

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
COMMON LAW AND EQUITY DIVISION**

**2020/CLE/gen/01025**

**BETWEEN:**

**ASHLEY REID-PASCARELLA (1)  
JEFFREY PASCARELLA (2)**

**Plaintiffs**

**AND**

**WEST BAY MANAGEMENT LIMITED  
(D/B/A Sandals Royal Bahamian Spa & Resort Offshore Island) (1)  
SANDALS RESORT INTERNATIONAL LTD (2)  
MORAL ADDERLEY (3)**

**Defendants**

**Before The Hon Mr. Justice Neil Brathwaite**

**Appearances:** Attorney Carl Bethel KC for the Plaintiffs  
Attorneys Marco Turnquest and Chizelle Cargill for the First Defendant  
**Date of Hearing:** 16<sup>th</sup> December, 2022

**DECISION**

**FACTUAL SUMMARY**

1. The First and Second Plaintiffs are American citizens who made plans through their travel agents for a destination wedding at the Sandals Resort, Nassau, The Bahamas in or about April 2016. About seventy guests were invited to celebrate with the couple, for which arrangements were made. On the eve of their wedding, the Plaintiffs reported an indecent assault on the First Plaintiff by the Third Defendant to the Resort and to local authorities. The Third Defendant pleaded guilty in the Magistrate's Court to indecent sexual assault, and was fined and later discharged. This matter

is an action for damages resulting from that indecent assault. The Plaintiffs' claims are founded on a breach of contract and negligence between the parties. They claim that the Defendants owed a contractual and tortious duty of care, and that the First and Second Defendants are vicariously liable for the actions of the Third Defendant. The Plaintiffs intend to re-amend their Statement of Claim so that any reference to tortious liability is removed, and proceed on the basis of contractual liability alone. However, leave was not granted prior to the filing of this application, and therefore, the pleadings in the Statement of Claim as it was amended on 15 March 2021, remain.

2. In the First Defendant's defence, the limitation period for the Plaintiffs' claim is challenged subject to the Terms & Conditions contractually agreed to by the Plaintiffs. The First Defendant denies vicarious liability or any acts which the Plaintiffs' claims were in breach of the said contractual duty owed.
3. The Plaintiffs made an interlocutory application to strike out the First Defendant's defence pursuant to Order 18 Rule 19 of the Rules of the Supreme Court ("the Rules") and under the inherent jurisdiction of the Court. The Plaintiffs are seeking to strike out several paragraphs of the defence or the entire defence on the grounds that it discloses no reasonable defence or is otherwise an abuse of the process.

#### **THE PLAINTIFFS' CASE**

4. The Plaintiffs filed a summons on 17 August 2022 seeking to strike out paragraphs 1, 7, 8, 9, 10, 15, 17a, 19, 22, 26, 30 and 31 of the First Defendant's defence, or otherwise the entirety of the defence, pursuant to Order 18 Rule 19 of the Rules of the Supreme Court. It is their position that these paragraphs in particular, and indeed the entire defence, discloses no reasonable cause of action or are otherwise an abuse of the Court's process. If the entire defence is struck out, the Plaintiffs seek to have judgment entered against the Defendants.
5. In a supporting Affidavit of Rchetta Godet filed 30 August 2022, the Plaintiffs exhibit a contract between themselves and Damico Travel and Travel Impressions to host their wedding at the First Defendant's hotel. Also exhibited is the On Resort Guest Registration Terms & Conditions form that contained 'matters affecting the Plaintiffs' legal rights', which the Plaintiffs signed. In the affidavit of Joycelyn Mackey filed 20 October 2022, also in support of the summons, a statement of the Plaintiffs is contained, which states that the Plaintiffs do not recall being asked to read the Terms and Conditions provided by the First Defendant. They stated that they only agreed to the exclusive jurisdiction of the courts. However, they deny agreeing to the abridged limitation period and the exclusions of liability contained in Clauses 16 and 17 of the Terms & Conditions respectively. It is the Plaintiffs submission that the requirement to provide written notice of any claim which may arise within 6 months to Unique Travel Corp., and to commence a suit within one year from the incident date under Clause 16 is a restriction on liability. They also submit that the limitation of damages contained in Clause 17 is an exclusion of liability. It is submitted that these clauses are in clear opposition to Bahamian Statute Law, and any reliance in the defence based on these clauses ought to be struck out as a matter of law.

6. The Plaintiffs submit that section 41 of the Consumer Protection Act, 2006 prohibits a party to a consumer contract from restricting or excluding liability for a breach of contract when he himself is in breach. Further, that this section was not subject to the requirement of reasonableness provided in section 46(1) of the Act. The Plaintiffs rely on section 4 of the Unfair Terms in Consumer Contract Act, 2007 to posit that any terms in the contract that are not specifically negotiated are presumed to be unfair. It is their contention that onerous terms that were contained in the Terms & Conditions should have been specifically brought to the attention of the parties, and there was nothing which directed the Plaintiffs to read the Terms & Conditions. They note that the website of the Defendant has now changed, and requires a user to actually click through the site, which was previously not the case, and imply that the change was necessary to rectify the issue that those terms were not specifically brought to the attention of a consumer. They cite the case of *Interfoto v Stiletto [1988] 1 All ER 348* for the proposition that a term which is particularly onerous must be specifically brought to the attention of a consumer. Thus, the issue should be resolved in favour of the consumer, with the Court concluding that those terms were not specifically brought to the attention of the Plaintiffs, with the result that the forum selection clause and the limitation clauses could not be relied upon by the First Defendant.
7. The Plaintiffs also submitted that vicarious liability extends to intentional wrongs committed, and that an employer is liable for the misconduct of his employee during the course of his employment, as the employer chose said employee to discharge their duty. They rely on *Photo Productions v Securicor and Morris v C W Martin & Sons Ltd [1965] 2 All ER* to support this contention. The Plaintiffs further submit that this is an appropriate juncture in the proceedings for the legal reasoning on the pleadings to be considered.

#### **THE FIRST DEFENDANT'S CASE**

8. The First Defendant submits that the paragraphs which the Plaintiffs seek to strike out go to the heart of the action and raise complicated issues of fact and novel issues of law. They submit that the facts of this matter are largely disputed and that it would be inappropriate for the Court to proceed with the Plaintiffs' application as it will prolong the action, lead to increased costs and appeals and will not be decisive of any of the issues or simplify the trial. It was highlighted that there has been no discovery or witness statements produced. It is the First Defendant's position that in order for the court to strike out the defence at this juncture, it must be clear and obvious that there is no realistic prospect of success or possibility of establishing the defence.
9. The First Defendant submits that they were not seeking to exclude liability for death or personal injury through the Terms & Conditions/contract, but to limit the damages arising from any claim, they note that Clauses 16 and 17 of the Terms and Conditions sought to establish a limitation period, that is, 6 months for the Plaintiffs to notify the United Travel Corp ("UTC") and 1 year to commence an action against the First Defendant in relation to any allegations, and to limit damages for emotional distress, mental suffering or psychological injury. Therefore, they say that section

41 of the Consumer Protection Act is not applicable, and rely on the principles in *Australian Competition and Consumer Commission v CLA Trading Pty Ltd [2016] FCA 377* to suggest that the said Clauses 16 and 17 of the Terms & Conditions are not unfair.

10. It is contended that the travel agents engaged by the Plaintiffs were provided with the Terms & Conditions and therefore their knowledge of the Terms & Conditions binds the Plaintiffs. Further, the Plaintiffs were provided with the Terms & Conditions by email. Given the all-inclusive nature of the First Defendant's hotel, the First Defendant contends that it was reasonable to assume that the contract between the parties would contain extensive terms, and that the Terms & Conditions would cover numerous issues. At no time did the Plaintiffs and/or their agents cancel the stay with the First Defendant because they were unsatisfied with the Terms & Conditions. The First Defendant relied on *Carnival PLC v Karpik [2022] FCAFC 149* to assert the point that the acceptance of the First Defendant's offer is signified by the Plaintiffs' conduct after a reasonable time in proceeding with the stay or arrangements at the First Defendant's hotel even if they had not read the Terms & Conditions, because they must be taken to have done so.
11. The First Defendant submits that there is no strict liability for the Resort as they can only be held liable for things that are reasonably within contemplation. Reliance is placed on the On Resort Guest Registration terms and conditions which provides that the First Defendant is not liable except in the case of proven negligence for the activities stipulated therein. The First Defendant states that the question for determination is whether the Third Defendant was acting on a frolic of his own, which is a question of fact that should be reserved for trial. The First Defendant further submits that there is no attempt on its behalf to transfer the burden of performance of its contract with the Plaintiffs to the Third Defendant. They say that this goes to the core of the dispute and is contested by the First Defendant. In any event, it is the First Defendant's submission that the matter is far from clear, and that it would be inappropriate for the court to strike out the relevant paragraphs of the Defence.

## LAW

12. The law on striking out has long been settled. Striking out is a discretionary power of the Court reserved for those pleadings that are incurably bad. Order 18 Rule 19 of the Rules of the Supreme Court provide in part:

“(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —

(a) it discloses no reasonable cause of action or defence, as the case may be;  
or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1) (a).”

13. In *Drummond-Jackson v British Medical Association (1970) 1 WLR 688*, Smith, L.J. stated:

“...It seems to me that when there is an application made to strike out a pleading, and you have to go to extrinsic evidence to shew that the pleading is bad, that rule does not apply. It is only when upon the face it is shewn that the pleading discloses no cause of action or defence, or that it is frivolous and vexatious, that the rule applies... ”

14. *Danckwerts LJ in Wenlock v Moloney [1965] 2 All ER 871* elucidated at p. 874

“There is no doubt that the inherent power of the court remains; but this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power.”

15. The power to strike out has also been extensively considered by the learned Stewart J in **Romona Farquharson-Seymour v Carolyn Vogt Evans (in the capacity as Stipendiary and Circuit Magistrate) 2018/CLE/gen/00203**, where the court said the following:

31. In *AML Food Limited v. Dennis Williams* 17<sup>th</sup> June 2020 SC 2018/CLE/gen/00169 (unreported) I considered the effect of Order 18, rule 19 (1) (a) of the RSC and reviewed the existing authorities in the law. I repeat them there.

“In *Sandyport Homeowners Association Limited v. P. Nathaniel Bain* SCCivApp & CAIS No. 289 of 2014, the Court of Appeal discussed the role of a judge when considering whether to accede to an application pursuant to O 18 r. 19 (1) (a) of the RSC. Crane-Scott JA in delivering the judgment of the Court stated:

"8. The scope and effect of the foregoing rule is succinctly explained in note 18/10/1 of the 1999 edition of the Supreme Court Practice in the following terms:

"There are two jurisdictions pursuant to which the Court may impose sanctions for breaches of the rules of pleading, (1) under the provisions of this rule...and (2) under the inherent jurisdiction...Not every writ or pleading which offends against the rules will be subjected to sanctions. An applicant must show that he is in some way prejudiced by the breach...In applying this rule, it must be remembered that "it is not the practice in the civil administration of our Courts to have a preliminary hearing, as it is in crime." (per Sellers L.J., in *Wenlock v. Maloney* [1965] 1 W.L.R. 1238 at 1242."

9. The following extract from Volume 36 of the Fourth Edition of Halsbury's Laws of England is also instructive as to how the discretion under Ord. 18,

r. 19 ought to be exercised:

"Although no evidence is admissible on an application invoking the rule, if the summons additionally invokes the court's inherent jurisdiction evidence may be filed, and all the relevant facts considered. The practice is not to consider the evidence until the question whether or not on the face of the pleadings some reasonable cause of action... is disclosed has been determined. In judging the sufficiency of a pleading for this purpose the court will assume all the allegations in it to be true and to have been admitted by the other party. If the statement of claim then shows on the face of it that the action is not maintainable or that an absolute defence exists, the court will strike it out. A pleading will not, however, be struck out if it is merely demurrable; it must be so bad that no legitimate amendment could cure the defect. The jurisdiction to strike out a pleading should be exercised with extreme caution and only in obvious cases; and where a question of general importance or a serious question of law would arise on the pleadings, the court will not strike out the pleading unless it is clear and obvious that the action will not lie." [Emphasis added]

10. The "Strike-out application" in this case was instituted under Ord. 18, r. 19 on the sole ground that the indorsements of the appellant's Writ and Statement of Claim disclosed no reasonable cause of action against the respondent. As paragraph (2) of rule 19 clearly states, no evidence is admissible where the only ground on which the application is made is that the pleadings disclose no reasonable cause of action. See for example *Republic of Peru v. Peruvian Guano Co. Ltd.* (1886-90) All ER Rep 368 at 371."

Crane-Scott JA continued:

"14. Case law also shows that the discretion to strike-out a pleading should be exercised with extreme caution and only in clear and obvious cases. The

discretion to strike may be exercised if it is clear and obvious on the pleadings that no reasonable cause of action is disclosed (meaning a cause of action with some chance of success) or if it is obvious that the pleadings are so bad that no legitimate amendment could cure the defect in its pleadings."

"18. The authorities in the Annual Practice also show that so long as the statement of claim or the particulars disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak, and not likely to succeed, is no ground for striking it out. See *Wenlock v. Maloney* [1965] 2 All ER 871 discussed below."

19. The Court's power to strike is a draconian one and should only be used where there is clearly no cause of action pleaded or inferred. The Court must be careful not to dispossess the Plaintiff of its right to be heard where there is the possibility of a weak or strong case against the Defendant. Likewise, if upon reviewing a pleading and the Court is satisfied that there is a cause of action, although not properly pled, the Court can exercise its discretion to grant leave to amend the pleading. At all times the power to strike should only be exercised where it is impossible to save the action by amendment. In *B.E. Holdings Limited v. Lianji* (also known as *Linda Piao-Evans or Lian Ji Piao-Evans*) - [2017] 1 BHS J. No. 28 Charles J stated:

"7 As a general rule, the court has the power to strike out a party's case either on the application of a party or on its own initiative. Striking out is often described as a draconian step, as it usually means that either the whole or part of that party's case is at an end. Therefore, it should be taken only in exceptional cases. The reason for proceeding cautiously has frequently been explained as that the exercise of this discretion deprives a party of his right to a trial and his ability to fortify his case through the process of disclosure and other procedures such as requests for further and better particulars.

8 In *Walsh v Misseldine* [2000] CPLR 201, CA, Brooke LJ held that, when deciding whether or not to strike out, the court should concentrate on the intrinsic justice of the case in the light of the overriding objective, take into account all the relevant circumstances and make 'a broad judgment after considering the available possibilities.' The court must thus be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of claim is incurably bad; or that it discloses no reasonable ground for bringing or defending the claim; or that it has no real prospect of succeeding at trial."

*No reasonable cause of action*

16. The Plaintiffs rely on the ground that the First Defendant's defence discloses no reasonable cause of action. In *Drummond-Jackson*, Lord Pearson stated 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". It must be irrefutably clear from the pleadings itself that the action is certain to fail. Crane-Scott JA in *Sandy Port Homeowners Association Limited v Bain [2015] 2 BHS J. No. 102* made it clear that a pleading so bad that no legitimate amendment can cure the defect should be struck out. At paragraph 18 of the case, Her Ladyship stated that:

"18. The authorities in the Annual Practice also show that so long as the statement of claim or the particulars disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak, and not likely to succeed, is no ground for striking it out, See *Wenlock v Moloney [1965] 2 All ER 871* discussed below"

*Abuse of the court's process*

17. The Plaintiffs also rely on the ground that the Defence is an abuse of the Court's process. Justice Stewart in *Romona Farquharson-Seymour v Carolyn Vogt Evans (in the capacity as Stipendiary and Circuit Magistrate) 2018/CLE/gen/00203* sheds light on authorities relevant to an abuse of the court's process. It is stated beginning at paragraph 54 that:

54. "In Note 18/9/9 of The Supreme Court Practice 1976 abuse of process of the court is discussed as follows:

"Abuse of the Process of the Court. — Para. (1) (d), supra, confers upon the Court in express terms powers which the Court has hitherto exercised under its inherent jurisdiction where there appeared 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"

55. In *Willis v. Earl of Beauchamp (1886) 11 P. 59*, Bowen L.J stated at pg. 63 of the judgment that:

"the Court has the inherent power to prevent the abuse of its legal machinery which would occur, if for no possible benefit, a party is to be dragged through litigation which must be long and expensive."

56. In *West Island Properties Limited v. Sabre Investment Limited et al 22 November 2012 CA SC No. 119 of 2010*, Allen P stated,



“30. Concerning Order 18; rule 19(1)(d) R.S.C. both Bramwell B. and Blackburn J. in the cases of *Castro v. Murray* Law Rep. 10 Ex. 213'218 and *Dawkins v. Prince Edward of Saxe-Weimar* 1 Q.B.D. 499; 502 respectively, underscored the fact that the court possessed a discretion to stop proceedings which are groundless and an abuse of the court's process. The discretion, as Mellor, J. in *Dawkins v. Prince Edward of Saxe-Weimar* indicated, must be exercised carefully and with the objective of saving precious judicial time and that of the litigant.”

## ANALYSIS

18. In considering this matter, it is appropriate in my view to deal firstly with the contention by the Plaintiffs that the limitation provisions in the contract were not specifically brought to the attention of the Plaintiffs, and were onerous and unfair. In my view a determination of these issues must necessarily involve a protracted examination of the evidence, as the Court must first determine on the evidence whether the clauses were in fact brought to the attention of the Plaintiffs, and whether, having waited some eight months without opting out of the contract, the Plaintiffs could still successfully argue that those terms were not effective. I note also that the First Defendant has submitted that the Plaintiffs have stayed at other Sandals properties in the past, which may also factor into a consideration of whether the Plaintiffs could be found to be bound by those terms. I must also say that, on the face of it, I see nothing onerous in terms that seek to limit, rather than exclude, liability, or the time within which a claim may be brought, and I note that this was not a trial of a preliminary issue, but rather a summons seeking to strike out, and for summary judgment.
19. The Plaintiffs have also referenced section 41 of the **Consumer Protection Act Chapter 337C**, which reads as follows:
- 41. No party to a contract shall —**  
**(a) when he is in breach of contract, exclude or restrict his liability in respect of the breach;**
20. In reading the section, it appears to me that, in order for the section to operate, it is necessary first for a determination to be made that a party is in breach of contract. Such a determination could only be made after a full consideration of evidence. I am therefore of the view that this section does not assist on a strike out application, where no evidence has been led, and the process of disclosure has not taken place.
21. Paragraph 1 of the Amended Defence essentially outlines the First Defendant's position that the claims of the Plaintiffs were statute barred pursuant to the terms of the contract and/or the Limitation Act. The First Defendant also reserved its right to make a striking out application pursuant to Order 18 Rule 19 that the Plaintiffs' claim discloses no reasonable cause of action; is scandalous, frivolous, and vexatious; and is otherwise an abuse of the process. The First Defendant also filed without prejudice to seek security for costs. This part of the defence put forth by the First Defendant in this paragraph is in my view a bona fide defence available to the First Defendant to be decided. There is nothing contained in this paragraph which suggests that there is not a valid

defence that has some chance of success. Without a protracted view of the affidavit evidence, it is clear on the face of Clause 16 of the contract that the Plaintiffs' time for bringing the action was abridged to one year from the date of the incident. Whether this contractual clause circumvents the Limitation Act or is defective for any reason as the Plaintiffs suggest, is a matter for determination of the Court at trial. Additionally, there is nothing found within this paragraph to be an abuse of the process of the court which will be used as a means of vexation or oppression in the process of litigation. I refuse to strike out this paragraph.

22. Paragraphs 7, 8 and 10 all refer to the Terms & Conditions contained in the Plaintiffs' booking with Unique Travel Corp, which the Plaintiffs had expressly agreed to. In paragraph 7, the Defendant denied paragraph 5 of the Amended Statement of Claim and stated that the Plaintiffs expressly agreed to the Terms & Conditions provided and that those terms and conditions would be enforceable by the the First Defendant and govern the relationship between the parties. The Plaintiffs then outlined the provisions that were set out in the Terms & Conditions. In paragraph 8, the First Defendant avers that the Terms & Conditions were reasonable as they were not objected to them by the Plaintiffs or their agents, and no attempt was made to cancel the booking after being apprised of those terms. Additionally, in paragraph 10, the First Defendant outlines the Plaintiffs' non-compliance with the Terms & Conditions by failing to give written notice of their claim to Unique Travel Corp within 6 months after the alleged assault, and by failing to commence an action in The Bahamas, within one year following the assault. Furthermore, the First Defendant relied on the provisions of the Limitation Act to suggest that the Plaintiffs' action is statute-barred as the cause of action accrued more than 3 years before the commencement of the action. These paragraphs again depend upon a determination of whether the impugned terms were effectively brought to the attention of the Plaintiffs, and whether were effective. There is nothing in these paragraphs that would suggest to me that the First Defendant does not have some chance of success in defending this claim on these grounds posited as they are bona fide defences available to them. I find nothing likewise in these paragraphs that I would consider amounts to an abuse of the Court's process that would warrant striking out. I therefore refuse to strike out these aforementioned paragraphs.

23. Paragraph 9 of the defence states simply that the Plaintiffs upon checking into the First Defendant's hotel signed its On Resort Guest Registration Terms & Conditions and that it is their intention to rely on this document at trial. On the face of it, I find that the Plaintiffs signed this document as it is exhibited to one of the supporting affidavits of Rchetta Godet, and bears their information and what appears to be their signature. Whether or not the Plaintiffs agreed to all of the Terms & Conditions contained therein, is a matter to be determined at trial. Although this paragraph does not technically disclose a defence as it is a supporting paragraph to give context to the defence, I do not find that it is a paragraph that warrants being struck out. Both parties are allowed to place their full case before the Court to be considered. At this juncture, I do not find that it is appropriate to strike the paragraph from the defence on the grounds that it discloses no reasonable cause of action or that it amounts to an abuse of the process.

24. In paragraphs 15 and 17(a) the First Defendant denies paragraphs 19 and 21 of the Amended Statement of Claim. The First Defendant suggests that all reasonable steps were taken to keep the Plaintiffs harmless and safe from any assault by having in-house and external private security on property; by training the Third Defendant as a Butler and by having adequate surveillance cameras about the property to monitor guests and employees. This is a viable explanation or defence to the Plaintiffs' claims that the First Defendant breached their duty to train their employees and have protective measures in place such as cameras and security personnel as contained in the Amended Statement of Claim. I find nothing in this paragraph that warrants it being struck out on the grounds of no reasonable cause of action or an abuse of the process.
25. In paragraphs 19, 22 and 26 the First Defendant denied paragraphs 23 (excepting that the Third Defendant was charged with Indecent Assault), 27 and 29 of the Amended Statement of Claim. The First Defendant averred that it was in no way vicariously liable for the actions of the Third Defendant and that his actions in no way formed part of his employment duties nor was he authorized to do so. It was averred that the Third Defendant acted outside the scope of his employment notwithstanding the strict sexual harassment policy of First Defendant. The First Defendant also alluded to offering to reimburse the Plaintiffs the wedding cost of \$14,658.56, not as an admission of liability, but as a gesture of goodwill which was refused. The Plaintiffs asserts vicarious liability against the First Defendant, thus, the First Defendant has the right to respond to such claim and defend itself. I do not find that these paragraphs above disclose no reasonable cause of action or are an abuse of the process. I refuse to strike them out on this basis.
26. Lastly, in paragraphs 30 and 31, the First Defendant denies paragraphs 33 and 34 of the Amended Statement of Claim and puts the Plaintiff to strict proof of the same. Furthermore, the First Defendant stated that it would rely on section 17 of the Terms & Conditions in relation to the Plaintiffs' alleged loss and damages. The First Defendant's intended reliance on the Terms & Conditions which appears to be signed and accepted by the Plaintiffs can in no way on the face of it amount to an abuse of the court's process or even be struck out for disclosing no reasonable cause of action. The First Defendant also denies that the Plaintiffs are entitled to interest as claimed. Again, the parties have a right to lead and rely on evidence in support of their case. To say that this paragraph warrants striking out on those grounds would be unfounded.
27. The power to strike out is reserved for those pleadings that are incurably bad. I do not find that the aforementioned paragraphs or any part of the defence are incurably bad, or warrants striking out. The Court at this juncture is not concerned with whether the Terms & Conditions were reasonable or unfair to the parties or whether the First Defendant was vicariously liable for the acts of the Third Defendant. Those questions would require some examination of the evidence before the Court, a deeper understanding of the parties' case and consideration of applicable legal principles. That is a matter that I say is suitable for a trial before a Judge.

## **CONCLUSION**

28. I hereby refuse the Plaintiffs' application to strike out paragraphs 1, 7, 8, 9, 10, 15, 17.a, 19, 22, 26, 30 and 31 from the First Defendant's Amended Defence, or the Defence in its entirety. I am not satisfied that this is an appropriate case to justify the exercise of the harsh power to strike out, as it is not clear and obvious that the First Defendant does not have a bona fide and viable defence to the claims made by the Plaintiffs. I find ultimately that the issues raised are fit for determination at trial where the Court can benefit from an examination of the evidence following the process of discovery, and legal submissions. The Plaintiffs shall bear the costs of this application to be taxed if not agreed.

Dated this 22<sup>nd</sup> day of March, A.D. 2024



J.

Neil Brathwaite

Justice