



[2024] JMCC COMM. 15

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE COMMERCIAL DIVISION**

**CLAIM NO. 2022CD00145**

<b>BETWEEN</b>	<b>SEAL CONSTRUCTION COMPANY LIMITED</b>	<b>1<sup>st</sup> CLAIMANT</b>
<b>AND</b>	<b>FIRST TROPICAL PROPERTIES LIMITED</b>	<b>2<sup>nd</sup> CLAIMANT</b>
<b>AND</b>	<b>COUNTERPOINT DEVELOPMENT COMPANY LIMITED</b>	<b>3<sup>rd</sup> CLAIMANT</b>
<b>AND</b>	<b>HERZOG SEAL LIMITED</b>	<b>4<sup>th</sup> CLAIMANT</b>
<b>AND</b>	<b>SEAL INVESTMENT LIMITED</b>	<b>5<sup>th</sup> CLAIMANT</b>
<b>AND</b>	<b>MATTHEW DONALDSON</b>	<b>6<sup>th</sup> CLAIMANT</b>
<b>AND</b>	<b>HERZOG CONTRACTING CORPORATION</b>	<b>1<sup>st</sup> DEFENDANT</b>
<b>AND</b>	<b>HERZOG JAMAICA LIMITED</b>	<b>2<sup>nd</sup> DEFENDANT</b>
<b>AND</b>	<b>MICHAEL EDDEY</b>	<b>3<sup>rd</sup> DEFENDANT</b>
<b>AND</b>	<b>HOUSING AGENCY OF JAMAICA LIMITED</b>	<b>4<sup>th</sup> DEFENDANT</b>
<b>AND</b>	<b>MINISTER OF HOUSING</b>	<b>5<sup>th</sup> DEFENDANT</b>

Mr. Keith Bishop instructed by Bishop & Partners for the Claimants.

Miss Carlene Larmond, KC and Miss Giselle Campbell instructed by Patterson, Mair Hamilton for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

Mr. Courtney M. Williams and Mrs. Alexidene Wittick instructed by Taylorlaw Williams Nembhard for the 4<sup>th</sup> Defendant.

Miss Faith Hall instructed by Director of State Proceedings for the 5<sup>th</sup> Defendant

**Rules 15, 26 and 41 Civil Procedure Rules, 2002- Whether the matter should be struck out against the 4<sup>th</sup> and 5<sup>th</sup> Defendants- Whether summary judgment should be granted.**

## **IN CHAMBERS**

**Heard on 13<sup>th</sup> March and 11<sup>th</sup> April 2024**

**STEPHANE JACKSON-HAISLEY J.**

## **INTRODUCTION**

**[1]** The Applicants herein are the 4<sup>th</sup> Defendant, the Housing Agency of Jamaica and the 5<sup>th</sup> Defendant the Minister of Housing. On the 27<sup>th</sup> day of April 2022 the 4<sup>th</sup> Defendant filed a Notice of Application seeking *inter alia* the following orders.

- (i) That the instant Claim as against the Applicant be struck out.
- (ii) Alternatively, that Summary Judgment on the whole claim be entered in favour of the Applicant.

**[2]** On the 21<sup>st</sup> day of October, 2022 the 5<sup>th</sup> Defendant filed a Notice of Application seeking *inter alia* that the Claim filed herein on April 21, 2021 be struck out against the 5<sup>th</sup> Defendant.

**[3]** The grounds on which the 4<sup>th</sup> Defendant is seeking the Orders are:

- (i) Pursuant to Rule 26.3(1) (c) of the Civil Procedure Rules, 2002 (as amended), (CPR) the Court may strike out a statement of case or part of a statement of case if it appears to the court-

*“...that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending the claim...”*

- (ii) Further, Rule 15.2(a) of the CPR makes it clear that the court may give summary judgment on the claim or a particular issue if it considers that-

*“the claimant has no real prospect of succeeding on the claim or issue..”*

- (iii) That in the instant claim the Claimants’ statement of case reveals no real/recognizable cause of action as against the 4<sup>th</sup> Defendant and/or other reason in law to join the Applicant to these proceedings. In that regard both the said Rules 26.3 (1) and 15.2 of the CPR are applicable and support the Application herein to bring a formal end to the Applicant’s participation in these proceedings.

- (iv) That it would be in the interest of justice and will prevent the wasting of time and expense by the relevant parties, if this Application were to be granted, since otherwise, the trial Court will have to attend to unnecessary and unwarranted (legal) issues pertaining to such aspects of the Claimants’ Claim which would not involve a canvassing of the central issues to be determined.

**[4]** The grounds being relied on by the 5<sup>th</sup> Defendant are that the pleadings disclose no reasonable grounds for bringing the claim and no relief is being sought against the 5<sup>th</sup> Defendant.

**[5]** The applications first came up for hearing on June 21, 2023 however on that occasion, King's Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, Carlene Larmond raised a preliminary point that the Affidavit of Chestcot Brownie filed December 23, 2022 should replace the Affidavit of Andrew Graham as Counsel should not be a witness whilst acting as Counsel in the matter. The matter was then adjourned so that other Counsel could appear on behalf of the Claimants.

## **THE CLAIM**

**[6]** The application stems from the Claimants' claim for injunctive relief, damages and for an account to be provided. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Claimants further claim an injunction to restrain D.C. Tavares Finson Realty Limited, being an agent of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from continuing to advertise the following properties for auction and/or sale without an Order from a Judge of the Supreme Court:

- a. Commercial Factory Building in the parish of St. James registered at Volume 1269 Folio 343 of the Register Book of Titles;
- b. Lot 14, Rose Hall in the parish of St. James registered at Volume 1358 Folio 824 of the Register Book of Titles;
- c. Townhouses Strata Lots 1 & 4 at Ironshore in the parish of St. James registered at Volume 1394 Folio 842 and Volume 1394 Folio 845 of the Register Book of Titles.

**[7]** The Claimants are also seeking the following Orders and Declarations-

- a. A declaration that on the face of the mortgage, the sum of US\$2,700,000 is excessive and bears no relations to the sum of J\$120,000,000 it was intended to protect or provide security when endorsed on three properties in [*sic*] parish of St. James with cumulative values in excess of US\$10M.

- b. A declaration that the terms of the mortgage deeds are peculiar and unusual and therefore the said deeds are null and void and not enforceable on the 1<sup>st</sup> Claimant.
- c. A declaration that any money owed by the 1<sup>st</sup> Claimant to the 1<sup>st</sup> Defendant was fully paid and discharged by payments to the 1<sup>st</sup> Defendant from the sum of J\$680M paid by the 4<sup>th</sup> Defendant to the 2<sup>nd</sup> Defendant.
- d. A declaration that the 1<sup>st</sup> Defendant demand by way of Letters of Demand for payment on the facility of J\$120,000,000 and/or mortgages was illegal, invalid and unenforceable since the 2015 contract supersedes the 2011 contract arrangement;
- e. A declaration that the loan US\$1,250,000 by the 1<sup>st</sup> Defendant was in breach of the Section 22A of the Bank of Jamaica Act by carrying on the business of lending foreign exchange without being an authorized dealer and as such the mortgage is invalid, illegal and unenforceable;
- f. A declaration that the 1<sup>st</sup> Claimant did not authorise the loan of US\$1,250,000 from the 1<sup>st</sup> Defendant since there was no Resolution to borrow the said sum from a meeting that was called pursuant to the provisions of the Companies Act of Jamaica and therefore the said mortgage is invalid and unenforceable.
- g. A declaration that due to the fiduciary relationship between the agents of the 1<sup>st</sup> Claimant and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the 1<sup>st</sup> Claimant was induced into signing the mortgage documents by the Attorneys-at-law of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant without the benefit and advice of its own legal counsel and by doing so the 1<sup>st</sup> and 2<sup>nd</sup> Defendants skilfully and intentionally caused the mortgage documents not to have any reference about representation and agreement between agents of the 1<sup>st</sup> Claimant ad the 1<sup>st</sup> and 2<sup>nd</sup> Defendants the [sic] that

the sums of J\$120,000,000 negotiated under the 2011 agreement and the loan of US\$1,250,000 would be paid back under the 2011 and 2015 Agreements.

- h. A declaration that the description given by the 1<sup>st</sup> Defendant's agent in the advertisement for the sale of the 1<sup>st</sup> Claimant's agents properties is inadequate and as such would not cause members of the public to whom the advertisement is direct to would want to purchase these properties for their fair market price.
- i. Alternatively, an order that any sums owed to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants should be set off from the sums owed to the 1<sup>st</sup> and 5<sup>th</sup> Claimants from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
- j. A Declaration that the charged endorsed for the sum of US\$2,700,000 as Miscellaneous No. 1782977 on Certificate of Title registered at Volume 1269 Folio 343 of the Register Book of Titles in favour of Herzog Contracting Corporation is null and void and not binding on the 1<sup>st</sup> Claimant, Garth Wilkinson and Matthew Donaldson.
- k. A declaration that the charge endorsed for the sum of US\$1,250,000 on Certificate of Title registered at Volume 1358 Folio 824 of the Register Book of Titles in favour of the Herzog Contracting Corporation is null and void and not binding on the 1<sup>st</sup> and 6<sup>th</sup> Claimants.
- l. A declaration that the charge endorsed on the sum of US\$2,700,000 as Miscellaneous No. 1782807 and Miscellaneous No. 1782807 [*sic*] respectively on Certificates of Titles registered at Volume 1394 Folio 842 and Volume 1394 Folio 845 of the Register Book of Titles in favour of Herzog Contracting Corporation is null and void and not binding on the 1<sup>st</sup> and 3<sup>rd</sup> Claimants.

- m. An order that the 1<sup>st</sup> Claimant Discharge the mortgage and return the following Duplicate Certificates of Titles associated with the following properties in the parish of St. James to the owners endorsed thereon, namely:
- (i) Commercial Factory Building in the parish of St. James registered at Volume 1269 Folio 343 of the Register Book of Titles;
  - (ii) Lot 14, Rose Hall in the parish of St. James registered at Volume 1358 Folio 824 of the Register Book of Titles, and
  - (iii) Townhouses Strata Lots 1 & 4 at Ironshore in the parish of St. James registered at Volume 1394 Folio 842 and Volume 1394 Folio 845 of the Register Book of Titles
- n. An Order that the 4<sup>th</sup> and 5<sup>th</sup> Defendants provide an account for all sums received under the Green Pond project to include payments made to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.(emphasis mine)**
- o. An Order that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants account to the 1<sup>st</sup> and 4<sup>th</sup> Claimants for the profits and/or sum due and payable to the 1<sup>st</sup> and 5<sup>th</sup> Claimants under the 2011 Agreement and the 2015 Agreement.
- p. An order that the 1<sup>st</sup> and 2<sup>nd</sup> Claimants pay to the 1<sup>st</sup> Claimant the sum of US\$290,000,000 being replacement costs for pieces of equipment owned by the 1<sup>st</sup> Claimant but which was exported or taken by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
- q. An Order for an accounting to determine what amount is due to the 5<sup>th</sup> Claimant from the contract amount of J\$941,856,409.77 being the total amount payable on certificate for part performance of the 2015 subcontract and the sum of J\$23,400,000 for mobilization respectively.

**[8]** The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in their Defence aver that though they provided development financing, they deny their involvement in the operation of the Green

Pond project. The 4<sup>th</sup> Defendant in its Amended Defence admits that it was in receipt of the sum of J\$120,000,000 from the Jamaica Mortgage Bank on or around December 20, 2011, however, it has no record of any request being made for an account of the disbursement of the J\$120,000,000. It is denied that it paid the sum of J\$687M to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants but expressed that it has instead paid the sum of \$448,143,883.02 to the 2<sup>nd</sup> Defendant.

**[9]** In its Defence filed August 3, 2022, the 5<sup>th</sup> Defendant denies that it has any knowledge of the allegations made by the Claimants. It is admitted that the 5<sup>th</sup> Defendant entered into the 2011 Public/Private Partnership Agreement (PPA) with the 4<sup>th</sup> Defendant and the 5<sup>th</sup> Claimant for the construction of the housing development however the agreement was terminated with effect from November 5, 2012. It is admitted that the 2015 PPA was concluded between the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants. The 5<sup>th</sup> Defendant further denies that the Claimants are entitled to any of the reliefs sought.

#### **EVIDENCE ON BEHALF OF THE 4<sup>TH</sup> DEFENDANT**

**[10]** The application to strike out is supported by one affidavit of Alexidene Fraser filed April 27, 2022 and two affidavits from Garfield Sewell filed July 22, and September 27, 2022, respectively.

**[11]** In her affidavit filed April 27, 2022, Ms. Fraser stated that the Claimants are making sundry allegations against the Defendants and are preventing the sale of the properties under powers of sale exercisable by the 1<sup>st</sup> Defendant. She further stated that the Claimants have failed to join the Applicant on any issue in the proceedings and seem only to be concerned about the production of certain information and/or clarification of the alleged “mortgage arrangements”.



[12] Ms. Fraser stated that pursuant to the 2011 Shareholders Agreement, the project land in Green Pond in the parish of St. James was owned by the Government of Jamaica but was held by the 4<sup>th</sup> Defendant. She sought to give clarity on how a particular sum was collected and paid out by the 4<sup>th</sup> Defendant and provided the balance remaining in its NCB account and she denied that the sum of \$687M was paid out to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Ms. Fraser stated that the requested accounting has already been provided in its Defence, therefore, the Claimants have no substantive issue(s) against the 4<sup>th</sup> Defendant.

[13] Mr. Garfield Sewell in his first affidavit filed July 22, 2022 simply exhibits copies of the relevant Mobilization General Ledger Account in relation to the 2011 Public Private Partnership Agreement (PPA) and the NCB transfer sheet evidencing the payment of the mobilization fund in the amount of \$118,521,856.00 used to launch the Green Pond project and states that the balance in the sum of \$2,434,082.83 was paid to the 5<sup>th</sup> Claimant on or about January 18, 2022. The affidavit also exhibits copies of the relevant Depositor's General Ledger Account in relation to the 2015 PPA showing that money collected from depositors in the sum of \$483,821,608.74 was paid out to Herzog Jamaica Limited as "advance to developer".

[14] In his supplemental affidavit filed September 27, 2022, Mr. Sewell indicates that the balance in the sum of \$2,434,082.83 was in fact paid to the 2<sup>nd</sup> Defendant Herzog Jamaica Limited and not the 5<sup>th</sup> Claimant as indicated in his first affidavit.

#### **EVIDENCE ON BEHALF OF THE 5<sup>TH</sup> DEFENDANT**

[15] The evidence of the 5<sup>th</sup> Defendant was presented by Counsel Miss Kamau Ruddock who stated that the dispute is between the Claimants and 1<sup>st</sup> and 2<sup>nd</sup> Defendants. It is averred that the only reference to the 5<sup>th</sup> Defendant is that he is a party to the PPA along with the 4<sup>th</sup> Claimant and for an accounting to be provided. It is also averred that there is nothing on the pleadings that joins any issue between

the Claimants and the 5<sup>th</sup> Defendant. In response to Miss Kamau Ruddock's Affidavit, Mr. Chescot Brownie stated that the 5<sup>th</sup> Defendant was the owner of the land at Green Pond where the project was carried out and was involved in the discussions surrounding the 2015 PPA of which it is a signatory. Mr. Brownie stated that the interpretation of the partnership agreement and the role played by the 5<sup>th</sup> Defendant should be resolved and this should be done through the trial process.

## **EVIDENCE ON BEHALF OF THE CLAIMANTS**

**[16]** Mr. Chescot Brownie in his Affidavit in Response filed December 23, 2022 stated that the 4<sup>th</sup> Defendant has adopted a very narrow view of the claim as its agent was involved in oral agreements which were reduced to writing which formed the 2015 PPA between the 1<sup>st</sup> Claimant and 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. He averred that the 4<sup>th</sup> Defendant's role is critical as it received money from the 1<sup>st</sup> Defendant for a project to be undertaken by the 1<sup>st</sup> Claimant and the 2<sup>nd</sup> Defendant. Mr. Brownie indicated that the 4<sup>th</sup> Defendant was responsible for the approval of drawings and designs, had to approve the project budget and provided technical supervision and oversight of the work done on the project.

**[17]** Mr. Brownie stated that the 4<sup>th</sup> Defendant is required to go beyond the disbursement of the sums mentioned by Ms. Whittick and provide information as to the process which led to the disbursement to the 1<sup>st</sup> Defendant but which deliberately excluded the 1<sup>st</sup> Claimant. He further stated that the parties went into a course of dealings that altered some of the provisions of the written contract, therefore the accounts from the 4<sup>th</sup> Defendant, by itself, would not sufficiently explain why the 1<sup>st</sup> Claimant was excluded from being a signatory on the account and was never consulted prior to payments being made to the 1<sup>st</sup> Defendant.

[18] Mr Brownie averred that the account record is only one issue to be resolved as other issues including the monitoring, supervisory and advisory role played by the 4<sup>th</sup> Defendant should also be resolved.

[19] In his affidavit in response to the 4<sup>th</sup> Defendant's application for summary judgment, Mr. Andrew Graham stated that even though the Claimants claim is largely related to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and their attempt to exercise powers of sale as mortgagee, the claim has its genesis in an agreement between the 5<sup>th</sup> Claimant and the 4<sup>th</sup> and 5<sup>th</sup> Defendants for the development of the land. Mr. Graham set out the terms under which the 2011 and 2015 PPA should have been governed and stated that there has been no accounting by the 1<sup>st</sup>, 2<sup>nd</sup> or 4<sup>th</sup> Defendants of the proceeds of sale and/or settlement of the sum due to the 5<sup>th</sup> Claimant.

#### **SUBMISSIONS ON BEHALF OF THE 4<sup>TH</sup> AND 5<sup>TH</sup> DEFENDANTS**

[20] Counsel Mr. Courtney Williams submitted that the sole issue for which the 4<sup>th</sup> Defendant has been joined as a party to the proceedings has been settled. Mr Williams contended that clarity was provided on how the particular sum was collected and paid out and the balance remaining inclusive of interest was provided. Counsel contended that the 4<sup>th</sup> Defendant has no legal or equitable interest in the claim and is being saddled with the burden of defending the case when all that is needed is information which has already been provided or could be extracted by other means.

[21] Mr. Williams submitted that the pleadings reveal no allegation of wrongdoing. Further, the allegations do not give rise to a cause of action against the 4<sup>th</sup> Defendant, neither is there any substantial dispute between them. Counsel submitted that the issues rest between the Claimants and the 1<sup>st</sup> and 2<sup>nd</sup>

Defendants and since the 4<sup>th</sup> Defendant can be of no further assistance in this matter, the Court should strike out the matter as against the 4<sup>th</sup> Defendant.

[22] The following authorities were relied on in support of the application to strike out:

- (i) **Dotting v Clifford & The Spanish Town Funeral Home Ltd.** in Claim No. 2006 HCV 0338, unreported Judgment delivered March 19, 2007;
- (ii) **Anthony Tharpe and Anor v Alexis Robinson et al** Claim No. SU 2019 CV 04009 delivered on May 20, 2022;
- (iii) **Sebol Limited and Selective Home v Ken Tomlinson et al** SCCA No. 115 of 2007;
- (iv) **Sadie Vaughan v National Water Commission** Claim No. 2007 HCV 03034 delivered November 14, 2008

[23] Mr. Williams argued that the proceedings against the Applicant were commenced for a *“purpose or in a way significantly different from the ordinary and proper use”* of the Court’s time and resources and they run contrary to the overriding objective and are an abuse of the Court’s process.

[24] As it relates to summary judgment, Counsel relied on the test in **Swain v Hillman** [2001] 1 All ER 91 and submitted that Lord Wolf MR noted that summary judgment is unsuitable for cases in which there are issues that should be investigated at trial, as the determination should not involve the conduct of a mini-trial. Counsel also relied on **Three Rivers District Council v Bank of England** (No. 3) [2001] UKHL 16, **Barbican Heights Limited v Seafood and Ting International Limited** [2019] JMCA Civ 1 as well as **Sagicor Bank Jamaica Limited v Marvalyn Taylor-Wright** [2018] UKPC 12 and submitted that an applicant for summary judgment is required to demonstrate that there is no “real prospect” of success.

[25] Counsel contended that the Claimants did not file any Reply to the Amended Defence and are now seeking to add further allegations against the Applicant

which should not be considered in this application. He pointed out that these are complicated proceedings which will require careful analysis and attention and that the court need not involve itself in canvassing whether certain “mortgage arrangements” are in fact viable or whether a power of sale may be exercised over certain properties. It was further submitted that the issue on which the Applicant was joined in these proceedings is miniscule and should not occupy the Court’s attention.

[26] Miss Faith Hall who appeared on behalf of the 5<sup>th</sup> Defendant submitted that the Claimants’ claim discloses no reasonable grounds for bringing the claim pursuant to rule 26.3 (1) (c). She highlighted that there is nothing in the pleadings that joins any issue between the Claimants and the 5<sup>th</sup> Defendant, that no cause of action is disclosed against the 5<sup>th</sup> Defendant and the Claimants have raised no allegations against the 5<sup>th</sup> Defendant in the claim. Ms. Hall also relied on **Sadie Vaughan v National Water Commission**, in submitting that the Claimants’ claim is an abuse of the process of Court and should be struck out.

## **SUBMISSIONS ON BEHALF OF THE CLAIMANTS**

[27] Counsel for the Claimants, Mr. Keith Bishop submitted that the claim against the 4<sup>th</sup> and 5<sup>th</sup> Defendants is properly pleaded with a reasonable prospect of success and is only capable of resolution by forensic examination. He argued that the issue for determination is whether or not the pleadings disclose no reasonable ground for bringing the claim. He sought to rely on **Jennes Anderson v General Legal Council** [2022] JMSC Civ 61 as well as **Daisy Eulalia St. Theresa Culliton Haynes v Lenin Thompson** [2022] JMSC Civ 127 and submitted that striking out a statement of case should be the very last resort and is reserved for extreme cases. He submitted that the cited section of **Tharpe & Anor v Myers, Fletcher & Gordon et al** relied on by the 4<sup>th</sup> Defendant is not helpful to the instant case and suggested that reliance should instead be placed on paragraphs 43 and 44.

- [28] He submitted that the application should be refused as it is premature since the disclosure procedure could be very helpful to obtain documents from the 5<sup>th</sup> Defendant. Counsel stated that a dispute exists between the Claimants' pleadings and the 4<sup>th</sup> Defendant's response which requires a thorough investigation, as such, prematurely disposing of the matter without addressing the dispute may lead to an incomplete and unjust resolution of the entire claim. Counsel submitted that the Claimants' case possesses a realistic chance of success and is not frivolous or vexatious. Further, that the authority of **Sebol Limited** relied on by the 4<sup>th</sup> Defendant is significantly diminished as there is a distinct cause of action which demonstrates sustainability and a reasonable prospect of success.
- [29] Mr. Bishop averred that the instant case, has been properly pleaded and that there is a clear identification of the appropriate named party from whom accounts are being sought. Mr. Bishop invited the Court to consider Rule 41.1 of the Civil Procedure Rules (CPR) which provides for the taking or examination of accounts and inquiries. He disputes the allegation that the proceedings against the 4<sup>th</sup> Defendant constitute an abuse of the Court's process.
- [30] As it relates to summary judgment, Mr. Bishop submitted that there is a reasonable prospect of success regarding the Claimant's claim. He further argued that merely furnishing a copy of the statement of account does not absolve the 4<sup>th</sup> Defendant from liability and the purported failure to provide a Reply to the Amended Defence does not concede the specific allegations. He submitted that the **Sagicor v Taylor-Wright** case recognizes that the requirement to plead facts or allegations may be satisfied by including them in a Reply not solely in the Particulars of Claim and the evidence can be introduced through an affidavit. He stated that the Court has the authority to consider both pleadings and evidence in the context of a

summary judgment and where there are perceived deficiencies, the pleadings can be addressed through subsequent filings including a Reply.

[31] Counsel submitted that disputed accounts of disbursement raise factual disputes that warrant proper examination and are relevant to the underlying claim against the other Defendants. He stated that simply having information on record does not negate the need to examine the completeness of veracity and details of the accounts.

## DISCUSSION

[32] When the applications and the submissions are considered the main issues that arise for my determination are whether the matter should be struck out against the 4<sup>th</sup> and 5<sup>th</sup> Defendants or whether summary judgment should be granted against the 4<sup>th</sup> Defendant.

### **Whether the matter should be struck out against the 4<sup>th</sup> and 5<sup>th</sup> Defendants?**

[33] In approaching the issue of whether to strike out the action, I am guided by the principles enunciated in the cases cited before me. The traditional approach to striking out a party's statement of case is reflected in the authority of **Dotting v Clifford and The Spanish Town Funeral Home Ltd** per McDonald Bishop J (as she then was). McDonald Bishop J made the point that.

*"In considering the application to strike out, I am mindful that such a course is only appropriate in plain and obvious cases...the ultimate question that should be considered in determining whether to strike out the statement of case on the basis that it discloses no reasonable cause for bringing the claim seems to be essentially, the same as that in granting summary judgment, that is: the claim against the defendant is one that is not fit for trial at all".*

[34] This approach was affirmed by the Board of the Judicial Committee of the Privy Council in the authority of **Peerless Limited v Gambling Regulatory Authority and Others** [2015] UKPC 29 and applied in the judgment of Nembhard J in **Anthony Tharpe and Anor v Alexis Robinson**. The dicta of Nembhard J summarizes the position extracted from a number of judicial authorities at paragraph 43 of the judgment:

*“The power of the court to strike out a party’s statement of case is permissive, not mandatory. It confers the court with a discretion which is to be exercised in the light of all the circumstances. This discretion is to be exercised by applying two fundamental, though complementary principles. Firstly, that the parties to an action should not lightly ‘be driven from the seat of judgment’. What that means is that the court will exercise its discretionary power with the greatest care and circumspection and only in cases where it is apparent, plain and obvious that a claim cannot succeed.”*

[35] I also find guidance in the other cases cited before me to include the Court of Appeal decision of **Sebol Limited and Selective Homes v Ken Tomlinson et al** relied on by both applicants. Dukharan JA pointed out at paragraph 16 that the main issue was whether the pleadings gave rise to a cause of action against the Respondent. He went on to say at paragraph 18 that “it is necessary to examine the pleadings carefully to see whether it gives rise to a cause of action against the Respondent”. At paragraph 28 he made the pivotal point that “The focus of the new rules is to deal with matters expeditiously and to save costs and time. If there is no reasonable ground for bringing an action then the court ought to strike out.

[36] It is clear from the authorities that the action of striking out should only be employed in plain and obvious cases and should be exercised with considerable caution. The starting point in the consideration of this application is to scrutinize the pleadings to ascertain firstly whether they give rise to a cause of action and secondly whether they disclose reasonable grounds for bringing the action against the 4<sup>th</sup> and 5<sup>th</sup> Defendants.



**[37]** The subject of the matter before the Court relates to the various mortgage arrangements between the Claimants and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The 4<sup>th</sup> and 5<sup>th</sup> Defendants were not a party to the mortgage agreement. The Claimants have not sought any interpretation of the original arrangement with the 4<sup>th</sup> and 5<sup>th</sup> Defendants and in the Orders sought although there is some reference to money due to the Claimant, there is no claim against the 4<sup>th</sup> and 5<sup>th</sup> Defendants for any payment by them to the Claimants. Among the several declarations and orders sought is the Order sought against the 4<sup>th</sup> and 5<sup>th</sup> Defendants that they provide an account for all sums received under the Green Pond Project, to include payments made to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

**[38]** Counsel for the 4<sup>th</sup> Defendant sought to emphasize that there are no allegations of any wrongdoing on the part of the 4<sup>th</sup> and 5<sup>th</sup> Defendants, all that is sought is an accounting. It is correct to say that no wrongdoing is alleged, however there need not be. Mr Bishop in response has pointed out that the relief sought is provided for in Rule 41.1 of the Civil Procedure Rules which deals with claims for an account or for some other relief which requires the taking of an account. He highlighted that this Rule does not mandate that a cause of action be named in the particulars of claim and argued that the claim against the 4<sup>th</sup> Defendant is a valid claim, properly pleaded with a reasonable prospect of success which is only capable of resolution by forensic examination and so is not a candidate for summary judgment or for striking out.

**[39]** Rule 41 provides as follows:

*41.1(1) This part deals with claims-*

*(a) for an account; or*

*(b) for some other relief which requires the taking of an account.*

*(2) A claim for an account must be made by fixed date claim supported by evidence on affidavit.*

- 41.2 (1) *Where a claim or counterclaim is made for an account or requires the taking of an account, an application for directions relating to the taking of the account must be made at the case management conference or first hearing.*
- (2) *The court may make any one or more of the following orders, namely that-*
- (a) any preliminary issue of fact be tried;*
  - (b) an account be taken;*
  - (c) inquiries be made; or*
  - (d) any amount shown to be due to a party on the account be paid by a date specified in the order.*

**[40]** There is merit in the argument of Mr Bishop in this regard. Based on the provisions of Rule 41, there would be no need to allege any wrongdoing on the part of the Applicants in order to bring an action for accounts. The fact of the Respondents' indication that a request was made for account which was not supplied has set the stage for why they have sought the intervention of the Court for the accounts to be provided. Rule 41 contemplates that such a claim can be made even without any dispute and that it can stand on its own. I am of the view that there is in fact a recognisable cause of action against the 4<sup>th</sup> and 5<sup>th</sup> Defendants who according to the Claimants have failed to provide them with an accounting.

**[41]** The question as to whether the Claimants have complied with the requirements of Rule 41 is however one for consideration. In the first instance the Claimants did not comply with the requirement that such a claim should be made on a Fixed Date Claim Form. However, in light of the fact that the claim involved several other Defendants against whom other orders have been sought, it could be argued that it would not have made practical sense to use a Fixed Date Claim Form. In any event this would have been a deficiency more in form than in substance which could be corrected by converting the Claim Form to a Fixed Date Claim Form if appropriate in light of the entire Claim. Even more critical to a claim for an Account

is the provision under Rule 41.2(1) which requires that an application for direction should be made at the Case Management Conference. No such application was made. This begs the question whether the Claimants have complied with the terms of a claim for an accounts and if so whether the 4<sup>th</sup> and 5<sup>th</sup> Defendants would be obliged to follow any particular format in providing an accounts.

**[42]** As against the 4<sup>th</sup> Defendant it was pleaded that the 1<sup>st</sup> Claimant provided the collateral for the sum of J\$120,000,000 which sum was deposited into the account of the 4<sup>th</sup> Defendant but despite the agreement of the parties that the 1<sup>st</sup> Claimant should have been a signatory, only the 4<sup>th</sup> Defendant was a signatory to that account. It is noted that the project commenced in 2011 but was discontinued by the 4<sup>th</sup> Defendant in 2012. The sum of J\$80M was paid out leaving a balance of J\$40M in the trust account of the 4<sup>th</sup> Defendant. This was to be recouped from the income or proceeds of sale from the project.

**[43]** It is also alleged that subsequently the 4<sup>th</sup> Defendant paid the 1<sup>st</sup> and 2<sup>nd</sup> Defendants the sum of J\$689M with no payment to the 1<sup>st</sup> or 4<sup>th</sup> Claimants. The agents of the 1<sup>st</sup> Claimant have called on the 4<sup>th</sup> Defendant to provide an account of the disbursement of the J\$120M and the proceeds of sale to include the J\$689M paid. The 1<sup>st</sup> Claimant further avers that it is entitled to J\$476M of the sum paid to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by the 4<sup>th</sup> Defendant. At paragraph 60 of the Particulars of Claim they seek an answer to the question as to whether or not the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have been fully paid by the 4<sup>th</sup> Defendant. It is in that context that the Claimants seek as against the 4<sup>th</sup> and 5<sup>th</sup> Defendants an Order that they provide an account of all sums received under the Green Pond project, to include payments made to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

**[44]** In the 4<sup>th</sup> Defendant's Amended Defence, they accept having paid out the sum of J\$118,521,848 to the 5<sup>th</sup> Claimant, receipt of which was acknowledged which left remaining in the account the sum of J\$2,622,164.84 and proof of this was provided for in the attachment to the Amended Defence. They have also provided copies of

the relevant Mobilization General Ledger Account in relation to the 2011 PPA and the NCB RTGS Transfer sheet reflecting payment of \$118,521,856.00 to launch the project and thereafter payment to the 2<sup>nd</sup> Defendant in the sum of \$2,434,082.83. They have attached the relevant portion of the National Commercial Bank account reflecting the balance. The Depositor's General Ledger Account shows monies collected from depositors in the sum of \$448,821,608.74 and thereafter paid out to 4<sup>th</sup> Claimant as an advance to developer. It is denied that they paid out the sum of J\$687M to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants but rather the sum of \$448,143,883.02 and the Claimants have not countered this.

**[45]** On behalf of the 4<sup>th</sup> Defendant, it was argued that there has been no Reply to say that the accounting provided is not sufficient. This is in fact so. Although the CPR does not mandate the filing of a Reply, it would have assisted in ascertaining the Claimants' position to the providing of the accounts and so I am of the view that if they intended to take issue with the 4<sup>th</sup> Defendant's provision of an accounts, there should have been a Reply to the Defence.

**[46]** Mr Chescot Brownie, the Claimants' representative in his affidavit in response avers that the account record is just one of many issues to be resolved but other issues include the monitoring and the supervisory and advisory role played by the 4<sup>th</sup> Defendant. Save for the accounts requested none of these allegations were made against the 4<sup>th</sup> Defendant in the pleadings. These are new and are not a part of the case that the 4<sup>th</sup> Defendant would be required to meet. It is not sufficient for these purposes to make these responses only by way of affidavit evidence. Pleadings are necessary to delineate the dispute of the parties. When the pleadings are examined, it is clear that the main issues for trial are between the Claimants and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. It is only in the affidavits that the affiants go on to indicate what more they would be seeking but this is not a part of the pleadings and striking out applications are based on pleadings.

- [47]** It is true that there is no assessment as to whether the accounts provided suffices however, the Claimants had the opportunity to indicate by virtue of a Reply the inadequacy of any accounts provided which they failed to do. An account is essentially a record of money received and money paid out over a particular period. In essence, this is what the 4<sup>th</sup> Defendant has provided. If the Claimant required the 4<sup>th</sup> Defendants to provide the accounts in a particular format, they should have availed themselves of the provisions of Rule 41.2(1) and sought this at the Case Management Conference.
- [48]** Mr Bishop submitted that the approach taken by the 4<sup>th</sup> Defendant is a narrow view. He asserted that the 4<sup>th</sup> Defendant is like a manager not only of the funds but the project itself, having approved drawings and provided technical support. He averred that they did not have confirmation that the funds were disbursed before filing the Claim. He maintained that a percentage of the sums disbursed belong to the Claimants and if the 4<sup>th</sup> Defendant is not a party it would be difficult to enter judgment but this argument is flawed for the reason that the Claimants make no assertion that the 4<sup>th</sup> Defendant erroneously disbursed sums belonging to the Claimant or that he mismanaged the funds, not is there any claim for any sums to be returned.
- [49]** The accounts having been provided, what then would be the basis for maintaining the Claim against the 4<sup>th</sup> Defendant.? What would a trial against the 4<sup>th</sup> Defendant be seeking to achieve? If the Claim were to go to trial and the Claimants are successful as against the 4<sup>th</sup> Defendant, the Court would be empowered to make the order for the Accounts to be provided. That is the very thing the Amended Defence asserts has been provided without demur or objection in the pleadings.
- [50]** Even if there was initially a reasonable ground for bringing the Claim, the question still arises whether the 4<sup>th</sup> Defendant having provided an accounting whether there remains any reasonable grounds for maintaining the action against them. I am of the view that there are no reasonable grounds for maintaining the action against

the 4<sup>th</sup> Defendant in light of the accounts provided. The case should be struck out against the 4<sup>th</sup> Defendant.

**[51]** The case against the 5<sup>th</sup> Defendant has similar considerations as that against the 4<sup>th</sup> Defendant in so far as it relates to the provision of the accounts and my findings above where applicable to the 5<sup>th</sup> Defendant are adopted in its favour. The 4<sup>th</sup> Defendant having provided the accounts, there would be nothing for the 5<sup>th</sup> Defendant to do. However, I will consider the other arguments advanced in relation to the 5<sup>th</sup> Defendant specifically.

**[52]** As against the 5<sup>th</sup> Defendant, it was also argued that the 5<sup>th</sup> Defendant was the registered owner of the premises developed by the 1<sup>st</sup> Claimant and the 2<sup>nd</sup> Defendants. Mr Bishop argued that the 5<sup>th</sup> Defendant has taken a very narrow interpretation of Rule 23(3)(c) without full consideration for Rule 1 which touch and concern the overriding objective which allows a judge to make sure the parties are on equal footing. He submitted further that the 5<sup>th</sup> Defendant has his hands all over the case and that case involves an interpretation of the contracts and there is no dispute that the 5<sup>th</sup> Defendant owns the land on which the development took place and also signed a very important contract document which is critically important for the trial of the matter before the court. He emphasized that the measure of striking out should be reserved for the most extreme cases and that this case is far from being extreme.

**[53]** However, much of what counsel has sought to claim here is not included in the Claim or the Particulars of Claim. By way of example there is no claim for any interpretation of the contract between the Claimants and the 5<sup>th</sup> Defendant. In the 5<sup>th</sup> Defendant's Defence it is accepted that they entered into a PPA with the 4<sup>th</sup> Defendant and the 1<sup>st</sup> Claimant for the construction of a housing development and that the 4<sup>th</sup> Defendant was to act as project manager. However, the Defence went on to indicate that the parties mutually agreed to terminate this agreement with

effect from November 5, 2012. It is denied that the Claimants are entitled to the relief claimed.

[54] On behalf of the 5<sup>th</sup> Defendant, it was argued that the Claim discloses no reasonable grounds for bringing the claim against the 5<sup>th</sup> Defendant. This is consistent with the judgment of the Court of Appeal in **Sebol Limited** which places emphasis on the grounds for bringing the Claim and reaffirms the principle that an action may be struck out if it can be tried without the person who wishes it to be struck out being a party to the action.

[55] It was contended that no cause of action was disclosed against the Minister and there is no dispute joined between the Minister and the Claimants and that the remedies being sought by the Claimant can be achieved without him being a party. It is for those reasons why it is argued on behalf of the Minister that joining him as a party to the claim is an abuse of the process of the court in accordance with the dicta of Mangatal J in **Sadie Vaughn v National Water Commission**. The essential question for the Court in respect of the 5<sup>th</sup> Defendant is whether this action can be tried without the Minister being a party. The Minister's inclusion seems to have been premised on the basis that he is a party to the PPA for the Green Pond Project. It is noted that the only Order sought against the 5<sup>th</sup> Defendant was for an account to be provided which the 4<sup>th</sup> Defendant provided in its Amended Defence.

[56] What was the basis for bring the action against the Minister in the first place? Was it to urge the 4<sup>th</sup> Defendant to provide the accounts? It is clear to me that the role of the Minister in relation to the account would have been at best miniscule. The accounts sought could have been achieved without the Minister bring included as a party. It was always the position that the funds were deposited in the account of the 4<sup>th</sup> Defendant. There were no allegations that the 5<sup>th</sup> Defendant had anything to do with this. Even if there was some justification for including the Minister initially,

what then would be the basis for maintaining the action against the 5<sup>th</sup> Defendant, where the accounts have been provided.

[57] I agree with the arguments advanced on behalf of the 5<sup>th</sup> Defendant that the inclusion of the Minister in the claim will run counter to the overriding objective of dealing with cases expeditiously and to save costs and time. I find that the situation bears similarities to the **Sadie Vaughn** case and that the action discloses no reasonable grounds for bring the action and that it may very well be tantamount to an abuse of the process of the court.

[58] I therefore conclude that the case against the 5<sup>th</sup> Defendant should also be struck out. Having decided that the case against both the 4<sup>th</sup> and 5<sup>th</sup> Defendants should be struck out there is really no need to consider the alternative order being sought that summary judgment be granted but I will say a few words on it nevertheless.

#### **Whether summary judgment should be granted against the 4<sup>th</sup> Defendant?**

[59] The law surrounding the circumstances in which the court may grant summary judgment is set out in Rules. 15.2(b) Civil Procedure Rules 2002 (CPR). Rules 15.2 CPR provides that-

*“The Court may give summary judgment on the claim or a particular issue if it considers that:*

*(a) The Claimant has no real prospects of succeeding on the claim or the issue, or;*

*(b) The defendant has no real prospect of successfully defending the claim or the issue.”*

[60] The submission is that the Claimants have no real prospect of succeeding on the claim or issues against the 4<sup>th</sup> Defendant. The test for real prospect of success was set out in **Swain v. Hillman** and applied in the decision of the Judicial



Committee of the Privy Council in the case of **Sagicor Bank v Taylor-Wright** relied on by both the Claimants and the 4<sup>th</sup> Defendant. At paragraph 17 Lord Briggs who delivered the judgment said:

*“17. There would, in almost all cases, be disputes about the underlying facts, some of which might only be capable of resolution at trial. However, a trial of those issues was only necessary if their outcome affected the claimant’s entitlement to the relief sought. If it did not, a trial of those issues would generally be nothing more than an unnecessary waste of time and expense.”*

**[61]** Summary judgment is designed to deal with cases that do not merit trial and a judge is urged not to conduct a mini-trial. On the pleadings the only remedy the Claimant seeks against the 4<sup>th</sup> Defendant is for an accounting. There is no further pleading to indicate that the accounts as submitted by the 4<sup>th</sup> Defendant have failed to satisfy the Claimants’ request. The Claimants herein would have no real prospect of succeeding in securing a relief with which they have already been provided. To proceed to a trial in these circumstances would be nothing more than an unnecessary waste of time and expense. The application for Summary Judgment would have been granted.

**[62]** My orders are as follows:

1. The Claim is struck out against the 4<sup>th</sup> and 5<sup>th</sup> Defendants; and
2. Costs of the Application to the 4<sup>th</sup> and 5<sup>th</sup> Defendants to be agreed or taxed.

.....  
**Stephane Jackson-Haisley**  
**Puisne Judge**