

**COMMONWEALTH OF THE BAHAMAS**  
**IN THE SUPREME COURT**  
**COMMON LAW & EQUITY DIVISION**  
**BETWEEN**

**2019/CLE/gen/01643**

**NEIL CAMPBELL**

**Plaintiff**

**AND**

- 1. LESIA ROLLE CAMPBELL**
- 2. COMMISSIONER OF POLICE**
- 3. THE ATTORNEY GENERAL**

**Defendants**

**Before The Hon Mr. Justice Neil Brathwaite**

Appearances: Attorneys Stephanie D. Bowleg McKenzie and Alton McKenzie for the Plaintiff

Attorneys Sophia Thompson – Williams and Danielle Francis for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

**DECISION**

**FACTUAL SUMMARY**

1. The Plaintiff and First Defendant are husband and wife who jointly entered into a mortgage agreement in or around 2013 with Teachers & Salaried Workers Co-operative Credit Union Limited (“TSWCCU”). The Plaintiff alleges that the terms of the mortgage provided for the Plaintiff and First Defendant to make equal monthly salary deductions to satisfy the mortgage. The Plaintiff alleges that his employer was consistent with the deductions to be applied to the mortgage. However, the First Defendant was not. The Plaintiff further alleges that the First Defendant completed an authorization for salary deductions form with her employer, the now Second Defendant in or about February 2014. Yet, no payment was made toward the mortgage loan on behalf of the First Defendant via salary deduction.
2. Notice of the default of the mortgage was provided to the First Defendant by TSWCCU via letters dated 12, 14, 16 June 2017 in which the entire amount of the mortgage was demanded. The amount

of the mortgage outstanding was \$388,215.93 and was demanded to be paid within a specified timeframe, otherwise, foreclosure proceedings would be commenced. An agent of the TSWCCU, InfoPort Global Ltd. prepared a notice to the Plaintiff via letter dated 18 October 2018, in which it demanded the payment of \$407,975.24 of the mortgage arrears plus interest to be paid in full. On 11 March 2019, the TSWCCU wrote to the Second Defendant advising of its breach of the salary deduction agreement.

3. The Plaintiff commenced this action via Writ of Summons filed 19 November 2019. Initially, the TSWCCU was joined to the action as the Second Defendant but has since been removed as a Defendant in the matter. The Plaintiff asserts negligence, breach of contract, and breach of fiduciary duty against the Second Defendant and by extension, the Third Defendant under the Crown Proceedings Act. The Plaintiff alleges that the First Defendant breached the contract between herself, the Plaintiff and TSWCCU to repay her portion of the mortgage loan. The Plaintiff further alleges that the Second Defendant breached its fiduciary duty and negligently failed to make the salary deduction payments on behalf of the First Defendant to the TSWCCU, and failed to notify the TSWCCU promptly that no payments were being made on behalf of the First Defendant. The Plaintiff claims general damages as a result of injury to his creditworthiness and special damages comprising of funds from his credit account with TSWCCU which were applied to the mortgage loan in the amount of \$24,364.08, investment made by him in the mortgaged property of \$150,000.00, and funds paid on the mortgage loan in the amount of \$83,339.20.
4. The Second and Third Defendants filed a Defence on 12 April 2021. In the Defence, the Defendants stated that the Plaintiff and First Defendant are jointly and severally liable for the repayment of the mortgage loan and had the duty to ensure that the payments were made to the TSWCCU. The Third Defendant does not deny the receipt of the salary deduction authorization form. However, they posit that a process must be completed before the salary deduction is made. The Second and Third Defendants asserted that the loss which the Plaintiff suffered was a result of his own failure to pay the mortgage and to do all that was possible to ensure that it was paid and/or remedy the default after receipt of the demand letter. The Second and Third Defendant deny every allegation and claim contained in the Writ of Summons.
5. The Summons before me was filed by the Second and Third Defendants' Summons on 16 December 2021 to strike out the Plaintiff's Writ of Summons, on the ground that it discloses no reasonable cause of action pursuant to Order 18 Rule 19(a) Rules of the Supreme Court ("RSC"). There lies a Summons by the Plaintiff filed 3 December 2021 to amend the Writ pursuant to Order 20 Rule 5 RSC. As indicated at the 10 March 2022 hearing, the adjudication of the Plaintiff's Summons is contingent on the success of the Second and Third Defendants' Summons, which I will now turn to consider.

### **THE SECOND AND THIRD DEFENDANTS' CASE**

6. The Second and Third Defendants assert that the Plaintiff's Writ discloses no reasonable cause of action against them and thus there is no chance of success. They rely on *B.E Holdings Ltd v Piao Lianji 2014/CLE/gen/01472* and *Cartwright v Just Dance Ltd. 2016/CLE/gen/00698* in support of this application. It is their position that there was no agreement between the Plaintiff and the Second and Third Defendant, and therefore, they have no duty to the Plaintiff that was breached. They contend that the Plaintiff and First Defendant entered into an agreement with the TSWCCU, to which they were beholden jointly and severally to make payments pursuant to the agreement. The Second and Third Defendants deny any involvement or knowingly assisting the First Defendant in committing fraudulent actions. The Second and Third Defendants cited Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378*, who stated that "dishonesty is a necessary ingredient of accessory liability". The Second and Third Defendants submit that the Plaintiff must show that as a third party, they acted dishonestly, which they deny doing, and of which they say there is no evidence.

7. The Second and Third Defendant submitted:

"19. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants (now 2<sup>nd</sup> and 3<sup>rd</sup> Defendants) submit that they did not act in dishonest assistance with the 1<sup>st</sup> Defendant and did not commit any fraud. The Plaintiffs' claim is misconceived as the contract for payment of the mortgage was the Plaintiff, the 1<sup>st</sup> Defendant and the TSWCCU. The Plaintiff and the 1<sup>st</sup> Defendant were jointly responsible in ensuring that their mortgage payments were made monthly. The Plaintiff and the 1<sup>st</sup> Defendant had every right to act with due diligence in requesting a confirmation or proof of payment from the 2<sup>nd</sup> Defendant (now TSWCCU) at all times. TSWCCU also had every right to act with due diligence to request information from the RBPF and they did not do so promptly, some 5 years and one month after. The 1<sup>st</sup> Defendant brought a Salary Deduction form to the payroll section of the RBPF in March 2014 and TSWCCU sent their first letter notifying the RBPF on 11 April 2019. The deductions were subject to other considerations.

20. At all times, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants (now 2<sup>nd</sup> and 3<sup>rd</sup> Defendants) acted honestly in that the 1<sup>st</sup> Defendant's full salary was paid to her, evidenced on pay slips, and no money was kept or received by the 3<sup>rd</sup> or 4<sup>th</sup> Defendants. It was for the 1<sup>st</sup> Defendant and the Plaintiff who were jointly responsible for the agreement, to adhere to the performance of the agreement.

....

26. The Plaintiff alleges that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants (now 2<sup>nd</sup> and 3<sup>rd</sup> Defendants) breached their fiduciary duty in not carrying out the salary deduction of which they were authorized to do. The Defendants submit that



the Plaintiff's claim in this regard is misconceived and in no way would the authorization form completed by the 1<sup>st</sup> Defendant incite a contractual agreement between them. Further, the authorization form is a consent provided by the employee to the employer and not one where the Plaintiff is entitled to the reliefs sought."

8. The Second and Third Defendants contend that for these reasons the Plaintiff's Writ discloses no reasonable cause of action against them and has no chance of success. Thus, the portion of the Writ with claims against the Second and Third Defendant should be struck out and they be removed as parties to the proceedings.
9. As it relates to the Plaintiff's application for leave to amend the Writ of Summons, it is the Second and Third Defendants' position that the Plaintiff's draft amended Writ, raises no other cause of action against the Second and Third Defendants. They reiterate that they held no funds or property on behalf of the First Defendant and therefore could not be liable for a breach of constructive trust, neither did they knowingly assist in any fraudulent activity on behalf of the First Defendant and could not be held liable. As such, the Second and Third Defendants assert that the Plaintiff's claim discloses no reasonable grounds and it would be a waste of the Court's time to allow such amendment as against the Second and Third Defendants.

#### **THE PLAINTIFF'S CASE**

10. The Plaintiff relies on the draft amended Writ of Summons contained in the Affidavit in Support of the Summons filed 3 December 2021, to amend the initial Writ. In the proposed amendments, the Plaintiff claims that the Second Defendant was a constructive trustee over the portions of the First Defendant's salary pledged to satisfy the mortgage pursuant to the salary deduction agreement. In failing to make the deductions, the Plaintiff claims that the Second Defendant knowingly assisted the First Defendant in committing fraud against the Plaintiff and breached the constructive trust. The Plaintiff credits his loss to the Second Defendant and by extension the Third Defendant under the Crown Proceedings Act. The Plaintiff relies on *Agip (Africa) Ltd. v Jackson (1989) 3 WLR 1367* in which the Court clarified that a stranger to a trust will be liable to account as a constructive trustee if he knowingly assists in the furtherance of a fraudulent and dishonest breach of the trust. The Plaintiff asserts that the Second Defendant was fixed with knowledge of the First Defendant's fraud and willfully and recklessly failed to make such inquiries as a reasonable and honest man would make.
11. In the Particulars of Claim against the Second Defendant, the Plaintiff alleges that:

"f. RBPF failed at all material times to promptly detect that it had not made salary deductions from the 1<sup>st</sup> Defendant's earnings as is customary and promised in the authorization for salary deductions and that RBPF should have known that failing to do so would not only affect the 1<sup>st</sup> Defendant

negatively but also her husband the Plaintiff whom RBPF did know or ought to have known was also a party to the mortgage.

g. RBPF in failing to withhold the agreed portions of the 1<sup>st</sup> Defendant's salary and pay the same to the credit of TSWCCU knowingly assisted the 1<sup>st</sup> Defendant's fraud.

h. That by virtue of the said salary deduction agreement RBPF was sufficiently fixed with the knowledge and notice of the 1<sup>st</sup> Defendant's obligation to the mortgage and as such the RBPF in agreeing to the terms of the said salary deduction agreement was a constructive trustee of the monies it should have withheld and paid to TSWCCU to satisfy the mortgage.”

12. In any event, the Plaintiff submits that the Second and Third Defendants are in contempt of the Court as they have been ordered to pay costs of \$750.00 to the Plaintiff almost a year ago. As such, the Plaintiff submits that the Defendants should be estopped from making any applications until they have purged their contempt, by complying with the said Order.
13. The Plaintiff submits that the Court should accede to its application to amend the Writ of Summons as it will add a new claim of fraud against the Defendants which arises out of the same facts posited in the initial Writ. Additionally, the Plaintiff claims that the application for the amendment was not delayed as there have not yet been any directions by the court as to the management of this case. The Plaintiff submits that the application should only be denied if the Defendants will suffer injustice/prejudice as pronounced by L J Bowen in *Cropper v Smith (1883) 26 Ch D 700*. The Plaintiff also relied on *CIP Properties (AIP) Ltd. v Galliford Try Infrastructure Ltd. and others (No. 3) [2015] All ER D 193 (May)* which was instructive on the considerations the Court must take into account when granting the application under the UK Civil Procedure Rules.

## **LAW AND ANALYSIS**

### *Striking out application*

14. Order 18 Rule 19 provide in part:

“19. (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —

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



and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

15. The law in this jurisdiction, as it relates to striking out applications, is well settled. Striking out is reserved for those cases which are prima facie incontestably bad and incapable of amendment. Charles J in *B. E. Holdings Limited v Lianji (also known as Linda Piao – Evans or Lian Ji Piao – Evans)* [2017] 1 BHS J. No. 28 cited *Walsh v Misseldine* [2000] CPR 201, CA where Brooke LJ held:

“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.”

16. The court considers “no reasonable cause of action” to be one without any chance of success, and upon examination is certain to fail. See *Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094. In exercising this discretion, the Court is prohibited from conducting a protracted examination of the evidence to determine whether there is a cause of action against the Defendant. It must be clear from the claims pleaded before the Court in the Statement of Claim that the Defendant has a case to answer, and that the Plaintiff has some prospect of success.

17. The Plaintiff in the Writ of Summons claims that the Second and Third Defendants were negligent and in breach of their fiduciary duty owed to him. As a result of this negligence and breach of fiduciary duty, the Plaintiff claims that he has suffered loss. As this application was brought by the Second and Third Defendants, I will only address the claims made against them and not the First Defendant. To establish a claim for negligence, there must be a duty of care owed, a breach of that duty of care, and loss suffered as a result of the breach. The Plaintiff contends that the Second and Third Defendants owed him a duty of care to make the salary deductions per the authorization form on behalf of the First Defendant, and failing to do so is a breach of that duty which has caused him loss. The Plaintiff has not claimed any special relationship with the Second or Third Defendants sufficient to establish that there was a duty arising on the part of the Second and Third Defendants owed to the Plaintiff. The Plaintiff has instead maintained that the Second Defendant was the employer of his wife, the First Defendant, with whom I find there to be a relationship and a mutual duty owed. I cannot find that the Second or Third Defendants owed the Plaintiff a duty to make salary deductions payable to the TSWCCU emanating from a salary that was not his, or pertaining to an authorization form that he did not sign.

18. It was the Plaintiff’s argument that the Second Defendant, as a result of receiving the authorization form for salary deductions from the First Defendant, ought to have known that the Plaintiff would be affected by its inactions. If we were to take the neighbourhood principle outlined in *Donoghue v Stevenson* [1932] All ER Rep 1 as per Lord Atkin:

“The rule that you are to love your neighbour becomes in law: You must not injure your neighbour; and the lawyer's question: Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”

19. In the context of this case, the Second Defendant's neighbor is the First Defendant. There is an employment contractual relationship between the two parties, and as an employee she instructed the Second Defendant to make a salary deduction on her behalf. On a quick examination of the salary authorization form alone, the First Defendant authorized the Second Defendant to deduct \$1,633.20 from her salary to the order of TSWCCU. No reason was given for the deduction, and neither was one required. Whilst it must have meant that the First Defendant had financial obligations to the TSWCCU, it is pointless to say that the Second Defendant should have had the Plaintiff in its contemplation when it failed to make the salary deduction. There is no way the Second Defendant could have possibly known from the authorization form that the deduction was to satisfy a mortgage obtained jointly with the Plaintiff. Having not succeeded on the first limb of negligence, it is otiose that I proceed further to determine whether there was a breach or loss suffered. I, therefore, find that portion of the Writ of Summons which claims negligence against the Second and Third Defendant, be struck out.
20. The Plaintiff further claims that the Second Defendant breached its fiduciary duty owed to himself. In *Plowright v Lambert (1885) 52 LT 646* at 652, Field J states that “The fiduciary relation as it is called, does not depend upon any particular circumstances. It exists in almost every shape. It exists, of course, notoriously in the case of trustee and cestui que trust; it exists in the case of guardian and ward, of parent and child, of solicitor and client.” In all instances, a fiduciary acts in a position of trust and there exists a relationship, in which the duty to act for the benefit of another arises. In the Writ of Summons, the Plaintiff gives no indication as to how a fiduciary duty arises between himself and the Second Defendant. As it relates to this breach, my findings above apply as there exists no such relationship between the Plaintiff and the Second Defendant where such a duty can arise.
21. The portions of the Statement of Claim that pertain to the Second and Third Defendant discloses no reasonable cause of action against them, and for these reasons must be struck out against them.

#### *Amendment of the Writ*

22. The Plaintiff applied for leave to amend the Writ of Summons pursuant to Order 20 Rule 5(1) and (5) RSC. It provides in part:



“5. (1) Subject to Order 15, rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

...

(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.”

23. The Plaintiff submits that the application falls squarely within the ambit of the rules as the exact facts are relied on for the new claim of fraud against the First Defendant, and “Knowing Assistance” against the Second Defendant. The Plaintiff contends that there was a trust agreement between himself and the First Defendant which was breached due to the mortgage payments not being applied, and that the Second Defendant knowingly assisted the First Defendant by failing to pay the funds to the TSWCCU. The Plaintiff claims that there would be no prejudice to the Second and Third Defendant as there has been no case management in the matter.

24. I am guided by the dicta of Bowen LJ in *Cropper v Smith (1883) 26 Ch. D 700*, where he stated:

“Now, I think it is a well-established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace..... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right.”

25. The Court is possessed with the discretionary power to grant or refuse the amendment subject to any injustice which it may cause to the other side. The First Defendant has not objected or laid before the Court any application with respect to the proposed amendments. Thus, I will address the amendments in light of the Second Defendant, who has presented arguments countering the leave to amend. The effect of the amendment, if leave is granted, is that it would take effect from



the date the original Writ of Summons was made, and continues as if the amendment was inserted from inception. Thus, I must evaluate the proposed amended claims to determine whether it would be practical to make the amendment against the Defendants as the Court does not operate in vain.

26. The concept of Knowing Assistance, as the Plaintiff claims, can hold a stranger liable for a breach of trust, where the third-party acted fraudulently and dishonestly. (see *Belmont Finance Corporation Ltd. v Williams Furniture Ltd. (1979) Ch. 250.*) The Privy Council in *Barlow Clowes International Ltd. (In Liquidation) and another v Eurotrust International Limited and another [2005] UKPC 37* stated at paragraph 10 that:

“[10] The judge stated the law in terms largely derived from the advice of the Board given by Lord Nicholls of Birkenhead in *Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378, [1995] 3 All ER 97*. In summary, she said that liability for dishonest assistance requires a dishonest state of mind on the part of the person who assists in a breach of trust. Such a state of mind may consist in knowledge that the transaction is one in which he cannot honestly participate (for example, a misappropriation of other people's money), or it may consist in suspicion combined with a conscious decision not to make inquiries which might result in knowledge: see *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd [2001] UKHL 1, [2003] 1 AC 469, [2001] 1 All ER 743*. Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards. The Court of Appeal held this to be a correct state of the law and their Lordships agree.”

27. The Court at this stage is not conducting a trial of the matter to determine whether the Second Defendant had a dishonest state of mind to assist the First Defendant with defrauding the TSWCCU. I refer to the point aforementioned that there is no possible way from the salary deduction form, that the Second Defendant could have contemplated that there was a trust, if there was one, between the Plaintiff and the First Defendant which it assisted the First Defendant in breaching. Whilst I accept that the Second Defendant as per the salary deduction form was made aware that the First Defendant had a financial obligation, the circumstances of the matter negate the requirements for knowing and dishonest assistance. With respect to the Second Defendant's position, which I accept, the Second Defendant had not retained any of the First Defendant's salary. The First Defendant was at liberty to apply her portions of the mortgage payment toward the mortgage, and allegedly failed to do so. In my view, there is no basis upon which to assert any dishonesty on the part of the Second and Third Defendants, where the Second Defendant is merely acting as a conduit to pay funds which are due to the First Defendant as a salary, to the TSWCCU instead, nor can it be said that the failure to do so, whilst retaining none of the First Defendant's salary, was dishonest assistance to the First Defendant to breach an agreement between herself and the Plaintiff.

28. The Plaintiff made this application for the amendment of the Writ prior to the Second and Third Defendants making an application to have the Writ against them struck out. Therefore, I will consider the arguments taken above by the Second and Third Defendants in light of this application and dismiss the Plaintiff's application to have the Writ amended to include a different cause of action against the Second Defendant. As there has been no action by the First Defendant as to the Plaintiff's application, and it arises on the same facts, I will allow the Plaintiff to make the proposed amendments, should he wish, as against the First Defendant only.

### **CONCLUSION**

29. After considering the matter in the round, I hereby order that the action be struck out as against the Second and Third Defendant for disclosing no reasonable cause of action in the circumstances, and I grant leave to the Plaintiff to amend its Writ of Summons as against the First Defendant solely. Having regard to the ordinary rule of costs, in that it follows the event, I order that cost be paid by the Plaintiff to the Second and Third Defendants, to be taxed if not agreed.

Dated this 29th day of August A.D., 2023



Neil Brathwaite

Justice