

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2000/CLE/gen/0009

B E T W E E N:

THE TREASURER OF THE COMMONWEALTH OF THE BAHAMAS

First Claimant

AND

THE ATTORNEY GENERAL OF THE COMMONWEALTH OF THE BAHAMAS

Second Claimant

AND

HAVANATURS (BAHAMAS) LIMITED

Third Claimant

AND

CIBC BAHAMAS LIMITED

Defendant

Before: The Honourable Madam Senior Justice Deborah E. Fraser

Appearances: Kristan Stubbs for the 1st and 2nd Claimant

Nadia Wright for the 3rd Claimant

Camille Cleare for the Defendant

Hearing Date: 16th October 2024

**Summary Judgment - Rule 15.2 of the Supreme Court Civil Procedure Rule – The
Inherent Jurisdiction of the Court**

JUDGEMENT

FRASER , SNR, J:

[1.] This is an action by the 3rd Claimant Havanatur (Bahamas) Ltd for summary judgment and that the 3rd Claimant be paid \$90,000 by the Defendant, and receive further relief from the Court.

BACKGROUND

[2.] That in the interest of brevity I will refer to the background set out in paragraphs 3 to 21 of my interlocutory Judgment 17th March 2024; DOM's International Importers Ltd v CIBC Bahamas Ltd v Havanatur (Bahamas) Ltd (Proposed Plaintiff) 2000/CLE/gen/9.

[3.] However with new developments proceeding after the 17th March 2024 Order and Judgment by this Court, the following should be noted: That The Treasurer of The Commonwealth of The Bahamas ("**The Treasurer**") and The Attorney General of The Commonwealth of The Bahamas ("**The AG**") are now parties to the action in substitution of DOM's International Importers Limited.

[4.] That a hearing took place on 16th October 2024 ("**The Hearing**") to hear the 3rd Claimant's Notice of Application filed on 10th April 2024, of which this judgment is rendered in response to.

Procedural History

[5.] On the 30th July 2020, the present matter between the 3rd Claimant and the Defendant was initiated when the 3rd Claimant filed its Notice of Intention to Proceed.

[6.] I will again refer to the background set out by in paragraphs 14 to 21 of my interlocutory Judgment 17th March 2024; DOM's International Importers Ltd v CIBC Bahamas Ltd v Havanatur (Bahamas) Ltd (Proposed Plaintiff) 2000/CLE/gen/9 which outlines the procedural history to 7th June 2022.

[7.] The following Orders and Notice of Applications would be filed in lieu of the 7th June 2022 Notice of Application by the 3rd Claimant: On 22nd September 2022, an Order by Justice Lewis-Johnson filed 13th October 2022 compelled the parties to file affidavits and applications within a certain period of time; On 17th March 2023, the 3rd Claimant filed a Notice of Application to join the present matter; On 27th March 2024, this Court ordered that the 1st and 2nd Claimants be substituted with the original Plaintiff DIIL and that the 3rd Claimant be joined to this matter as a Plaintiff.

ISSUES

[8.] The Issue(s) that this Court must decide is:

Whether summary judgment should be granted to the 3rd Claimant on the basis of paragraphs 7 and 8 of the 3rd Claimant's Amended Submissions?

Whether summary judgment should be granted in a situation where the 3rd Claimant has not filed any pleadings with a cause of action?

EVIDENCE

The Evidence of Havanatur's (Bahamas) Limited

[9] On 10th April 2024, the 3rd Claimant filed the Affidavit of Luis Armando Perez Cobas in support of the Notice of Application for summary judgment made on the same day. An unnecessary filing because the facts asserted by Luis Armando Perez Cobas do not deviate from the facts in the affiant's 15th February 2021 Affidavit.

[10.] The 3rd Claimant also relied on the Supplemental Affidavit of Denise-La S. Newbold filed on 24th May 2022. For ease of reference and efficiency, this Court need not summarize the contents within said affidavit because it already did so at paragraph 29 in its 27th March 2024 ruling.

[11.] During the 16th October 2024 hearing, the 3rd Claimant relied on its Amended Submission. Likewise, the 3rd Claimant relied on the 8th March 2000 Affidavit of Perry Rombough during The Hearing when its Counsel replied to the Defendant counsel's oral submission. The Affidavit of Perry Rombough was succinctly summarized in its 27th March 2024 ruling at paragraph 23.

The Evidence of CIBC (Bahamas) Limited

[12.] The Defendant relies on the following: Its 20th April 2023 filed Skeleton Submission; Its Counsel's oral submissions made on 16th October 2024; The Affidavit of Jeremy Gibbs filed on 23rd March 2023; The Affidavit of Merrit Storr filed 17th March 2023; The 24th May 2022 Supplemental Affidavit of Denise-La S. Newbold; The Affidavit of Floyd Watkins filed 24th November 2000; The Letter of Floyd Watkins dated 3rd September 1999; and its skeleton submissions made on 20th April 2023 and on 9th September 2022.

SUBMISSIONS

3rd Claimant

[13.] Through its Amended Submission and the oral submission by its Counsel, the 3rd Claimant seeks summary judgment on the basis that the Defendant has no real prospect of successfully defending the claim per **CPR Part 15.2(b)**. The 3rd Claimant also seeks the Statement of Claim filed on behalf of DIIL to be struck out per **CPR Part 26.3**.

[14.] The 3rd Claimant, in its Counsel's oral submissions, allege that the Defendant failed to promptly resolve the issue the Defendant's had with the 3rd Claimant once DIIL was struck off the Companies Register on 23rd August 2019.

[15.] The 3rd Claimant in its Counsel's oral submission, when the issue of limitation arose, also asserted that the allegation of fraud it made specifically against Nelson Garcia extends by proximity to the Defendant and that Section 33 of **the Limitation Act [Ch83]** is applicable.

[16.] Furthermore, the 3rd Claimant submits, in reply to the Defendant Counsel's assertion that the 3rd Claimant hasn't filed pleadings and that its dispute between the Defendant differs from the Defendant's dispute with DIIL, without authority that an affidavit can be substituted for an applicant/claimant's pleadings once a Court's inherent jurisdiction is invoked.

[17.] Lastly, the 3rd Claimant submits that the Defendant has been holding the \$90,000 on trust for it within the framework of a constructive trust.

The 2nd Claimant

[18.] Kristan Stubbs on behalf of The AG has not received any instructions as it relates to The Treasurer's claim to the disputed \$90,000 being held by the Defendant.

[19.] Counsel for The AG however asserts that there are issues of fact that can only be determined by a future substantive hearing.

The Defendant

[20.] The Defendant relies on the oral submissions made by its counsel during The Hearing, and its 20th April 2023 Skeleton Argument in rejection of the 3rd Claimant's notice of application for summary judgment.

[21.] The Defendant is of the position that if the 3rd Claimant is awarded \$90,000, the latter would be unjustly enriched. The Defendant also denies the claim that it is a trustee under a constructive trust. The Defendant asserts that there's no breach of trust because there is no evidence that the \$90,000 was removed from the 3rd Claimant's account. The Defendant, also asserts that it has a complete defense on the ground of statutory limitation if the Court finds that a trust did arise. The Defendant asserts that the 3rd Claimant cannot invoke Section 33 of the Limitation Act because the latter did not specifically plead fraud.

[22.] The Defendant also asserts that the 3rd Claimant lacks the proper pleadings to show that it has a cause of action against the Defendant. In doing so, the Defendant counterclaims during The Hearing that the 3rd Claimant has no real prospect of succeeding on its claim.

[23.] In the alternative, if a substantive hearing occurs, the Defendant asks the Court for costs to be assessed first before the 3rd Claimant files its pleadings.

LAW

[24.] In concurrence with the 3rd Claimant, the jurisdiction of the Court to grant summary judgment is governed by **Rules 15.2, 15.5 and 15.6 of the Bahamas Supreme Court Civil Procedures Rules, 2022 ("CPR")**.

Rule 15.2 of the CPR provides:

"The Court may give summary judgment on the claim or on a particular issue if it considers that the—

- (a) Claimant has no real prospect of succeeding on the claim or the issue; or
- (b) defendant has no real prospect of successfully defending the claim or the issue”

Rule 15.5 of the CPR states:

“ (1) The applicant must—

- (a) File affidavit evidence in support with the application; and
- (b) Serve copies of the application and the affidavit evidence on each party against whom the summary judgment is sought,

at less than 14 days before the date fixed for hearing the application.

(2) A respondent who wishes to rely on evidence must-

- (a) File affidavit evidence, and
- (b) Serve copies on the applicant and any other respondent to the application;

At least seven days before the summary judgement hearing.”

Rule 15.6 of the CPR supplements Rule 15.2 of the CPR and provides:

“(1) The Court may give summary judgment on any issue of fact or law whether or not the judgment will bring the proceedings to an end.

(2) “Where the proceedings are not brought to an end, the Court must also treat the hearing as a case management conference.”

[25.] The test for summary judgment can be found in one of the authorities cited in **The Supreme Court Civil Procedure Rules 2022 Practice Guide Jan 2024 Ed** on page 142. That being **the Swain v Hillman and another [2001] All ER 91** where Lord Woolf MR at pages [92] and [95] stated the following:

“Under r 24.2, the court now has a very salutary power, both to be exercised in a claimant’s favor or, where appropriate, in a defendant’s favor. It enables the court to dispose summarily of both claims or defence which have no real prospect of being successful. The words ‘no real prospect of succeeding’ do not need any amplification, they speak for themselves. The word ‘real’ distinguishes fanciful prospects of success or, as Mr. Bidder QC submits, they direct the court to the need to see whether there is a ‘realistic’ as opposed to a ‘fanciful’ prospect of success. It is important that a judge in appropriate cases should make use of the powers contained in Pt. 24. In doing so he or she gives effect to the overriding objectives contained in Pt. 1. It saves expenses; it achieves expedition; it avoids the court’s being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant’s interest to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible.”

[26.] A ‘real prospect of success’ means a case or defence that is more than merely arguable. This legal principle is further fleshed out by the Court of Appeal in **Bank of Nevis International Trust Services Inc v Belmont Holdings SKN Limited NEVHCA2023/0018**, where the court cited the test in **RBTT Bank Caribbean Limited v Financial Services Authority SVGHCVAP2021/0005 (delivered 25th January 2023, unreported)**:

“The test of ‘real prospect of success’ on summary judgment application means that the claimant or defendant must have a case or defence that is more than merely arguable. There must be a ‘realistic’ as opposed to a ‘fanciful prospect of success’. A claim would be considered fanciful ‘where it is entirely without substance or where it is clear beyond question that the statement of case is contradicted by all documents or other materials on which it is based’.”

[27.] The 3rd Claimant also relies on the notes attached to Rule 15.2 entitled “Grounds for Summary Judgment” at page 103 of the **CPR 2022 Practice Guide 4th Edition**. The 3rd Claimant also cites Lord Hope’s dicta at paragraphs 95 and 158 in **Three Rivers District Council v. Bank of England (No.3) [2001] 2 ALL ER 513** in its Amended Submissions. While the legal principle underpins the test of summary judgment, this test is reiterated in the authorities cited above.

[28.] In **Ralph Gooding (In his capacity as Widower, Heirs-at-law and Administrator of the Estate of Coral Gooding , deceased) v Elizabeth Ellis et al [2021] 2020/CLE/gen/00272** , Charles J (as she then was) reaffirmed the following from the Court in **Montague Investments Limited v Westminster College Ltd and Mission Baptist Church [2015/CLE/gen/00845]**:

“[15] The purpose of pleadings in civil cases is to identify the issue or issues that will arise at trial. This is in order to avoid the opposing parties and the court taken by surprise. The pleadings must be precise and disclose a cause or causes of action. Evidence need not be pleaded, because that will come from the affidavits and cross-examination thereon or by oral evidence.”

[29.] The above authority is instructive in this Court’s review of the 3rd Claimant’s submission that an Affidavit can be used in substitute for pleadings.

[30.] Similarly, Anderson J of the Caribbean Court of Justice in the case of **Wilfred P Elrington v Progresso Heights Limited [2024] CCJ 4 (AJ) BZ** reaffirmed the importance of proper pleadings in the following:

“[47]. As I have had cause to say on another occasion (**Nicholson v Nicholson [2024] CCJ 1 (AJ) BZ**) pleadings are the alpha and omega of litigation in our legal system. They are the guardrails which guide the commencement, progression, and disposition of the case. The rules governing pleadings are therefore not optional. They are pivotal. They are mandatory. They are to be complied with by the parties lest chaos overtakes the process of adjudication and lest the unruly horse of litigation be allowed to roam free.”

[31.] The Court finds the following authority **Belgravia International Bank & Trust Company Limited et al v Sigma Management et al [2022] SCCivApp No. 75 of 2021** instructive because Sir Michael Barnett JA (as he then was) sets out the salient limitation of a

Court's inherent jurisdiction. In paragraph 64 of the judgement, Sir Michael Barnett JA states the following:

“Inherent Jurisdiction only begins where rules of Court end.”

[32.] Sir Michael Barnett JA in paragraph 62 of the judgment cites an instructive passage from Lord Dyson of the Board of the Privy Council in **The Attorney General v Universal Projects Limited [2011] UKPC 37** on the law regarding inherent jurisdiction versus rules of court:

“[27] There is no scope for recourse to the inherent jurisdiction of the court. The territory is occupied by the rules. The court's inherent jurisdiction cannot be invoked to circumvent the express provisions of the rules.”

[33.] The aforementioned authorities will be instructive in the discussion further below in this judgment as it concerns whether the 3rd Claimant is able to invoke the Court's inherent jurisdiction to substitute filed affidavits for pleadings. This is despite the fact that the 3rd Claimant's counsel was unable to perform her undertaking, made in her oral submissions, to furnish the Court with authorities so relevant to the issue.

[34.] As it concerns costs, the Court finds the authority provided by the 3rd Claimant in its Amended Submissions and how the 3rd Claimant used the authority to be ineffectual. The 3rd Claimant just cites the case of **Dr. Paul D. Fuchs, MC Grotto and Lockhart & Co. (a firm) et al. 2023/CLE/gen/00763** without directing the Court to any legal principle that would provide the Court with the authority to satisfy the 3rd Claimant's sought relief; “[order] to pay the sum of B\$90,000 plus prejudgment interest from the 31st October 1999 to the 16th October, 2024 at the rate of 3% per annum and thereafter at the statutory rate of 6.25% plus costs to be paid forwith, to be remitted to the client account of the attorneys for Havanatur (Bahamas) Limited.”

[35.] The case of **Dr. Paul D. Fuchs [2023]** can also be distinguished from the facts of the present matter because the Court in **Dr. Paul D. Fuchs [2023]** was concerned with issues of contempt proceedings and not of any cost related issues.

Discussion & Analysis

[36.] After reviewing the written and oral submissions made by the 3rd Claimant and the Defendant, the Court will now consider the 3rd Claimant's application for summary judgement. .

Whether the 3rd Claimant is entitled to summary judgment?

[37.] The Court must assess whether the Defendant has a “realistic” prospect of defending the claim. In considering whether the matter is an appropriate one to engage the summary judgment procedure the Court has taken account of the differing views of the parties on the findings, the written submissions of the parties and the oral submissions made by the parties and comes to the following conclusion that the 3rd Claimant's application fails for the reasons set out below.

[38.] The Defendant has a real prospect of defending the claim. This finding is in opposition to the 3rd Claimant's ground for summary judgment; Rule 15.2(b). Firstly, the Defendant is correct in its review of paragraphs 3 and 4 of the 3rd Claimant's Supplemental Affidavit of Denise-La Newbold filed 24th May 2022. That the 3rd Claimant's bank statements, exhibited in the affidavit,

do not provide evidence of a debit or withdrawal of \$90,000; Statement from CIBC bank account #100094010 taken on 26th August 1999 shows a balance of \$92,335.06; and Statement from CIBC bank account #25434319 taken on 31st August 1999 shows a balance of \$1099540.42. Thus, the issue of whether the \$90,000 was withdrawn from one of the 3rd Claimant's accounts is still a live issue.

[39.] Furthermore, the Defendant's counsel in her oral submissions asserted that upon review of 23rd March 2023 Affidavit of Jeremy Gibbs (CIBC executive), not even Mr. Gibbs can locate a statement of the 3rd Claimant's accounts that could reflect a removal of monies had occurred. This is an issue of fact, if determined in a trial, could provide the Defendant with a successful defense against the claims brought by the 3rd Claimant. If it is found in trial that no monies were deducted from either of the 3rd Claimant's accounts, the Defendant now has a strong defense that it is not holding the 3rd Claimant's funds in abeyance. More so, this finding of fact would substantiate the Defendant's counterclaim that the 3rd Claimant is attempting to use these proceedings to "double dip." The Defendant's counterclaims and defenses are then not fanciful, as coined by the Court in **RBTT [2023]**, and are not entirely without substance. Therefore, this Court is minded to rule contrary to the 3rd Claimant's application for summary judgment on the ground set out by **Part 15.2(b) of the CPR 2022**.

[40.] Furthermore, the Defendant in its oral submission counterclaims that the 3rd Claimant has no real prospect of success. This is according to **Part 15.2(a) of the CPR 2022**. This case is unique in that the 3rd Claimant has not filed any pleadings with an expressed statement of case. The 3rd Claimant makes vague allusions to its statement of case, in substance and not form, being in a filed affidavit. The 3rd Claimant did not assist the Court by identifying said affidavit during The Hearing. The Defendant was of some assistance as it speculates that the 3rd Claimant's cause of action may be found in the Affidavit of Merrit Storr, filed on 17th March 2023. This Court, in its prior ruling on 27th March 2024, at paragraph 30 does recognize that the 3rd Claimant sees itself as a beneficiary of the \$90,000 and that it claims Nelson Garcia fraudulently transferred from the former's account to DIIL. Though this Court is minded to determine that said affidavit is inadequate in conveying a pleading where fraud is alleged; Fraud must be specifically pleaded and particularized.

[41.] The Court is minded to prima facie agree with the Defendant that the 3rd Claimant has no real prospect of succeeding if the latter continues to rely on the current form of its claim for the following reasons: The bank statements provided by the 3rd Claimant in the 24th May 2022 Newbold Affidavit does not, on a balance of probabilities, evidence that monies were transferred from the 3rd Claimant's account to DIIL; The 3rd Claimant must specifically plead fraud, if that is central to their cause of action, and have failed to do so; and failing to prove that the Defendant is a constructive trustee as opposed to a regular trustee, the 3rd Claimant would be barred by the regular limitation period prescribed by the Act.

[42.] **The Court in Swain [2001]**, like the Court in **RBTT[2023]** provides a useful explanation of the real prospect of succeeding test:

"[7] The words no real prospect of succeeding do not need any amplification, they speak for themselves."

[43.] The 3rd Claimant's case is bound to fail on strict statutory grounds of limitation if the Court is minded to view the Defendant as a regular trustee. However, in the interest of justice and in concurrence with counsel for The Treasurer, a substantive hearing should be undertaken so as to clarify who the beneficiary to the \$90,000 is and to provide the 3rd Claimant a forum to rebut the Defendant's defenses. Though to ensure that said hearing is conducted properly, this Court is minded to provide the 3rd Claimant a grace period to file pleadings with an express cause of action.

Whether summary judgment should be granted in a situation where the applicant has not filed any pleadings for a cause of action?

[44.] The Court must determine whether it can use its inherent jurisdiction to grant the 3rd Claimant the opportunity to substitute formal pleadings with one of its affidavits. The 3rd Claimant in its counsel's oral submission attests that this legal procedure can be performed by the Court. Counsel for the 3rd Claimant did not commit to the undertaking made during The Hearing to furnish the Court with an authority for the legal procedure.

[45.] The 3rd Claimant finds itself seeking such relief because there's no express ground in **Part 15.2 of the CPR 2022** that requires that a claimant needs a statement of case to apply for summary judgment. Sir Michael Barnett JA (then) in the Court of Appeal matter of **Belgravia International Bank [2022]**, in his discussion on the inherent jurisdiction of the Court states the following:

“[64] Inherent jurisdiction only begins where rules of Court end.”

[46.] Since, **Part 15.2(a) of the CPR 2022** is silent, the Court may use its inherent jurisdiction to allow the 3rd Claimant to rely on its affidavits instead of formal pleadings. However, counsel for the 3rd Claimant did not direct the Court to the affidavit(s) the 3rd Claimant relies on in substitution of its pleadings. Culminating with counsel for the 3rd Claimant's inability to perform the undertaking made by providing the Court with authorities, the Court is minded to not extend such relief to the 3rd Claimant. The Court is minded to agree with the Defendant's assertion made in paragraph 13 of its 21st April 2023 Submission Opposing Joinder of Intended Plaintiff Havanatur (Bahamas) Limited:

“[13] The Plaintiff has not provided a draft Statement of Claim and so we are unable to determine what the cause/s of action are that Havanatur intends to pursue as Plaintiff in the action against the Bank.”

[47.] The Court, even if the 3rd Claimant identified the affidavit it wishes to use as pleadings, would not be minded to use its inherent jurisdiction because granting said relief would allow the 3rd Claimant to bypass its duty to the Court to help the Court deal with cases expeditiously and fairly.

[48.] The authorities of **Part 1.1(2) (d) and 1.3 of the CPR 2022** outline the above duty:

“[1.1(2)(d)] ensuring that it is dealt with expeditiously and fairly;”

“[1.3]It is the duty of the parties to help the Court to further the overriding objective.”

[49.] The 3rd Claimant is not assisting the Court in dealing with the current matter expeditiously and fairly by compelling all other parties to decipher the affidavit(s) and come to a consensus on what the Claimant's case actually is. Such a situation is wholly unfair to the Defendant.

[50.] The 3rd Claimant through the filing of its multiple affidavits is "proving" but the absence of a pleadings makes it ambiguous as to what the 3rd Claimant is "asserting." Pleadings are vital in evidencing to the Court and wider public what a claimant's grievance is. Likewise stated in paragraph 15 of the case in **Montague Investments Limited [2015]**, the object of pleadings is to dispel of any scenario where the Court and the Defendant could be taken by surprise. Similarly, the Court is in agreement with Anderson J of the CCJ in **Wildred P. Elrington [2024]** that pleadings act as the "guardrails" of the proceedings. So as to ensure that no party unjustly falls off the litigation's ledge.

CONCLUSION

[51.] In conclusion, I find that there are serious issues to be tried and on that basis summary judgment should not be granted to the 3rd Claimant. I am of the belief that the Defendant does have an arguable case and that a date should be fixed for a future hearing. Furthermore, the 3rd Claimant shall file four weeks before the substantive hearing its statement of case.

[52.] The 3rd Claimant shall pay the costs of the Defendant, 1st Claimant and 2nd Claimant, to be taxed, if not agreed.

Dated this 20th of March 2025

Deborah E. Fraser

Senior Justice