COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division
CLE/GEN/01304

BETWEEN:

KEVIN ALEXANDER HOLDEN
(OWNER OF FUNKY MONKEY)

CLAIMANT

AND
THE MINISTRY OF TOURISM & AVIATION
AND
THE ATTORNEY GENERAL OF THE COMMONWEALTH OF THE BAHAMAS

DEFENDANTS

Before:	The Hon. Mr. Justice Loren Klein
Appearances:	I.A. Nicolas Mitchell for the Claimant Sophia Thompson-Williams, Tommel Stuart for the Defendants Shantarra Davis-Gaszczyk (holding a watching brief for the Ministry of Tourism)
Hearing date:	22 July 2025

RULING

KLEIN, J.

Vendor granted approval by Ministry of Tourism (MOT) to construct beach bar at Tourism development site—Approval rescinded—Building larger than drawings submitted—Lack of building permit from Ministry of Works (MOW)—Whether development subsequently authorized by official in MOT—Interlocutory injunction preventing defendants interfering with construction project—Long delay—Discharge of injunction—Grounds for Discharge—Continuing effect of injunction oppressive—Delay in pursuing claim—Material change in circumstances—Originating Summons— Striking out—Failure to disclose reasonable cause of action—CPR Part 26.3—CPR Part 8—RSC Order 7, r. 13—Application for amendment—Factors to be considered—Misrepresentation—Requisite elements of claim—CPR 8.19—Discretion to convert OS to proper form (Standard Claim Form)—Exercise of Discretion

INTRODUCTION AND BACKGROUND

1. By an application filed 10 April 2025, the applicants (the Attorney General and Ministry of Tourism) sought an order striking out an Originating Summons ("OS") filed 1 November 2018 (the "strike-out application") which, in substance, only sought an interlocutory injunction against them and the discharge of the injunction granted pursuant to the OS on 2 November 2018 ("the discharge application").

2. By a cross-application filed 17 June 2024, the claimant sought leave pursuant to Part 26.9 of the *Civil Procedure Rules 2022* ("CPR") to amend the OS filed in 2018 ("the amendment application") or, in the alternative, an order pursuant to CPR 8.19 directing the amended OS to proceed as if commenced by the appropriate form (standard claim form) ("SCF"). The defendants resist this application and seek to have it dismissed.

3. After hearing submissions from counsel for the parties, I ordered that: (i) the injunction be discharged; (ii) that the OS stand struck out; and (iii) that the application by the claimant to amend and convert the proceedings be dismissed. Having regard to the comprehensive written submissions of the parties and the long history of the matter, I thought it prudent to set out my brief reasons for making the Order I did.

Background facts

4. The facts underlying these applications go back a few years. It appears that the claimant applied to the Ministry of Tourism ("MOT") at some point in 2017 for a vendor's permit to develop and operate a bar on Junkanoo Beach (near Long Wharf) under the name "Funky Monkey Ltd.". He was granted permission by the MOT by letter dated 15 January 2018 authorizing construction of the development to commence on 18 January 2018 ("the approval letter").

5. The approval was granted on the basis that the necessary permits and approvals from the Ministry of Works ("MOW") and any other governmental authorities had been approved, and the letter recited that an official of MOT "confirmed" that the required documents had been submitted. These included (among others) "…*approved drawings by Building Control with Permit #125094*". The approval letter was promptly rescinded, however, by another email from MOT dated 17 January 2018. It appears that the reason for this was that the building size had a larger footprint than indicated in the drawings for which approval was granted.

6. To complicate matters, it appears that the claimant received a further email from a Parliamentary Secretary in the MOT on 26 January 2018 authorizing him to "*reconvene your construction of which you were approved for by Tourism on Junkanoo Beach*."

7. This was the somewhat confused state as to whether he had been granted "permission" against which the claimant commenced framing up the Bar Project on Junkanoo Beach. As related below, however, this was only half of the story, as the claimant had applied for but was aware that he had not yet been granted any building permits. On the 8 February 2018, an inspector from the Department of Physical Planning of the MOW visited the site to investigate the construction and a "stop order" was issued and posted at the site pursuant to s. 48 of the *Planning and Subdivision Act* ("PSA) 2010. That section authorizes the Town Planning Committee ("TPC") to require anyone who acts in contravention of s. 36 of the PSA, which requires a permit for building works, to take action to require the person to cease such development, demolish the building or cause alterations to be made.

8. Then, on the 13 March 2018, the claimant received a requisition under s. 48 of the PSA requiring him to "*cease all work forthwith and await further instructions from the Department of Physical Planning*" on the basis that the project was "*being constructed without approval…of the Town Planning Committee*."

9. The visit by the TPC also determined that the claimant had expanded the footprint of the proposed structure by installing additional poles for a proposed kitchen and bathroom facilities subsequent to the issuance of the stop order. This was communicated to the claimant's then counsel by letter dated 3 August 2018, and it was also indicated that the TPC was awaiting the submissions of a detailed master plan (apparently from MOT/MOW) before it could make any decisions about the project.

10. By October of 2018, the MOT observed that construction on the site had ceased and the project appeared to be abandoned and was overgrown, while the structure (some of which was partially hidden by undergrowth) posed a hazard to beach goers and passers-by. As a result, the MOT on 31 October 2018 by email requested the claimant to remove the structure that had been erected.

11. In response, the claimant filed an Originating Summons on 1 November 2018 seeking: (i) an injunction restraining the defendants from interfering with (including "trespassing" upon) the construction site; and (ii) ordering the defendants to produce and deliver up to the TPC the master plan for the development of Junkanoo Beach. On 2 November 2018, pursuant to a summons and affidavit of the claimant filed 1 November 2018, Thompson J. granted an injunction that the development and construction site "*…not be disturbed or interfered with by the defendants….and that the status quo be maintained until further or final order*…".

12. Following the grant of the injunction, a mention date was set for 17 December 2018 by Thompson J., and it appears that further mention and trial dates were set. For whatever reason, these hearing dates never materialized. There were also two mention hearings before this Court in April of 2021, during which it was represented that the parties were exploring settlement options, and further case management dates were also set. The Court also drew to the attention of counsel for the claimant the deficits in the OS in terms of pleading a cause of action or question for the consideration of the Court, and queried whether the OS was the proper form of commencing proceedings, as there were disputes of fact. At the hearing on 7 April 2021, leave was granted for the claimant to amend the OS. It does not appear that any amendment was attempted until the current application that is before the Court. It also appears that the defendants filed an application to strike-out under R.S.C. Ord. 18, rule 19 in 2021, but that does not appear to have been pursued.

13. The defendants filed the affidavit of Warren Johnson on 11 April 2025 in support of its application to strike out and dismiss the claimant's application, but they also refer to and rely on a number of earlier affidavits filed in the proceedings. The claimant filed a draft SCF containing

the proposed amendments in support of its application to convert the OS, but no affidavit was filed in support.

DISCUSSION AND ANALYSIS

The Strike-out application

14. Although the OS was filed prior to the effective date of the CPR (March 2023), any trial dates that had been set were adjourned, and therefore pursuant to Rule 2 the provisions of the *CPR 2022* apply to these proceedings. The defendants referred to the powers of the Court pursuant to CPR 26.1(2) to strike out a matter under the Court's case management powers after a decision on a preliminary issue, but specifically apply pursuant to Part 26.3 of the CPR which provides for striking out a statement of case if it appears to the Court, *inter alia*, that:

> "…(b) The statement of case or the part to be struck out does not disclose any reasonable grounds for bringing or defending a claim;
> (c) The statement of case or part to be struck out is frivolous, vexatious, scandalous, an abuse of the process of the Court, 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.

15. Part 8.20 of the *CPR* provides that:

> "(1) Where the claimant uses an originating application form it must state—
> (a) That this Part applies;
> (b) The question which the claimant wants the Court to decide or the remedy which the claimant is seeking and the legal basis for the claim to the remedy;
> (c) If the claim is being made under an enactment, what the enactment is; …
>
> (2) Every originating application form must be verified by a certificate of truth in compliance with Rule 3.8 as amended to apply to such a form."

16. By way of analogy, and as the proceedings were commenced by OS under the RSC, the Court's attention was also drawn to the provisions of *Ord. 7, r. 3(1)* of the RSC, as follows:

> "Every originating summons must include a statement of the questions on which the plaintiff seeks the determination or direction of the Supreme Court or, as the case may be, a concise statement of the relief or remedy claimed in the proceedings begun by the originating summons with sufficient particulars to identify the causes of action in respect of which the plaintiff claims that relief or remedy."

17. The defendants argue that it is plain on the face of the OS that it does not disclose *any* cause of action, or set out any question on which the claimant seeks the determination of the court, or the legal basis for the claim to any remedy. In this regard, it was pointed out that the OS simply sought the following relief:

> "(i) An Order restraining the Defendants…from disturbing, delaying, demolishing, trespassing upon, or otherwise interfering with the Plaintiff's Funky Monkey Development Project and construction site located on the Western end of Junkanoo Beach….
>
> (2) An Order that the defendants do produce and deliver to the Town Planning Committee a Master Plan for Junkanoo Beach within such period as may be determined by the Court."

18. It was contended further that on its face the OS violates both CPR 26.3 and 8.20 (and by analogy Ord. 7 of the RSC). Further, it is argued that the Court should not allow the amendment because to do so would cause prejudice to the defendants (for the reasons set out in the Johnson affidavit, among others), a point that I will return to in considering the claimant's application for amendment.

19. I accept the defendants' arguments that the OS does not plead any cause of action, and no great exposition of legal principle or case law is necessary in support of this conclusion. Although it was a case decided under the RSC, the principles stated in **Drummond-Jackson v British Medical Association** [1970] 1 All ER 1094 are instructive. There, the observation was made (per Lord Pearson at 1110-f) that a reasonable cause of action is *"...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"*.

20. On the face of the pleadings, this is not a case where a cause of action is pleaded that may be weak and whose prospect of success the Court may be required to assess. There is simply no cause of action or legal question disclosed. Further, the legal basis for the order directing the delivery of the master plan to the TPC was never explained, and in any event this was a claim for mandamus more properly sought on an application for judicial review.

21. I also agree that the OS fails to comply with Part 8.20 in that it does not set out any legal basis for the claim, and neither does it include any particulars to identify the cause or causes of action on which the claimant relies, as would have been required under the provisions of the *RSC*.

The Discharge application

22. The defendants advanced several grounds for the discharge of the injunction: (i) that the grant of the injunction was not consistent with the guidelines in **American Cyanamid Co. v Ethicon Ltd.** [1975] A.C. 396, in that there was no serious question to be tried; (ii) that the balance of convenience favoured the defendants if the wider public interests had properly been taken into consideration (**Smith v Inner London Education Authority** [1978] 1 All ER 411); (iii) that there was failure to make frank and full disclosure (**Brinks-Mat v Elcombe** [1988] 3 All ER 188); (iv) that there was inordinate delay by the claimant in pursuing the action; and (v) that the continuing effect of the injunction had become oppressive.

23. In relation to the claim that the injunction was oppressive, the affidavit of W. Johnson stated as follows:

> "21. Due to the existing court injunction, the Ministry of Tourism is currently unable to proceed with its redevelopment plan for Junkanoo Beach, which is pending approval from the Ministry of Public Works. The redevelopment plan includes the construction of new vendor stalls that meet the Ministry of Public Works Building standards and zoning requirements. This initiative is considered urgent in light of escalating criminal activity in the area, particularly involving unregulated local vendors and jet ski operators. These incidents have prompted several travel advisories from the United States, highlighting safety and security concerns for visitors. The presence of unregulated vendors continues to pose risks, which the redevelopment aims to eliminate."

24. Points (i) to (iii) of the defendants' argument for discharge state principles that are relevant to the grant of an interlocutory injunction or an appeal therefrom, or which may be taken on an application to set aside an *ex parte* injunction (e.g., full and frank disclosure). However, I do not find that they are apposite the current application. No written reasons were provided for the grant of the injunction, and it appears that the hearing was at short notice. But it was an *inter partes* hearing, at which the claimant made written and oral submissions, and the defendants had an opportunity to make these points in opposition to the injunction.

25. What is more significant, however, is that it is clear that following the 2021 hearings the claimant took no steps to pursue the claim, even failing to amend the OS after the Court granted leave to do so. I would therefore hold that it would be oppressive for the injunction to remain in place. A plaintiff who obtains an injunction that limits the liberty or freedom of the defendant to take lawful actions is under a duty to proceed with diligence so as to limit as far as possible the period during which the defendant's liberty is restricted, and the court will grant an order to vary or discharge such an order where the plaintiff did not proceed with alacrity in pursuing the claim (**Richardson Computers Ltd. v Flanders** (1992) FSR 391, (1992) IP &T Digest 28).

26. There is, however, another and more practical basis for the discharge of the injunction. This is because the claimant indicated to the Court that it would consent to its discharge, as he was no longer interested in pursuing the development. This constitutes a material change in circumstances that would have justified the discharge of the injunction in any event. As said in **Travelers Insurance Company Ltd. v Baldwin** [2025] EWHC 1371 (KB):

> "8. Where a party applies to discharge or vary an interim injunction made until trial or further order, they must show a material or significant change of circumstances. Even if they do so, the court does not then proceed to hear the application anew. It only considers the effect of the change of circumstances on the grant of the injunction. That is because this is not an appeal. Those contentions are the effect of the leading Supreme Court decision on the issue, *PJS v News Group Newspapers Ltd.* [2016] UKSC 26."

27. In the circumstances, I would forthwith discharge the injunction, whether on the grounds of delay and oppression, or because of the material change in circumstances.

The Application for amendment/conversion to Standard Claim Form

28. As indicated, the claimant sought leave to amend the OS in the manner set out in the draft amended Originating Application (said to be attached to the affidavit of the claimant), or in the alternative to direct that the Originating Application (as amended) be treated as having been commenced by the appropriate prescribed form (a SCF). No supporting affidavit was filed, but in the main counsel's arguments were directed to seeking leave to amend the OS and convert it to a SCF.

29. The discretion to convert an originating application into a SCF is set out at Part 8.19 of the CPR as follows:

> "(1) The Court may at any stage, either on application or on its own initiative, order a claim commenced by originating application form to continue as if the proceedings had been commenced using a standard claim form and where the Court takes this course it will give such directions as it considers appropriate."

Draft amended SCF

30. The draft amended SCF simply recited the background facts and claimed the following for the "loss and damage" said to have been suffered by the claimant:

> "h. General damages flowing from the misrepresentation and/or unilateral withdrawal of the claimant's approval, despite the criteria as stipulated by the issuing body having been met.
> i. Special damages in the amount of $80,000.00 to cover other costs incidental therefore as more particularly set out in the annexed affidavit."

31. The factors the Court must have regard to when considering an application to amend a statement of case pursuant to Part 20, are set out at 20.1(3) as follows:

> "(a) how promptly the applicant has applied to the Court after becoming aware that the change was one which he wished to make.
> (b) the prejudice to the applicant if the application was refused;
> (c) the prejudice to the other parties if the application were refused;
> (d) whether any prejudice to any other party can be compensated by the payment of costs and/or interest;
> (e) whether the trial date or any likely trial date can still be met if the application is granted;
> (f) the administration of justice."

32. As to promptness, counsel for the claimant acknowledged that he "*falls on his sword*" in this regard, as while he was personally unaware until recently (he only took carriage of the matter

this year), it is the case that leave had been granted from April 2021 to make the amendment. Thus, the current application to amend is being made more than four years after leave was granted for that purpose. On this factor alone, I would have been prepared to dismiss the application to amend. Not only has there been inordinate delay, but the delay has occurred in the context of an interlocutory injunction being in place which prevented the defendants from taking steps to address a development concern of considerable importance to them.

33. As to prejudice, counsel argued that the claimant would be prejudiced as the draft amended SCF discloses a "reasonable cause of action" and to refuse the amendment would basically prevent the claimant having his claim determined. I pressed counsel as to what would constitute the cause of action, as the only ground seemingly relied on in the proposed amended form was a claim for "*misrepresentation*" and "*unilateral withdrawal*". In my view, the claim as to misrepresentation is completely misconceived. It is trite that misrepresentation claims require some particularity in pleading the elements of the claim (see **BrewDog Plc and another v Frank Public Relations Ltd.** [2020] EWHC 1276 (QB)). For example, the proposed amendment does not plead, among other things, (i) whether the representation was innocent, negligent, or fraudulent; (ii) whether the claimant was induced to act on the representation, or whether there was the intention that the claimant should act on the representation; and (iii) the relationship between the parties which gave rise to a duty of care (if the claim is in negligence) not to cause economic loss, as that now appears to be the only claim.

34. Except for a bare reference to "misrepresentation", none of these elements are pleaded. In any event, they could hardly arise on the facts of this case. As indicated, the claimant was given initial permission to commence the development, on the ostensible basis that he had obtained the requisite approvals from other Government agencies. This was rescinded almost immediately when it became clear that his development exceeded the size which was agreed, and furthermore that he did not have the statutory approvals required.

35. The net effect of this is that there was no representation on which he could have placed any reliance to commence construction. In this regard, it is clear that only the decision-makers under the relevant legislation are empowered to grant the planning or building approvals required, based on statutory conditions. These legal requirements cannot be overridden by permission from any other person or body. In fact, it is the claimant who seems to have falsely represented to the MOT that he had the necessary permits, when he had only made application. Having made the application for the permits required by law, it could not seriously be argued by the claimant that he relied on any purported permission given by an official of MOT in the absence of the statutorily required permits.

36. Mr. Mitchell took the point that, as the claimant was not objecting to the discharge of the injunction, there could be no prejudice to the defendants caused by the injunction. I do not agree. The defendants specifically set out in their affidavit the prejudice and inconvenience that had been caused by the inability to develop the site, and the knock-on effects of the injunction. In fact, I noted that the Order prevented the defendants from "*trespassing*" on the site, which is curious,

since it was represented to the Court that the property appears to be foreshore and therefore Crown land. In addition, there was harm done to the public interest by the inability of the planning authorities to enforce planning law because of the injunction. Generally, prejudice caused to the public interest is not of the kind that can be compensated in damages. Further, in oral submissions the defendants took the point that to now permit the amendments would be to introduce a potentially new cause of action outside of the applicable statutory limitation period (whether the one-year limitation period for public authorities or the 6-year period for a claim in negligence).

37. Finally, counsel makes much of the interest of justice point, and submitted that it was in the interest of justice to allow the amendment so that the "real issue" between the parties is heard and determined on the merits, and not punish the claimant for any "procedural" errors. In this regard, reference was made to the principle laid down in **Cropper v Smith** (1883) 26 Ch. D. 700, at 710-711 (approved in **Oxley and another v. Predgent and another** [2014] 3 BHS J No. 73 by Bowe J), as follows:

> "As is so often the case where a party applies to amend pleadings or to call evidence for which permission is needed the justice of the case can be said to involve two very compelling factors. The first factor is that it is desirable that every point which a party reasonably wants to put forward in the proceeding is aired; a party prevented from advancing evidence and/or argument on a point (other than a hopeless one) will understandably feel that an injustice has been perpetrated on him, at least if he loses and has reason to believe that he may have won had he been allowed to plead, call evidence on and/or argue the point. Particularly where the other party can be compensated in costs for any damage suffered as a result of a late application being granted, there is obviously a powerful case to be made out that justice indicates that the amendment should be permitted."

38. In my view the balance of justice does not favour the claimant. As indicated by the principles set out in the cases cited, where the Court holds that there is a deficit in pleadings, the usual course is for the court to refrain from striking out and allow the party an opportunity to put the deficit right. But as noted, even the attempt at amendment fails to show that the claimant can make good the deficits in their case. In my judgment, the right course is to strike out the application, as even the proposed amendments fail to disclose a reasonable or any cause of action.

39. In light if the decision I have come to with respect to the proposed amendment, there is no prospect of converting the action to a SCF. That rule is clearly concerned with preventing injustice to a claimant simply because of procedural or technical errors that can be compensated with costs. It has been said in one case that "…*the overriding objective is not furthered by arid squabbles about technicalities*…" (see **Hannigan v Hannigan and others** [2000] All ER (D) 693 (UK Court of Appeal). In that case, the Court of Appeal held that the use of the wrong form, coupled with other procedural errors, did not justify striking out the claimant's (appellant's) claim, as the defendants and their solicitors knew exactly what was being claimed even when the wrong from was served on them. As indicated above, that cannot be said of the case here, and even now the cause of action is obscure.

CONCLUSION AND DISPOSITION

40. Therefore, for the reasons given above, I strike out the OS, discharge the injunction, and dismiss the claimant's application to amend and convert the originating application to a SCF.

41. I make no order for costs, having regard to all the circumstances of this case and the passage of time.

Klein J,

25 July 2025