IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2023/CLE/gen/00137

B E T W E E N

DR. CHRISTINA E. DARVILLE

Claimant

AND

LOIS EAST

Defendant

Before:	**The Honorable Madam Justice Carla Card-Stubbs**
Appearances:	Mr. Serfent Rolle Counsel for the Claimant
	Mr. Neville Wilchcombe Counsel for the Defendant
Hearing date:	April 17, 2024

Civil Procedure and Practice- Defendant's Application to strike out Claimant's statement of case - Court's jurisdiction to strike out - Rule 26.3(1) CPR

The Claimant claims to have a right of way and access to the sea and to a piece of disputed property and that such access was being impeded by the actions of the Defendant. The Defendant, inter alia, denies that the Claimant enjoys such a right of way or that she is entitled to access the property in dispute. The Defendant made an application pursuant to Rule 26.3(1)(b) and (c) of the Supreme Court Civil Procedure Rules, 2022, as amended ('CPR') to strike out the Statement of Claim. The Application was supported by affidavits which sought to rebut allegations made in the Statement of Claim.

HELD: The Defendant's application is dismissed on both grounds.

The court held that on a summary strike out application under Rule 26.3(1)(b), the court must determine by a review of the pleading whether it discloses, on the face of it, a legally recognisable claim against the defendant, whether the pleaded facts support the allegation and whether the claim is misconceived or bound to fail. On a summary strike out application as to whether the statement of case discloses a reasonable ground for bringing an action, the court makes that determination considering the pleadings ex facie and on the basis that the allegations are true. The court is not to engage in an assessment of contradicting facts. The court found, in the absence of an investigation into the facts, that the statement of claim discloses a reasonable ground for bringing a claim. The court also found that there was no basis for a strike out order under Rule 26.3(1)(b).

RULING

CARD-STUBBS, J

Introduction

[1.] Before this court is the Defendant's application to strike out the Statement of Claim on the grounds that it discloses no reasonable ground for bringing the action and/or that the action is scandalous, frivolous or vexatious and is otherwise an abuse of the process of the court.

[2.] For the reasons that follow, that application is dismissed.

Background

[3.] On the 16th day of February 2023 the Claimant brought an action against the Defendants by filing a specially-endorsed Writ of Summons. The Claimant alleges that the Defendant, by her actions, has prevented the Claimant's access to certain property ('the disputed property') and access to the sea.

[4.] The Defendant filed a Memorandum of Appearance and a Notice of Appearance on the 22nd day of March 2023.

[5.] A Defence was filed on 30th day of March 2023 and an Amended Defence was filed on 1st day of June 2023. The Amended Defence was filed subsequent to the Claimant's Reply.

[6.] The Claimants filed a Reply on 21st day of April 2023.

[7.] A Case Management Conference held on 2nd day of October 2023.

[8.] On the 18th day of January 2024, the Defendant filed a notice of application to strike out the Statement of Claim.

The Application

[9.] The Defendant's application filed on the 18th day of January 2024 is made pursuant to Part 11 and Part 26 of the Supreme Court Civil Procedure Rules, 2022, as amended ('CPR').

[10.] The grounds of the application are stated as "the Statement of Claim filed herein on the 16 day of February. A.D. 2023 discloses no reasonable ground for bringing the action and/or the action is scandalous, frivolous or vexatious and is otherwise an abuse of the process of the court pursuant to Rule 26.3 (1)(b) and (c)518 [sic] of the Supreme Court Civil Procedure Rules 2022."

[11.] In support of the Application, the Defendant relied on an affidavit sworn by Surveyor Vanbert H. Pratt filed on January 19, 2024 and an affidavit of Wayde Christie filed on April 15, 2024. The affidavit of Vanbert H. Pratt exhibits the following:

(i) Deed of Partition dated 24th December 1936 made between Aline May Saunders and Emilie Savage Van Zeylen recorded in the Registry of Records in the City of Nassau in Book S. 13 at pages 123 to 126 (Exhibit 'VP3')

(ii) Conveyance dated 1st July 2002 made between Gracia Charron Smalley of the one part and The Defendant/ Respondent of the other part and recorded in the said registry of Records in Volume 9455 at pages 307 to 311(Exhibit 'VP4'); and

(iii) an approved Subdivision Plan issued by the Department of Physical Planning dated 12 September 2017 (Exhibit 'VP3').

Issue

[12.] The issue to be determined in this instance is whether the Statement of Claim should be struck out.

Jurisdiction to strike out

[13.] The Court may strike out a statement of case under **Rule 26.3 CPR . Rule 26.3(1)** provides:

> (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.

Notably Rule 26.3 CPR is "in addition to any other power under these Rules".

Statement of Case – The Statement of Claim

[14.] The relevant statement of case in this matter is the Statement of Claim. The allegations set out in the Statement of Claim are:

1. By virtue of a Conveyance dated the 28th day of February A.D., 2019 the Plaintiff became the Beneficial Owner of a portion of Lot Number Nine (9) of the Cable Beach Subdivision situate on the Northern side of West Bay Street in the Western District of the said Island of New Providence *("Plaintiff's Property")*.
2. By virtue of a Deed of Grant of Right of Way dated 30th January, 2002, the Beneficial Owner of the Plaintiff's Property was granted *"...access to and from the sea..."*
3. The ocean sits adjacent to the Defendant's northernmost boundary, which ends prior to the high-tide mark.
4. That a concrete slab, gazebo and stairs have been constructed below the high-tide mark on Crown Land (hereinafter *"the disputed property")*.
5. The Defendant wrongly claims the disputed property to be exclusively her own and has caused to be constructed a wire fence that has and continues to prevent the Plaintiff from accessing the disputed property.
6. The Plaintiff wrote to the Defendant, including a copy of the Defendant's Conveyance which clearly indicates the disputed property is not beneficially owned by the Defendant.
7. The Defendant refuses access to the Plaintiff and verbally harasses the Plaintiff should she attempt to access the disputed property or the sea.
8. As a result the Plaintiff has been unable to enjoy access to and usage of the disputed property and access to and usage of the sea.

[15.] By the claim, the Claimant seeks

(1) A Court Order that the Disputed Property is not beneficially owned by the Defendant;
(2) A Court Order that the Defendant is to cause the removal of the fence preventing access to the Plaintiff;
(3) A Court Order that the Defendant is not to harass or otherwise interfere with the Plaintiff's enjoyment of the disputed property or the sea;
(4) Costs;
(5) Such further or other relief as to the Court may seem [sic] just.

[16.] A Defence was filed on 30th day of March 2023 and an Amended Defence was filed on 1st day of June 2023. It is not necessary for the purpose of this application to reproduce the contents here.

[17.] By the Statement of Claim the allegations are that the Claimant enjoys a right of way by Deed of Grant of Right of Way dated 30th January, 2002 by which she was granted "...access to and from the sea...". The allegations are that "a concrete slab, gazebo and stairs" was constructed on Crown Land and that the Defendant "constructed a wire fence that has and continues to prevent the Plaintiff from accessing the disputed property and the sea."

[18.] The Defendant disputes that the Claimant enjoys the right of way in the nature alleged or that the construction was on Crown land.

[19.] What this court must decide is whether the Statement of Claim filed herein on the 16th day of February. A.D. 2023 discloses no reasonable ground for bringing the action and/or whether the action is scandalous, frivolous or vexatious and is otherwise an abuse of the process of the court.

Submissions of the Parties

Defendant's Submissions

[20.] The Defendant argues that the Statement of Claim does not disclose a reasonable ground for bringing the claim because the property referred to in the Statement of Claim (Lot 9) had been divided into two lots by virtue of a deed of partition dated December 24,1936, exhibited in the affidavit of Vanbert H. Pratt. The Defendant submits that each lot has had different and separate ownership ever since. The Defendant posits that the land that the Claimant alleges that she owns is a part of the western half and that the Defendant owns the Eastern half of the said Lot 9.

[21.] The Defendant's case is that the referenced right of way was granted by someone who did not own the Eastern half "or any part of it and could not, therefore grant any right of way over the Eastern half or any part of it" to the Claimant.

[22.] The Defendant further argues that the Claimant has not claimed any personal right to the disputed property because the pleading is that the disputed property is Crown land. The Defendant submits that the Claimant does not have a right to bring the action and, instead, it would be the Crown that is entitled to bring an action with respect to the disputed property. The Defendant also submits that the government has reviewed and approved plans concerning the disputed property as a part of Lot 9, Eastern Half of Lot 9 and has raised no objection.

[23.] The Defendant submits that the Defendant "has acquired and maintains possessory titles of the said property by virtue of past time". The Defendant submits that the disputed property has been annexed to the Defendant's property since at least 1936, the date of the aforementioned deed of partition, which is more than sixty-year limitation period set forth in section 16 of the Limitation Act and that section 16 would prohibit the Crown from reclaiming any foreshore. The Defendant relies on the affidavit of Wade Christie filed on 15 April 2024 by which the affiant avers that it is within his personal knowledge that the said concrete slab or deck had been annexed to the Defendant's property since prior to 1974.

[24.] The Defendant submits that the Claimant has no right to access any part of Eastern Half, and that "the Defendant is of the view that [the action] is purely a personal attack meant to aggravate and harass her." The Defendant submits that the action is frivolous, vexatious, and scandalous, and an abuse of process of the court, and should be struck out.

[25.] The Defendant concludes:

> In the circumstances, based upon Mr. Pratt's evidenced [sic] and Mr. Christie's evidence, even if the court finds that the Defendant does not have documentary title to the said disputed property she has acquired and maintains possessory title to the said property by virtue of the passage of time and the aforementioned Sections 16(2) and (3) of the Limitation Act. Therefore the Defendant/Respondent submits that the Plaintiff/Claimant has no right to access to any part of the Eastern half and thus this action is frivolous, vexatious and scandalous, and an abuse of the process of the Court and should thus be struck out.

[26.] The Defendant relies on the construction of certain documents placed before the Court by way of exhibit to the affidavits in support.

Claimant's Submissions

[27.] The Claimant submits that the overriding objective of these rules is to enable the court to deal with cases justly and a proportionate cost.

[28.] The Claimant submits that the Defendant has introduced the idea of possessory title, or possessory interest but that there has been no determination, and no certificate issued, in relation to the disputed property. The Claimant submits that the only evidence before the court are the conveyances that both parties have presented to the court. The Claimant argues that the issue of any possessory interest can only be determined by a "full and frank hearing by the court" and would require both parties to adduce evidence for the court to make a determination. "The documentary evidence that has been presented and any that will be adduced is to be investigated at a trial and that can only take place through a full and frank hearing, a full and frank hearing of the evidence and the issues."

[29.] The Claimant argues that the affidavit by Wade Christie and of Vanbert Pratt introduced claims of limitation and that such claims of limitation are still subject to

investigation, notwithstanding the terms of 60, thirty years, or whatever the Limitation Act may afford.

[30.] The Claimant submits that the plans exhibited by Vanbert Pratt were provided and drawn by him and are plans that have given rise to the issues in the suit. The plans are "a self-serving and self-affirming effort".

[31.] The Claimant submits that the documents as provided are in dispute. The Claimant's case is that the interpretation of the documents is in dispute.

[32.] The Claimant's allegation is that the construction is on Crown land. The Claimant submits that the allegation is not that she has any interest in the disputed land nor is her claim for access premised on ownership of the disputed property. The Claim is that "she does not enjoy access to a usage of the sea, but she has a right of way granted to her … giving her access to the sea." The Claimant argues that the Statement of Claim alleges that the construction is "below the high-tide mark" and the Claimant will rely on statutory provisions that govern "access at points, of and beyond the high tide mark." The Claimant in her affidavit in response produces images and maps in support of that assertion.

[33.] The Claimant concludes:

> The Claimant submits that all claims or interests articulated in land should be thoroughly investigated as per the required standard to secure the just, most expeditious and least expensive determination of every cause or matter on its merits. The Claimant has brought this claim and is therefore entitled to have a full ventilation and presentation of her claim and for the evidence to be so adduced to a standard required by law. For these reasons the Claimant submits that the Defendant's Strike Out application should be dismissed.

The Court's Analysis and Determination

[34.] The application is brought pursuant to Rule 26.3(1) and the guidance notes to Part 26.3(1) as appear in the Supreme Court Civil Procedure Rules, 2022, Practice Guide January 2024 are helpful in this regard. Reference is made to several cases which confirm the practice and procedure in this area. Some of those cases, as shown, are:

> ***John W. Russell (in his capacity as Administrator of the Estate of William Russell) v Bahamas Agricultural and Industrial Corporation 2019/CLE/gen/00093*** (The defendant applied to strike out the claimant's statement of claim in which it was alleged that the defendant knowingly practised deceit on a third party by granting a lease over the claimant's land to an entity who then sub-leased it. The claimant claimed to have owned the land as the heir-at-law of the true owner of the land since 1827 under a Crown grant. The defendant argued that fraud was not specifically pleaded and the claim was brought outside of the limitation period pursuant to section 16(3) and 41(1)(a) of the Limitation Act. The Court held that striking out is reserved for plain and obvious cases. The Court held that, in applying Order 18, rule 19(a) RSC or CPR 26.3(1)(b), the statement of

claim should be read on its face without a consideration of the evidence and assuming all the allegations it contains are true. The Court was satisfied that, approached on this basis, the statement of claim disclosed a reasonable cause of action. The Court held that a pleading is scandalous if it imputes dishonesty, bad faith or other misconduct against the defendant or a third party and the allegations are immaterial or irrelevant. The Court noted that the issue of whether a pleading is frivolous or vexatious depends on all the circumstances and considerations of public policy and the interests of justice may be "very material". The Court was not persuaded that the claim was frivolous or vexatious. Nor was the Court persuaded that the statement of claim or claim were an abuse of process. The Court noted under its inherent jurisdiction it could consider evidence but even taking into account the evidence there was no evidence to show how the Crown was able to lease the land to the defendant.)

Glenard Evans v Airport Authority 2022/CLE/gen/01521 **(23 November 2023)**
(The claimant was allegedly terminated from his employment with an airline until he received his badges/credentials from the defendant. He allegedly applied for a job with another airline and was informed by employees/servants/agents of the defendant before applying that he would be re-issued his badges/credentials. However, the claimant complained that the defendant delayed in responding to his application and only granted him limited access, without reasons and without an opportunity to be heard, which caused the airline to which he applied for a job to rescind its offer of employment. The claimant averred that the actions of the defendant were "malicious and/or reckless and/or negligent" and sought damages, interest and costs. The defendant sought to strike out the claimant's originating summons and statement of claim on the basis that the action was an abuse of process because the claimant chose to proceed by ordinary action instead of judicial review and had brought another identical action against the defendant and on the basis that the claimant had no reasonable grounds for bringing the claim.

The Court held that, as a general rule, it would be an abuse of process, which may be addressed under the inherent jurisdiction, for a claimant to avoid the judicial review procedure and the built-in safeguards therein and go by way of an ordinary procedure to vindicate a public law right or to challenge a public law act or decision (the "exclusivity principle"). CPR 26.3 does not displace the Court's inherent jurisdiction to strike out pleadings which are an abuse of the process of the court. CPR 26.3 (1) is not merely a rule on technicality but it goes to furthering the overriding objective in an appropriate case. If, on review of a statement of case, it is clear that it is groundless, then it would be a waste of time and resources to allow the matter to proceed to trial and for the parties to incur further costs. Dealing with a matter expeditiously and fairly includes acceding to a party's application to pre-empt trial where a statement of case is defective or does not disclose a reasonable ground for bringing or defending a claim. Striking out is often described as a draconian step and, therefore, striking out should be allowed only in plain and obvious cases. If the application to strike out is complex and requires extended argument and fact-finding, then the case is not appropriate for striking out and such matters are to be resolved at trial. CPR 26.3(1)(b) requires that the statement of case must disclose on its face, a ground or cause of action known in law, for otherwise it is defective and doomed to fail. "No reasonable grounds for bringing the claim" allows for a court to, on considering the statement of case, find that even

if the allegations are proven, a party cannot succeed at trial. A court is also empowered to strike out the statement of case under the rule where the pleaded cause of action is not supported in the allegations or is not otherwise viable or justiciable.

On the facts, the Court held that the case fell "squarely within" the exclusivity principle as the case was, at its core, a case for the review of the defendant's decision and the defendant's decision-making process. The public law decision was not collateral but the main issue in the proceedings. The Court further held that the case was fit for striking out as disclosing no reasonable cause of action as the claimant was attacking a decision which had not been overturned, the claimant had failed to show how he was entitled to the badges/credentials that he sought such that the failure by the defendant to issue the badges/credentials would amount to a breach of duty and there was no application to amend.)

Citco Global Custody NV v Y2K Finance Inc HCVAP 2008/022 On hearing an application to strike out for disclosing no reasonable grounds for bringing or defending the claim, the judge should assume that the facts alleged in the statement of case are true. Despite this general approach, however, care should be taken to distinguish between primary facts and conclusions or inferences from those facts. Such conclusions or inferences may require to be subjected to closer scrutiny. Striking out is inappropriate where the argument involves a substantial point of law which does not admit of a plain and obvious answer; or the law is in a state of development; or where the strength of the case may not be clear because it has not been fully investigated. It is also well settled that the jurisdiction to strike out is to be used sparingly since the exercise of the jurisdiction deprives a party of its right to a fair trial, and its ability to strengthen its case through the process of disclosure and other court procedures such as requests for information; and the examination and cross–examination of witnesses often change the complexion of a case. Also, before using CPR 26.3(1) to dispose of 'side issues', care should be taken to ensure that a party is not deprived of the right to trial on issues essential to its case. In deciding whether to strike out, a judge should consider the effect of the order on any parallel proceedings and the power of the court in every application must be exercised in accordance with the overriding objective of dealing with cases justly.

Ian Peters v Roger George Spencer **HCVAP 2009/016** Striking out for disclosing no reasonable cause of action is appropriate in the following instances: where the claim sets out no facts indicating what the claim is about or if it is incoherent and makes no sense, or if the facts it states, even if true do not disclose a legally recognisable claim against the defendant. A statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence.

***Partco Group Ltd v Wragg* [2002] EWCA Civ 594, [2002] 2 BCLC 323, [2002] 2 Lloyd's Rep 343, [2004] BCC 782, (2002) Times, 10 May, [2002] All ER (D)** 08 (May) Test for striking out under Part 26.3(1)(b) - paragraph 45 per Potter, LJ - Case (i) refers to a case which is unwinnable on the merits, whereas case (ii) refers to the failure of a claim which is misconceived or, upon the facts or matters pleaded is bound to fail as a matter of law

Rule 26.3(1) (b) CPR

[35.] **Rule 26.3(1)(b**) CPR provides for striking out on the ground that the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim. On my review of the cases in the Supreme Court Civil Procedure Rules, 2022, Practice Guide January 2024, it seems to me that the following extracted principles are relevant principles that ought to govern a court in exercising its discretion under Rule 26.3(1)(b):

A. Rule 26.3(1)(b) requires that the statement of case must disclose *on its face,* a ground or cause of action known in law, for otherwise it is defective and doomed to fail.

B. Examples of when striking out a statement of claim is appropriate under Rule 26.3(1)(b) include instances such as:

(i) The pleaded cause of action is not supported in the allegations or is not otherwise viable or justiciable. In such a case, the pleaded case (claim) is misconceived or, upon the facts or matters pleaded, is bound to fail as a matter of law. For example, where a claim sets out no facts indicating what the claim is about or if it is incoherent and makes no sense, or if the facts it states, even if true, do not disclose a legally recognisable claim against the Defendant.

(ii) The pleaded case is unwinnable on the merits. "No reasonable grounds for bringing the claim" allows for a court to, on considering the statement of case, find that even if the allegations are proven, a party cannot succeed at trial.

C. Under CPR 26.3(1)(b) the statement of case must disclose *on its face*, a ground or cause of action known in law. The statement of claim should be read on its face, assuming all the allegations it contains are true, and without resort to a review of contradicting evidence.

D. If the application to strike out is complex and requires extended argument and fact-finding, then the case is not appropriate for striking out and such matters are to be resolved at trial. A statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence.

[36.] This court must determine by a review of the pleading whether it discloses a legally recognisable claim against the defendant, whether the pleaded facts support the allegation and whether the claim is misconceived or bound to fail. On a summary strike out application as to whether the statement of case discloses a reasonable ground for bringing an action, the court makes that determination considering the pleadings *ex facie* and, on the basis that the allegations can be proven. In other words, a court is to consider that the facts as alleged in the statement of case are true.

[37.] In **Citco Global Custody NV v Y2K Finance Inc HCVAP 2008/022,** the Court of Appeal of the Virgin Islands allowed an appeal where the lower court considered "whether the Claimant had a real prospect of success" in determining a strike out application. In distinguishing the nature of the two jurisdictions and the exercise of the discretions, the appellate court emphasized that the statement of case is to be considered on its face and that the judge should assume that the facts alleged in the statement of case are true. Rule 26.3(1)(b) of that jurisdiction is in the same terms as exists in the local CPR.

[38.] Justice of Appeal Edwards delivered the judgment of the court and opined at paragraphs 11 to 18:

> The Principles Governing CPR 26.3 (1)(b) Applications to Strike Out a Claim
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> [11] By CPR 26.3(1):
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> > "… the court may strike out a statement of case or part of a statement of case if it appears to the court that –
> > (a) …
> > (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 an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings."
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> [12] Striking out under the English CPR, r 3.4(2)(a) which is the equivalent of our CPR 26.3(1)(b), is appropriate in the following instances: where the claim sets out no facts indicating what the claim is about or if it is incoherent and makes no sense, or if the facts it states, even if true, do not disclose a legally recognisable claim against the defendant.
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> [13] On hearing an application made pursuant to CPR 26.3(1)(b) the trial judge should assume that the facts alleged in the statement of case are true. "Despite this general approach, however, care should be taken to distinguish between primary facts and conclusions or inferences from those facts. Such conclusions or inferences may require to be subjected to closer scrutiny."
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> [14] Among the governing principles stated in **Blackstone's Civil Practice 2009** the following circumstances are identified as providing reasons for not striking out a statement of case: where the argument involves a substantial point of law which does not admit of a plain and obvious answer; or the law is in a state of development, or where the strength of the case may not be clear because it has not been fully investigated. It is also well settled that the jurisdiction to strike out is to be used sparingly since the exercise of the jurisdiction deprives a party of its right to a fair trial, and its ability to strengthen its case through the process of disclosure and other court procedures such as requests for information; and the examination and cross–examination of witnesses often change the complexion of a case. Also, before using CPR 26.3(1) to dispose of

'side issues', care should be taken to ensure that a party is not deprived of the right to trial on issues essential to its case. Finally, in deciding whether to strike out, the judge should consider the effect of the order on any parallel proceedings and the power of the court in every application must be exercised in accordance with the overriding objective of dealing with cases justly.

[15] The learned judge at paragraphs 16 to 23 of her judgment considered the court's power to strike out and the principles that she was applying to the application to strike out. She identified the power under CPR 26.3(1)(b) and (c), and though it was unnecessary, she also mentioned the power under CPR 15 to enter summary judgment against a claimant who has no real prospect of succeeding on the claim. The learned judge referred to the substantial overlap between the two powers and recited the learning expressed in the **Supreme Court Civil Practice White Book** that an application can be made under both rules. At paragraph 18 the learned judge stated:

> "If a party believes he can show without a trial that an opponent's case has no real prospect of success on the facts, or that his case is bound to succeed or the opponent's fail because of a point of law, he can apply either under CPR 26 or CPR 15 or both as he thinks appropriate. When
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> deciding whether or not to strike out, the court takes into account all relevant circumstances and "makes a broad judgment after considering the available possibilities."

See **Caribbean Civil Court Practice**, 2008, page 230, Note 23.22.

[16] Thereafter the learned judge recited the observations of the Court of Appeal in **Bank of Bermuda Ltd v Pentium (BVI) Ltd and Landcleve Ltd** concerning a summary judgment application.

[17] CPR 15.2 governs summary judgments and provides that "The court may give summary judgment on the claim on a particular issue if it considers that the - (a) claimant has no real prospect of succeeding on the claim or the issue." CPR 15.5(2) allows a respondent to prove that the claim has a real prospect of success at the hearing by filing and relying on affidavit evidence.

[18] The powers of the court under CPR 15.2 are seemingly wider than those contained in CPR 26.3(1). In **Swain v Hilman and another** Lord Woolf MR contrasted the court's power under rule 3.4 (the English CPR equivalent of our CPR 26.3 (1)(b)) and rule 24.2 the English summary judgment rule which is similar to our CPR 15.2. Lord Woolf said at page 92:

> "Rule 3.4 makes provision for the Court to strike out a statement of case or part of a statement of case, if it appears that it discloses no reasonable grounds for bringing or defending a claim. Clearly there is a relationship between r. 3.4 and r. 24.2. However the power of the court under Pt 24, the grounds are set out in r. 24.2, are wider than those contained in r. 3.4. The reason for the contrast in language between r. 3.4 and r.24.2 is because under r. 3.4, unlike 24.2, the Court generally is only concerned with the statement of case which it is alleged discloses no reasonable grounds for bringing or defending the claim. Under r. 24.2 the Court now has a very salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour."

[39.] The learned Justice of Appeal Edwards concluded on that issue at paragraph 19:

> [19] Looking at the application that was before the learned judge, this was not an application for summary judgment. It was obviously an application under CPR 26.3(1)(b) though it did not expressly say so. Consequently, ***the learned judge would be obliged to assume that the facts alleged in the amended statement of claim were true***, and she would not be entitled to make use of the powers contained in CPR 15.2 in the absence of any application for summary judgment before her. The summary judgment test - whether the claimants had any real prospect of succeeding on the claim - was not an option in considering the respondent's application to strike out the amended statement of claim.
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> [Emphasis supplied]

[40.] This approach was also confirmed in ***John W. Russell (in his capacity as Administrator of the Estate of William Russell) v Bahamas Agricultural and Industrial Corporation 2019/CLE/gen/00093,*** where the learned trial judge opined at paragraph 22:

> 22. In applying Order 18 r 19 (a) of the RSC (Rule 26.3 (1) (b) of the CPR) the Statement of Claim should be read on its face without consideration of evidence and the statements should therefore be taken as prima facie true. If all of the allegations in the Statement of Claim were taken to be true on principle, the Statement of Claim should not be struck. The case has not yet reached the stage where the necessary evidence can be taken so that a determination can be made on the evidence. 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. As established by **Hamby v Hermitage Estates Ltd.** (supra), **Electra Private Equity Partners** (supra) and other cases mentioned above this is not a plain and obvious case where there is no need for a trial. Therefore, having considered the Statement of Claim I find that the Statement of Claim does disclose a reasonable cause of action and/or raises some question fit to be decided by this Court.

[41.] In this case, the filed Statement of Claim alleges that the Claimant enjoys a right of way which is being obstructed by the Defendant. The Claimant alleges ownership of property adjoining that of the Defendant's and alleges a right of way to access the sea. The Claimant alleges actions of the Defendant which, it is claimed, impedes that right of access. Whether the right of way gives the access claimed and whether the Defendant is impeding same, or has any justification for doing so, is a matter for investigation and trial.

[42.] In the case before me, the Defendant relies on several affidavits and evidence therein in support of the proposition that the Statement of Case "discloses no reasonable ground for bringing the action." In those affidavits are unevaluated statements and

uninvestigated documents. Not surprisingly, the Claimant filed an affidavit in support rebutting such evidence and producing documents of her own.

[43.] In this case, on the Defendant's application, the Defendant can only succeed if the evidence in the affidavits relied upon are to be believed in contrast to the allegations in the Statement of Claim or in contrast the evidence produced in the affidavit of the Claimant. This would require the Court to embark on fact-finding. In invoking its jurisdiction to strike out under Rule 26.3(1)(b) a court does not investigate whether the allegations are true. It is not appropriate to strike out a statement of case if the application to strike out calls for substantive fact-finding. Nor is it appropriate to strike out a statement of case if it raises a serious live issue of fact. In consideration of the matters averred in the affidavits relied upon by the Defendant, it appears to me that there is a serious live issue of fact.

[44.] There was no submission by the Defendant that the allegations in the Statement of Claim, for example, do not disclose a cause of action against the Defendant. Counsel for the Defendant did assert that the Claimant shows no title to the disputed property. However Counsel did not attempt to show why that would be fatal to a claim in law as pleaded. It seems to me that the claim as pleaded is two-fold: (1) a claim relying on a right of way for access to the sea which is impeded by the Defendant's construction of a fence to the disputed property and (2) a claim that the disputed property does not belong to the Defendant and ought to be accessible because of where the construction took place by reference to the high-tide water mark.

[45.] Assuming the statements pleaded to be true, in the absence of a trial or other investigation into the facts, it is my determination that the Statement of Claim discloses a reasonable ground for bringing a claim.

Rule 26.3(1) (c) CPR

[46.] **Rule 26.3(1)** (c) CPR provides for striking out on the ground that the statement of case or the part to be struck out is frivolous, vexatious, scandalous or is an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings."

[47.] In ***John W. Russell (in his capacity as Administrator of the Estate of William Russell) v Bahamas Agricultural and Industrial Corporation 2019/CLE/gen/00093,*** Hanna-Adderley, J considered the nature of the words "scandalous", "frivolous" and "vexatious". In that case, the learned trial judge opined at paragraphs 23 to 24:

> 23. 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.** Having carefully considered the Statement of Claim I have concluded that there is nothing contained in it which supports the Defendant's contention that the Statement of Claim is scandalous, frivolous or vexatious.

> 24. The Defendant contends in its Summons that this action by the Plaintiff 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).** Having determined that the Statement of Claim discloses a reasonable cause of action, that it is not scandalous, frivolous or vexatious I have concluded that the action is not an abuse of the process of the Court.

[48.] In this case, the Defendant submitted that "the defendant is of the view that [the action] is purely a personal attack meant to aggravate and harass her." No evidence in support of that submission was presented. Nor is it clear how such a motivation could displace a pleaded claim in law.

[49.] Without repeating the definitions captured in ***John W. Russell (in his capacity as Administrator of the Estate of William Russell) v Bahamas Agricultural and Industrial Corporation 2019/CLE/gen/00093,*** I find that there has been no sustainable submission for striking out the statement of case under Rule 26.3(1) (c) CPR.

CONCLUSION

[50.] For the foregoing reasons, the Defendant's Application to strike out the Statement of Claim is dismissed.

COSTS

[51.] Taking into account the provisions of Part 71, CPR and in particular the provisions of Part 71, Rule 71.6, I find no reason to depart from the general rule that the unsuccessful party should pay the costs of the successful party. Therefore, in this matter, the Defendant shall pay the Claimant's costs, to be assessed if not agreed.

[52.] I direct the parties to lodge with the court written submissions on the quantum of costs payable, in the event that the parties are unable to agree on a sum. The written submissions should not exceed 2 pages and should be lodged with the court within 21 days of the date of this ruling.

ORDER

[53.] The ORDER and directions of this Court are as follows.

(i) The Defendant's Application to strike out the Statement of Claim is dismissed.

(ii) Costs of the Application is awarded to the Claimant to be assessed, if not agreed.

Dated this 15th day of September 2025

Carla D. Card-Stubbs, J

Justice