COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Side
2010/COM/com/FP/00002

In The Matter Of The Law of Property And Conveyancing (Condominium) Act (Sect 13)

And

In the Matter Of The Companies Act (Sect 280)

BETWEEN

TYRONE ANDERSON
Applicant

AND

CORAL BEACH MANAGEMENT COMPANY LIMITED
Respondent

BEFORE: Assistant Registrar Rosanne Sweeting (Acting)

APPEARANCES: Mr. Jacy Whittaker for the Respondent

Ms. Meryl Glinton for the Applicant

HEARING DATE: August 10th and 15th, 2023

RULING

This is an application by the Respondent to strike out the Applicant's Notice of Motion filed in this Action.

Introduction

1. The Respondent filed a Notice of Intention to Proceed and its Summons to Strike Out the Notice of Motion filed in this action on November 21, 2022 on the grounds that it discloses no reasonable cause of action or any reasonable grounds for bringing the claim; it is scandalous, frivolous, and vexatious, it may prejudice, embarrass or delay a fair trial of the action and it is an abuse of the court's process. The Respondent filed a Notice of Change

of Attorney on February 8, 2023. Counsel for the Applicant filed a Notice of Appointment to Act on February 6, 2023 and a Notice of Intention to Proceed on February 8, 2023.

Background

2. The parties appeared before the Court on August 10, 2023 for the hearing of the Respondent's strike out application. However, Counsel for the Applicant raised a preliminary point as to whether this Court had the jurisdiction to hear a strike out application following the determination of then Justice Evans on November 11, 2013 whereby she refused to accede to then Counsel for the Respondent's application to strike out the Notice of Motion. I asked the parties to provide written submissions to the Court and rendered my oral Decision whereby I was of the view that as a result of the prior strike out application being predicated on two narrow issues; i.e. striking out two of the items of relief sought by the Applicant, that I was not precluded from hearing and determining the present strike out application. As a result of my Decision the parties are before me for the determination of the substantive application to strike out the Applicant's Notice of Motion.
3. The Respondent relies on its Written Submissions filed on May 8, 2023 and September 8, 2023 and Supplemental Submissions dated August 10, 2023. The Applicant relies on the oral submissions made on August 10, 2023 and Skeleton Submissions filed on September 1, 2023.
4. I just wish to highlight the below:-
    a. An application to strike portions of the Notice of Motion (paragraphs 1 and 4) and portions of the Affidavit of the Applicant was made by the Respondent by Summonses dated May 21 and 24 May, 2013.
    b. By a Decision of Justice Evans, as she then was she refused to accede to the Respondent's application to strike out paragraphs 1 and 4 of the Notice of Motion.
    c. She also refused to strike out paragraphs 4, 5, 9 of the Affidavit of the Applicant and Rose Toth. However, she did strike out certain portions of the Affidavits as they did not comply with Order 41, Rule 6 of the RSC as they were either irrelevant, not within the deponents own knowledge and or was scandalous, and/or irrelevant and/or oppressive as no such relief was sought in this action.
    d. The instant matter was set down for trial on November 18 2013 however the trial did not go off.

e. The Applicant filed applications to restrain the Respondent from disconnecting the power and an Order was made by the Court to reconnect the power.

The Substantive Application

5. The Applicant in his Notice of Motion to Address Oppression of the Minority filed on January 22, 2010 seeks the following Orders:
    a. That an independent and impartial person be appointed by the court to conduct the next General Meeting that the Meeting be conducted in accordance with Roberts Rules of order; that members be allowed to speak on matters relevant to the conduct of business of the Company and the Coral beach condominium and that the election of the Board of Directors, including the counting of ballots, be conducted in the meeting and in view of the members;
    b. That the Articles of Association of the Company be amended to make them compatible and consistent with the provisions of the Law of Property and Conveyancing (Condominium) Act - Chapter 139 of the Statute Laws of The Bahamas;
    c. That the leasing of Common Property without the unanimous consent of unit owners be restrained;
    d. That amendments to the Declaration affecting common property purporting to have been made with unanimous consent of unit owners be investigated and declared void where the amendments affect the access of unit owners to fire escapes and rights of way to and from their units;
    e. That the Board of Directors be removed, and an Administrator be appointed to administer the affairs of the Condominium until such time as an investigation into the conduct of the Condominium business be completed and audited statements of account produced;
    f. That the relationship between Kenilworth lnvestments Ltd. and the Respondent be investigated and the extent to which funds of Coral Beach Management Company Limited are used to support, Kenilworth lnvestments Ltd.;
    g. That the Board of Directors, managers or agents of the Company be restrained from carrying on the affairs of the Company in an oppressive and unfair manner and unfairly disregarding the interest of unit owners by 3. 4. 5. 6. 7. obstructing the

rental of some units and harassing the guests of certain unit owners while promoting the rental of their and their friends' units;

h. That the Company be restrained from purchasing real property and carrying on business not related to the Declaration of Condominium and the Law of Property and Conveyancing (Condominium) Act.

6. The Applicant seeks these orders on the ground that "the Company having been incorporated and registered under the Company's Act has adopted Articles which are appropriate to a trading company and that the Officers and Directors have disregarded the provisions of the Law of Property and Conveyancing (Condominium) Act and the Declaration of Condominium notwithstanding that the Company exists to perform the functions of the body corporate under the Act."
7. The Respondent has stated that the Applicant has no basis to request these orders.

Issues

8. The issues to be determined by the Court in this application are (1) whether this is a clear and obvious case where it is possible to say, at this interlocutory stage and before full discovery, that a particular allegation set out in the Notice of Motion is incapable of proof and that there is no need for a trial; (2) whether the claim is scandalous, frivolous or vexatious; (3) whether the claim may prejudice, embarrass or delay the fair trial of the action and; (4) whether the claim is otherwise an abuse of the process of the Court.

Analysis and Conclusion

The Law

9. Order 18 Rule 19 of the RSC provides as follows:

"(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)."

10. In **St. George and others v. Hayward and others** [2008] 5 BHS J. No. 5 per Adderley J, as he then was, summarized the law as follows:

"The Law

Amendments and Strike out Applications

13. As submitted by counsel for the plaintiffs the court should exercise its discretion to strike out an action only in plain and obvious cases and the corollary of that is, provided it does not cause undue prejudice to the other parties, it should allow amendments unless there would be no reasonable cause of action even with the amendments.

Particularly Central to that also is that causes of action not pleaded in the Originating Summons cannot be added in the points of claim. This principle was highlighted in **Re Lundie Brothers Ltd.** [1965] I W.L.R. 1051…"

11. In **PLC Bettas Limited v Hong Kong and Shanghai Banking Corporation Limited and HSBC Bank SCCiv App No. 312 of 2013,** cited by Mr. Russell, Allen P., with whom Conteh JA and Adderley JA agreed, held that the power to strike out is a draconian remedy which should be employed only in clear and obvious cases where it is possible to say at the interlocutory stage and before full discovery that a particular allegation was incapable of proof.

12. The principal was reinforced obiter by the Privy Council in **Ingraham & Ors v. Glinton & Anor (The Bahamas)** [2006] UKPC 40 (24 July 2006) at [9] where Lord Brown of Eaton-under-Heywood] speaking for the panel (Lords Rodger of Earlsferry, Steyn, Walker of Gestingthorpe and Carswell) said at [9] in reference to the appeal before them from The Bahamas:

> "Having noted that the main issue on the appeal was whether the Chief Justice had jurisdiction under Order 18, Rule 19 to summarily strike out the disputed paragraphs, the Court correctly reminded itself that the strike out power is to be exercised only in "plain and obvious" cases"

13. Guidance on how this rule should be applied is set out by **Osadabey, JA** in **Hamby v Hermitage Estates Ltd SCCiv App No. 21 of 2008** and also by **Auld, LJ** in **Electra**

Private Equity Partners v KPMG Peat Marwick (a firm) & Ors [2001] 1 BCLC 589. Osadabey, JA states in **Hamby**:

> "It is well settled that the jurisdiction to strike out is to be used sparingly and limited to plain and obvious cases where there is no need for a trial. There is no doubt that the exercise of that jurisdiction may deprive a party of the examination and cross examination of witnesses which can change the result of a case." At page 613 of **Electra Private Equity Partners**, Auld LJ stated: "It is trite law that the power to strike out a claim under RSC Ord.18, r.19 or in the inherent jurisdiction of the Court should only be exercised in "plain and obvious" cases. That is particularly so where there are issues as to material primary facts and the inferences to be drawn from them, and when there has been no discovery or oral evidence. In such cases, as Mr. Aldous submitted, to succeed in an application to strike out, a defendant must show that there is no realistic possibility of the plaintiff establishing a cause of action consistently with his pleading and the possible facts of the matter when they are known. Certainly, a judge, on a strike-out application where the central issue is one of determination of a legal outcome by reference to as yet undetermined facts, should not attempt to try the case on the affidavits. See **Goodson v Grierson [1908] 1 KB 761, CA**, per Fletcher Moulton LJ at 764-5 and Buckley LJ at 766; **Wenlock v Moloney**, per Sellers LJ at 1242G-1243D and Danckwerts LJ at 1244B ([1965] 1 WLR 1238); and **Torras v Al Sabah & others(unreported) 21 March 1997 CA**, per Saville LJ. There may be more scope for early summary judicial dismissal of a claim where the evidence relied on by the plaintiff can properly be characterised as "shadowy" or where "the story told in the pleadings is a myth . . . and has no substantial foundation"; see eg **Lawrance v Lord Norreys (1890) 15 App Cas 210**, per Lord Herschell at 219-220. However, the court should proceed with great caution in exercising its power of strike-out on such a factual basis when all the facts are not known to it, when they and the legal principle(s) turning on them are complex and the law, as here, is in a state of development. It should only strike out a claim in a clear and obvious case. Thus, in **McDonald's Corporation v Steel [1995] 3 All ER 615, [1995] EMLR 527, CA**, Neill LJ, with whom Steyn and Peter Gibson LJJ agreed, said, at 623e-f of the former report, that the power to

strike out was a Draconian remedy which should be employed only in clear and obvious cases where it was possible to say at the interlocutory stage and before full discovery that a particular allegation was incapable of proof."

Discloses No Reasonable Cause of Action

14. Mr. Whittaker in his Written Submissions has submitted:-

a. That when it is clear "from the face of the pleading that the pleading is "obviously unsustainable," an application to strike pursuant to Order 18 Rule 19 (1) (a) may be granted. (**Turner v Harajchi et al 1419/02 (Bahamas**);

b. That courts routinely strike out pleadings which fail to properly allege a cause of action. See **White v Withers LLP [2008] EWHC 2821 (QB); Knowles v Thompson [2004] BHS J. No. 409**;

c. That the issues are discernible from the face of the pleadings themselves. If a pleading patently lacks a sustainable claim, the Court can, and indeed should recognize this without the need for additional evidentiary material.

d. The Plaintiffs' Notice of Motion cannot stand because it failed to show that he has suffered any oppression or unfair prejudice as a result of the Defendants act or omission. The allegations mentioned in the Notice of Motion are either tales or hearsay which cannot be substantiated by evidence. The proper place for addressing going with the way a condominium is being run is at the annual general meeting, not by filing a Notice of Motion alleging oppression.

15. Ms. Glinton has submitted in response:-

e. That there is no dispute between the parties as to the Court's approach on applications under this ground, namely that "before a claim can be struck out it must be plain an obvious that no reasonable cause of action is disclosed" and that "what the court is expected to do is to look at the pleadings under attack and, without making a minute and protracted examination of the documents and the facts of the case, come to a conclusion as to whether the Applicant really had a cause of action." and "the court is required to assume that the facts pleaded are true and undisputed.";

f. That the Plaintiff's claim is not unsustainable or unarguable, or defective in law. The Applicant's claim is grounded in s. 280 of the Companies Act **("the Act");**

g. That to sustain an action under s. 280 of the Act, the Applicant need only satisfy this Court that he is a "complainant" as defined within s. 278 of the Act. It is submitted that, as a member of Coral Beach, the Applicant is a proper applicant, with standing to "**apply to the Court for <u>any order</u> against a company or a director or officer of that company to restrain oppressive action**" and s. 280 (3) of the Act provides the Court with a wide discretion as to the interim or final orders it may grant, so that none of the relief claimed by the Applicant are out with the Court's powers;

h. That the Respondent's attack on the Notice under this ground and elsewhere are directed primarily to what the Applicant will be able to prove evidentially which are matters for trial and the trial judge.

16. Having reviewed the Notice of Motion the Court at this stage is only required to determine if the pleadings disclose a reasonable cause of action with some chance of success or raises some question fit to be decided by this Court. Moreover, so long as the statement of claim or particulars disclose some cause of action or raise some question fit to be decided by a Judge or jury the mere fact that the case is weak and not likely to succeed is no ground for striking it out (**Wenlock v Mooney [1965] 1 W.L.R. 1238; Moore v Lawson (1915) 31 T.L. R. 418 CA**). Therefore, I find that after reviewing the Notice of Motion on the face of the pleadings it discloses some question fit to be decided by the Court.

17. Likewise as the prior application to strike albeit such application was only to strike paragraphs 1 and 4 of the Notice of Motion which was refused by then Justice Evans, I am inclined to follow her reasoning that whether the Applicant obtains the relief sought is dependent on whether or not he satisfies the court with credible evidence. However, the lack of evidence at this stage of the proceedings only reinforces that this case is not one which is obvious to be struck out.

Scandalous/Frivolous/Vexatious and Embarrass/Delay Fair Trial

18. Allegations in a pleading are scandalous if they impute dishonesty, bad faith or other misconduct against another party or anyone else and they are immaterial or irrelevant. Whether a pleading is frivolous or vexatious depends "on all the circumstances of the case; the categories are not closed and the considerations of public policy and the interest of justice may be very material." **See Ashmore v British Coal Corp [1990] 2 QB. 338**.

19. As it relates to whether an allegation is embarrassing, prejudicial or delay the fair trial of the action the Court is to give a liberal interpretation to those words. Additionally, the Court is not to dictate to parties how they should frame their case however, parties must ensure that their pleadings do not offend the rules of pleading. Further, the mere fact that an allegation is unnecessary is no ground for striking it out nor is a pleading embarrassing merely because it contains allegations which are inconsistent or stated in the alternative. **See The Supreme Court Practice, Volume 1, Note 18/19/17 at page 351; Odgers' Principles of Pleading and Practice, 22nd Edition at page 151**.
20. Mr. Whittaker in his Written Submissions has submitted in part on the ground that the Notice of Motion is scandalous, frivolous or vexatious:-
    a. A claim may be found to be frivolous, and vexatious where it is brought for an improper purpose, or "merely to cause hassle" to the Respondent.
    b. The Applicant in his Notice of Motion has not shown in what way is CBMC has disregarded the provisions of the Law of Property and Conveyancing Condominium) Act;
    c. that the Court should only exercise its discretion to strike out an action in plain and obvious cases, that is, where the case is unarguable or where it is scandalous, frivolous or vexatious, otherwise an abuse of the process of the court. It is submitted that the current case is clearly frivolous or vexatious and fits in the requirements where a case can be struck out.
21. Mr. Whittaker in his Written Submissions has also submitted in part on the ground that the Notice of Motion is embarrassing and/or delay the fair trial of this action:
    d. that it must be conceded that delay, especially delay of the nature found in the case, will lead to the prima facie presumption of prejudice. In these circumstances, the Respondent has submitted that it is prejudiced by the claim continuously hanging over its head indefinitely as it must annually report the claim as a contingent liability to its shareholders and insurers;
    e. The granting of the Orders sought will affect CBMC's right to a fair trial, in that these Orders may impact the outcome of this case to favour the Applicant as it may be deduced that CBMC's conduct is in contravention with the Act and the Declaration of Condominium.

f. In order to succeed, the Plaintiffs will have to establish that the Defendant's conduct amounts to oppression and/or and utter disregard of the interest of the unit owners which resulted in prejudicial consequences. There is nowhere in the Plaintiff's Notice of Motion which establish these fundamental requirements.

g. The proper place for addressing going with the way a condominium is being run is at the annual general meeting, not by filing a Notice of Motion alleging oppression.

h. the foundation of our application, which is grounded in Order18, Rule 19. The clear language of this rule permits an application to be "made at any stage of the proceedings." This, in itself, denotes the flexibility and broad scope of this rule.

i. The delay in applying to strike out two grounds in the Notice is not inordinate so as to cause injustice to the Applicant. The court is to take into account of the time the application is made, it means the court must weigh the question of time in balance and to determine what effect it has on the scales of justice between the parties.

22. Ms. Glinton in response has submitted in part that:

j. Coral Beach has adduced no evidence by which to persuade this court that the Notice is scandalous, frivolous of vexatious, that it may prejudice, embarrass or delay a fair trial of the action, or that it is an abuse of process, and there is nothing disclosed in the Notice which supports the application on these grounds.

k. Coral Beach's submission that a claim is frivolous and vexations when it is brought "for an improper purpose, or 'merely to cause hassle" is accepted. It is submitted that the court has nothing before it to exercise its discretion in favour of a finding as to Anderson's purpose or intentions. Nor does the Notice contain "oppressive, bizarre or prolix pleading."

23. The Respondent has not filed any Affidavit evidence in support of its application to strike out the Applicant's Notice of Motion. Therefore, there is nothing before this Court whereby I can find that the Applicant's Notice of Motion is scandalous, frivolous or vexations.

24. Further, having carefully considered the Notice of Motion I have concluded that there is nothing contained in it which supports the Respondent's contention that the Notice of Motion is scandalous, frivolous or vexatious. Further, that the allegations contained in the Notice of Motion are embarrassing or its inclusion will delay the fair trial of this action.

Abuse of Process

25. The Respondent contends in its Summons that this action by the Applicant is an abuse of the process of the Court. This ground confers upon the Court in express terms powers which the Court has hitherto exercised under its inherent jurisdiction where there appears to be an abuse of the process of the Court. This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation (**Commentary at 18/19/18 on page 352 of the Supreme Court Practice 1, 1999 Castro v Murrary (1875) 10 Ex. 213**).
26. Having determined that the Notice of Motion discloses a reasonable cause of action, that it is not scandalous, frivolous or vexatious and/or is not embarrassing or delay the fair trial of this action I have concluded that the action is not an abuse of the process of the Court.

Timeliness of the Application

27. Considering the history of this matter I wish to draw Counsel's attention to the Court of Appeal Decision in **Fidelity Bank (Bahamas) Limited v Geltex SCCivApp** No. 46 of 2022. The parties can read the headnote for the background facts but I wish to highlight paragraphs 21-24 where Sir Michael identified that an application to strike out an action under Order 18, Rule 19 must be made promptly and that prior to 1992 the prevailing jurisprudence was that an application to strike made after the trial date was fixed ought to be refused. Moreover, in **Halliday v Shoesmith [1993]** 1 W.L.R. the English Court of Appeal cautioned that such a late strike out application should only be heard in exceptional circumstances. Sir Michael at paragraph 24 concurs that the jurisprudence reflects that only in exceptional circumstances should a claim be struck out under Order 18, Rule 19 when a trial date has been fixed and even more so when the trial has begun. He continues that this principle is even more applicable when the trial is a short one.
28. Likewise, in the instant action, this matter had been set down for trial and former Counsel for the Respondent had made an application to be heard on several preliminary objections before the trial commenced.

29. It is clear that the trial in this action has yet to be heard and the file has laid dormant for the past few years.
30. However, the Respondent on this application has not persuaded me that this case is an exceptional case for the Court to invoke its discretionary jurisdiction to strike at this point in the matter.

Disposition

31. Therefore, having reviewed the Notice of Motion I find that it does disclose a reasonable cause of action and/or raises some question fit to be decided by this Court.
32. Further, having already determined that the pleadings do disclose issues fit to be tried and after considering the relevant case law, and the submissions of Counsel, I find that the instant action is clearly not a proper case to strike out the Applicant's action as against the Respondent under Order 18 r 19 of the RSC.
33. For all the above reasons I dismiss the Respondent's application to strike out.

Costs

34. On the issue of costs, the usual costs order is that costs follow the event and I see no reason to depart from that. Therefore, the Respondent is to pay the Applicant's costs of this application to be taxed if not agreed.

Dated the 15th day of November, 2023

Rosanne O. Sweeting
(Acting) Assistant Registrar