

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

2014/CLE/gen/01472

BETWEEN

B.E. HOLDINGS LIMITED

Plaintiff

-and-

PIAO LIANJI

(also known as Linda Piao-Evans or Lian Ji Piao-Evans)

Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Charles Mackay for the Plaintiff
Mr. Roger Minnis and Mr. Kahlil Parker for the Defendant

Hearing Date: 5 July 2016

Practice and Procedure - Summons to strike out Statement of Claim – Defence and Amended Defence filed – Reply filed – Pleadings raised important question of fact –Rules of the Supreme Court, Order 18, Rule 19, Rule 31 (A)

Summons to be made promptly – Summons to strike out is only appropriate to cases which are plain and obvious – Reasonable cause of action means a cause of action with some chances of success

The Plaintiff instituted these proceedings against the Defendant for possession of a building which it alleged it owns. The Defendant refutes the allegation and asserts that some other company is the owner of the building. She next asserts that by virtue of that other company's ownership, she is entitled to be in possession of the building in question since she is the execu

trix of the estate of her deceased husband. She filed a Summons to strike out the Plaintiff's Statement of Claim on the grounds that (i) it discloses no reasonable cause of action and/or is otherwise an abuse of the process of the court; (ii) it may prejudice,

embarrass or delay the fair trial of the action and; (iii) it is scandalous, frivolous or vexatious.

HELD, dismissing the Summons to strike out the Statement of Claim with costs of \$3,000 to the Plaintiff.

1. 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, the summary power to strike out a pleading should be exercised only in plain and obvious cases when the alleged cause of action is certain to fail.
2. A reasonable cause of action means a cause of action which has some chance of success when only the allegations in the pleading are considered. As long as the statement of claim discloses some cause of action, or raises some question fit to be decided at the trial, the mere fact that the case is weak and is not likely to succeed is no ground for striking it out: **Drummond-Jackson v British Medical Association** (1970) 1 All ER 1094.
3. A statement of claim is not suitable for striking out if it raises a serious live issue of fact which can only be determined by hearing oral evidence: **Ian Peters v Robert George Spencer**, ANUHCVAP2009/016 - Antigua & Barbuda Court of Appeal- per Pereira CJ [Ag.] - Judgment delivered on 22 December 2009.
4. It does not lie in the Defendant's mouth to say that the Statement of Claim should be struck out because it may prejudice, embarrass or delay the fair trial of the action when it was the Defendant who filed her Summons to strike out after pleadings were closed, case management conference took place and a trial date was given.
5. The concept of abuse of process does not arise in the present action. Although there is another extant action, it does not concern the same parties and/or the same issues.

JUDGMENT

Charles J:

- [1] This is a Summons to strike out the Plaintiff's Statement of Claim pursuant to Order 18 Rule 19 (1)(a), (b), (c) and (d) of the Rules of the Supreme Court 1978 ("the RSC").

Background

- [2] On 24 September 2014, the Plaintiff, a company incorporated under the laws of The Bahamas, filed a Writ of Summons endorsed with a Statement of Claim in which it sought several reliefs against the Defendant including ownership and possession of a lot situate at the corner of Mackey Street and Ivanhoe Road with a building thereon (“the building”), mesne profits, damages and costs. On 26 September 2014, the Defendant entered an appearance and on 10 October 2014, she filed a Defence. In her Defence, the Defendant puts the Plaintiff to strict proof of all of the allegations in the Statement of Claim.
- [3] On 24 November 2014, the Plaintiff applied to strike out the Defendant’s Defence. On 4 March 2015, Dunkley J (Ag) heard the Summons to strike out the Defence and dismissed it. He also gave leave to the Defendant to amend her Defence in the terms of the draft Amended Defence attached to her Summons filed on 25 March 2015. An Amended Defence was filed on 16 April 2015. A Reply to the Defence was filed on 26 June 2015. A Notice of Referral to Case Management Conference was filed on 29 June 2015. On 10 September 2015, Evans J gave Case Management Directions. The trial dates were confirmed for 1 and 2 June 2016. Pre-trial Review was set down for 6 May 2016.
- [4] On 6 May 2016, the Defendant filed a Summons to strike out the Statement of Claim. It was fixed for 2 June 2016. On that day, the parties appeared before me. They were not ready for the trial of the substantive action as the Defendant had not complied with the directions given by Evans J. In the interim, the Plaintiff obtained an *ex parte* injunction restraining the Defendant from, among other things, erecting any signs on any part of the Plaintiff’s building with or without the direction that the parking space belongs to “Evans Dry Cleaners” without its permission. On 2 June 2016, the injunction was heard *inter partes* and there was an undertaking to maintain the status quo. The Summons to strike out was fixed for hearing on 5 July 2016. Unquestionably, this Summons derailed the

substantive action for which I take full responsibility and, at the same time, I apologized for the protracted delay in delivering this judgment.

Summons to strike out

[5] The grounds upon which the Summons to strike out the Statement of Claim are founded are:

(a) It discloses no reasonable cause of action and/or is otherwise an abuse of the process of the court, for the following reasons:

- i. The Plaintiff's pleaded claim, if any, is against Evans Dry Cleaners Limited, a separate legal entity, and not the Defendant in her personal capacity; and
- ii. At paragraph 9 of the Statement of Claim, the Plaintiff explicitly acknowledges that it has no reasonable cause of action as against the Defendant.

(b) It may prejudice, embarrass or delay the fair trial of the action.

(c) It is scandalous, frivolous or vexatious for the following reasons namely:

- i. The entire premise of the Plaintiff's claim is to disparage the Defendant's marriage to her late husband;
- ii. At paragraph 5 of the Statement of Claim, the Plaintiff pleads that "*On 23 August 2013 the said Berkeley Evans married the Defendant at Green Cove Springs in the State of Florida after she was forced to leave The Bahamas due to the fact that she had no status to remain in The Bahamas as the work visa which she had as a purchasing assistant for the Plaintiff expired on 1st February 2016...*". The clear, unnecessary, frivolous, scandalous and vexatious implication being that the Defendant's marriage was a sham and not based upon genuine love and affection.

Court's power to strike out

[6] Order 18 Rule 19 (1) of the RSC states:

"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.”

- [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.
- [9] It is also part of the court’s active case management role to ascertain the issues at an early stage. However, a statement of claim is not suitable for striking out if it raises a serious live issue of fact which can only be determined by hearing oral evidence: **Ian Peters v Robert George Spencer**, ANUHCVAP2009/016 - Antigua & Barbuda Court of Appeal - per Pereira CJ [Ag.] - Judgment delivered on 22 December 2009.

[10] The court, when exercising the power to strike out, will have regard to the overriding objective of Order 31A of the RSC and to its general powers of management. It has the power to strike out only part of the statement of claim or direct that a party shall have permission to amend. Such an approach is expressly contemplated in the RSC: see Order 18 Rule 19.

[11] An application to strike out is essentially a summary procedure and it is not suitable for complicated cases which would require a mini-trial.

Discussion

First ground - Reasonable cause of action

[12] Learned Counsel for the Defendant Mr. Minnis ably assisted by Mr. Parker submitted that there is no reasonable cause of action for two reasons namely:

- 1) The Plaintiff's pleaded claim, if any, is against Evans Dry Cleaners Limited, a separate legal entity, and not the Defendant in her personal capacity; and
- 2) At paragraph 9 of the Statement of Claim, the Plaintiff explicitly acknowledges that it has no reasonable cause of action as against the Defendant. At the said paragraph 9 the Plaintiff states that: "*Following the death of the said Berkley Evans the Defendant moved into the controlling position of Evans Dry Cleaners and changed the signatories on the bank account(s) of the Company and also the computer system in the business so that she totally changed the operation of the company to become the sole person in control....*" The Plaintiff has no reasonable cause of action in fact and in law as against the Defendant as a result of her said alleged actions. The principals of the Plaintiff company appear to be so blinded by their palpable personal bitterness at the Defendant's marriage to their late father, which bitterness is a thread laced throughout its pleadings, that they have compelled the Plaintiff to institute and prosecute this still-born

action against the Defendant personally, which discloses no reasonable cause of action and represents a clear abuse of the process of the court.

- [13] With respect to the first limb of the Plaintiff's pleaded claim, learned Counsel Mr. Minnis insisted that the Plaintiff's claim is against Evans Dry Cleaners Limited, a separate legal entity, and should not be against the Defendant in her personal capacity. He therefore urged the Court to strike out the Statement of Claim. It should be noted that the Court must exercise its striking out jurisdiction sparingly. Pursuant to Order 18 Rule 19, the Court has a discretion to strike out or amend any pleading or the indorsement of any writ. There is nothing precluding an amendment to reflect the proper parties to this action although, in my opinion, the Plaintiff has sued the correct party. This submission is therefore untenable.
- [14] With respect to the second limb, the Defendant says that the Plaintiff has acknowledged that there is no reasonable cause of action in paragraph 9 of its Statement of Claim. On the face of the pleadings, the Plaintiff alleges that it is the owner of the building. The Defendant refutes the allegation by saying that some other company is the owner of that same building and by virtue of that company's ownership, she is entitled to be in possession of the building in question. As learned Counsel Mr. Mackay correctly pointed out, at paragraph 10 of the Defendant's Amended Defence, she has already provided evidence in support of the allegation. The Plaintiff has also produced its evidence of ownership in the form of a deed of conveyance. There is therefore a joinder on the issue of ownership. I agree with Mr. Mackay that it does not lie in the mouth of the Defendant to assert that no issue has been joined between the parties.
- [15] The case of **Ian Peters v Robert George Spencer** [supra] accentuates that a statement of claim is not suitable for striking out if it raises a serious live issue of fact which can only be determined by hearing oral evidence.
- [16] Reasonable cause of action means a cause of action with some chances of success when only allegations in the pleadings are considered: **Drummond-**

Jackson v British Medical Association (1970) 1 All ER 1094 is sound authority for this principle.

[17] A reasonable cause of action, according to Pearson LJ in **Drummond-Jackson** connotes a cause of action which has some chance of success when only the allegations in the pleading are considered. As long as the statement of claim discloses some cause of action, or raises some question fit to be decided at the trial, the mere fact that the case is weak and is not likely to succeed is no ground for striking it out. Where a statement of claim is defective only in not containing particulars to which the defendant is entitled, the application should be made for particulars under O 18 r 12 and not for an order to strike out the statement.

[18] In the present Summons, the ground that the Plaintiff has no reasonable cause of action against the Defendant fails because there is a live issue to be tried with respect to the ownership of the building. On this discrete point alone, the Court should dismiss the Defendant's Summons. But, in the event that I am wrong to come to this conclusion, I shall address the remaining grounds.

Second ground - Prejudice, embarrass or delay the trial of the action

[19] The Defendant did not advance any evidence that the pleadings may prejudice, embarrass or delay a fair trial of the action and as Mr. Mackay corrected submitted, no submissions need be made in this regard. That being said, it does not lie in the Defendant's mouth to raise this ground since she has delayed the trial of this action by filing her Summons to strike out after pleadings were closed, case management conference took place and a trial date was given.

[20] A summons to strike out should be made promptly and, as a rule, before the close of pleadings, even though Order 18 states that the application may be made at any stage of the proceedings. In addition, where the statement of claim is being attacked; as in the present case, the application may be made before the defence is filed: see **Attorney General of the Duchy of Lancaster v London and North Western Railway Company** (1892) 3 Ch. 274.

Third ground - Scandalous, frivolous or vexatious action

[21] The Defendant's third ground is that the Statement of Claim is scandalous, frivolous or vexatious for the following reasons namely:

- (i) The entire premise of the Plaintiff's claim is to disparage the Defendant's marriage to her late husband.
- (ii) At paragraph 5 of the Statement of Claim, the Plaintiff pleads that "*On 23 August 2013 the said Berkeley Evans married the Defendant at Green Cove Springs in the State of Florida after she was forced to leave The Bahamas due to the fact that she had no status to remain in The Bahamas as the work visa which she had as a purchasing assistant for the Plaintiff expired on 1st February 2016....*" The clear, unnecessary, frivolous, scandalous and vexatious implication being that the Defendant's marriage was a sham and not based upon genuine love and affection. The inherent nonsense of this pleading notwithstanding, it is wholly irrelevant and unnecessary and does nothing to advance the Plaintiff's purported claim. This pleading runs counter to Order 18 Rule 12(1) which requires that "*every pleading must contain the necessary particulars of any claim...*". The said allegation complained of herein by the Defendant [sic] is neither necessary nor relevant, it is however frivolous, scandalous, and vexatious. The Defendant's late husband's children are clearly using their assumed interest in the Plaintiff's company to attack, malign and abuse the Defendant out of sheer and unabashed bitterness. Pleadings of this nature have no place in a *bona fide* action for possession and/or purported *mesne profits*.
- (iii) It is clear from the Plaintiff's pleadings that it is fully aware that Evans Dry Cleaners Limited owns the premises from which it has operated for decades without any reference to the Plaintiff whatsoever. The bitterness of the Defendant's deceased husband's children at her relationship with her late husband and his bequests to her in his will, generically alluded to at paragraph 8 of the Statement of Claim, is quite probably the real reason for this claim as it serves no reasonable or lawful purpose. The said children, as the assumed principals of the Plaintiff company, are unreasonably and unlawfully seeking to escape the lawful result of their father's will to harm the Defendant in any way they can. The Court is duty bound to ensure that its process is not abused with scandalous, frivolous and vexatious litigation. The alleged principals of the Plaintiff are not entitled to arbitrarily harass the Defendant and put her to expense in defending a nonsensical claim and to waste valuable judicial time.

[22] Lindley LJ in **Attorney General of the Duchy of Lancaster** [supra] described the basis of rules allowing a case to be struck out for being ‘scandalous, frivolous or vexatious’. He stated at page 277:

‘....To what extent is the Court to go on inquiring into difficult questions of fact or law in the exercise of the power which is given to it under Order xxv.,rule 4? It appears to me that the object of the rule is to stop cases which ought not to be launched - cases which are obviously frivolous or vexatious, or obviously unsustainable....’

[23] At the heart of this dispute is ownership of the building. The Plaintiff’s claim is against the Defendant personally because she is saying that the Plaintiff is not the owner of the building whereas the Plaintiff is asserting its rights as the owner of the building. There is nothing scandalous, frivolous or vexatious about such a claim.

Abuse of process

[24] Although not a separate ground, it was intertwined with the first ground and tersely addressed. For completeness, I will state that the concept of ‘abuse of the court’s process’ in the form of re-litigation is wider than *res judicata* or issue of estoppel. This ground includes situations such as bringing an action:

- 1) Between the same parties and based upon the same matters as have already been adjudicated upon, such as to give rise to an issue estoppel.
- 2) Which could and should have been raised in earlier concluded proceedings between the same parties: **Yat Tung Investment Co v Dao Heng Bank Ltd** [1975] AC 581, PC in which a second claim for injuries was struck out following the successful first claim for damage to the car.
- 3) Which amounts to a collateral attack upon an earlier decision of a court of competent jurisdiction: **Hunter v Chief Constable of West Midlands Police** [1982] AC 529;

4) Which would involve the re-litigation of issues already settled by a compromise: **Schellenberg v BBC** [2000] EMLR 296 where a libel claim was struck out as an abuse of the process following the claimant's compromise of similar proceedings against other defendants.

[25] Although the above list is non-exhaustive, none of these situations present itself in the present case. There is one extant action: Action 2015/CLE/gen/01519 which is an action between **Evans Dry Cleaners Limited v B.E. Holdings Limited**. It was filed on 8 October 2015. In this action, Evans Dry Cleaners seeks an order from the court to declare it to be a beneficiary of a trust with respect to the building. It is not a re-litigation of the same issues between the same parties. In any event it is not a concluded action. This ground also fails.

Conclusion

[26] For all of the reasons stated above, I will dismiss the Defendant's Summons to strike out with Costs of \$3,000 to be paid to the Plaintiff on or before 31 March 2017.

[27] The Court now gives new case management directions. Trial of this action is fixed for 9 and 10 November 2017.

Dated this 31st day of January, A.D. 2017.

Indra H. Charles
Justice