COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division
2017/CLE/gen/00695

B E T W E E N:

SHEILA L. GOMEZ

Plaintiff

AND

TREVOR ROLLE
(EXECUTOR OF THE ESTATE OF MARK JOHNSON)

Defendant

Before:	The Honourable Mr. Justice Loren Klein
Appearances:	Travette Pyfrom for the Plaintiff
	Cathleen Hassan-Johnson for the Defendant
Hearing date:	26 November 2020

R U L I N G

KLEIN J.

Civil Practice and Procedure—Rules of the Supreme Court (R.S.C) 1978—Pleadings—Defence to counterclaim filed nearly two years out of time—Application to set aside for irregularity—Order 2, r. 2—Striking out pleadings—No reasonable cause of action, frivolous, vexatious or otherwise an abuse of process—Order 18, r.19, Ord. 31A, r. 20(1)(b)—Inter-relationship between Ord. 18, r.19 and Ord. 31A, r. 20(1)—Close of Pleadings—Writ of Summons—Claim of trespass—Application to strike out writ—Order 18, r. 19—Ord. 14, Summary Judgment—Vacant Possession—Principles—Contents of affidavit in support—Counterclaim

INTRODUCTION AND BACKGROUND

[1] This litigation concerns the rights of the parties in respect of a large tract of land off St. Vincent Road.

[2] It was commenced by writ of summons filed in 2017, in which the plaintiff claims trespass against the defendant relating to the portion of the land on which the plaintiff has lived for some 15 years, and to which she claims a right of possession. The defendant denies the trespass and counterclaims for vacant possession, on the basis that the land on which the plaintiff resides is part of a larger tract to which he holds documentary title, rooted in a Certificate of Title ("COT") granted in 1997 to a predecessor in title.

[3] The matters which trouble the court, however, are interim applications made by summons filed 29 July 2020, in which the defendant seeks to strike out the plaintiff's writ and pleadings on various grounds and applies for summary judgment on his

counterclaim. The specific orders sought are as follows: (i) an order setting aside the plaintiff's defence to the counterclaim under Ord. 2, r. 2 of the Rules of the Supreme Court ("RSC") 1978 for irregularity and/or striking out the defence under Ord. 18, r.19 and/or Ord. 31A, r. 20(1)(b), on the ground that it is an abuse of the process of the court; (ii) an order striking out the writ of summons on the grounds that it discloses no reasonable cause of action or is frivolous, vexatious or otherwise an abuse of the process of the court under Ord. 18, r. 19 of the RSC and/or Ord. 31A, r. 20(1) of the RSC; and (iii) an order for summary judgment to be entered against the plaintiff on the counterclaim pursuant to Ord. 18, r. 19 and/or Ord. 14, r. 5 of the RSC.

[4] The summons was supported by the affidavit of the defendant filed 10 November 2020, and the plaintiff filed an affidavit in opposition to the application on 18 November 2020.

Procedural history

[5] As mentioned in the introduction, these applications have their origin in an action for trespass commenced by way of a generally indorsed writ of summons filed 18 June 2017. In it, the plaintiff claims damages for the defendant's alleged wrongful entry to the portion of land on which she resides, as well as special damages of $2,500.00 for actual loss suffered as a result of the trespass. Judgment in default of appearance was entered by the plaintiff on 4 August 2017, but this was set aside on 16 January 2018 by the Deputy Registrar ("the Registrar"). The Registrar's order gave also leave for the plaintiff to file a statement of claim ("SOC") within 14 days and for the defendant to file a defence within 14 days after service of the SOC. The SOC was filed on the 31 January 2018, and in it the plaintiff claimed that she is in possession and entitled to possession of a tract of land off St. Vincent Road comprising some 20,000 sq. ft. (1.1157 acres). She claims that on two occasions, the 24 September 2016 and the 6 June 2017, the defendant wrongfully entered the property and dumped debris consisting of tree cuttings and other materials, in one case blocking her entrance.

[6] The defendant filed a defence and counterclaim on the 15 February 2018. The defence consisted of a bare denial of the allegations contained in the plaintiff's SOC. However, by his counterclaim, the defendant sought vacant possession and damages in the amount of some $36,000.00, which was said to represent "*back rent*". He asserts in the counterclaim that he was at all material times "*the intended beneficiary of the estate*" of his predecessor in title, who is alleged to be the legal and beneficial owner of a tract of land comprising some 3.208 acres (or 139,772 sq. ft.) off St. Vincent Road, and which is registered in the Registry of Records as Plan #3136. As stated, the land on which the plaintiff resides is a portion of the larger tract of land to which the defendant claims to be entitled.

[7] Following the filing of the defence and counterclaim, on 6 March 2018 the plaintiff filed a request for further and better particulars of the defence and counterclaim, which the defendant answered by affidavit filed 30 April 2018. The defendant then, on 16 November 2018, filed a request for further and better particulars of the statement of claim, which was answered on 3 March 2020 by the plaintiff. For whatever reason,

the plaintiff did not file a defence to the counterclaim until 14 January 2020. It is that failure which has prompted the defendant to seek summary relief.

[8] Not surprisingly, since the institution of these proceedings, relations between the parties have soured. On 15 April 2021, I heard an urgent *ex parte* application by the plaintiff, which was attended by the defendant at the court's invitation, and granted an interim order requiring both parties to maintain the status quo pending an *inter partes* hearing of an application for an injunction by the plaintiff, or further order. The application was made after the defendant allegedly employed a backhoe to remove fencing which had been erected by the plaintiff at the entrance of the property. There have been allegations that both sides have interfered with fencing erected by the other party, and that the plaintiff has also unlawfully cleared down portions of the property. That order remains in place.

Factual background to claim

[9] To understand how the claims arise, some basic facts relating to the land that is the subject matter of this claim ("the property") and how the plaintiff came to be on it need to be explained. The original defendant to this action was Frederick Mark Johnson ("MJ"), who represented himself as the beneficial owner of the property, which it is alleged was devised to him by his eldest brother Ethan Alexander Johnson ("EJ"). EJ was the heir-at-law of their mother Angela Ruth Carnell Johnson ("AJ"), who died intestate on 29 July 1993. EJ obtained letters of administration of her estate on 29 January 1994 and was granted a Certificate of Title ("COT") as the legal and beneficial owner "*in trust*" of the fee simple in the property (which formed part of the estate of AJ) on 30 January 1997. By his will, dated 28 June 2013, EJ devised his entire real and personal estate to MJ, and named him as executor.

[10] EJ died on the 21 May 2017, and MJ obtained a grant of probate of the estate on 14 August 2017. MJ died on the 31 December 2018. His son Trevor Rolle ("TR") was named as the executor and trustee of his will, and by order of the Court dated 30 October 2019, TR was substituted for MJ in the action as executor. More will be said a little later about the devolution of this property, as this is one of the issues that the plaintiff challenges.

[11] The plaintiff's claim also arises out of close family connections. In the 1960's, it appears that AJ gave permission to her brother Edwin Bain ("EB") to build a house on the property, where he lived until his death in the late 1970's or early 1980's. However, this permission was said not to include the transfer of any legal interest in the property. After EB's death, his live-in companion, Olga Gomez, was given permission by AJ to remain on the property rent-free until her death. She died in 1994. Origin Gomez, brother of Olga, visited and stayed with Olga during her waning years and remained in occupation of the house and property after her death in 1994. The defendant says this was without permission, and Origin was served with several letters during 1996 from law firms requiring him to vacate the property. The plaintiff is the niece of Origin, and she entered the picture in 2004, when she moved into the house with her children to look after her aging uncle, who eventually died in September of 2011. The defendant

also alleges that Origin made an adverse claim for interest in the premises "*in the Supreme Court*", which he says was rejected, but no further details about this application were provided.

[12] What transpired after the death of Origin is subject to some dispute. According to facts pleaded in the defendant's counterclaim, the defendant (MJ) became aware that the plaintiff was living in the premises when he visited her uncle in 2005. It is alleged that he informed her of his ownership of the premises and gave her permission to remain there until the death of Origin. The defendant also claims to have visited on several other occasions, one such occasion being in or about October 2010 (and others after the death of Origin in 2011), and states that during those visits he suggested to the plaintiff that she had to enter into a rental agreement or vacate the premises. She refused, hence the notice to vacate the premises which was given in December 2013.

[13] The plaintiff's version of events is different. She denies that the defendant gave her permission to live in the home in 2005, or at all. She concurs, however, that he was aware that she was living there from at least 2005, as she had knowledge of the 2005 visit to Origin, during which (she later learned from her uncle) the defendant had claimed that he was the owner of the property, although he was apparently unable to provide any documentation of ownership when requested of him. If the defendant did broach the idea of a rental arrangement with her uncle, she indicates that she was unaware of it, as her uncle never mentioned it to her.

[14] Origin died on 9 September 2011. In December 2011, she says that she was approached on the front porch of the house by a person who identified himself as Mark Johnson and the owner of the property. He asked what she intended to do about her living arrangements, now that Origin was deceased, and sought to discuss an agreement for her to pay rent for the house. She told him that she was not prepared to enter into any agreement, as she had lived on the property for many years and considered it her home. She says that she heard nothing further until 2013, when she was served with a notice to vacate. She also indicates that she was served a summons to attend magistrate's court in 2014 for rent arrears and for vacant possession, but that this application was withdrawn by the defendant on the first appearance, apparently based on the ground that he could not prove title to the property.

The issues

[15] The issues to be determined, as framed by the summons, are as follows: (i) whether the defence to the counterclaim should be set aside as being irregular and/or an abuse of process; (ii) whether the writ should be struck out on Ord. 18, r. 19 grounds; and (iii) whether summary judgment should be entered for the plaintiff on the counterclaim. They will be dealt with in that order. As will presently emerge, these matters turn largely on what may be considered pleading points.

DISCUSSION AND ANALYSIS

I: Application to set aside defence to counterclaim on grounds of irregularity and/or to strike out as an abuse of process.

Irregularity

[16] The main contention of the defendant is that the defence to the counterclaim is irregular within the meaning of Ord. 2, r.1, as being filed well outside the time limited for filing (i.e., 14 days after the service of the counterclaim) and without leave. In fact, the defendant points out that the pleading was filed 1 year and 10 months after the close of pleadings, which are deemed to be closed 14 days after service of the defence if the plaintiff fails to serve a reply or defence to the counterclaim (Ord. 18, r. 20 (1)(b)).

[17] The defendant also claims that the counterclaim is irregular as "*it purports to make further claims not contained in the writ of summons and without the leave of the court*". The defendant did not identify the additional claims said to have been made. But in the defence to the counterclaim, it is to be noted that the plaintiff raised issues of limitation, sought a declaration that she had a beneficial interest in 1.157 acres of the property, and in the alternative a declaration as to the extent of her interest and consequential relief.

[18] I can dispose of the objection to the additional claims shortly. The general rule is that a plaintiff who, when confronted with a counterclaim, realizes that he has omitted some claim in his statement of claim, ought to raise it by seeking leave to amend the statement of claim. But there is no inflexible rule to this effect. A counterclaim is essentially an independent action from the claim (Ord. 15, r.2). Thus, even if the plaintiff's claim is held to be frivolous or vexatious, the defendant may still succeed on his counterclaim (see *Adams v Adams* (1892) 45 Ch. 436). The effect of that rule, as summarized in the Commentary to the Supreme Court Practice 1998 (15/25) ("The White Book"), is that it "*…enables the plaintiff to raise a counterclaim to the counterclaim raised by the defendant against him, even though the plaintiff's counterclaim may be no more than a mere protection against the defendant's counterclaim, and even though the cause of action on which it is founded arose after the writ…*" (*Renton Gibbs & Co. Ltd. v. Neville & Co.* (1900) 2 Q.B. 181 CA).

[19] In *Renton*, the Court of Appeal refused to strike out the plaintiff's claim for breach of contract, which was added in its reply to the defendant's counterclaim founded on that contract. It reasoned that it would be an injustice to require the plaintiff to have to amend its statement of claim in the circumstances and not be allowed to set up the claim in answer to the counterclaim.

[20] Further, Ord. 18, r. 8(2) provides in material part as follows: *"…[A] defendant to an action for the recovery of land must plead specifically every ground of defence on which he relies, and a plea that he is in possession of land by himself or his tenant is not sufficient*." I therefore do not find that the additional claims by the plaintiff set out in her defence to the counterclaim are irregular. I would not set them aside on this basis, and any requirement to amend the statement of claim at this late stage would work an injustice.

The Ord. 2 jurisdiction

[21] Ord. 2, r.1 (1) of the RSC provides that any noncompliance with the rules in the course of or in connection with any proceedings is to be treated as an irregularity. It does not nullify the proceedings, any step taken or any document, judgment or order made therein. However, the court may set aside the proceedings or any step taken or any document therein on such terms as it thinks just (Ord. 2, r. 1(2)). Alternatively, it may exercise its powers under the rules to allow any amendment, or make such order dealing with the proceedings as it thinks fit. To invoke the court's power to set aside, the applicant must file a notice or summons specifying the objections, and the application must be made within a reasonable time and before the applicant has taken any fresh steps in the proceedings (Ord. 2, r.2 (1).

[22] In *Family Guardian Insurance Company Limited v Dixon* [2014] 1 BHS J. No. 39, Winder J. explained the requirements for setting aside proceedings under Ord. 2 as follows [20]:

> "To succeed on an application for setting aside of proceedings under Order 2 rule 2, the defendant must demonstrate: (1) the occurrence of the irregularity; (2) the identification of the irregularity in the Summons; (3) prompt action by the applicant; and (4) no next steps prior to applying for the setting aside."

[23] The plaintiff does not deny that the defence to the counterclaim was filed late. However, through counsel she contends that the irregularity in this regard does not warrant setting aside the defence, mainly because it caused no prejudice to the defendant. In this regard, counsel argued that the defence to the counterclaim was filed some eight months before the original trial dates set for the matter, which were 19 and 26 November 2020. These trial dates were set in a case management conference held 30 October 2019 (before another Judge), and it does not appear that any issue was taken at that point that a defence to the counterclaim had not been filed.

[24] There can be no gainsaying that the filing of the defence to the counterclaim well outside the time limit and without leave was irregular, or perhaps even seriously irregular, as the defendant contends. The application to set aside was made some 7 months after the filing of the defence, so the next question is whether it was made promptly.

[25] In *Major v The Attorney General* [2012] 1 BHS J. No. 5, Bain J. held [at 43] that six months was not too long for the defendant to make an application to set aside for irregularity, taking into consideration all of the circumstances. On the other hand, in *Reynolds v Coleman* (1887) 36 Ch. 453, it was held too late to apply to set aside service out of the jurisdiction after a year had elapsed. Given the exigencies of the Covid-19 pandemic and the state of emergency imposed in March of 2020, in response to which rules were made extending the time periods set in the RSC for filing documents (to 14 days following the cessation of the period of emergency, which ended 13 November 2021), it cannot be said that the application was not made promptly. It also appears that the defendant technically did not take any fresh steps in the matter after the defence to the counterclaim was filed.

[26] But even if an applicant meets the preconditions for the exercise of the court's discretion to set aside for irregularity, the court is entitled to consider all the facts of the case and take whatever course seems just. The approach of the court to the exercise of its discretion to set aside for irregularity is often guided by the observations of Cumming-Bruce LJ in *Metroinvest Analt v Commercial Union* [1985] 1 WLR 513, where he stated that (at 324):

> "I would say that in most cases the way in which the court exercises its powers under Ord 2, r 1(2) is likely to depend on whether it appears that the opposite party has suffered prejudice as a direct consequence of the particular irregularity, that is to say the particular failure to comply with the rules. But I would construe Ord. 2, r 1(2) as being so framed as to give the court the widest possible power in order to do justice."

[27] This test was followed by a majority of the UK Court of Appeal in *The Golden Mariner* [1990] 2 LLR 215 (223), in which the court refused to set aside an irregular service, on the basis that the defendant suffered no prejudice as a result. In that same case, however, Lloyd LJ, who dissented, commented [at p. 219] that although prejudice "*…was always a factor to be taken into account, absence of prejudice is by no means conclusive in favour of the plaintiffs*."

[28] In all the circumstances of this case, I refuse to exercise my discretion to set aside the defence to the counterclaim, for reasons which I summarize below. Firstly, I am not of the view that the delay in filing the defence to the counterclaim caused any prejudice to the defendant. As indicated, the defence to the counterclaim was filed on 14 January 2020, some ten months before the dates set for the trial. In any event, as pointed out by the plaintiff in the affidavit filed in support of the application, the defendant does not in fact claim that he suffered any prejudice as a result of the delay.

[29] Secondly, the cases also make the point that while the court has a general power under Ord. 2, r. 1 of "*killing or curing*" irregularities, the court is more reluctant to act under this general rule where a more specific rule is available to address the particular breach. In this regard, it is notable that Ord. 19, r. 8 provides for the filing of a defence to a counterclaim to be subject to the same timelines as the filing of a defence and for the same remedies to be available for any default. Therefore, the defendant was free from 1 March 2018, when it is said the pleadings closed, to have applied for judgment in default of defence on the counterclaim.

<u>*Striking out, abuse of process*</u>

[30] The defendant further relies on Ord. 18, r. 19(d) R.S.C and/or Ord. 31A, r. 20(1)(b) to contend that the defence to the counterclaim should, in the alternative, be struck out on the ground that it is an abuse of the process of the court given the significant delay in filing. Ord. 18, r. 19(d) provides in part that a court might strike out any pleadings if it is "*otherwise an abuse of the process of the court…*".

[31] The plaintiff relies on the case of *BE Holdings Ltd. v Piao Lianji* (Cle/gen/1472 of 2014), where Charles J. held set out various categories of abuse of process in the context of re-litigation, to suggest that the instant case does not come within any of

those categories and is therefore not an abuse of process in the conventional sense. I do not think this case assists the plaintiff, as the court there was only dealing with abuse in the context of re-litigation, and not purporting to set out any general principles relating to abuse of process. As has been often said, the categories of abuse of process are far from closed, and the concept is invoked whenever the machinery of the court is being improperly used (see *Castro v Murray* (18975) 10 Ex. 213).

[32] Delay in taking steps to advance litigation may of itself amount to an abuse of process, and it is an issue that can be considered independently of whether any prejudice is caused: *Culbert v Stephen G. Westwell & Co. Ltd.* (1993) PIQR 54. There, the Court of Appeal allowed the appeal of the defendants against the decision of the trial judge, who had reversed the decision of a master striking out the claim based largely on grounds of delay. Parker L.J. said [65-66]:

> "In my view, however, a series of separate inordinate and inexcusable delays in complete disregard of the rules of court and with full awareness of the consequences can also properly be regarded as contumelious conduct, or if not that, to an abuse of the process of the court."

[33] However, in that same case, the court referred to a significant line of cases of high pedigree which stressed that the conduct of the other party was also a factor to be taken into account in considering an application to dismiss or strike out on the grounds of delay. They referred to the oft-quoted speeches of Diplock L.J. and Salmon L.J. in *Allen v Sir McAlpine & Sons Ltd.* [1968] 1 QB 229, discussing the issue of dismissal for want of prosecution. In that case, Salmon L.J. said:

> "The only point that has caused me any hesitation upon this appeal arises out of the argument that the defendants have waived or acquiesced in the delay upon which they found their application. Clearly no defendant can successfully apply for an action to be dismissed for want of prosecution if he has waived or acquiesced in the delay. Mere inaction on the part of the defendant cannot in my view amount to waiver or acquiescence. Positive action, however, by which he intimates that he agrees that the action may proceed, is a different matter. If for example, he intimates that he is willing for the action to proceed and thereby induces the plaintiff's solicitors to do further work and incur further expense in the prosecution of the action, he will be precluded from relying on the previous delay by itself as a ground for dismissing the action."

[34] In *Culbert*, the court accepted that the defendants were "*estopped from complaining of delay and consequential prejudice*" up to the point where their conduct induced the plaintiff to believe they would still go on with trial, and that "*accordingly their application must succeed or fail on the basis of what has occurred since that time*" (pg. 62).

[35] In the instant case, it has already been noted that subsequent to the close of pleadings, and after the expiration of the time for the plaintiff to have filed her defence to the counterclaim, both sides sought further and better particulars. Further, on the 30 October 2019, the plaintiff participated in a case management conference, and a directions order was made setting trial dates and timelines for preparing for trial (although it does not appear that the Order was ever perfected). In fact, pursuant to the

terms of the directions given, the plaintiff filed her list of documents on 14 July 2020. It seems to me that, it cannot be just or right, for the defendant to have sat back in circumstances which might be regarded as inducing the plaintiff to reasonably believe that the matter would proceed to trial, with the result that the plaintiff incurred additional expenses in preparing for trial. It does not matter for this purpose whether what has occurred is described as waiver, acquiescence or estoppel. In all the circumstances, I do not think that the defendant's claim for striking out for abuse of process ought to succeed, and I dismiss that application.

Ord. 31A, r. 20

[36] Something also needs to be said about the Order 31A, r. 20 point, which the defendant invokes in the alternative for striking out. Ord. 31A, r. 20(1)(b) provides in material part as follows:

> "20(1). In addition to any other powers under these Rules, the Court may strike out any pleading or part of the pleading if it appears to the court— […]
>
> (b) that the pleading or 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."

[37] Firstly, it is to be noted that Ord. 31A ("Case Management Powers") were introduced into the RSC by the Rules of the Supreme Court (Amendment) Rule 2004. The rules were inspired by and basically mirror the case management powers provided for under the UK Civil Procedure Rules 1998 ("CPR"), which replaced the former rules under the Supreme Court Practice ("The White Book"). Ord. 31A, r. 20(1)(b) is basically the same as CPR 3.4(1)(b). There is very little jurisprudence in this jurisdiction as to the principles on which the court should act in striking out under O.31A, r.20, but as the rules are materially indistinguishable from the English CPR, I am of the view that the English jurisprudence is highly persuasive.

[38] In considering an application to strike out under 3.4 of the CPR, the UK cases have held that the matters which the court is directed to take into account under CPR 3.9 (relief from sanction) are relevant to the court's decision whether to strike out under 3.4 (see *Alba Exotic Fruit SH PK v MSC Mediterranean Shipping Company S.A.* [2019 WL 02394633]. The factors provided under 3.9 are very similar to those provided under Order 31A, r. 25, which provides as follows:

> "(3) In considering whether to grant relief [from sanction] the Court must have regard to—
>
> (a) the interest of the administration of justice;
> (b) whether the failure was due to the party or that party's counsel and attorney;
> (c) whether the failure to comply has been or can be remedied within a reasonable time;
> (d) whether the trial date or any likely trial date can still be met if relief is granted; and
> (e) the effect which granting of the relief or not would have on each party."

[39] It is indisputable that the superimposition of modern case management rules into the RSC 1978 provided the court not only with the tools to more actively manage cases,

but also provided greater flexibility in the approach to the imposition of penalties for procedural errors. However, even having regard to these additional factors, I do not find that the reliance on O. 31A, r. 20 advances the defendant's case any further than the O.18, r. 19 grounds.

[40] Firstly, it would not be in the interest of justice to strike out the pleadings, as the plaintiff had every reason to believe the trial would proceed and, as stated, the court had made a directions order for trial. As to (b), there is no evidence on the point, and the court does not wish to speculate in that regard. Thirdly, the failure can be remedied simply by the court extending time for the filing of the defence. In this regard, the plaintiff did file a summons for extension of time as a precautionary measure, but also relied on the court's powers under Ord. 31A, r. 26 to make such an order even in the absence of an application by a party. Fourthly, although the original trial dates were missed, this was due mainly to the filing of the interlocutory applications and the court's availability, and not the late filing of the defence to the counterclaim. Notably, the plaintiff took steps to prepare for trial by filing her list of documents; it does not appear that the defendant took any steps to comply with the directions order although, as stated, the order does not appear to have been perfected. Lastly, the result of striking out would have the drastic effect of automatically exposing the plaintiff to summary judgment on the counterclaim.

II: <u>Striking out of Writ of Summons</u>

[41] I now turn to the second limb of the defendant's summons, which is to strike out the writ of summons pursuant to Ord. 18, r. 19 of the RSC on the ground that it discloses no reasonable cause of action, or is frivolous, vexatious or otherwise an abuse of the process of the Court. Ord. 18, r. 19 provides in part that:

> "(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.
>
> (2) No evidence shall be admissible on an application under paragraph (1) (a).
>
> (3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading."

[42] Striking out is a summary process which is used sparingly by the Courts and reserved for those cases which are irrefutably bad on the face of the pleadings. The principles governing such applications have been explained numerous times in the cases and are not in doubt. Only a few examples need be repeated. From *Dyson v Attorney General* [1911] 410 (419), we have Fletcher Moutin LJ's classic statement that "*our judicial system would never permit a plaintiff to be 'driven from the judgment seat' in this way*

without any Court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad." In *Hamby v. Hermitage Ltd.* (SCCIV App. No. 21 0f 2008), a case on which the plaintiff relies, the Court of Appeal reminded the parties that "*It is well settled and plain that the jurisdiction to strike out is to be used sparingly and limited to plain and obvious cases where there is no need for trial*."

[43] The requirement for a "reasonable cause of action" has been described as "…*a cause of action with some chance of success, when…only the allegations in the pleadings 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*": *Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094, per Lord Pearson (pg. 1101-f). Cases coming under the umbrella of being frivolous or vexatious or an abuse of process, include those cases which are obviously unsustainable or spurious. In assessing whether there is a reasonable cause of action, the court is precluded from conducting a "*minute and protracted examination of the documents*" and it ought not to engage in a trial on the affidavits (per Danckwerts, LJ in *Wenlock v. Moloney* [1965] 2 All ER 871).

[44] Against this backdrop, the court must now examine whether there is a reasonable cause of action disclosed in the writ and statement of claim. The plaintiff's action is for trespass, for which she seeks damages in the amount of $2,500.00. She claims as a person in possession and said to be entitled to possession, based on her occupation of the property for many years.

[45] The defendant denies the trespass and places great reliance on the Court of Appeal case of *Fairness Limited v Steven Bain et al.* (SCCivApp No. 30 of 2015) [pg. 2], where the court stated that "…*a trespasser is one who has unlawfully entered the land in possession of another without a defence to such entry*." Ms. Hassan-Johnson argued that for the plaintiff to disclose a reasonable cause of action, she must establish the following:

> "(i) the details of the Plaintiff's title to the property; (ii) the full details of the property in which the Plaintiff claims title and/or possession; (iii) the wrongful and direct interference of the Defendant to the plaintiff's property; (iv) that the defendant entered the property unlawfully; and (v) that the defendant's unlawful entry to the property was without defence".

[46] With respect, I think the first of these requirements overstates the test for a person suing in trespass. It is trite law that a person in *de facto* possession of land may have sufficient possession at law to maintain an action for trespass against another entering thereon, except a person having a better legal right to possession (see, *Delaney v TP Smith Ltd.* [1946] K.B. 393, and the Privy Council case of *Ocean Estates Ltd. v Pinder* [1969] 2 A.C. 19, on appeal from The Bahamas.) In *Delaney*, Tucker L.J. expressed the position as follows [p. 397]:

> "…It is no doubt true that a plaintiff in an action for trespass to land need only in the first instance allege possession. This is sufficient to support his actions against a wrongdoer, but is not sufficient as against the lawful owner…".

It is equally plain, however, that a possessory claim cannot avail against a defendant who can prove documentary title to the land (*Fairness Ltd. v. Steven Bain et. al., Ocean Estates*).

[47] The plaintiff's counsel does not take any issue with the rationale in *Fairness.* She contends, however, that the situation here is different. In *Fairness*, the Court of Appeal was considering a case where the documentary title of the appellant (plaintiff in the trespass action below) had been clearly established and declared, and therefore it held that the finding of the trial judge (then the Chief Justice) that the defendant's (respondent's) long-adverse possession was a defence to trespass was in error, as the appellant clearly held documentary title to the land.

[48] In the instant case, she points out that there has been no trial yet and no determination of the defendant's title. Secondly, and the plaintiff makes heavy weather of this, it is contended that the defendant does not plead that he holds the legal estate in the property and is thereby entitled to possession. To the extent any title is asserted, he claims in the counterclaim as "*intended beneficiary*". Thirdly, it is argued that the defendant has not in any event provided any evidence of how the title to the property came to be vested in him. It is pointed out that the defendant defended the action in his personal capacity, and not as a beneficiary or even executor or trustee of the estate of Ethan Johnson. As the argument was put in written submissions:

> "This is an action for trespass. The plaintiff is in possession. The deceased when he committed the trespass had no authority to enter and carry out the acts in question. Even if it is accepted that the deceased was an intended beneficiary, there is no evidence to support this claim."

[49] The principle has been stated that in deciding whether a case discloses a reasonable cause of action, the court cannot look beyond the pleadings, and cannot conduct a mini-trial on any affidavit evidence. So the court cannot speculate on what the parties may or may not be able to prove at trial, nor can it consider the evidence under an Ord. 18, r. 19 (1)(a) application; it can only look to the allegations. In this regard, counsel for the plaintiff referred the Court to the Commentary to the Supreme Court Practice on Ord. 18 rr 7/8 ("The White Book", 1965 Ed., pg. 268-269), which provides in part that:

> "Each party must plead all material facts on which he means to rely at the trial; otherwise, he is not entitled to give any evidence of them at trial. …Those facts must be alleged which must, not may, amount to a cause of action…. 'If the parties were held strictly to their pleadings under the present system, they ought not to be allowed to prove at the trial any fact not stated in the pleadings' (per Brett, LJ in *Phillips v. P*., 4 QBD, p. 133). …Moreover, if the plaintiff succeeds on findings of fact not pleaded by him, the judgment will not be allowed, and the Court of Appeal will dismiss the action (*Pawding v. London Brick Co.* (1971) 4 K.I.R. 207), or in a proper case will if necessary order a new trial…".

[50] Unfortunately, the pleadings on behalf of both sides are somewhat deficient and lacking in the details one would expect in pleading such actions. One would ordinarily expect that in a defence to a claim for trespass, where the defendant claims to be the legal and beneficial owner of the land, he would plead that fact and his right to possession as part of his defence, and as justification to any entry made to the property. On the other hand, the claim by the plaintiff for trespass is made by a person in *de facto* possession of the property that is the subject matter of the claim, and it alleges specific acts of interference which, if done by a person who is unable to assert a superior title, would raise a cause of action in trespass.

[51] The plaintiff also alleges that the trespass was committed by the defendant, Mark Johnson, or his agents. In this regard, it is significant that the last act of trespass complained of was allegedly committed on 6 June 2017, which would have been after the death of EJ and before MJ obtained probate of the estate (on 14 August 2017). At best, the land would have devolved on him as personal representative, but it would have been legally impossible for the defendant to have asserted any freehold ownership rights to the land at that point and, in fact, the plaintiff alleges that he never pleads such an interest, but only that of an "*intended beneficiary*". (Where a personal representative is entitled to the estate in some other capacity, such as beneficiary, it requires a written assent by himself vesting the land in him in that capacity: see, *Re Kings W.T.* [1964] Ch. 542.) In this regard, counsel for the plaintiff drew to the attention of the court an assenting conveyance dated 22 August 2017, as appears from the backing sheet exhibited in the defendant's affidavit answering the request for particulars, which, as she described it, "*is curiously made between Ethan Alexander Johnson (heir at law) to Frederick Mark Johnson*." (As noted, EJ died 21 May 2017.)

[52] Confined as it is to assessing the prospects of the cause of action based on the pleadings alone, in my judgment there is nothing in the pleaded case that would compel the court to strike out the plaintiff's writ and statement of claim for trespass on the grounds that no reasonable cause of action is disclosed. I therefore refuse to strike out the pleadings on this ground.

III: <u>Summary Judgment on Counterclaim</u>

[53] In order to persuade a court to exercise its discretion to grant summary judgment, the plaintiff, or defendant in the case of a counterclaim (as is the case here), must allege and demonstrate that the other party has no defence to the claim or counterclaim, or to a part of it. Hence, it would be baseless and a waste of judicial resources to pursue the action or that part of the claim any further. Order 14, r. 5 of the RSC provides as follows:

> "(1) Where a defendant to an action begun by writ has served a counterclaim on the plaintiff, then, subject to paragraph (3), the defendant may, on the ground that the plaintiff has no defence to a claim made in the counterclaim, or to a particular part of such a claim, apply to the Court for judgment against the plaintiff on that claim or part."

[54] Further, Order 3, r. 3(1) provides as follows:

> "3(1) Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim, the Court may give such judgment for the plaintiff against that defendant on that claim or part of as may be just having regard to the nature of the remedy or relief claimed."

[55] It is well established that the court's jurisdiction to order summary judgment is a draconian one and should be used cautiously. As pointed out by Charles J. in *Higgs Construction Company v Patrick Devon Roberts and another* [2020] 1 BHS J. No. 9 (paras. 26, 27):

> "Under O. 14 r 5, the test to be applied by the Court is whether there is any "triable issue or question" or whether "for some other reason there ought to be a trial". If a plaintiff's application is properly constituted and there is no triable issue or question nor any other reason why there ought to be a trial the Court may give summary judgment for the plaintiff."
>
> "It is a well-established principle of law that the Court ought to be cautious since it is a serious step to give summary judgment. Nonetheless, a plaintiff is entitled to summary judgment if the defendant does not have a good or viable defence to his claim. This is also in keeping with the overriding objective of Order 31A to deal with cases justly by saving unnecessary expense and ensuring timely and expeditious disposal of cases. It is also part of the Court's active case management role to ascertain the issues at an early stage and to decide what issues need full investigation at trial and to dispose summarily of the others."

[56] In addition to the principles governing applications for summary judgment, the relief is also subject to procedural requirements. Order 14 Rule 2 (1) provides that:

> "2. (1) An application under rule 1 must be made by summons supported by an affidavit verifying the facts on which the claim, or the part of a claim, to which the application relates is based and stating that in the deponent's belief there is no defence to that claim or part, as the case may be, or no defence except as to the amount of any damages claimed."

Thus, an applicant for summary judgment must first meet the conditions precedent imposed by rule 2(1), which is evidence verifying the cause of action, and also stating that in the plaintiff's (in this case defendant's) belief there is no defence to the action.

[57] Firstly, it is to be noted that the supporting affidavit does not comply with the formal requirement to contain the express averment that there is no valid defence to the claim or part of the claim. The commentary to the *Supreme Court Practice* (1998), vol. 1, pg. 138, note 14/2/8, states that "*This is an essential part of the affidavit*", and the case law seems to regard that provision as mandatory (see the Irish case of *Kiely v Massey* (1888) 6 L.R. Ir. 445, and dicta in *Stainer v Tragett* [1955] 1 WLR 1275 (pg. 1280)). If this strict technical approach is observed, then the affidavit would be defective.

[58] However, later cases have suggested that in Order 14 proceedings the Court ought to look at the situation in the round. In *Banque de Paris et des Pays-Bas (Suisse) S.A. v Costa de Naray* [1984] 1 Lloyd's Rep. 21, Acker L.J. said:

> "It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of a defence, does not *ipso facto*, provide leave to defend; the court must look at the whole situation and ask itself whether the defendant has satisfied the court that there is a fair or reasonable probability of the defendants having a real or *bona fide* defence."

[59] In this vein, it is also important to note that, while the court considers the case for summary judgment on the affidavits, defects or omission in the claim cannot be made good by the contents of the affidavits (see *Gold Ores Reduction Co. v Pain* [1892] 2 QB). Against this principle, it is useful to consider the material averment in the defendant's supporting affidavit, which is contained in para. 7 as follows:

> "I am advised by my Counsel and verily believe that the Plaintiff's whole case for alleged trespass is purported to rely on an alleged possessory title. To my knowledge, information and belief, the Plaintiff has made no formal claim in any Court of the Commonwealth of The Bahamas to substantiate and/or validate her alleged possessory title as is required by the laws of the Commonwealth of The Bahamas. Moreover, the Defendant has provided a clear documentary and undisturbed root of title by the Affidavit in Response to Request for Further & Better Particulars filed on the 30th day of April, A.D., 2018. I have been advised and verily believe that the Plaintiff's alleged possessory title cannot supersede the Defendant's legal documentary title."

Is there a defence to the claim or some other triable issue?

[60] It is therefore left to be inferred that the defendant is contending that there is no defence to the claim for vacant possession, based on his documentary title. But as has been noted with respect to the discussion on the strike-out application, the defendant's claims the property in the following capacity (para. 8 of counterclaim):

> "8. The Defendant [MJ] was at all material times the <u>intended beneficiary</u> of the Estate of the late Ethan Alexander Johnson, the heir-at-law of the Estate of the late Angela Johnson, the legal and beneficial owner of the fee simple in possession of ALL that tract containing 3.208 acres and situated Southwards and Southwestwards of the junction of Blue Hill Road and St. Vincent Road on the Island of New Providence and designated as Parcel #1 on Registered Plan 3136 NP. [….]."

It goes on to plead that EJ obtained a COT "*as the legal and beneficial owner in trust of the fee simple*", but the title claims stop there. It is not pleaded as to how the defendant (Mark Johnson) obtained the freehold ownership, although as mentioned the affidavit giving further and better particulars records that EJ devised his real and personal estate to MJ.

[61] The plaintiff's counsel advances several grounds for resisting summary judgment. Firstly, she takes issues with the purported documentary title of the defendant, mainly on the grounds that it is unclear how (or indeed whether) the beneficial ownership in

the property ever passed to him. It is contended that, based on documents which the defendant filed in answer to a request for further and better particulars, the COT was granted to EJ, through whom MJ claims, as *trustee* in favour of unnamed beneficiaries. Yet, the relevant bequest in EJ's will devised and bequeathed "*the entirety of my estate, both real and personal…unto my brother Frederick Mark Johnson*", who was also named as executor. It is pointed out that, in fact, the property granted by the COT is not mentioned in the will of EJ. Thus, the argument goes, there is no evidence that the land was actually ever beneficially owned outright by EJ, enabling the fee simple to be devolved to MJ as a beneficiary, or that MJ ever executed and recorded an assent transferring the property in his capacity as executor to himself as beneficiary under the will.

[62] Secondly, she contends that the defendant is barred under the Limitation Act from bringing any action to enforce the "judgment" (COT granted in 1997), under the six-year limitation rule which applies to actions to enforce judgments. I think the plaintiff is clearly mistaken in this regard, as the COT declares a documentary title to the land it concerns, which is something completely different from enforcement of a judgment.

[63] The plaintiff also generally alleges that the plaintiff is barred by the Limitation Act "*from enforcing his alleged rights or claiming any relief due under the judgment*", but it is unclear whether this is an attempt to set up a defence of adverse possession under that Act. In fact, it is stated in the plaintiff's skeleton submissions that "*No issue arising [sic] concerning adverse possession as the Defendant has not pleaded a valid documentary title*." Nevertheless, she contends that she has been in possession of the premises for 13 years prior to the Defendant filing his counterclaim, without any request for rent or a rental agreement, and without being put out of possession by the alleged documentary title owner. Many of the facts relating to the plaintiff's occupation of the home and the defendant's actions to either demand rent or have her removed are disputed between the parties.

[64] Thirdly, the plaintiff claims a beneficial interest in the house and property and seeks a declaration in that regard. She indicates that she has made significant investments and improvement to the property "*freely and openly*" over the past 15 years, based on various assurances from her uncle. As a result, she did not invest in any other property. Consequently, she is also claiming equitable relief, including an inquiry as to any amounts that might be due from the estate based on her improvements to the land, and declarations in that regard.

[65] In all the circumstances of this case, I cannot say, with the requisite degree of assurance, having regard to what has been contended by the plaintiff, that this is case where there are no possible defences or issues in dispute which ought to be tried.

[66] For one, the plaintiff has alleged that the defendant has not pleaded a valid documentary title. It is an important principle in an action for vacant possession that the plaintiff (in this case by counter claim) must recover on the strength of his title and not on the weakness of the defendant's (in this case the plaintiff's) title (see the decision of the *Privy Council in Emmerson v Maddison* [1906] AC 569).

[67] Secondly, there are significant disputes of facts between the parties as to the circumstances in which the plaintiff occupied the land. As noted by Woolf, LJ in *Filemart v Avery* [1989] WL 650928, in respect of an appeal to the UK Court of Appeal of a summary judgment for possession of a house under Ord. 24 of UK County Court Rules and Ord. 113 of the UK Rules of the Supreme Court:

> "The jurisdiction which the court exercises under Order 113 of the Rules of the Supreme and under Order 24 of the County Court Rules involves a summary procedure. It is a summary procedure which can result in a defendant being deprived of possession of property without the normal trial which takes place in contested proceedings. Having regard to the nature of the procedure, it is only in a limited number of cases that it is appropriate, in my view, to dispose of the matter as occurred in this case where a defendant puts forward a defence which, on its face, raises a factual issue."

The appeal was dismissed in that case, but on the basis that there was clear evidence before the Judge who granted the summary judgment that the house was conveyed under an arrangement for the purposes of defrauding the bank, and there was therefore no need to adjourn the matter for a full hearing on the merits to further test the evidence.

[68] In my judgment, whatever the true legal position as to the documentary title to the property, the nature of the plaintiff's possession is a matter of fact which ought to be tried out. If the defendant is able to prove title, then it is clear that he will succeed on his claim for vacant possession, unless the plaintiff can establish adverse possession for a period in excess of the applicable limitation period.

[69] But even putting to one side the claim to vacant possession and title issues, the plaintiff also claims a beneficial interest and or equitable interest in the property, based on her alleged investment in the house and improvements to the land. So even if I am wrong as to any possible defences, I am satisfied that in her counterclaim and affidavit resisting the application for summary judgment the plaintiff also discloses some triable issues, both of fact and law, which ought to be ventilated. In my judgment, having considered the issues, I do think it would be pointless for me to have these matters adjourned to trial so that they may be ventilated by discovery and the evidence tested by the regular process of cross-examination. I would therefore dismiss the application for summary judgment and give unconditional leave to defend. I will also convene a directions hearing at the earliest opportunity to give directions for the hearing of the matter.

Conclusion and Disposition

[70] This is a Ruling which, regrettably, the court was constrained to determine based on what might be considered technical pleading points. And it should be clear that it does not say anything at all about who might be entitled to succeed at trial.

[71] However, for the reasons which have been set out above, I order as follows: (i) the application to set aside/strike out the defence to the counterclaim for irregularity and/ or as being an abuse of process is refused and dismissed; (ii) the application to strike out the writ as disclosing no reasonable cause of action, or being frivolous, vexatious

or otherwise an abuse of process is also dismissed; and (iii) the application for summary judgment on the counterclaim is refused; the plaintiff (defendant by counterclaim) is given unconditional leave to defend. I invite the parties to submit a draft Minute of Order reflecting this ruling. Costs are awarded to the plaintiff to be taxed if not agreed.

5 September 2023

Klein, J.