COMMONWEALTH OF THE BAHAMAS 2014/CLE/GEN/FP/00283

IN THE SUPREME COURT

Civil Division

BETWEEN

DOROTHY BAIN

Plaintiff

AND

ROYAL BANK OF CANADA (BAHAMAS) LIMITED

Defendant

BEFORE:	The Honourable Mr. Justice Andrew Forbes
DATE:	10TH November 2023
APPEARANCES:	Ms. Edwina Waldron on behalf of the Plaintiff
	Ms. Karen Brown & Ms. Tashana Wilson on behalf of the Defendant.

Decision

BACKGROUND

1. The plaintiff had filed its special endorsed Writ of Summons on the 25th August 2014 and claimed inter alia that the defendant was a Banker and carried on the business of Banking at their branch in the City of Freeport, Grand Bahama and elsewhere. That all material times the plaintiff together with her late husband Dencil Bain were customers of the defendant and operate a loan account being 3312170 or account number 7075625. That on or about 23rd June 2009 a person or person having access to the plaintiff's account forged a promissory demand loan application in the amount of Five Thousand Dollars ($5,000.00) in the names of the plaintiff and her late husband Dencil Bain jointly and that the bank processed and granted the loan. That on or about 25th June 2009 and on or about the 2nd July 2009 the defendants wrongfully and without the plaintiff's authority paid out monies from the said loan dated 23rd June 2009 in the amount of Three Thousand Dollars ($3,000.00) and Two Thousand and Ten Dollars ($2,010.00) respectively. That Dencil Bain died on the 11th July 2010. That the plaintiff nor her late husband did not make application for a loan for Five Thousand Dollars ($5,000.00) on or about the 23rd June 2009 nor did they receive the proceeds of the said loan or authorized the drawing thereof and that the signatures of the Plaintiff and her late husband are forged by some person unknown. In the premises the defendants had no authority to pay out proceeds of the said loan and the plaintiff has been injured in her credit and reputation. The plaintiff seeks a declaration that the defendants have wrongfully and were not entitled to debit the plaintiff's account with the amount of the loan of the 23rd June 2009. The plaintiff further claims the sum of Five Thousand Dollars ($5,000.00), the reversal and credit to the plaintiff of the interest charges of expenses in connection with the said loan, interest, costs and damages.

2. The Defendant having filed a Memorandum and Notice of Appearance on the 14th August 2014 filed its defence on the 4th April 2017 which states inter alia that the defendant admits paragraph 1 of specially endorsed Writ of summons filed on 25th August 2014. That at paragraph 2 the defendant admits that the plaintiff and Dencil Bain were customers of the loan account number 3312170 and a savings account number 7075625. The defendant avers that on or about the 23rd June 2009 the defendant advanced a principal sum of Five Thousand Dollars ($5,000.00) to the plaintiff and the said Dencil Bain by way of a loan such sum to be repaid together with interest thereon at the defendants loan base rate of 11% plus 2 ½% per annum. The promissory note was signed by both the plaintiff and the said Dencil Bain. The defendant further avers that on or about the 25th June 2009 the loan proceeds in the sum of Five Thousand Dollars ($5,000.00) were credited to the plaintiff's savings account. The defendant therefore denies paragraph 3 and puts the plaintiff to strict proof of the forgery alleged. As to paragraph 4 the defendant avers that on the 25th June 2009 the plaintiff withdrew the sum of Three Thousand Dollars ($3,000.00) from the plaintiff's saving account. The receipt of transaction in respect of this withdrawal was signed by the plaintiff. On or about the 2nd July 2009 the plaintiff's savings account was debited in the sum of Two Thousand Dollars ($2,000.00) in respect of purchase by the plaintiff of currency of the United States of America. Thereafter on the 6th July 2009 and 7th July 2009, withdrawals were made from the plaintiff's savings account at the automatic bank machines in the State of Florida, one of the United States of America. Save as aforesaid the defendant denies paragraph 4. The defendant admits paragraph 5. The defendant denies paragraph 6 and 7 and refers to and repeats paragraphs 4, 5 & 6 above. Further, the plaintiff is put to strict proof of the injury claimed in paragraph 7. And save as herein before expressly admitted the Defendant denies each and every allegation of fact contained in paragraphs 6 through 7 of the Statement of Claim indorsed on the Writ of Summons as if the same were set forth herein and specifically traversed.

3. The plaintiff although represented by Counsel on diverse occasions appeared to have filed documents on her own without reference to her representations. Once such instance was the Plaintiff self-filed an Affidavit on the 12th June 2018 in which she had exhibited the Forensic Report commissioned by her Attorney

at the time with reference to the allegations of potential fraud and forgery which was being alleged. The Court will speak to this Report at a much later stage at this decision.

4. That the Plaintiff would have again applied for case management notwithstanding being represented by Counsel. The Court invited the Plaintiff and Counsel for the Defendant to attend Court and sought to make inquires of the Plaintiff about her Attorney. The Plaintiff advised that she had discontinued this representation, although the Court noted the documents didn't support this assertion. The Court invited the Plaintiff to reconsider attempting to represent herself and invited her to retain Counsel to advise and assist her. The matter was then adjourned to allow the Plaintiff to obtain Counsel. At the next sitting the Plaintiff appeared with current Counsel who represented that it was her intention to make adjustments to the Writ. As a consequence the Court granted leave for the Application to be filed.

5. That Plaintiff's Counsel then actually filed an amended Writ of Summons on the 12th October 2023 notwithstanding the application of the Civil Procedure Rules (CPR) and its applicability to the current matter. However, while at the hearing of the Application admitted the error and indicated that there was no intention to move forward with the Writ of Summons so filed. Shortly thereafter Plaintiff's Counsel then filed a Notice of Application on the 16th October 2023 seeking leave to Amend and an Affidavit in Support sworn by the Plaintiff and exhibiting the intended amendments marked in red filed also on the 16th October 2023. The defendant likewise filed on the 23rd October 2023 an Application seeking to strike the Plaintiff's entire action alleging that it disclosed no cause of action. This was likewise filed with an Affidavit in support sworn by Jennifer Styles and filed on the 25th October 2023. The Defendant's Counsel also objected to the Application being perused by the plaintiff also the Defendant sought Summary Judgement although the Court noted that the Defendant had not filed a counterclaim or setoff. The claimant/plaintiff filed on the 3rd November 2023 an affidavit in response to the affidavit of Ms. Styles.

6. That the parties appeared before the Court and the Court observed that both the Plaintiff and Defendant Counsel had filed and laid over Skeleton Arguments

in support of their respective applications. The Court noted that the Plaintiff's arguments failed to address the defendant application at all. In an effort to get full arguments the Court invited the Plaintiff's Counsel to provide supplemental arguments and if the Defendant Counsel felt it was necessary. The Court would note that at the deadline given by the Court Counsel Claimant filed additional arguments on the 14th November 2023 and the Defendant likewise filed supplement arguments on the 16th November 2023. The Court wishes to take this opportunity to thank both Counsel for their assistance. The Court had indicated an intention to provide its decision on the applications and does so now.

LAW

7. The Court notes that the following provisions of the CPR accounts for the current applications filed by the Plaintiff and the Defendant respectively. The Plaintiff/claimant would be required to make an Application pursuant to Part 20.2 which reads: *"20.2 Changes to statements of case after end of relevant limitation period. (1) This rule applies to a change in a statement of case after the end of a relevant limitation period. (2) The Court may allow an amendment the effect of which will be to add or substitute a new claim but only if the new claim arises out of the same or substantially the same facts as a claim in respect of which the party wishing to change the statement of case has already claimed a remedy in the proceedings. (3) The Court may allow an amendment to correct a mistake as to the name of a party but only where the mistake was — (a) genuine; and (b) not one which would in all the circumstances cause reasonable doubt as to the identity of the party in question. (4) The Court may allow an amendment to alter the capacity in which a party claims."* This Rule is similar in its application to the Rule of the Supreme Court (RSC) found in Order 20 Rule 5(1) of the RSC. The Defendant likewise made an application pursuant Part 26.4 of the CPR which reads: *"26.4 Court's general power to strike out statement of case. (1) If a party has failed to comply with any of these rules or any Court order in respect of which no sanction for non-compliance has been imposed, any other party may apply to the Court for an "unless order". (2) Such an application may be made without notice but must be supported by 169 evidence on affidavit which — (a) contains a certificate that the other party is in default; (b) identifies the rule or order which has not been complied with; and (c) states the nature of*

the breach. (3) The judge or registrar may — (a) grant the application; (b) direct that an appointment be fixed to consider the application and that the applicant give to all parties notice of the date, time and place for such appointment; or (c) seek the views of the other party. (4) If an appointment is fixed the applicant must give seven days' notice of the date, time and place of the appointment to all parties. (5) An "unless order" must identify the breach and require the party in default to remedy the default by a specified date. (6) The general rule is that the respondent should be ordered to pay the assessed costs of such an application. (7) If the defaulting party fails to comply with the terms of any "unless order "made by the Court, that party's statement of case shall be struck out subject to an order under rule 26.8. ..." which is similar to the Application made pursuant to Order 18 Rule 19 of the RSC

8. The Court also notes the Overriding objective of the CPR which states the following: *"1.1 The Overriding Objective. (1) The overriding objective of these Rules is to enable the Court to deal with cases justly and at proportionate cost. (2) Dealing justly with a case includes, so far as is practicable: (a) ensuring that the parties are on an equal footing; (b) saving expense; (c) dealing with the case in ways which are proportionate to — (i) the amount of money involved; (ii) the importance of the case; (iii) the complexity of the issues; and (iv) the financial position of each party; (d) ensuring that it is dealt with expeditiously and fairly; (e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases; and (f) enforcing compliance with rules, practice directions and orders."*

9. The Court notes the Rules related to Summary Judgement found at Part 15 of the CPR and reads as follows: ***"SUMMARY JUDGMENT"*** *15.1 Scope of this Part. This Part sets out a procedure by which the Court may decide a claim or a particular issue without a trial. 15.2 Grounds for summary judgment. The Court may give summary judgment on the claim or on a particular issue if it considers that the — (a) claimant has no real prospect of succeeding on the claim or the issue; or (b) defendant has no real prospect of successfully defending the claim or the issue.42 15.3 Types of proceedings for which summary judgment is not available. The Court may give summary judgment in any type of proceedings*

except — (a) admiralty proceedings in rem; (b) probate proceedings; (c) proceedings by way of a fixed date claim; (d) proceedings for — (i) claims against the Crown; (ii) defamation; (iii) false imprisonment; (iv) malicious imprisonment; and (v) redress under the Constitution. 15.4 Procedure. (1) Notice of an application for summary judgment must be served not less than fourteen days before the date fixed for hearing the application. (2) The notice under paragraph (1) must identify the issues which it is proposed that the Court should deal with at the hearing. (3) The Court may exercise its powers without such notice at any case management conference.43 15.5 Evidence for the purpose of summary judgment hearing. (1) The applicant must — (a) file affidavit evidence in support with the application; and 103 (b) serve copies of the application and the affidavit evidence on each party against whom summary judgment is sought, at less than fourteen days before the date fixed for hearing the application. (2) A respondent who wishes to rely on evidence must — (a) file affidavit evidence; and (b) serve copies on the applicant and any other respondent to the application; at least seven days before the summary judgment hearing. 15.6 Powers of Court on application for summary judgment. (1) The Court may give summary judgment on any issue of fact or law whether or not the judgment will bring the proceedings to an end. (2) Where the proceedings are not brought to an end the Court must also treat the hearing as a case management conference."

10. The Court is aware of the Case Management provision of the CPR Parts 25 to Parts 27 and in particular Part 26.3 which reads as follows: *"26.3 Sanctions – striking out statement of case. (1) In addition to any other power under these Rules, the Court may strike out a statement of case or part of a statement of case if it appears to the Court that — (a) there has been a failure to comply with a rule, practice direction, order or direction given by the Court in the proceedings; (b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim; (c) the statement of case or the part to be struck out is frivolous, vexatious, scandalous, an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings; or (d) the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10. (2) Where — (a) the Court has struck out a claimant's statement of case; (b) the claimant is ordered*

to pay costs to the defendant; and (c) before those costs are paid, the claimant starts a similar claim against the same defendant based on substantially the same facts, the Court may on the application of the defendant stay the subsequent claim until the costs of the first claim have been paid."

PROPOSED AMENDMENTS BY THE PLAINTIFF

11. The Plaintiff now seeks to add a declaration that the defendant wrongfully withheld the claimant conveyances and secured mortgages on lot 17 & 18 Arden Forest. That the defendant provides a deed of release and deed of re-conveyance conveying lots 17 & 18 back to the claimant.

12. Then commencing at paragraphs 4 thru to 25, the claimant then engages in a narrative, as an example at paragraph 17 the claimant states as follows: "On the 1st July 2013, the Claimant then asked Mrs. Collie for the application for the loan, *and Mrs. Collie told her she could not find the application, and that they were only in possession of the 2010 computer generated application. The Claimant/ plaintiff told Mrs. Collie that when she comes back to the bank she wants to see the Application that she made...*" And again at paragraph 23 the claimant states*: "Nonetheless, the Claimant continued making payments until November 2019, four years beyond the maturity date, as she verily believed that the amount owed from the last extension on the loan taken out in November 2008...."*

13. The Court is seeking to point out as we circle back to the actually gravamen of the claimant's allegations is that the defendant engaged in fraud. The only added dimension is this new allegation related to the retention of title documents. There is no correlation between this apparent new allegation and the previous allegation although the claimant now appears to want there to be a correlation.

SUBMISSIONS

14. Claimant/plaintiff's contends that after retaining new Counsel that the specially endorsed Writ failed to specify how the claimant came into discovering the alleged forged promissory note and that two of claimant lots were mortgaged by the defendant as collateral for the alleged promissory note. The claimant noted Part 20 of the Civil Procedure Rules (CPR) which permits applications for changes to statement of case. The Court has already laid out this provision in its entirety. The claimant further noted that a Court in excising its discretion should be guided by the general principle that amendments are made when necessary to ensure the real issues are resolved between the parties. The claimant cites Mark Brantley v. Dwight C. Cozier [2015] ECarSc. 195. Further noting that notwithstanding the limitation period has expired that parties should still be permitted to amend their pleadings citing Cropper v. Smith (1883) Ch. D. 700 and specifically Bowen LJ at pages 710-*711 "It is well established principle that the object of the Court is to decide the rights of the parties, and not punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights... 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 is done without injustice to the other party..."* Also cited the case of Clarapede v. Commercial Union Association (1883) 32 WR 262, where Brett MR. said: *"However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side."* The claimant is seeking that the Court accede to their application in permitting them to amend their claim and allow the case to proceed to trial so all the evidence can be adduced, and allow the claimant her day in Court.

15. In response to the defendant's application to Strike Out and Summary Judgment, the claimant asserts that she does have a reasonable cause of action as she alleging the defendant bank breached its fiduciary duty owed to the claimant. The claimant cites for support the case of Wenlock v. Maloney [1965] 2 AER 871. The claimant contends that there is a realistic prospect of success which carries some conviction that as a result of the defendant's actions and

negligence, the claimant was injured in her credit reputation and suffered a loss coupled with the fact that the claimant went to great lengths and incurred expenses in initiating this action. And that when the Court is considering a summary judgement application it is not confided to an examination of the statement of case. The requirement that the claimant ought to plead and or particularize facts or allegations in which the claimant wishes to rely may be satisfied by pleading them in a reply and not necessarily or specifically in particulars of claim.

16. The defendant for its part argues that the Court when considering an amendment is required to carry out a balancing exercise to determine the interest of each party and the pursuit of justice, citing CIP Properties (AIPT) Ltd v. Galliford Try Infrastructure Ltd and others (No.3) [2015] AER (D) 193 Also relied upon the case of Swain-Mason and others v. Mills & Reeve [2001] EWCA Civ. 14, where it was held that a party seeking to amend must demonstrate the strength of their case, show why justice in the case necessitates the granting of the amendment and the Applicant must put forward amendments that meet and satisfy the requirement of proper pleadings.

17. The defendant contends that the claimant application is made at a very late stage in the proceedings some nine (9) years since the filing of the Writ. That the defendant would be prejudiced by any amendments noting the time and expenses incurred to date. They further note that several of the proposed amendments contain evidence. Notably paragraphs 4 thru 9, 10 through 25 and paragraph 29 contains evidence or hearsay conversations and in some instances are irrelevant. The defendant further noted that fraud must be specifically pleaded and there is an absence of such particulars in the claimant's case, citing Superwood Holdings plc Superwood Ltd Exports LTD, Superchip Ltd, Superwood International LTD and Superwood (UK) Ltd v. Sun Alliance and London Insurance plc trading as Sun Alliance Insurance Group, Prudential Assurance Co. Ltd, Church & general Insurance Co. Ltd and Raymond P. McGovern [1995] 3 IR 303, where the Court said: *"Fraud must be pleaded with the utmost particularity and would not be inferred from the circumstances pleaded....."*

18. They further noted the decision of Glendon E. Rolle v. Scotiabank (Bahamas) Limited [2022] 1 BHS.J No. 30 where Senior Justice Indra Charles (as she then was) noted that parties are bound by their pleadings. The defendant also contend that the claimant's case is unsustainable and cited The "Bunga Melati 5" [2012] SCCA 46. And also noted the English Court of Appeal decision in Taylor v. Midland Bank Trust Co. Ltd [1999] AER 831, which held that the Court may treat an application to strike under Rule 26(3) as if were an application for summary judgement. It finally noted that the claimant Counsel suggested that the claimant has a fiduciary relationship with the defendant and reject that noting in **Glendon Rolle's case** the court noted that the relationship between customer and bank was a contractual not fiduciary relationship. They seek that the amendments be rejected that the entire action be struck out and or summary judgment grant.

ANLAYSIS & DISCUSSION

19. The issues for the Court to consider is whether claimant has a sustainable case, and if the answer is in the affirmative should the Court exercise its discretion in allowing the proposed amendments. The second issue for consideration is whether the Court in the exercise of its discretion ought to strike out the claimant's action and or award summary judgement to the defendant.

20. The Court initial review commences with the original Writ of Summons 25 August 2014 which was specially endorsed where the claimant alleged that that she nor her late husband applied for a loan, however, the defendant bank acting on the instructions of person known or unknown process and granted a loan. That some unknown person forged her late husband and her signature and drew the monies loaned by the defendant bank. What is also enlightening is the affidavit filed on the 12th June 2018 titled Affidavit in Support of the cost of the signature results examination and damages which was apparently filed by the claimant notwithstanding she was at the time represented by Counsel on the Court's record. It is noted that this affidavit contained a number of exhibit's the most important and relevant of these is a report commissioned by Counsel for the Claimant Mr. Jethro Miller(deceased) and prepared by Ms. Dianne Flores a Forensic Document Examiner and dated 8th January 2018.

21. According to Ms. Flores she examined a machine copy of form bearing the disputed signatures of the claimant and her late husband. As well as the original of this very same form and the copy of a Royal Bank of Canada withdrawal receipt dated 25/6/2009 bearing the contested signatures of the claimant and her late husband. These documents were compared against documents which were not disputed and bore confirmed signature of the claimant and her late husband. As an example, the Passport of the late husband of the claimant issued 16/6/2006, an original agreement bearing the claimant's signature and that of her late husband dated 7/3/2006. And the original Jamaican Passport issued on the 24/10/2006 to the claimant. As the Court noted the signature on these documents were not disputed.

22. The results were illuminating in that the examiner found that on the original promissory note that the signature of both the claimant and her late husband was identified. Further that the signature of the claimant was likely identified on the withdrawal receipt. The amendments now being sought by the claimant are release of documents which is being alleged are held by the defendant. This amounts to a new allegation. Also breaches of a fiduciary duty, inconveniences emotional and financial distress. However a deeper look and proposed amendments from paragraph 4 to 25 appear to be a narrative of interaction with alleged defendant's employee and purported conversations with these individuals. Whereas what is now paragraphs 26 et. seq. under the title Particulars of Special Damages, merely regurgitates the claim of the specially endorse Writ filed in August 2014.

23. The Court notes the Text of Odgers Principles of Pleadings and Practice in Civil Actions in the High Court of Justice authored by D.B. Casson & I.H. Dennis Twenty Second Ed., at page 94 where it said as follows: *"The fundamental rule of our present system of pleadings is this, every pleading must contain, and contain only, a statement in summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be brief as the nature of the case admits..."* Also in the case of Re Rica Gold Washing Co. (1879) 11 CH.D 36, It was noted *"any allegation of fraud must be expressly*

pleaded together with the facts, matters and circumstances relied upon to support the allegation. In practice the acts alleged to be fraudulent should be set out then it should be stated that those acts were done fraudulently."

AMENDMENTS

The Court notes the comments made Coulson J in **CIP Properties Case,** where at paragraph 19 thereof he summarized the consideration of the Court when considering amendments he said as follows:

"(a). The lateness by which an amendment is produced is a relative concept (Hague Plant). An amendment is late if it could have been advanced earlier, or involves the duplication of cost and effort, or if it requires the resisting party to revisit any of the significant steps in the litigation (such as disclosure or the provision of witness statements and expert's reports) which have been completed by the time of the amendment.

(b) An amendment can be regarded as 'very late' if permission to amend threatens the trial date (Swain-Mason), even if the application is made some months before the trial is due to start. Parties have a legitimate expectation that trial dates will be met and not adjourned without good reason (Brown).

(c) The history of the amendment, together with an explanation for its lateness, is a matter for the amending party and is an important factor in the necessary balancing exercise (Brown; Wani). In essence, there must be a good reason for the delay (Brown).

(d) The particularity and/or clarity of the proposed amendment then has to be considered, because different considerations may well apply to amendments which are not tightly-drawn or focused (Swain Mason; Hague Plant; Wani).

(e) The prejudice to the resisting parties if the amendments are allowed will incorporate, at one end of the spectrum, the simple fact of being 'mucked around' (Worldwide), to the disruption of and additional pressure on their lawyers in the run-up to trial (Bourke), and the duplication of cost and effort (Hague Plant) at the other. If allowing the amendments would necessitate the adjournment of the trial, that may be an overwhelming reason to refuse the amendments (Swain Mason).

(f) Prejudice to the amending party if the amendments are not allowed will, obviously, include its inability to advance its amended case, but that is just one

factor to be considered (Swain-Mason). Moreover, if that prejudice has come about by the amending party's own conduct, then it is a much less important element of the balancing exercise (Archlane)."

24. In the view of this Court this application by the Claimant is late, in fact, the pleadings were closed and it was the claimant's intervention writing several times seeking case management for the purposes of setting the matter down for trial. It was in fact at such a case management proceedings that the Court invited the claimant to have her Attorney present because the Court was of the view that the case was materially deficient in several regards. At the adjournment current Counsel was alerted to those deficiencies and sought leave of the Court to apply to amend the claim. The Court acceded. Similarly, the defendant sought leave to file its own application and Court again acceded. The explanation as to why the application to amend is not sustainable. Furthermore, at all stages the claimant was represented by multiple Attorneys from 2014 to current. The claimant now seeks to accuse these Attorneys of abandoning her. In the opinion of the Court the claimant undermined her Attorneys by self-filing. It is clear that many of her very own actions resulted in the many delays along with the constant changing in lawyers representing her in this matter.

25. The Court has highlighted some of the proposed amendments and found many to be evidentiary in nature and not material facts. Further the claimant makes allegations as to forgery or fraud but doesn't particularize the forgery or fraud. Further the attempt to add an additional claim regarding the title documents only now means that this entire process will likely have to be restarted and further causing more delays. These delays and additional cost will greatly prejudice the defendants as they have noted and the Court agrees with Counsel for the defendant's sentiments. Should the Court however not allow these amendments it means that the claimant's case will be sadly deficient. The Court however, having considered the proposed amendments found them unspecific not tightly drawn. Further there was narrative and evidence being discussed not material facts and as such the Court is retrained against permitting the proposed amendments submitted by the claimant.

STRIKING OUT

26. The other question to consider is whether this entire claim filed by the claimant/plaintiff ought to be set aside as disclosing no reasonable cause or

action. Taking the comments of the Court of Appeal case in West Island Properties Limited v. Sabre Investment Limited et.al. Civil Appeal No. 119 of 2010. Where the Court at Paragraph 14 et. seq said as follows:

*"In our view, the learned judge properly exercised his discretion within the ambit of Order 18; rule 19(1) (a) and (d) R.S.C. That is, the learned judge at paragraphs 19–21 of his decision found that the appellant's Amended Statement of Claim disclosed no reasonable cause of action as against the 1st respondent ('Sabre'), and was an abuse of the process of the Court. His basis for so finding was stated to be that the aforesaid **pleading** lacked sufficient particularity with respect to the allegations made against Sabre.*

*In the case of Drummond-Jackson v. British Medical Association [1970] 1 W.L.R. 688, Lord Pearson determined that a cause of action was reasonable where it had some chance of success when considering the allegations contained in the **pleading**s alone. That is, beginning at page 695, he said the following:*

"Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases.

...

*In my opinion the traditional and hitherto accepted view — that the power should only be used in plain and obvious cases — is correct according to the intention of the rule for several reasons. First, there is in paragraph (1) (a) of the rule the expression "reasonable cause of action," to which Lindley M.R. called attention in (Hubbuck & Sons Ltd. v. Wilkinson, Heywood & Clark Ltd 18991 1 Q.B. 86, pp. 90–91. No exact paraphrase can be given, but I think "reasonable cause of action" means a cause of action with some prospect of success, when (as required by paragraph (2) of the rule) only the allegations in the **pleading** are considered. If when those allegation are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out In Nagle v. Feilden (1966) 2 Q.B. 633 Danckwerts L.J. said, at p. 648:*

The summary remedy which has been applied to this action is one which is only to be applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process of the Court'

Salmon L. J. said, at p. 651: it is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable.' Secondly, subparagraph (a) in paragraph (1) of the rule takes some colour from its context in subparagraph (b) "scandalous, frivolous or vexatious," subparagraph (c) "prejudice, embarrass or delay the fair trial of the action" and subparagraph (d) "otherwise an abuse of the process of the Court." The defect referred to in subparagraph (a) is a radical defect ranking with those referred to in the other subparagraphs. Thirdly, an application for the statement of claim to be struck out under this rule is made at a very early stage of the action when there is only the statement of claim without any other ***pleading****s and without any evidence at all. The plaintiff should not be "driven from the judgment seat" at this very early stage unless it is quite plain that his alleged cause of action has no chance of success. The fourth reason is that the procedure, which is (if the action is in the Queen's Bench Division) by application to the master and on appeal to the judge in chambers, with no further appeal as of right to the Court of Appeal, is not appropriate for other than plain and obvious cases.*

...

That is the basis of rule and practice on which one has to approach the question whether the plaintiff's statement of claim in the present case discloses any reasonable cause of action. It is not permissible to anticipate the defence or defence's possibly some very strong ones — which the defendants may plead and be able to prove at the trial, nor anything which the plaintiff may plead in reply and seek to reply on at the trial."

Thesiger, L.J. in the Court of Appeal case of Davy v. Garrett (1877–78) L.R. 7 Ch. D. 473; 489, agreed that the Statement of Claim in that case ought to have been struck out, inter alia, for inadequately ***pleading*** *an allegation of fraud. The learned judge tells why, beginning at page 489, where he said:*

"There is another still stronger objection to this statement of claim. The plaintiffs say that fraud is intended to be alleged, yet it contains no charge of fraud. In the Common Law Courts no rule was more clearly settled than that fraud must be distinctly alleged and as distinctly proved, and that it was not allowable to leave fraud to be inferred from the facts. It is said that a different rule prevailed in the Court of Chancery. I think that this cannot be correct. It may not be necessary in all cases to use the word "fraud" — indeed in one of the most ordinary cases it is not

necessary. An allegation that the defendant made to the plaintiff representations on which he intended the plaintiff to act, which representations were untrue, and known to the defendant to be untrue, is sufficient. The word "fraud" is not used, but two expressions are used pointing at the state of mind of the defendant — that he intended the representations to be acted upon, and that he knew them to be untrue. In the present case facts are alleged from which fraud might be inferred, but they are consistent with innocence. They were innocent acts in themselves, and it is not to be presumed that they were done with a fraudulent intention."

Similarly, Jessel, M.R. in the case of Re Rica Gold Washing company (1879) 11 Ch.D. 36, emphasized the fact that general and vague allegations of fraud are not permitted. At page 43, the learned judge said:

"That being the state of the law, one will first of all mention generally how this petition is wrong and then I will discuss it a little in detail. The petition contains vague allegations of fraud; but I have always understood it to be a rule in equity that where you allege fraud you must state the facts which constitute the fraud. You are not entitled on a petition any more than in an action to say to the other side, "You have defrauded me; you have obtained my money by fraud." You must state the facts which you say amount to a fraud, so that the other party may know what he has to meet. I agree that it is not necessary to state the evidence which shews the fraud, but you must state the facts which constitute the fraud."

Further, then acting Chief Justice Byron in the Court of Appeal of the Eastern Caribbean States in the case of Thomas v. Stoutt and Others (1997) 55 WIR 112, in considering identical provisions to ours pertaining to striking out a Statement of Claim for inadequately ***pleading*** *fraud, said, beginning at page 117:*

"The legal principles which govern the ***pleading****s where fraud is alleged are ancient and well settled, and would apply to both the common-law and statutory claims.*

...

The mere averment of fraud in general terms, is not sufficient for any practical purpose in the prosecution of a case. It is necessary that particulars of the fraud are distinctly and carefully pleaded. There must be allegations of definite facts, or specific conduct. A definite character must be given to the charges by stating the facts on which they rest. The requirement for giving particulars of fraud in

*the **pleadings** is mandated in the rules of the Supreme Court, Order 18, rule 12(1)(a).*

This ancient principle was referred to in Wallingford v. Mutual Society and Official Liquidator (1880) 5 App Cas 685 at page 697 by Lord Se/borne LC:

'With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however, strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material fact is condescended upon; in manner which would enable any Court to understand what it was that was alleged to be fraudulent. These allegations, think, must be entirely disregarded.'"

27. The Court notes that the Order 18 Rule12 of the Rules of the Supreme Court(RSC) is the precursor to Part 26.3 of the CPR. The Court also notes that the claimant now seeks to make a fiduciary claim against the defendant. In the **Glendon E. Rolle case,** Senior Justice Charles (as she then was), said as follows quoting from the headnote*: "HELD: finding that (1) the relationship between the Bank and the Plaintiff was not of a fiduciary nature but was contractual: one of banker and customer..."*

28. The court accepts the position offered by the defendant's Counsel that the initial allegations itself was frivolous and even more so once the production of the Affidavit in which the experts report was exhibited, that contradicted the substance of the entire claimant's case. To permit this case to proceed would be contrary to the principles articulated within the current CPR. Further this Court adopts the dicta in the **West Properties case** and those of the **Glendon Rolle case** as they both speak glaring flaws in this current case. It is clearly a known fact that Banks enter into a contractual relationship with their customers, this claim doesn't seek to explore a potential breach of contract or even a negligence allegations as was presented in the case of Macushla Pinder v. Scotiabank (Bahamas) Limited 2017/Cle/gen/01499, which was initially determined by Justice Keith Thompson, (retired) but set aside by the Court of Appeal in SCCivApp App. No.73 of 2021 noting that the Respondent did not discharge the burden of proof. Further the statement of claim failed to identify either expressed or implied terms of contract which was alleged to have been

breached. The Court accepts that the claim made by the claimant/plaintiff is frivolous and without a discernible cause of action.

SUMMARY JUDGEMENT

29. The defendant also seeks to apply for summary judgement pursuant to Part 15.6 of the CPR. The arguments is that the claimant's case has no real prospects of success and on the facts the Court has the discretion to dismiss the case without trial. The Court notes that the commentary offered by the CPR states that that the Court can exercise its authority under summary judgement in three types of cases (1) allowing summary judgement against a claimant where, on all the facts, the claim has no reasonable prospect of success, (2) allowing summary disposal of preliminary issues where the court is satisfied those issues do not need a full investigation and trial; and (3) allowing the court to fix summary judgement hearings of its own initiative. The CPR also noted a substantial overlap between Part 15 and Part 26.3. The CPR notes also indicate that an application for summary judgement may be combined with an application to strike out under Part 26.

30. The Court notes that several cases from the Eastern Caribbean Courts were relied upon to provide directions and offer guidance when considering the issue of summary judgement. They do not intend to reproduce them all but save to acknowledge that they were beneficial in arriving at the determination that the claimant's case on its facts there is no real prospects of success. The Court notes the cases of Swain v. Hillman [2001]1AER 91 & Royal Brampton Hospital NHS Trust v Hammond (No.5) [2001] EWCA Civ. 550 and Also Three Rivers District Council v. Bank of England (No.3) [2001] UKHL 16 where Lord Hope said at Paragraphs 95 and 158 *"The rule is designed to deal with cases which are not fit for trial at all; The test of no real prospect of succeeding requires the Judge to undertake an exercise of judgement. He must decide whether to exercise the power to decide the case without trial and give summary judgement. It is a discretionary power, he must then carry out the necessary exercise of assessing the prospects of success of the relevant party. The judge is making an assessment not conducting a trial or a fact finding exercise, it is the assessment of the case as a whole which must be looked at accordingly, the criterion which the judge has to apply under CPR Part 24 is not one of probability it is the*

absence of reality." The Court also noted that in order to defeat an application for summary judgement the party must show some prospect; some chance of success. And that prospect must be real.

31. And according ED & F Man Liquid Products Ltd v. Patel [2003] EWCA Civ. 472. The Eastern Caribbean court said that under its corresponding Rule that the burden of proof rest on the applicant to establish that the grounds to believe that the respondent has no real prospect of success and that there is no other reason for a trial. This Court having reviewed the pleadings and the arguments and authorities agree with Counsel for the Defendant that the claimant has no real prospects of success and accepts that this Court ought not to engage in a full trial to make that determination.

DISPOSITION

32. The Court is satisfied upon its discretion that the claimant's proposed amendments are without merit and would further delay this matter, moreover, the proposed amendments are not in keeping with drafting of pleadings as they evidence a narrative as oppose to material and relevant facts. Additionally, that the claimant cannot justify the reasons for the delay between the initial filing in 2014 and the current proposed amendments some nine(9) years at which all times the claimant was duly represented by Counsel. The Court will not accede to the Application to permit the amendments. The second issue for consideration is whether the Court ought to strike out or grant summary judgement. The Court having considered the entire facts as currently presented. In the Court's discretion find that the claim does not disclose a cause of action nor is a reasonable prospects for success and as such the Court will accede to the defendant's application striking out the entirety of the claimant's action and granting summary judgement to the defendant.

COST

33. On the question of cost the Court will note the comments of the Court of Appeal in Rubis Bahamas Limited v. Lillian Antoinette Russell SCCrApp. No. 86 of 2022 and citing the headnote which reads as follows: *"It is settled law that costs are at the discretion of the Court. It is generally accepted and the authorities confirm that this discretion, although wide, is not to be exercised arbitrarily but*

must be exercised judicially. This requires the Court to act in accordance with established principles applied to the relevant facts of the case. The general rule is that at the conclusion of a hearing, costs follow the event with the result being that a successful party is awarded his costs of the proceedings, unless, there are special circumstances which may militate against the usual order being made. The Court must consider the appeal as a whole, as well as the points submitted and decided by the Court, in establishing who is the successful party in this appeal. In this case...."

34. There are no special circumstances in this case and as such the Court and as such the claimant is to pay the defendants their cost to be taxed if not agreed. Parties aggrieved by the decision may make the appropriate application within the statutory time.

Dated the 29th December, 2023

Andrew Forbes
Justice of the Supreme Court