phase 1, Western Subdivision, Harmony Hill, New Providence ("the Property").They purchased the Property by way of a mortgage dated 7 January 2011 whereby they mortgaged the Property for a term of 25 years to First Caribbean Bank International ("the Bank").

[5] On or about November 2015, the Plaintiffs were accepted to attend Saint Mary's University in Halifax, Nova Scotia, Canada. In pursuance of their relocation to Canada, they discussed with the First Defendant the prospects of selling the Property prior to their relocation. As time was of the essence, they sought legal advice from the First Defendant, an Attorney-at-Law, as to whether they would be able to sell the Property for the value which they had injected into the mortgage. The First Defendant gave them advice and agreed to assist them with the sale of the Property. There was a verbal retainer agreement ("the Implied Retainer"). The terms of the Implied Retainer was that he would market the Property and handle all inquiries including all dealings with the Bank on their behalf after they left the jurisdiction. The First Defendant would also carry out the sale of the Plaintiffs' furniture.

[6] The Plaintiffs relocated to Canada in August 2016 and, at the time of their relocation, their mortgage was in good standing. They had already made about 5 years of payments towards the equitable interest. A prospective purchaser was identified but no agreement for sale had been entered into. In order to ensure that the mortgage was in standing for several months, prior to their departure, the Plaintiffs made several months of payments to satisfy the mortgage for the remainder of 2016.

[7] On or about April 2017, the First Defendant advised the Plaintiffs that a new purchaser had been identified. The First Defendant proposed that the Property be sold via a sale of the Equity of Redemption to the Second Defendant whom he had

been in contact with and whom he also represented. The offer was that the Second Defendant would pay $14,000 by monthly instalments with the amount to be paid in full within 6 months and be guaranteed by a Promissory Note. All expenses would be those of the Second Defendant.

[8] The Plaintiffs accepted the First Defendant's advice. The First Defendant prepared an Agreement for Sale of the Equity of Redemption for execution by the Second Defendant (Exhibit "AFD-8") and a Promissory Note (Exhibit "AFD-11"). The Promissory Note evidences that the Second Defendant promises to pay to the Plaintiffs the sum of $14,000 being the purchase price of their Equity of Redemption in the Property in periodic monthly payments within the next six months. The Promissory Note contained no commencement or completion date nor the installment amount. In effect, it did not satisfy the requirements of the Bill of Exchange Act, 1882 of The Bahamas.

[9] In emails dated 24 August 2017 and 5 November 2017 respectively, the Plaintiffs drew to the attention of the First Defendant that the Promissory Note did not identify a payment schedule (Exhibit "AFD-12") and on 5 January 2018, they sent another email requesting from the First Defendant a status update relative to the payments which the Second Defendant should have made (Exhibit "AFD-13").

[10] On 12 January 2018, the First Defendant advised the Plaintiffs via email that the Second Defendant was taking steps to move forward. The email continued: *"The outstanding mortgage will be paid next week and payments will also be made to reduce your balance*:" Exhibit "AFD-14".

[11] During February and March 2018, the Plaintiffs requested via email that the First Defendant in his capacity as their Counsel and Attorney-at-Law commenced legal proceedings against the Second Defendant for default and non-payment (Exhibit "AFD-15"). The First Defendant never complied with the Plaintiffs' request.

[12] To cut a long story short, the mortgage instalments were not paid on time. In fact only two payments were made. In July 2018, the Bank stepped in as the mortgage

repayments were 480 days past due. Vacant possession proceedings had begun. The Bank informed the Plaintiffs that it was not aware of the Conveyance nor did it recognize such a sale of the Bank's assets. In August 2018, the Plaintiffs agreed to give the Bank vacant possession to avoid proceedings being commenced against them by the Bank. The Plaintiffs were forced to turn over the Property to the Bank.

[13] The Second Defendant failed to provide consideration for the purchase of the Equity of Redemption and breached the obligation to pay notwithstanding that she had been in possession of the Property since May 2017.

[14] As a result, the Plaintiffs instituted the present action on 21 December 2018 against the both Defendants seeking damages for breach of contract, breach of fiduciary duty and negligence against the First Defendant arising from legal services provided by the First Defendant to the Plaintiffs in relation to the attempted sale of their Property. The Plaintiffs also seek a declaration that the purported sale of the Property to the Second Defendant be declared null and void and that the Conveyance of Equity of Redemption be rescinded on the basis of non-compliance and due to the dishonour of the Promissory Note.

[15] On 26 February 2019, the Plaintiffs filed an Amended Statement of Claim which is very comprehensive and ran into 41 paragraphs. The Amended Statement of Claim was principally concerned with additional allegations against the First Defendant.

[16] On 8 February 2019, a Memorandum of Appearance was filed on behalf of the First and Second Defendants by the First Defendant.

[17] On 7 October 2019, the parties appeared in Court pursuant to a Summons filed on 26 March 2019 on behalf of the Plaintiffs for Judgment in Default of Defence. This application is also considered in this Ruling.

[18] Both Defendants requested an adjournment. Counsel for the Second Defendant, Ms. Taylor explained to the Court that she was recently retained and Mr. Alfred Gray, who held papers for the First Defendant, also sought an adjournment. Learned Counsel for the Plaintiffs, Mrs. Rolle-Kapousouzoglou, did not strenuously oppose the request for an adjournment but sought wasted costs which were awarded to the Plaintiffs against both Defendants.

[19] The Plaintiffs' Summons for Judgment in Default of Defence was adjourned to 21 November 2019.

[20] In the intervening period, on 13 November 2019, the Second Defendant filed a Summons seeking an extension of time and leave to file and serve her draft Amended Defence out of time.

[21] On 21 November 2019, the parties appeared before the Court. The First Defendant requested an adjournment to seek representation. He explained that he had discussions with Attorney, Mrs. Kathleen Hassan, to represent him but she was unable to do so because of other pressing matters and a heavy workload. At the same time, Mrs. Rolle-Kaposouzoglou who appeared with Mr. Valdere Murphy for the Plaintiffs, stated that she was objecting to the request for an adjournment as she had not been served with any documents with respect to the First Defendant. Mrs. Rolle-Kapousouzoglou also stated that she intended to object to the application by the Second Defendant for an extension of time to file and serve her draft Amended Defence That being said, the Court gave some directions, including directions for written submissions, and fixed a hearing of all the applications for 17 February 2020.

Preliminary objection

[22] Learned Counsel Mr. Murphy, who argued the case on behalf of the Plaintiffs, made a preliminary objection. He submitted that the First Defendant has not filed a Summons seeking an extension of time to file and serve his Defence. Instead,

the First Defendant has only filed an Affidavit on 20 November 2019 with a Draft Defence seeking the extension of time.

[23] According to Mr. Murphy, the First Defendant has not complied with the procedural requirements of RSC O. 3 r. 4 which provides as follows:

> **"(1) The Court <u>may</u>, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these Rules, or by any judgment, order or direction, to do any act in any proceedings.**
>
> **(2) The Court <u>may</u> extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.**
>
> **(3) The period within which a person is required by these Rules, or by any order or direction, to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the Court being made for that purpose."** [Emphasis added]

[24] Mr. Murphy argued that since there is no extant Summons before the Court, the First Defendant has not properly engaged the jurisdiction of the Court. He urged the Court to grant the relief sought by the Plaintiffs pursuant to RSC O. 19 r.7 and/or under the inherent jurisdiction of the Court, that Judgment in Default of Defence be entered for the Plaintiffs as against the First Defendant.

[25] It is a fact that the First Defendant is not proper before the Court but he has filed an Affidavit and a draft Defence on 20 November 2019. I do not think that I should strike out his draft Defence because he has not filed a Summons. I am often reminded of the judicious words of Lord Collins in **Texan Management Limited v Pacific Electric Wire & Cable Company Limited** [2009] UKPC 46. At paragraph 1, Lord Collins stated:

> **"It has often been said that, in the pursuit of justice, procedure is a servant and not a master."**
>
> See also: **Dramiston Ltd & Ors v Financial Intelligence Unit** [2017/CLE/gen/1256] –Written Ruling delivered on 28 February 2018.

[26] Furthermore, RSC O. 3 r. 4 invests a discretion on the Court.

[27] For these reasons, the preliminary objection raised by Mr. Murphy against the First Defendant fails.

The law

Summons for default judgment and summons for extension of time

[28] As the Plaintiffs correctly submitted, the Australian decision of **Wiedenhofer v The Commonwealth** [1970] HCA 54; (1970) 122 CLR 172, is instructive relative to instances where the Court is faced not only with an application for judgment in default but also with an application for an extension of time for the filing of a defence. There, Gibbs J stated at paragraph 8 that:

> **"…In the present case, where I have before me not only a motion for a judgment but also a motion for extension of time for filing the defence, and where a defence has in fact been delivered although out of time, and there is no ground to suggest that this defence is merely frivolous or filed for the purpose of delay and an explanation has been given of the failure to deliver it within time, in my opinion it would lead to injustice to take any other course than to grant a reasonable extension of time and to refuse the motion for judgment.**"[Emphasis added]

[29] The decision of **Wiedenhofer** is consistent with the law that where a defence is served after expiration of the prescribed time but before judgment has been given, the defence cannot be disregarded and will generally prevent the plaintiff from entering judgment, even though it is not served until after the plaintiff has served his summons or notice of motion for judgment but the defendant may be ordered to pay the costs occasioned by his/her delay: see **Gill v Woodfin** (1884) 25 Ch.D.707, CA and **Gibbings v Strong** (1884) 26 Ch.D. 66, CA. In such a case, the Court will have regard to the contents of the defence served out of time and deal with the case in such a manner that justice can be done. In the latter case of **Gibbings**, Earl of Selbourne LC stated at page 69 that:

> **"…[A]nd if a defence has been put in, though irregularly, I think the Court would do right in attending to what it contains. If it were found to contain nothing, which, if proved, would be material by way of**

> **defence, the Court would disregard it. If, on the other hand, it discloses a substantial ground of defence, the Court will not take the circuitous course of giving a judgment without regard to it, and obliging the defendant to apply, under rule 14, to have that judgment set aside on terms, but will take steps to have the case properly tried on the merits."** [Emphasis added]

Court's power to strike out

[30] RSC O. 18 r. 19(1) allows a party to attack the validity of its opponent's pleadings which may result in part or the whole of the pleadings being struck out. It provides:

> **"The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the 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."**

[31] In addition, O. 31A r. 20(1) provide further grounds for striking out a pleading or part of a pleading. It states:

> **21. (1) In addition to any other powers under these Rules, the Court may strike out a pleading or part of a pleading if it appears to the Court -**
>
> **(a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the Court in the proceedings;**
>
> **(b) that the pleading or the part to be struck out is an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings;**
>
> **(c) that the pleading or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or**
>
> **(d) that the pleading or the part to be struck out is prolix or does not comply with the requirements of any rule."**

[32] In **B.E. Holdings Limited v Piao Lianji** [2014/CLE/gen/01472], this Court set out the powers of the court to strike out at paras [7] to [11] as follows:

> **"[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.**
>
> **[9] It is also part of the court's active case management role to ascertain the issues at an early stage. However, a statement of claim is not suitable for striking out if it raises a serious live issue of fact which can only be determined by hearing oral evidence: *Ian Peters v Robert George Spencer*, ANUHCVAP2009/016 - Antigua & Barbuda Court of Appeal - per Pereira CJ [Ag.] - Judgment delivered on 22 December 2009.** [Emphasis added]
>
> **[10] The court, when exercising the power to strike out, will have regard to the overriding objective of RSC O. 31A r. 20 and to its general powers of management. It has the power to strike out only part of the statement of claim or direct that a party shall have permission to amend. Such an approach is expressly contemplated in the RSC: see Order 18 Rule 19.**
>
> **[11] An application to strike out is essentially a summary procedure and it is not suitable for complicated cases which would require a mini-trial"**[Emphasis added]**.**

[33] I shall therefore apply these legal principles to the facts of the present case.

Draft Defence of First Defendant
Discussion

[34] The Plaintiffs assert that the draft Defence of the First Defendant discloses no reasonable cause of defence, is scandalous, frivolous and vexatious and it may prejudice, embarrass and delay the fair trial of the action and is otherwise an abuse of the process of the Court. They further assert that the draft Defence also consists of bare denials.

[35] The Plaintiffs also contend that the First Defendant's draft Defence is replete with mistruths and omissions, and consists primarily of bare denials and general traverses that the he did not act as Counsel and Attorney-at-Law on behalf of the Plaintiffs: see paragraphs 7, 8-10, 18, 20, 24, 29 and 32 of the draft Defence where it is denied that the Plaintiffs sought legal advice from the First Defendant.

[36] In paragraph 7 of the draft Defence, the First Defendant admits the discussions referred to in paragraph 7 of the Plaintiffs' Statement of Claim but denies that the Plaintiffs sought "legal advice" on the prospects of selling the Property to cover the mortgage. The First Defendant insists that there was no agreement for legal services between the Plaintiff and himself. According to the First Defendant, there is no document that set forth the scope of work to be performed, fees and invoicing, conflict of interest, references, limitation of liability, termination of agreement, governing law, claims disputes, notices and amendments. The First Defendant exhibits the Cobalt Law firms' general terms and conditions and states that these terms and conditions are equally applicable to The Bahamas: Exhibit 1 to his Submissions and Authorities of the First Defendant.

[37] Learned Counsel for the First Defendant Mr. D'Arceuil argued that the Plaintiffs and the First Defendant were not in a lawyer/client relationship. He further argued that the Plaintiffs are alleging that there was an implied contract for services but the evidence of the terms and conditions have not been produced. Says Mr. D'Arceuil, the works performed for the Plaintiffs were largely consultative by way of suggestions to them and not of a legal nature. When one scrutinizes the

documentary evidence presented by the Plaintiffs, this assertion by Mr. D'Arceuil is not accurate.

[38] Further, in paragraph 9 of their Amended Statement of Claim, the Plaintiffs assert that "[T]he First Defendant failed to advise the Plaintiffs that unless they obtained the agreement of the Bank to the sale or assignment of the Equity of Redemption, the Plaintiffs would remain liable to the Bank: **Re Errington** (1894) 1 QB 11, Megarry 3rd Edition page 948.

[39] The First Defendant responds in paragraph 9 of his draft Defence that he was not engaged to render legal service as regards the Equity of Redemption. No written engagement/agreement was entered into to require the First Defendant to research the matter and render an opinion.

[40] The Plaintiffs accept that there was no written retainer. Learned Counsel for the Plaintiffs, Mr. Murphy contended that there was an implied retainer of attorney/client. He referred to the Delancy Affidavit and the attached exhibits to substantiate his arguments.

[41] At Tab 6, the First Defendant penned a letter on his Firm's letterhead to the Manager of First Caribbean International Bank (Bahamas) Limited stating:

> **"I have been instructed by the afore-mentioned mortgagors to indicate that a payment of two months installment will be made on the account before the end of the month and the arrears are expected to be paid in full before the end of June, 2017."** [Emphasis added]

[42] At Tab. 7, the First Defendant sent an email to one of the Plaintiffs, Petrona Russell stating:

> **"The bottom line is that you will get $18,000 within six months, but the arrangements would be final as far as you are concerned. I would want a certainty that you have no further liability if you agree the arrangement. If you want me to continue with it I shall sit with the client and put in writing exactly what she is saying."**

[43] At Tab. 8, the First Defendant submitted the purported Conveyance of Equity of Redemption to the Registry of Records for recording. It states:

"Received From:	**ANTHONY THOMPSON & CO.**
From/Of Parties (first entry)	**Russell, Petula Asce-Ola**
To Parties (first entry)"	**Thompson, Cleopatra P.**

[44] Mr. Murphy emphasized that although the Bank is the mortgagee, it is not a party to the Conveyance of Equity of Redemption. Further, at Recital E, it states:

> **"The Purchaser has agreed with the Vendor to purchase from the Vendors their equity of redemption in the said hereditaments at the price of Fourteen Thousand Dollars ($14,000.00) in the currency of the Commonwealth of The Bahamas".**

[45] Mr. Murphy submitted that when one looks at the documentary evidence which had been produced, it is beyond doubt that the First Defendant was engaged by the Plaintiffs as their Attorney-at-Law and the draft Defence is just a tactic to delay the inevitable. Mr. Murphy next submitted that in the First Defendant's Counterclaim, he claimed that he suffered loss and damage. He particularized his loss as:

"Approximately 35 hours of professional time at $500/hour in holding discussions with realtors and interested persons, showing the unit on many occasions, securing person to clean, paint and repair it, drawing draft agreements with potential buyers, and discussions with the Plaintiff	**$19,000**
Out of Pocket disbursements	**$ 1,000**
Time spent on reviewing matters referred to herein and Research 18 hours at $500	**$9,000**

[46] In my considered opinion, at the heart of the present action, is whether the First Defendant was retained by the Plaintiffs to act as their attorney. The Plaintiffs insist that the First Defendant acted as their Attorney-at-Law pursuant to an Implied Retainer. They accept that there was no written retainer. On the other hand, the

First Defendant argues that there was no written retainer and all that he did was to provide consultative works.

[47] In terms of retainers, the law is clear. A retainer does not have to be in writing. It may be implied from the conduct of the parties. In **Blyth v Fladgate** [1891] 1 Ch. 337, it was held that though there had not been an express retainer, the relationship of solicitor and client might be inferred from the acts of the parties; that it subsisted between the firm and the trustees, and that the firm was liable in damages for the negligence of S. for failure in discharge of the duty which had been undertaken to the clients.

[48] Also, in the case of **Alan Crawford & anor. v Donna Dorsett Major (Trading as Dorsett Major & Co., a firm** [2015/CLE/gen/00765] (Judgment delivered on 1 May 2020), now under appeal, the Court found that Mrs. Major acted as the Plaintiff's attorney as well as the attorney for the First and Second Defendants even though there was no written retainer. The Court found that there was an implied retainer based on the conduct of the parties.

[49] In addition, at paragraph 37 of the Amended Statement of Claim, the Plaintiffs averred that the Second Defendant has wholly failed to provide consideration for the purchase of the Equity of Redemption and, as a result, the Conveyance is void. The First Defendant denied this averment and states, at paragraph 37 of his Draft Defence that "the Second Defendant made multiple installment payments to the Bank on the mortgage". The Plaintiffs asserted that in light of the documentary evidence presented, the First Defendant has made shockingly outrageous and disingenuous allegations in his draft Defence. Scrutinizing the documentary evidence attached to the Delancy Affidavit, they refute the averment made by the First Defendant that multiple payments were made: see Tab 5 of the Delancy Affidavit exhibiting an email from Charmaine Eve of the Bank outlining that:

"A breakdown of payments received since November 2016 are:

28-07-17	**$2,587.00**
29-07-17	**$1,293.50"**

[50] Further, at paragraph 42 (i) of the Second Defendant's Supplemental Affidavit, she expressly stated that she has defaulted in making and/or continuing the mortgage payments after being in possession of the Property since May 2017. Indeed, this is a far cry from the allegation that the Second Defendant made multiple payments.

[51] In the present case, the First Defendant alleged that he provided consultative works. It is unclear what that really means given the documentary evidence which has been produced. They are written on his firm's letterhead. Analyzing the Amended Statement of Claim and the First Defendant's draft Defence as well as the documentary evidence, it is clear to me that the First Defendant acted as Counsel and Attorney-at-Law for the Plaintiffs. Therefore, the arguments advanced by the First Defendant that the First Defendant was not negligent may be the next stage of the process. A helpful excerpt may be gleaned from the **Donna Dorsett Major** judgment (supra) at paragraphs 119 to 148.

[52] The Bahamian Court of Appeal case of **West Island Properties Limited v Sabre Investment Limited and others** [2012] 3 BHS J. No.57 is also instructive. It gives guidance on the application of RSC O. 18 r. 19(1). In delivering the majority decision of the Court, Allen P stated at paragraph 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.** [Emphasis added]

[53] In the case of **Imperial Life Assurance Company of Canada v Flamingo Arms Ltd** [1995] BHS J. No. 68**,** the defence consisted primarily of bare denials and general traverses and was struck out pursuant to RSC O. 18 r. 19.

[54] The Court is always mindful that striking out any party's case at such an early stage is a very draconian step and extreme caution must be exercised. Having said that, the Court will also prevent the improper use of its machinery, and in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation: **Castro v Murray** (1875) 10 Ex. 213; **Dawkins v Prince Edward of Saxe Weimar; Willis v Earl Beauchamp** (1886) 11 P. 59, per Bowen LJ at page 63.

[55] I therefore agree with the Plaintiffs that the application of the First Defendant is no more than a vexatious and oppressive attempt by him to use the Court's machinery for an improper purpose.

[56] Applying the law to the pleadings and evidence (documentary) presented thus far, I find that the draft Defence of the First Defendant discloses no reasonable cause of defence, is scandalous, frivolous and vexatious and it may prejudice, embarrass and delay the fair trial of the action and is otherwise an abuse of the process of the Court. Also, in my judgment, the draft Defence of the First Defendant has no reasonable chance of success and ought to be struck out. Therefore, the Plaintiffs are entitled to leave to enter a default judgment as against the First Defendant. The First Defendant's Counterclaim will naturally fall away since the time for filing a Defence and Counterclaim is refused.

Draft Defence of the Second Defendant
Discussion

[57] To reiterate, on 13 November 2019, the Second Defendant filed a Summons pursuant to RSC O. 18 r. 2 and RSC O. 3 r. 4 seeking leave of the Court to file and serve a Defence out of time. In her affidavit filed on the same date, she alleged, among other things, that when she received the Plaintiffs' Writ of Summons on or about December 2018, she immediately informed the First Defendant about it and he took the documents and informed her that he would handle the matter. She trusted the First Defendant that he would act prudently. She averred that she was absolutely unaware that the First Defendant did not file a Defence on her behalf.

According to her, her failure to file and serve a Defence herein the prescribed time was due to her naivety on her reliance on the First Defendant. She attached a draft Defence which has subsequently been amended.

[58] On 5 December 2019, the Second Defendant filed a Supplemental Affidavit in support of her application for extension of time. She exhibited a draft Amended Defence of the Second Defendant.

[59] Paragraph 1 of her draft Amended Defence averred that the Plaintiffs' Statement of Claim discloses no reasonable and/or cause of action against her. This is not so as I dissect the Amended Statement of Claim.

[60] The Second Defendant admits paragraphs 1 to 4 of the Amended Statement of Claim upon which nothing turns whether or not she admits them. She does not admit but puts the Plaintiffs to strict proof of paragraphs 5 to 17 of the Amended Statement of Claim. She admits paragraphs 18 of the Amended Statement of Claim (relates to discussions by the First Defendant and the offer that the Second Defendant would pay the $14,000 by monthly instalments with the amount to be paid in full within six months and which was guaranteed by a Promissory Note.

[61] She also admits paragraph 19 which states "*At no time, in breach of the First Defendant's professional obligations, was it disclosed that the First Defendant was acting as Counsel and Attorney-at-Law for both the Plaintiffs and the Second Defendant with respect to the sale.*"

[62] The Second Defendant denies the allegations contained in paragraphs 20 to 21 of the Amended Statement of Claim and puts the Plaintiffs to strict proof. She admits paragraph 22 of the Amended Statement of Claim which speaks to her executing the Promissory Note prepared by the First Defendant on 30 May 2017. According to her, the Promissory Note did not refer to a commencement or completion date nor did it refer to the instalment amount. In short, she alleges that the First Defendant was negligent in preparing a Promissory Note which did not comply with the requirements of the Bill of Exchange Act, 1882 of The Bahamas.

[63] The Second Defendant admits some parts of paragraph 23 which pertains to the First Defendant. She denies what is in reference to her and puts the Plaintiffs to strict proof. She does not admit paragraphs 24 to 30 of the Amended Statement of Claim and puts the Plaintiffs to strict proof thereof.

[64] In paragraph 31, the Second Defendant does not admit that she caused any hardship to the Plaintiffs which resulted in them having to turn over the Property to the Bank. What is clear however from her draft Amended Defence is that she has been in possession of the Property since May 2017 (paragraph 39) and admits that she has defaulted in making and /or continuing the mortgage payments (paragraph 42(i)), she denies each and every allegation contained in the Amended Statement of Claim.

[65] Learned Counsel Ms. Taylor who appeared for the Second Defendant asserted, in a nutshell, that the Promissory Note and Conveyance of the Equity of Redemption executed on 30 May 2017 are both void for common mistakes between the parties. See also paragraphs 39 to 42 of the Second Defendant's draft Amended Defence.

[66] In her written as well as oral submissions, Ms. Taylor valiantly fought for leave to file and serve her Defence out of time. She submitted that the Second Defendant's failure to do so was not intentional, that there is a good explanation for her non-compliance and she has generally complied with other orders of the Court (I am unsure what she has complied with). She further submitted that the draft Amended Defence has merit and there is a reasonable chance of success should the matter proceed to trial.

[67] In my considered opinion, the draft Amended Defence of the Second Defendant consists of bare denials. More specifically, 25 out of the 45 paragraphs or 55% of the Second Defendant's draft Amended Defence comprises of bare denials and putting the Plaintiffs to strict proof. The averments by the Second Defendant relative to common mistake and waiver are, in my judgment, untenable and have no reasonable chance of success. Her draft Amended Defence is therefore

scandalous, frivolous and vexatious and it may prejudice, embarrass and delay the fair trial of the action and is otherwise an abuse of the process of the Court.

[68] As already stated, the Second Defendant acknowledges and accepts that she has defaulted in making and/or continuing the mortgage payments after being in possession of the Property since May 2017. She now turns around and raises common mistake and waiver. I agree with the Plaintiffs that the Second Defendant has no right in law or otherwise to remain in possession of the Property and if she is still in the Property, she must vacate it within 30 days hereof. She must also satisfy all expenses, utilities and charges whatsoever in relation to the Property.

Conclusion

[69] It is trite law that the Court has the power pursuant to the RSC O. 18 r. 19 and O. 31A r. 20(1) to strike out proceedings before it which are obviously frivolous or vexatious or an abuse of its process. Such cases include, *inter alia*, obviously unsustainable, spurious, or hopeless proceedings and cases involving the improper use of the court's machinery: **Talbot-Etienne v. Baker's Bay Club Limited t/a "Baker's Bay Golf and Ocean Club"** [2016] 1 BHS J. No. 69.

[70] In my judgment, neither the First Defendant nor and Second Defendant has a genuine answer to the allegations made by the Plaintiffs. Consequently, the Court hereby grants leave to the Plaintiffs to enter judgment in default as against both Defendants.

[71] The First and Second Defendant's respective applications for an extension of time to file and serve their respective draft Defences are dismissed with costs to the Plaintiffs to be taxed if not agreed.

Dated this 26th day of April, A.D., 2021

Indra H. Charles
Justice