

**COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**COMMON LAW AND EQUITY DIVISION**

**2020/CLE/GEN/01025**

**BETWEEN**

**ASHLEY REID-PASCARELLA**

**First Claimant**

**JEFFREY PASCARELLA**

**Second Claimant**

**AND**

**WEST BAY MANAGEMENT LIMITED  
(D/BA/SANDALS ROYAL BAHAMIAN SPA &  
RESORT OFFSHORE ISLAND)**

**First Defendant**

**SANDALS RESORT INTERNATIONAL LTD**

**Second Defendant**

**MORAL ADDERLEY**

**Third Defendant**

**Before:** The Honourable Justice Camille Darville Gomez

**Appearances:** Mr. Carl Bethel, KC for the Plaintiffs  
Mr. Marco Turnquest and Ms. Chizelle Cargill for the Defendants

**Hearing Date:** November 23, 2023

*Permission to file a Counterclaim pursuant to CPR 18.4 – judgment pending on strike out of the First Defendant’s Defence – action not at CMC stage – overriding objective – saving expense – ensuring that the case is dealt with expeditiously*

**RULING**

**DARVILLE GOMEZ, J**

1. The First Defendant applied by Notice of Application filed on October 5, 2023 for permission to file a counterclaim against the Claimants; it was supported by and Affidavit of Adrian Whitehead filed on October 4, 2023.
2. The First Defendant submitted in their affidavit in support for leave that the Claimants through their travel agent booked a stay with Sandals Royal Bahamian through Unique

Travel Corp (“UTC”), its booking agent. The invoice provided by UTC contained the terms and conditions of Sandals Royal Bahamian which the First Defendant assert were expressly agreed to by the Claimants and the Travel Agent and which govern the relationship between the parties. Specifically, Clause 15 B in summary stated that any claims whatsoever arising from, in connection with or incidental to any personal injury, illness or death that would include any claim whatsoever against Sandals Resorts International Limited shall be litigated solely and exclusively in the Courts of the Country in which the hotel is physically located and governed exclusively by the laws of the Country in which the hotel is physically located and further that the Courts of the Country in which the Resort is physically located shall be the exclusive venue/forum for any proceedings, claims or litigation whatsoever.

3. Further, the First Defendant has submitted that the Claimants upon checking into Sandals Royal Bahamian executed its ‘On Resort Guest Registration Terms & Conditions’ which state at Clause 7 in summary, that the laws of The Bahamas would be the exclusive choice of law and further that the courts of Bahamas shall be the exclusive venue/forum for any proceedings, claims, or litigation whatsoever.
4. It is undisputed that the Claimants checked into the Sandals Royal Bahamian on April 12, 2015 and on or about April 15, 2015 alleged that the Third Defendant assaulted the First Claimant; which is denied by Sandals Royal Bahamian.
5. The Claimants filed an Amended Complaint on June 12, 2019 in the United States District Court of the Southern District of New York and included Sandal Royal Bahamian as a defendant and claimed damages for the alleged assault. This claim was dismissed on March 4, 2020 because of the lack of personal jurisdiction.
6. I set out below a chronology of the filings by the parties.

Name of Pleading	Date pleading filed	Party filing the pleading
Generally endorsed Writ of Summons	October 14, 2020	Claimants
Memorandum and Notice of Appearance	November 11, 2020	First Defendant
Statement of Claim	December 9, 2020	Claimants
Defence	December 22, 2020	First Defendant
Amended Statement of Claim	March 16, 2021	Claimants
Amended Defence	March 30, 2021	First Defendant
Affidavit of Adrian Whitehead	October 4, 2023	First Defendant
Notice of Application for leave to file Counterclaim	October 5, 2023	First Defendant

Notice of Application to strike out the First Defendant's Defence	October 6, 2023	Claimants
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7. The Claimants oppose the said application on the following grounds:

- (i) The application is premature given that there is a pending application by the Claimants for the strike out of the First Defendant's Defence; it is presently awaiting a decision from another Judge;
- (ii) The application is bad for laches;
- (iii) The application is oppressive, frivolous, vexatious and an abuse of the process of the Court.

**HELD:** For the reasons hereinafter set out, I have granted the First Defendant permission to file a Counterclaim in the action and awarded fixed costs to the Claimants.

8. I will consider each of the issues raised by Counsel for the Claimants separately.

**Issue 1 – Application is premature**

9. The Claimants set out a portion of their legal submissions in support of the strike out application of the First Defendant's Defence. Given that this application is presently before another Judge, I do not think it appropriate to address the merits or otherwise of this submission.

10. In any event, the First Defendant can file a new action without reference to the Claimants and therefore, it is a moot point whether the Claimants are successful in their strike out application or not. Then, given the nexus between the two actions, the First Defendant may apply to consolidate the new action to the instant action in the event that the Claimants' strike out application is unsuccessful.

**Issue 2 – Laches**

11. The Claimants' Counsel referred to the following paragraphs in the Affidavit of Adrian Whitehead:

*"31. Given that the threat of a default judgment was looming, Sandals Royal Bahamian did not have sufficient time to consider advancing a counterclaim against the Claimants at the start of this Action, as its priority was filing its Defence.*

*32. Sandals Royal Bahamian has now had the opportunity to analyse the issues more carefully and has concluded that it has a strong Counterclaim against the Claimants. As*

*stated above, this Action is still in its beginning stage; therefore, allowing Sandals Royal Bahamian to file its Counterclaim will not delay the Action.”*

12. The Claimants' Counsel assert that these paragraphs are plainly an insufficient and unconvincing excuse for the delay. Further, he explained that the First Defendant took immediate steps to seek Security for Costs and spent almost a year doing so. Therefore, it was his submission that there was ample opportunity to file a Counterclaim but, the First Defendant failed to do so. Finally, he posited that in view of the reserved judgment which could potentially strike out its Defence, the First Defendant has sought to bring this application.
13. I do not agree with Counsel for the Claimants.
14. The First Defendant addressed the reason for the delay in bringing their counterclaim in their affidavit in support of this application and also, the lack of prejudice to the Claimants given that the action is at an early stage. Case management has not yet occurred.
15. Additionally, I am not aware that there is a limitation issue which would preclude the Defendants from commencing a new action against the Defendants, therefore, I reiterate the point that even if the First Defendant's Defence is struck out, this option is available to the First Defendant.

**Issue 3 – Frivolous, vexatious, abuse of the process of the Court and oppressive**

16. The Claimants' Counsel has further submitted that the application is vexatious and oppressive to the Plaintiffs because they are not of great wealth and are simply seeking “to vindicate a right, against an economic powerhouse”; that the clear intent is to effectively drive them from the seat of justice by making the security for costs applications.
17. I do not agree.
18. If leave is granted to file a Counterclaim, the First Defendant has no basis to make an application for security for costs against the Claimants. Therefore, this does not arise.
19. Further, in the authorities relied on by the First Defendant **Union Discount Co Ltd v Zoller 2001 EWCA Civ 1755** and **A/S/D/Svenborg D/S af 1912 A/S Bodies Corporate trading in partnership as ‘Maersk Sealand’ v Akar and others [2003] EWHC 797 (Comm)** the court had to consider exclusive jurisdiction clauses and in each of them the court held that the party was entitled to recover the costs of defending foreign proceedings.
20. Therefore, on the basis of these authorities, I accept that the First Defendant's proposed Counterclaim has a prospect of success.

**The Overriding Objective – 1.1 Civil Procedure Rules, 2023**

21. Finally, I wish to address the First Defendant's submissions (i) that the proposed Counterclaim relates to the same facts and issues as the instant action and therefore, it would be convenient for the court to determine them simultaneously; and (ii) that the commencement of a duplicate action by the First Defendant in circumstances where the facts overlap, the witness would be identical and the relevant documents to the claim and counterclaim are the same would save the parties time and cost.
22. While I appreciate that there is an extant application by the Claimants for a strike out of the First Defendant's Defence, this has not yet been determined. Therefore, until such time as the action has been struck out, I unequivocally accept these submissions.
23. The purpose of the overriding objective is to enable the Court to deal with cases justly and at a proportionate cost. Therefore, the grant of permission to file the proposed Counterclaim by the First Defendant achieves this objective by (i) saving expense –the parties are only exposed to an order for costs in one and not two actions; and (ii) ensuring that the case is dealt with expeditiously and fairly - the Court would only have one action and not two actions to consider. [my emphasis added]

**Conclusion**

24. Accordingly, I have for the above reasons, granted permission to the First Defendant to file a Counterclaim pursuant to CPR Part 18.4(2)(b) and have awarded fixed costs to the Claimants in the sum of \$1,500.00.

Dated the 13<sup>th</sup> day of February, 2024



**Camille Darville-Gomez**  
**Justice**