

**COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**COMMON LAW & EQUITY DIVISION**

**2018/CLE/gen/01129**

**BETWEEN**

**GEORGE DAMIANOS  
D/B/A DAMIANOS SOTHEBY'S INTERNATIONAL REALTY**

**Plaintiff**

**AND**

**BANK OF THE BAHAMAS LIMITED**

**First Defendant**

**WINDERMERE ISLAND NORTH DEVELOPMENT LTD.**

**Second Defendant**

**JOSEPH CARRY RICH**

**Third Defendant**

**CH WINDERMERE LENDER LLC**

**Fourth Defendant**

**Before:** The Honourable Madam Justice Tara Cooper Burnside (Ag)

**Appearances:** Sophia Rolle-Kapousouzoglou and Valdere J. Murphy for the Plaintiff

Luther McDonald and E. Terry North for the First Defendant

Erin M. Hill for the Second and Third Defendants

Giahna Soles-Hunt for the Fourth Defendant

**Hearing Date:** 25 January 2021

**Civil Practice – Summons to Strike-out action – Order 18 Rule 19(1)(a)(b) and (d) of the Rules of the Supreme Court – frivolous, vexatious and/or abuse of the process of the Court – Whether action should be struck out when there are disputes of fact.**

## RULING

- [1] This is an application by the Fourth Defendant, CH Windermere Lender LLC (the “**LLC**”), by a Summons (the “**Summons**”) issued on 16 November 2020 for (i) an Order pursuant to Order 15, rule 6(2) directing that the LLC shall cease to be a party to these proceedings and (ii) an Order pursuant to Order 18, rule 19(1)(a),(b) and (d) and the inherent jurisdiction of the Court that this action be struck out as against the LLC on the grounds that it is frivolous, vexatious and/or an abuse of the process of the Court.

### General background

- [2] The facts of this action relate to Windermere Island (the “**Property**”), one of several privately owned islands in The Bahamas. The Plaintiff George Damianos is a licensed real estate broker in The Bahamas doing business as Damianos Sotheby’s International Realty, the First Defendant Bank of The Bahamas Limited (the “**Bank**”), is a Bahamian bank, the Second Defendant Windermere Island North Development Ltd (the “**Developer**”) is a real estate developer, the principal of which is the Third Defendant Joseph Carry Rich (“**Mr Rich**”) and the LLC is an SPV which acquired the Property from the Bank in or about 2018.
- [3] In or about 2003, the Bank advanced a loan (the “**Loan**”) to the Developer. At that time, the Loan was secured by a Debenture and First Demand Mortgage from the Developer to the Bank over the Property. Subsequently, in 2005, the Loan was increased and further secured by a Supplemental Debenture and Further Charge of the Property from the Developer to the Bank.
- [4] The Loan went into default and the Bank agreed to forbear its collection of the sums due under the Loan in consideration of a Promissory Note (the “**Note**”) dated 27 June 2011 issued by the Developer to the Bank and also a Guarantee (the “**Guarantee**”) by Mr Rich of the same date. For ease of reference, the Debentures, Mortgage, Further Charge, Note and Guarantee are collectively referred to in this Ruling as the “**Security Documents**”.
- [5] The Bank subsequently became entitled to exercise its power of sale under the Mortgage and Debenture; it entered into a Listing Service Agreement (the “**Listing Agreement**”) with the Plaintiff for these purposes. The Listing Agreement provided, *inter alia*, that: (i) the Plaintiff would have the sole and exclusive right, power and authority to act as the Bank’s agent for the listing, marketing and sale of the Property, (ii) the Bank would pay the Plaintiff a commission of 6% of the sale price plus VAT if a sale of the Property was completed and (iii) the terms of the agreement would be effective for the period 6 June 2016 to 5 June 2017.
- [6] Sometime after May 2017, the Plaintiff discovered that the Bank had conveyed the Property to the LLC, and had sold, assigned and transferred (i) the debt due by the

Developer under the Loan, (ii) the Security Documents and (iii) all powers rights and remedies contained in the Security Documents to the LLC.

[7] The Plaintiff contends that the conveyance of the Property to the LLC in the context of that transaction is a “sale” within the scope of the Listing Agreement and he is entitled to be paid a 6% commission in accordance with its terms. On that basis, he commenced these proceedings against the Defendants.

[8] In his specially indorsed Writ of Summons filed on 3 October 2018, the Plaintiff claims:

- “1. A Declaration that the Bank sold [the Property] to [the LLC] for the purposes of the Conveyancing and Law of Property Act and the Agreement;
2. Four Hundred and Thirty-Two Thousand Dollars (BDS\$432,000.00) being the amount of commission payable to the Plaintiff for his services as agent under an agreement dated the 6 day of June 2018 made between the Plaintiff and the Defendant whereby the Plaintiff was contracted to exclusively list, market and sell [the Property] on behalf of the Defendant, and the Defendant in breach of said agreement has failed to pay the Plaintiff his commission in accordance with the terms of the agreement;
3. Damages against the Second to Fourth Defendants for tortious wrongdoing against the Plaintiff.
4. Alternatively the said sum as damages for breach of contract;
5. Interest pursuant to s.3 the Civil Procedure (Award of Interest) Act on all sums due and owing;
6. Costs; and
7. Such further or other relief as the Court deems just.”

[9] The LLC entered an appearance to the action on 25 October 2019 and subsequently filed its Defence on 28 November 2018. In summary, the Defence of the LLC is as follows: The LLC had no knowledge of the Loan Documents or Listing Agreement. By May 2017, it was engaged in discussions with the Bank regarding the purchase of the Debenture and Mortgage. On 22 September 2017, it entered into a loan sale agreement with the Bank whereby it agreed to purchase the Bank’s rights, title and interests in a loan secured by the Debenture and Mortgage. In the loan sale agreement the Bank represented to the LLC that no brokerage commissions would be payable in connection with the intended transaction. The LLC did not know that the Plaintiff had been engaged by the Bank to sell the property and did not conspire with the other Defendants to cause the Plaintiff loss. Additionally, the LLC did not (in combination with the Developer and Mr Rich) knowingly

induce the Bank to breach the Listing Agreement with the intention of causing loss and damage to the Plaintiff.

### Legal basis of the application

[10] As indicated above, the LLC's application is brought under Order 15, rule 6(2)(a), Order 18, rule 19(1)(a)(b) and (d) and under the inherent jurisdiction of the Court.

[11] Pursuant to Order 15, rule 6(2), the Court has power, at any stage, to order a person who has been unnecessarily or improperly added as a party to the proceedings, to cease to be a party. It states:

“(2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application —

- (a) order any person who has been improperly or unnecessarily made a party of who has for any reason ceased to be a proper or necessary party, to cease to be a party”

[12] Further, pursuant to Order 18, rule 19(1), the Court may, at any stage, order to be struck out any pleading or the indorsement of any writ on the ground that it discloses no reasonable cause of action, is frivolous, vexatious or an abuse of the process of the Court. Order 18, rule 19(1), insofar as it is relevant, states:

“19.(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
- ...
- (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 (2) on an application under paragraph 1(a).”

[13] In addition to its powers under Order 18, rule 19(1), the Court enjoys inherent jurisdiction to prevent its process from being obstructed or abused and to stay or dismiss any proceedings which it regards as frivolous, vexatious or an abuse of its process.

## General Principles applicable to strike out

- [14] The principles which apply on an application to strike out are well established and are not in dispute:
- (i) The object of the rule is to stop cases which ought not to be launched, which are obviously frivolous or vexatious or obviously unsustainable: ***Duchy Lancaster v London and North Western Railway Company***.
  - (ii) The jurisdiction is draconian and should be exercised cautiously and only in clear cases; for once it is exercised, the party affected is deprived of a hearing of his case on the merits.
  - (iii) A statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable and there is no need to go to trial: ***Nagle v Feilden*** [1966] 2 Q.B. 633, ***Hamby Limited v Hermitage Estates Limited and others***.
  - (iv) An application under Order 18, rule 19(1)(a) is only appropriate when, on the face of the pleading complained of, it is clear that the facts stated do not give rise to a triable issue or defence. No evidence is permitted to be adduced and it is not permissible for the Court to anticipate the defence(s) which the defendant may plead and be able to prove at the trial, nor anything which the plaintiff may plead in reply. The Court must make a determination based on the four corners of the pleading alone and the primary question to be determined is whether, assuming the allegations are true, a cause of action with some chance of success is disclosed when only the allegations are considered. So long as this question may be answered in the affirmative, a strike out order will not be justified. This is so, even if the case is highly improbable, difficult to believe or not strong: ***Lawrance v Lord Norreys*** (1890) 15 AC 210.
  - (v) Under the inherent jurisdiction, abuse of process concerns the power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people. The circumstances in which abuse of process can arise are wide and varied and depend on the facts of the particular case: Per Lord Diplock in ***Hunter v CC of The West Midlands Police*** [1982] AC 529, 536.
  - (vi) The strike out power of the Court is a summary jurisdiction which 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: per Dankwerts LJ in *Wenlock v Moloney* [1965] 2 All ER 871, 874.

**Order 18 rule 19(1)(a)**

[15] The LLC's first ground of complaint is that the Statement of Claim fails to disclose a reasonable cause of action against the LLC.

[16] In the present case, there are essentially two paragraphs in the Statement of Claim which allege wrongdoing on the part of the LLC, viz: paragraphs 43 and 44. To put the Statement of Claim in perspective, it is comprised of 44 paragraphs, most of which are devoted to pleading the Security Documents, the Listing Agreement and the transaction between the Bank and the LLC. After this, the Plaintiff avers as follows:

"35. On 28<sup>th</sup> March 2018, Johnathan Morris, an estate agent for Damianos Sotheby's International Realty ("Sotheby's") received an email from Eric Christensen of CrossHarbour Capital Partners indicating that a deal was closed regarding [the Property], and as a result, requested that the listing in relation to [the Property] be removed from Sotheby's website.

36. Lennox Paton conducted a company search at the Companies registry where it was discovered that the Officers of [the LLC] are directly associated with CrossHarbour Capital Partners.

37. Notwithstanding the Plaintiff's repeated requests, [the Bank] has failed to pay the Commission owed to the Plaintiff and by reason of [the Bank's] breach of contract the Plaintiff has suffered financial loss.

38. The Plaintiff will contend that having regard to [the Developer's] default under the Loan evidenced by the promissory note and guarantees and its failure to tender any sum owing under the promissory note of 27 June 2011 or Mr Rich's guarantee, the Developer could have had no right in law to request from [the Bank] a conveyance of [the Property] to any third party and [the Bank] was therefore not obliged to accede to any such request.

39. Any response to a request coming from [the Developer] could only be by way of accommodation as [the Bank] was interested in recovering its money. It had no obligation in law to surrender [the Property] to [the Developer].

40. The Plaintiff avers that the conveyance by [the Bank] of [the Property] to [the LLC] for money consideration was a sale within the context of the Listing Agreement.

41. The Plaintiff asserts by virtue of the fact that as agent it had been advertising the sale of [the Property] and inviting inquiries from third parties that this fact was well known to the Defendants.
42. There was in fact no approach by the Developer to pay off the debt as is evidenced by the Transfer of Debenture rather there was an offer and agreement for the LLC to purchase the Bank's interest in the Loan and security as well as [the Property].
43. **The Defendants** well knew that the Plaintiff had been engaged by the Bank to market and sell [the Property] and **in combination with a common intention conspired to cause the Plaintiff loss** by the First Defendant's breach of the listing agreement.
44. In combination, **the Second to Fourth Defendants** have **knowingly induced [the Bank] to breach its agreement** with the Plaintiff by the same of [the Property] **with the intention of causing loss and damage to the Plaintiff.**" (my emphasis)

#### ***Lack of particulars***

[17] Counsel for the LLC, Ms Soles-Hunt, submitted that the averments in the Statement of Claim are fanciful and speculative; and there is nothing in the pleading which particularises the Plaintiff's claim against the LLC. Her primary complaints are that the Statement of Claim (i) does not indicate the acts alleged to have been committed by the LLC to further the alleged conspiracy and (ii) fails to particularise the LLC's knowledge of the Listing Agreement. For these reasons she says there is no reasonable cause of action disclosed.

[18] In support of her position Ms Soles-Hunt referred the Court to Bullen and Leake's Precedents of Pleadings, 12<sup>th</sup> Edition, which addresses the manner in which a claim of conspiracy should be pleaded. It states (at pages 340 – 341):

"Pleading. The Statement of Claim should describe who the several parties are and their relationship with each other. It should allege the agreement between the defendants to conspire, and state precisely what was the purpose or what were the objects of the alleged conspiracy, and it must then proceed to set forth, with clarity and precision, the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy; and lastly, it must allege the injury and damage occasioned to the plaintiff thereby."

[19] In addition, she cited the decision in ***OBG Ltd v Allan*** [2007] UKHL 21 where the House of Lords authoritatively determined:

“In order to be liable for inducing a breach of contract, a person had to know that he was inducing a breach of contract and to intend to do so with knowledge of the consequences. A conscious decision not to inquire into the existence of a fact could be treated as knowledge for the purposes of the tort and a person who knowingly induced a breach of contract as a means to an end had the necessary intent even if he was not motivated by malice but had acted with the motive of securing an economic advantage for himself. However, a breach of contract which was neither an end in itself nor a means to an end but was merely a foreseeable consequence of a person's acts did not give rise to liability.”

[20] I agree with Ms Soles-Hunt that the claims against the LLC are not sufficiently particularised. Given that conspiracy is a serious allegation, it is especially important for the claim to be set out clearly and with adequate particularity.

[21] In *Alesco Risk Management Services Ltd and other companies v Bishopsgate Insurance Brokers Ltd and others* [2019] EWHC 2839 Freeman J endorsed the following comments of Megaw LJ in *Jarman & Platt Ltd. v I. Barget Ltd, and Others* [1977] FSR 260, with which I wholeheartedly agree:

“... a charge of conspiracy in civil proceedings is generally to be regarded as a grave charge; and that, particularly where the allegation is made against persons of hitherto unblemished reputation, the standard of proof which has to be satisfied before a court can properly hold that the charge is established is a high one, commensurate with the seriousness of the charge. *Hornal v Neuberger Products Ltd.* [1957] 1 Q.B. 247; *Blyth v. Blyth* [1966] A.C. 643. Unless for some good reason on the particular facts an allegation of conspiracy in civil proceedings is to be treated, substantially, only as a technical matter, **such an allegation, equally with an allegation of fraud, must be clearly pleaded and clearly proved by convincing evidence.**” (my emphasis)

[22] In my view, the Statement of Claim does not clearly set out the basis upon which the Plaintiff alleges a conspiracy to cause him loss. Firstly, it does not provide particulars of the LLC's alleged agreement to conspire or the specific acts committed by the LLC in pursuance and in furtherance of that agreement. Secondly, the Statement of Claim does not plead any primary facts to support the claim that the LLC “knowingly induced” a breach of contract as alleged in paragraph 44.

[23] Nonetheless, I am of the view that the averments in paragraphs 43 and 44 plead the essential elements of the torts alleged to have been committed. For the conspiracy - a combination of two or more persons (including the LLC) to injure the Plaintiff; and for the claim of inducement of breach of contract - knowledge on the part of the LLC that it was inducing a breach of the Listing Agreement with the intention of causing loss. There



averments against the LLC in paragraphs 43 and 44 are unequivocal and assuming the allegations are true, they clearly raise issues which are fit to be tried by a judge. I am also of the view that, where a pleading is defective merely because, as in this case, it does not contain particulars to which the other side is entitled the usual remedy is an application for further and better particulars and not an order that the action be struck out: see ***Paragraph 18/19/13 of The Supreme Court Practice, 1999***

- [24] In all the circumstances, I decline to exercise my discretion under Order 18, rule 19(1)(a) to strike out the action as against the LLC.

**Order 18 rule 19(1)(b) and (d)**

- [25] The LLC's second and third grounds of complaint are that the Statement of Claim is frivolous or vexatious and/or otherwise an abuse of the process of the Court.

***Evidence***

- [26] While no evidence is permitted to be adduced for the purposes of an application under Order 18, rule 19(1)(a), affidavit evidence is always admissible upon an application made under Order 18, rule 91(1)(b) or (d) or the inherent jurisdiction of the court.

- [27] On behalf of the LLC, Samuel T. Byrne swore two affidavits in support of the Summons. A summary of that evidence is as follows:

- (i) Mr Byrne is the Managing Partner of both CrossHarbour Capital Partners LLC ("**CrossHarbour**") and the LLC.
- (ii) In or around May 2017, CrossHarbour entered into discussions with the Bank regarding the sale of rights, title and interest in the Loan. CrossHarbour's initial offer was rejected and the parties continued to negotiate. During those negotiations, Mr Byrne was not informed of the existence or terms of the Listing Agreement.
- (iii) After a series of discussions and negotiations, on 22 September 2017, a loan sale agreement was entered into between the LLC and the Bank. In that agreement the Bank represented to the LLC that no brokerage, commission was payable to any person in connection with the transaction and agreed to indemnify the LLC against any such payment. The transaction closed on or around March 2018, subject to regulatory approval.
- (iv) The LLC was not a party to the Listing Agreement and Mr Byrne verily believes that no agent of the LLC was aware of the Listing Agreement before the action.

- (v) The LLC did not conspire with the Developer and Mr Rich to cause loss to the Plaintiff. The acquisition of the Loan was an investment opportunity. And until the commencement of the action, Mr Byrne was unaware of the terms of the Listing Agreement.
- (vi) Mr Byrne became aware of the Loan from the Mr Rich through a mutual acquaintance and had discussed with Mr Rich refinancing the development of the Property, which appeared to be a viable investment opportunity for the LLC at the time.
- (vii) After the closing of the transaction with the Bank, Mr Christiansen, a consultant engaged to assist the LLC with property development in The Bahamas, sought assistance from local real estate agents about leasing and purchasing property in the vicinity of the Property. He contacted Mr Morris in this regard but never received a response.
- (viii) The transaction between the Bank and the LLC was a simple loan sale transaction. Instead of a release and satisfaction of the loan and the issuance of a new loan and security documents, the transaction was structured to ensure that the LLC retained priority and saved on costs.
- (ix) Mr Byrne believes the LLC should not be a party to the action in the circumstances.

[28] In opposition to the Summons, the Plaintiff swore an affidavit, the contents of which are summarised below.

- (i) It is doubtful that the LLC was not informed about his involvement with the Property by the Bank, Mr Rich or the Developer.
- (ii) The Listing Agreement required third parties interested in the Property to be referred to the Plaintiff but the LLC engaged directly with the Bank.
- (iii) It is unlikely that the LLC was unaware of the Plaintiff's exclusive rights with respect to the marketing of the Property since Mr Byrne is also the Managing Director of CrossHarbour, and CrossHarbour entered into negotiations with the Bank in May 2017. Further, in February 2018, an agent of the LLC [Mr Christiansen] was informed by a broker of the Plaintiff [Mr Morris] that the Property was listed with the Plaintiff for sale; and Mr Christensen subsequently requested Mr Morris to remove the Property from the Plaintiff's website in March 2019.
- (iv) The LLC likely became aware of the Property as a result of the Plaintiff's marketing efforts or its relationship with CrossHarbour.

- (v) The Plaintiff believes the Defendants, including the LLC, knowingly conspired to circumvent him and intentionally structured the transaction under the guise of a “transfer” in an attempt to assist the Bank in avoiding its obligations under the Listing Agreement to pay commission to him and/or for tax benefits for both the Bank and the LLC.

[29] Ms Soles-Hunt submitted that if the Court determines at trial that the Bank committed a breach of contract and it is liable to pay a commission to the Plaintiff, there would be no further loss suffered by the Plaintiff for which the LLC could be liable. Related to this, she also submitted that inducing a breach of contract is an accessory tort of secondary liability whereby, if the Court determines that the Bank did not commit a breach of contract, the claim against the LLC for inducement would fall away. It does not follow from those submissions that the claims against the LLC are frivolous and vexatious or an abuse of the process of the Court.

[30] Ms Soles-Hunt further submitted that there is no evidence before the Court to establish that the LLC *conspired* to cause the Plaintiff loss. She also submitted that there is no evidence to support the Plaintiff’s contention that the LLC was aware of the Listing Agreement and its terms. She stressed in her submissions that based on the documents currently before the Court, the Plaintiff has not *proved* that the LLC had the requisite knowledge or intention. All of these submissions raise questions of fact which, based on the evidence before me, are clearly disputed. It follows that I am being asked to embark on an exercise to resolve conflicts of evidence on the affidavits before the Court and determine the case between the Plaintiff and the LLC on this application. Ms Soles-Hunt stated that the documents contained in the Agreed Bundle of Documents for use at trial demonstrates that the Plaintiff has not discharged its burden of proof; therefore, proceeding through a trial would not assist. While the purpose of a strike out application is to avoid a waste of time and money, I do not believe that it is my function to examine each document in the Agreed Bundle of Documents and determine whether the Plaintiff has proved its case. That is the function of the trial judge and I regard very carefully the admonition given by Danckwerts LJ in *Wenlock v Moloney*. The jurisdiction which I am currently being asked to exercise is summary in nature and a minute and protracted examination of the documents and facts is objectionable. Such an exercise would usurp the position of the trial judge and would amount to a trial of this action in Chambers, on affidavits, without the parties’ exercising their right to cross examine.

[31] I am also mindful of that fact that the usual method by which issues of fact are tried in our courts is well settled. After discovery, the parties are allowed to call their witnesses and lead their evidence, after which, the trial judge determines which party is telling the truth. It is only in exceptional cases that a party should be deprived of his day in court.

[32] It is possible that the Plaintiff’s claim against the LLC might be contradicted by the documents contained in the Agreed Bundle but that cannot be ascertained without a minute and protracted examination. And in any case, the evidence on which the Plaintiff

may rely is not limited to the documents, but includes his own evidence, the evidence of witnesses called on his behalf and the evidence elicited from the Defendants and/or the Defendants' witnesses in the course of cross-examination.

[33] It may well be that the Plaintiff will face difficulties in proving his case. A claim of conspiracy is such that cogent and convincing evidence will be required to prove it. Furthermore, if the trial judge determines at trial that the Bank breached the Listing Agreement, it appears that the Plaintiff may be challenged in proving that the LLC knowingly induced a breach. However, those reasons are not sufficient to warrant an order that the action be struck out. I cannot say with confidence that the Plaintiff's case against the LLC is entirely without substance and doomed to failure. In my view, justice requires that the Plaintiff be given an opportunity to present his case against the LLC before the trial judge who will assess its merits in light of all the evidence presented at trial.

[34] For the reasons indicated above, I am not prepared to exercise the powers under Order 18, rule 19(1)(b) or (d), or the inherent jurisdiction of the Court, to strike out the action on the basis that the Plaintiff's claim is frivolous, vexatious and/or an abuse of the process of the Court. Moreover and for the same reasons, I decline to order that the LLC shall cease to be a party to the action. The LLC's Summons is therefore dismissed.

[35] I invite the parties to make submissions with respect to costs.

**DATED** this 25<sup>th</sup> day of March, 2021



**TARA COOPER BURNSIDE  
JUSTICE (AG)**