COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
2018/CLE/gen/FP/000337
Common Law & Equity Division

BETWEEN

REGAL HOMES LIMITED
Plaintiff

AND

STEPHEN NORTON
Defendant

AND

OTHEA INC.
2nd Defendant

AND BETWEEN

STEPHEN NORTON
Plaintiff by Counterclaim

AND

WAYNE OLSEN
1st Defendant by Counterclaim

AND
REGAL HOMES LIMITED
2nd Defendant by Counterclaim

AND
GILLIAN OLSEN
3rd Defendant by Counterclaim

BEFORE: The Honourable Justice Petra M. Hanna-Weekes

APPEARANCES: Mr. Branville McCartney along with Ms. Rochetta Godet for the 1st and 2nd Defendants

Mr. Wendell A. Smith for the Plaintiff

HEARING DATE: June 14, 2021

Hanna-Adderley, J

RULING

Background

1. The Plaintiff is and was at all material times a duly incorporated company carrying on the business of a building contractor. In an Affidavit filed herein on May 7, 2020, in support of an application for security for costs against the Plaintiff, the 1st Defendant states that he is an Officer and Director of the 2nd Defendant and that the 2nd Defendant is the owner of Lot 49, Block 13, Fortune Bay Subdivision, Unit 4, Freeport, Grand Bahama ("the Property"). This action involves a dispute in connection with an alleged oral contract between the parties for the construction of a dwelling house on the subject lot.
2. The Specially Endorsed Writ of Summons was filed herein on December 4, 2018. On November 11, 2019 leave was granted to the Plaintiff to file an Amended Writ of Summons which was filed on March 10, 2020. On October 15, 2020 at a Pretrial Review hearing the parties attended the hearing having already agreed the further directions which were made orders of the Court. The Directions Order was perfected on November 12, 2020. At the first paragraph of the said Order it was ordered that Dean Norton and Kerry Hinchcliffe be struck out as Defendants and at the second paragraph that Othea Inc. be joined as the 2nd Defendant. Security for Costs by the Plaintiff and the 1st Defendant was agreed and ordered to be paid in the sum of $35,000.00 and it was further agreed that the payments of the security would be made in cash by the parties to the Court. The 1st and 2nd Defendants by the Directions Order were given leave to file and serve an Amended Defence and Counterclaim on or before November 2, 2020. The payments into Court were subsequently made by the parties and the Amended Writ of Summons was filed on December 16, 2020. Instead of filing an Amended Defence and Statement of Claim as Ordered the 1st and 2nd Defendants by their new Counsel entered Conditional Appearances filed on February 8, 2021.
3. This is an application brought by Summons filed on February 15, 2021 in the Supreme Court, Nassau Registry and again on March 15, 2021 in the Supreme Court, Freeport Registry seeking an Order that this action be struck out against the 1st and 2nd Defendants pursuant to Order 18 Rule 19 (1) (a) (b) (c) and (d) of the Rules of the Supreme Court ("**RSC**") on the grounds that the Plaintiff's Amended Writ of Summons filed herein on December 16, 2020 discloses no reasonable cause of action, is scandalous, frivolous or

vexatious or is an abuse of the process of the Court and costs. The Defendants' application is supported by the Affidavit of Mr. William Arthur Branville McCartney filed on February 15, 2021 in the Supreme Court, Nassau Registry and again in the Supreme Court, Freeport Registry on March 15, 2021.

4. The Plaintiff opposes this application and relies on the Affidavit of Mrs. Tiffany Dennison filed herein on April 21, 2021. The Defendants laid over written Submissions dated June 10, 2021 and the Plaintiff filed written submissions on June 14, 2021. The issue is whether the pleadings disclose a triable issue(s) with any chance of success or is unsustainable and whether the machinery of the Court is being used in a manner that is an abuse of process. The Court finds that the pleadings disclose triable issues, namely, whether there exists an oral contract which binds the parties and whether there has been a breach of this contract by either party. That although the pleadings are deficient in certain aspects such deficiencies can be cured by a request and/or application for further and better particulars or amendment. The reasons for these findings are as follows.

Statement of Facts

5. The Plaintiff in its Amended Writ of Summons and Statement of Claim claims inter alia:-

"

STATEMENT OF CLAIM

1. The Plaintiff is and was at all material times a duly incorporated company carrying on the business of building contractor.
2. The 1st Defendant is and was are and were at all material times owners and a residents of the City aforesaid and owner of property situated as Lot 49 Cross Bones, within the City of Freeport On the island of Grand Bahama, one of the islands within the Commonwealth of The Bahamas. (the property) The Second Defendant is an IBC incorporated in the Commonwealth of The Bahamas that owns the property, whose shares are held by registered office third parties.
3. That the 1st Defendants engaged the services of the Plaintiff to build a house on the said property, the Plaintiff offered the same, for momentary compensation in the form in express terms of Costs Plus Contract with stage payments made before each stage commences.
4. That on or about November 2015 by verbal agreement, the 1st Defendants paid the first installment of Fifteen Thousand Three Hundred Dollars

(15,300.00) and the Plaintiff commenced services of the property, gaining building permits January 2017, work commenced and the second stage installment was provided to the Plaintiff on or about January 4th 2016 in the amount of One Hundred and Seventy Two Thousand Dollars ($172,200.00).

5. That on or about October 2018, before the completion of the agreement between the parties, a report was provided to the 1st Defendant at the Defendant's behest from Engineer Burton Miller, containing a punch list for completion by the Plaintiff.
6. The Plaintiff, willing and able to attend to the same, requested payment from the 1st Defendants to date as agreed under stage payments before proceeding to complete the said list and conclusion of the agreement.
7. As of September 2018, works were completed and small items of the punch list to still complete, which the Plaintiff agreed to, final inspection date to be set.
8. That at various time of the terms of services, the 1st Defendants would ask for the Plaintiff to await payments due until such funds were had by the Defendant. The Plaintiff made all attempts to accommodate the Defendant's needs. In addition the 1st Defendants did not want works carried out whilst he was away, and again the Plaintiff would accommodate such request.
9. That on or about November 2018, the 1st Defendant advised the Plaintiff that the total amount due left and owing would not be paid by him, in breach of the express terms of the agreement for services.
10. That despite repeated requests and demands by the Plaintiff, the Defendants continue to refuse to render payment for services and products received.
11. That as a result of the refusal to pay, the Plaintiff has suffered loss and damage.

PARTICULARS OF BREACH

None payment of services rendered.

AND THE PLAINTIFF CLAIMS:

1. Payment in the amount of $116,610.36
2. Damages for breach
3. Costs
4. Interest
5. Such further or other relief as to the court may seem just"

6. Mr. Branville McCartney submitted, in part, that the Amended Writ of Summons specifically states that the 2nd Defendant is an IBC incorporated in the Commonwealth of the Bahamas and that it owns the subject property and that its shares are held by the Registered office and third parties. That at paragraph 10 the Writ states that despite repeated requests and demands by the Plaintiff the Defendants refuse to render payments for services and products received. That it is only in these 2 instances that the 2nd Defendant is mentioned and that no cause of action has been directed towards the 2nd Defendant.
7. Mrs. Tiffany Dennison in paragraphs 4-19 of her Affidavit evidence sets out a chronology of events in this matter from November 2018 to the filing of the Directions Order on November 5, 2020, the Defendants' non-compliance with the Order, the recent involvement of Halsbury's Law Chambers and her belief that instant application is the 1st Defendant 's way of evading paying the contract between the parties, and costing the Plaintiff more money and frustration. In particular at paragraph 15 Mrs. Dennison deposes to the fact that following the Directors Order made by the Court, the Defence served Appearances, filed various applications such as to strike out the Plaintiff's claim; security for costs and to remove the new parties added subsequently advising the Court that the IBC Company with no shareholders within the action was the actual owner of the property and that as a result of the applications made at the pretrial review both parties have had to pay costs into Court and the action name was changed.

Submissions

Defendants

8. Mr. Branville McCartney Counsel for the 1st and 2nd Defendants submitted, in part, that an application to strike out can be made at any stage in the proceedings; that a reasonable cause of action means a cause of action that has some chance of success when only the pleadings are considered (Per Lord Pearson in **Drummond-Jackson v British Medical Association** (1970) 1 All ER 1094); that if it appears clearly that there is no contract between the parties the Writ of Summons and Statement of Claim will be struck and the

action dismissed (Per **South Hetton Coal Co. v Haswell** (1898) 1 CH 465); that when there is no contract valid in law (**Humphreys v Polak** (1901) 2 KB 385) the action should be struck; that when suing for breach of contract the pleading should state the date of the alleged agreement, the names of the parties to it, whether it was made orally or in writing, and it should set out the relevant terms relied upon.

9. Mr. McCartney submitted that the Amended Writ discloses no cause of action against the 1st and the 2nd Defendant and should be struck on the basis that the Plaintiff did not have the capacity to engage in an oral/verbal agreement/contract; it cannot form an intention to create legal relations; as an incorporated company is incapable of verbal communication or having an intention, and the pleadings fail to outline the date of the agreement, the names of the party to it and the relevant terms of the contract.

Plaintiff

10. Mr. Wendell Smith Counsel for the Plaintiff submitted, in part, that it is trite that law that in a striking out application under Order 18, rule 19 the application will only succeed in plain and obvious cases where no minute and protracted examination of documents and facts of the case is required (See **Hobbuck v Wilkinson** [1899] 1 QB 86, 91 per Lindley MR; **Wenlock v Moloney and Others** [1965] 2 All ER 871; **Standard Chartered Bank (Switzerland) S.A. v. UBS (Bahamas) Ltd.** SCCrApp No. 222 of 2012 and Lord Hope of Craighead in the House of Lords in **Three Rivers District Council v Governor and Company of The Bank of England** [2001] 2 All ER 513).

11. Mr. Smith referred the Court to the judgment of Lord Justice Sellers in **Wenlock v Moloney and Others**:

> *"this summary jurisdiction of the court was never intended to be exercised 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 trail judge, and to produce a trail 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".*

12. He submitted that in relation to the Defendants application, the Defendants must show that the Plaintiff has no reasonable cause of action; that the Court must be satisfied by the Defendants that the Plaintiff's Statement of Claim is not arguable. Moreover, that if

the points raised require substantial argument and consideration, it is submitted a more appropriate remedy to allow a trial to occur. He referred the Court to the commentary to Order 18, rule 19 of the English Rules of the Supreme Court (which order is in para materia with the Bahamas Order 18 rule 19) which states:

> "*It is only in plain and obvious cases that recourse should be had to the summary procedure under this Rule.... The summary procedure under this rule can be adopted when it can be clearly seen that a claim or answer is on the face of it: obviously unsuitable... The summary remedy under this rule is only to be implied in plain and obvious cases where the action is one which cannot succeed or is in some way an abuse of the process or the case unarguable".*

13. It is his submission that the test for the court to consider in determining whether to use its inherent jurisdiction or powers under the rule, is one of reasonableness and as stated by Justice Lush in **Norman v Matthews** (1416) 85 L.J .K.B. 857,859:

> "*In order to bring a case within the description it is not sufficient merely to say that the Plaintiff has no cause of action. It must appear that his alleged cause of action is one on the face of it is clearly one which no reasonable person could treat as bona fide".*

14. Mr. Smith submits that he Plaintiff has particularized the partly oral and partly written agreement between the parties at paragraphs 3 and 4 of the Amended Writ of Summons herein. That the 1st Defendant in his Defence filed on the 23rd day of April, 2019 particularized his Defence at paragraphs 2 and 3 therein with respect to the agreement between the 1st and the Plaintiff. The 1st Defendant in his Defence has admitted that there is a contract, however the terms of the agreement are in dispute.
15. Additionally he submits that the 1st Defendant further particularized in his Defence at paragraph 2 that at all material times the owners of the Property were Dean Norton and Kerry Hinchcliffe and that the Plaintiff in its Amended Writ of Summons added the 2nd Defendant and asserts that it owns the property, an assertion that has not been refuted in the Affidavit in support of the Defendants applications.
16. It is also Mr. Smith's submission that the International Business Companies Act Section 69 (1) (c) states that a contract that, if entered into between individuals, is valid although entered into orally, and not reduced to writing, may be entered into orally by or on behalf of the company by a person acting under the express or implied authority of the company,

and may in the same manner, be varied or discharged.

17. Mr. Smith submits that the Amended Writ of Summons discloses a cause of action against the Defendants and raises questions that should be decided by the trial judge. Moreover, with respect to the 2nd Defendant, as the 1st Defendant's Defence has particularized that he is not the legal owner of the property a trial is necessary to determine whether the 1st Defendant by his words or conduct represented that he had apparent (or ostensible) authority to act on behalf of the 2nd Defendant the owner of the property. Mr. Smith states that, in the alternative, the Plaintiff submits that if the Court determines that there is no cause of action against the 2nd Defendant in the Amended Writ of Summons, that the Plaintiff be granted leave to provide further and better particulars.
18. The Plaintiff submits further that the agreement as asserted is not ex facie an illegal contract, and as such if the Court determines at a trial that there was an agreement between the parties it is valid in law.
19. The Plaintiff submits further that the Amended Writ of Summons at paragraphs 3 and 4 clearly states the date of the agreement which was on or about November, 2015, it states the parties thereto, and it states that the agreement was express by virtue of a Costs Plus Contract and verbal. The Plaintiff submits further that in the event the particulars were deemed insufficient by the Defendants a request for further and better particulars could have been requested, and in the alternative an application made to this Honourable Court.
20. Mr. Smith submits that it is trite law that a contract if not otherwise invalid can be made on behalf of a company in the same manner as an individual may enter into a contract, so long as the individual acting on behalf of the company has express or implied authority to act on behalf of the company. (See Section 25 of the Companies Act Chapter 308 of the Statute Laws of the Commonwealth of the Bahamas, and Section 25 of the Companies (Amendment) Act 2020 of the Statute Laws of the Commonwealth of the Bahamas).
21. Mr. Smith also submits that in the event the particulars are deemed insufficient, further and better particulars can be requested.
22. The Plaintiff finally submits that the doctrine of a company having a separate legal personality is the foundation of company law and as such the assertions of the Defendants at paragraph 5 are without merit**. Salomon v Salomon & Co.** [1897] A.C. 22 & **Lee v Lee's Air Farming Ltd** [1961] AC 12, PC.
23. Mr. McCartney in reply submits that Mr. Smith referred to an agreement partly oral and

partly in writing but that the Amended Writ only referred to an oral agreement. He further submits that the previously filed Defence had no bearing on the application and that there was no Defence filed to the Amended Writ.

Issues

24. The issues to be determined are whether (1) the Plaintiff's pleadings disclose a triable issue with some chance of success or (2) are obviously unsustainable or (3) whether the Courts machinery is being used as a means of vexation and oppression in the process of litigation.

Analysis and Conclusion

The Law

25. Order 18, Rule 19 of the RSC 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

(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).

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading."

26. The power to strike out is a Draconian remedy which should be employed only in clear and obvious cases where it is possible to say at the interlocutory stage and before full discovery that a particular allegation was incapable of proof (per Allen, J in **Bettas Limited v Hong Kong and Shanghai Banking Corporation Limited and HSBC Bank Plc SCCiv App No. 312 of 2013**).

27. Guidance on how this rule should be applied is set out by **Osadabey, JA** in **Hamby v Hermitage Estates Ltd SCCiv App No. 21 of 2008** and also by **Auld, LJ** in **Electra Private Equity Partners v KPMG Peat Marwick (a firm) & Ors [2001] 1 BCLC 589**. Osadabey, JA states in Hamby:

"It is well settled that the jurisdiction to strike out is to be used sparingly and limited to plain and obvious cases where there is no need for a trial. There is no doubt that the exercise of that jurisdiction may deprive a party of the examination and cross examination of witnesses which can change the result of a case." At page 613 of **Electra Private Equity Partners**, Auld LJ stated: "It is trite law that the power to strike out a claim under RSC Ord.18, r.19 or in the inherent jurisdiction of the Court should only be exercised in "plain and obvious" cases. That is particularly so where there are issues as to material primary facts and the inferences to be drawn from them, and when there has been no discovery or oral evidence. In such cases, as Mr. Aldous submitted, to succeed in an application to strike out, a defendant must show that there is no realistic possibility of the plaintiff establishing a cause of action consistently with his pleading and the possible facts of the matter when they are known. Certainly, a judge, on a strike-out application where the central issue is one of determination of a legal outcome by reference to as yet undetermined facts, should not attempt to try the case on the affidavits. See **Goodson v Grierson [1908] 1 KB 761, CA**, per Fletcher Moulton LJ at 764-5 and Buckley LJ at 766; **Wenlock v Moloney**, per Sellers LJ at 1242G-1243D and Danckwerts LJ at 1244B ([1965] 1 WLR 1238); and **Torras v Al Sabah & others(unreported) 21 March 1997 CA**, per Saville LJ. There may be more scope for early summary judicial dismissal of a claim where the evidence relied on by the plaintiff can properly be characterised as "shadowy" or where "the story told in the pleadings is a myth . . . and has no substantial foundation"; see eg **Lawrance v Lord Norreys (1890) 15 App Cas 210**, per Lord Herschell at 219-220. However, the court should proceed with great caution in exercising its power of strike-out on such a factual basis when all the facts are not known to it, when they and the legal principle(s) turning on them are complex and the law, as here, is in a state of development. It should only strike out a claim in a clear and obvious case. Thus, in **McDonald's Corporation v Steel [1995] 3 All ER 615, [1995] EMLR 527, CA**, Neill LJ, with whom Steyn and Peter Gibson LJJ agreed, said, at 623e-f of the former report, that the power to strike out was a Draconian remedy which should be employed only in clear and obvious cases where it was possible to say at the interlocutory stage and before full discovery that a particular allegation was incapable of proof."

Discloses No Reasonable Cause of Action

28. Counsel for the Defendants, Mr. McCarney referred the Court to the well known case of **Drummond-Jackson v British Medical Association 1 W.L.R. 688** in support of his submission that the Plaintiff's claim fails to disclose a reasonable cause of action. Lord Pearson in **Drummond-Jackson (supra) as found at 18/19/10 Commentary of The Supreme Court Practice 1999 on page 349**, states that a reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleadings are considered. Moreover as long as the statement of claim or particulars disclose some cause of action or raise some question fit to be decided by a Judge or jury, the mere fact that the case is weak and not likely to succeed is no ground for striking it out (**18/19/10 Commentary of The Supreme Court Practice 1999 on page 349**).
29. In the instant case I find that the Plaintiff's pleadings are deficient but that they do raise some questions fit to be decided. The 1st paragraph of the Statement of Claims fails to particularize the nexus between the 1st Defendant and the 2nd Defendant although it is pleaded that they both own the subject Property. Although perhaps inelegantly pleaded paragraphs 3 and 4 provide particulars of an oral agreement between the 1st Defendant and the Plaintiff. As submitted by Mr. Smith, such deficiencies can be cured by a request for further and better particulars, and I might add an amendment of the Statement of Claim. I accept Mr. Smith's submission concerning the applicability of Section 69 (1) (c) of the International Business Companies Act. The position with IBCs and Domestic Companies is the same. Each type of company is a "legal person" capable of entering into contracts, suing and being sued. The Officers and Directors of a company may and do act for and on behalf of the company, including entering into oral contracts.
30. I am satisfied that what is pleaded is that parties entered into an oral contract for the construction of a residence on the Property, that considerable sums of money passed between the parties and as of September 2018 the work was completed on the construction save for some small items. A dispute has arisen between the parties as to whether the contract has been breached. As established by **Hamby v Hermitage Estates Ltd**. (supra), **Electra Private Equity Partners** (supra) and the **Drummond-Jackson** (supra) and other cases mentioned above this is not a plain and obvious case where there is no need for a trial. Having determined that the pleadings do raise triable

issues with some chance of success, I conclude that the pleadings do disclose a reasonable cause of action.

Scandalous, Frivolous or Vexatious

31. On this ground the Court must consider whether the matters alleged to be scandalous would be admissible in evidence to show the truth of any allegation in the pleading which is material to the relief prayed (**Commentary at 18/19/15 on page 350 in the Supreme Court Practice 1, 1999, per Selborne, L.C. in Christie v Christie (1873) L.R. 8 Ch. App at 503**). Moreover, this is applicable for cases which are obviously frivolous or vexatious, or obviously unsustainable (**Commentary at 18/19/16 on page 350 in the Supreme Court Practice 1, 1999 per Lindley L.J. in Att-Gen of Duchy of Lancaster v L. & N.W. Ry [1892] 3 Ch. 274 at 277**). The pleading must be "so clearly frivolous that to put forward would be an abuse of the process of the Court" (**Commentary at 18/19/16 on page 350 in the Supreme Court Practice 1, 1999 per Jeune P. in Young v Holloway [1895] P. 87 at 90**).
32. I feel compelled to point out that while Mr. McCartney has provided Affidavit evidence as required by Order 18, Rule 19 1 (b) and (d) of the RSC, I am not satisfied that the said the Affidavit demonstrates the ways in which the pleadings are scandalous, frivolous or vexatious or an abuse of court process or that these proceedings amount to the same. Moreover, having determined that the Amended Writ of Summons discloses a reasonable cause of action and that the Plaintiff's claim is not unsustainable, I have concluded that the claim is not scandalous, frivolous or vexatious.

Abuse of Process

33. This ground confers upon the Court in express terms powers which the Court has hitherto exercise under its inherent jurisdiction where there appears 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 (**Commentary at 18/19/18 on page 352 of the Supreme Court Practice 1, 1999 Castro v Murrary (1875) 10 Ex. 213**). The Defendants have failed to adduce any evidence to satisfy the Court that the Plaintiff is attempting to use the Court's machinery improperly as a means

of vexation or to oppress the process of litigation and having made this determination, I conclude that there has been no abuse of the process of the Court.

34. Having already determined that the pleadings do disclose issues fit to be tried albeit that there is a need for further and better particulars, after considering the relevant case law, the Affidavit evidence before me and the submissions of Counsel, I find that the instant action is not a proper case to strike out the Plaintiff's action as against the 1st and 2nd Defendants. The Defendants' Summons is dismissed. Costs usually follow the event and I see no reason to depart from the usual costs order. The Plaintiff is hereby awarded its costs occasioned by this application.

Dated this 4th day of August A. D. 2021

Petra M. Hanna-Adderley

Petra M. Hanna-Adderley
Justice