In The Supreme Court of Bermuda

CIVIL JURISDICTION
(COMMERCIAL COURT)

2019: No. 379

BETWEEN:

DENISE PRISCILLA TREW

Plaintiff

- and -

HSBC BANK BERMUDA LIMITED

First Defendant

-and -

DENNIS WILLIAM DWYER

(as Executor of the Estate of Robert Allen Trew)

Second Defendant

RULING

First Defendant application to strike out action against it, RSC Order 18 rule 19, inherent jurisdiction of the Court, Section 36C of the Convenyancing Act 1983

Date of Hearing: **17 June 2021**
Date of Ruling: **28 July2021**

Appearances: **Michael Scott, Browne Scott, for the Plaintiff**

John Hindess, Marshall Diel & Myers Limited, for the First Defendant/Applicant

RULING of Mussenden J

Introduction

1. This matter came before me by the Summons of the First Defendant HSBC Bank Bermuda Limited (the "**Bank**") dated 7 January 2021 to strike out the Plaintiff's claim against the Bank pursuant to the Rules of the Supreme Court ("RSC") Order 18/19 and/or under the inherent jurisdiction of the Supreme Court on the grounds that:
    a. Neither the indorsement of the Specially Indorsed Writ of Summons nor the Statement of Claim dated 18 September 2019 (the "**Writ**" and the "**Statement of Claim**") disclose a reasonable cause of action against the First Defendant; further or in the alternative;
    b. That the said Writ and Statement of Claim as against the First Defendant are scandalous, frivolous or vexatious; further or in the alternative;
    c. That the said Writ and Statement of Claim as against the First Defendant are an abuse of the process of the Court.

2. The application is supported by the First Affidavit of Adenike D. Carmichael, of HSBC Bank Bermuda Limited sworn on 19 April 2016 ("**Carmichael 1**") with its Exhibit "**ADC-1**" and the First and Second Affidavits of Lavonne Brown sworn respectively 23 December 2020 ("**Brown 1**") with its Exhibit "**LB-1**" and 25 February 2021 ("**Brown 2**") with its Exhibit "**LB-2**".

3. The Plaintiff Denise Trew ("**Mrs. Trew**") opposes the application. She relies on her Affidavit in Reply sworn 5 February 2021 ("**Trew 1**") with its Exhibits "**DPT-1**".

Background

4. The evidence of Carmichael 1 states that on 12 January 1996, Mrs. Trew's husband, Robert Allen Trew ("**Mr. Trew**"), borrowed the principal sum of $325,000 from the Bank. The loan was secured by a Promissory Note dated 12 January 1996 as well as an equitable mortgage over the property known as 6 York Street in St. George's Parish (the "**Equitable Mortgage**" and the "**Property**" respectively).

5. Mr. Trew died on 20 June 1999.

6. The Last Will and Testament of Mr. Trew executed on the 23 June 1998 (the "**Will**"): (i) appointed Dennis William Dwyer, Terry Eugene Lister and Ronald Leslie Brown as executors of Mr. Trew's estate and (ii) directed that the Property pass to his wife Mrs. Trew, as life tenant and upon her demise her interest was to be passed to several of Mr. Trew's children in various percentages of interest.

7. Soon after Mr. Trew passed away, payments under the loan facility with the Bank became delinquent. The attorneys for the Bank, Marshall Diel and Myers Limited ("**MDM**") wrote to Mrs. Trew by letter dated 5 November 2012 notifying her as such and requesting that she arrange a meeting to resolve the situation.

8. Mrs. Trew sought to retain the property and requested that the Bank not enforce the Equitable Mortgage and allow her to pay it. Throughout the period 2012 to 2016, the Bank continuously tried to work with Mrs. Trew to allow her to retain possession of the property.

9. However, the facility remained delinquent and so on 20 April 2016, the Bank filed an Originating Summons to enforce the Equitable Mortgage with Carmichael 1 filed in support, that matter being matter No. 150 of 2016 ("**matter No. 150 of 2016**").

10. The Bank served the Originating Summons and supporting affidavit in matter No. 150 of 2016 on the Plaintiff on 10 May 2016 and on the Second Defendant, Mr. Dennis Dwyer as executor of the estate of Mr. Trew on 2 May 2016.

11. Mr. Dwyer responded that since Mr. Trew's death, Mrs. Trew had had control and possession of the Property and that, as far as he was concerned, Mr. Trew's estate had no remaining assets whatsoever as all assets had been distributed pursuant to the terms of the Will.

12. In response to the Originating Summons, Mrs. Trew again asked the Bank not to proceed with repossession of the Property and the Bank, once again, gave Mrs. Trew more opportunities to remedy the situation and retain possession of the Property. At this time and at least as early as 1 November 2016, Mrs. Trew was represented by Michael Scott of Browne Scott.

13. A hearing was held on 7 December 2017 with Mr. Scott as counsel for Mrs. Trew in attendance where the Court ordered that the Equitable Mortgage was foreclosed and the Bank was entitled to enforce the Equitable Mortgage by sale (the "**December 2017 Order**").

14. The Court granted a Writ of Possession on 17 January 2018 and the Writ was executed by the Provost Marshall General on 15 May 2018.

15. According to the evidence of Brown 2, at the time that the Bank took possession of the Property in May 2018, it was in a severely dilapidated condition. As such, the Bank obtained a structural survey report from Mason and Associates Ltd on 24 May 2018.

16. The structural survey report quoted a cost of $885,000 for necessary remedial work and upgrades to the property. It also stated, *inter alia*, that:

> *"The subject property is well below market condition with significant structural, electrical and plumbing concerns noted. Walkway supporting steel beams are severely corroded impacting the structural integrity of these two elements and should now be considered to be unsafe to access. Plumbing and electrical infrastructure is substandard and should all be replaced to code compliant safe, modern standards. Significant termite activity noted in the wood windows and door frames and upper level stud partition walls. Wood windows and some doors were noted to show significant rot*

and deterioration and should be replaced with new to match. West and north boundary stone wall/rock facings shows some undermining and localized erosion and should be strengthened."

17. The Bank then obtained three valuations on the Property from three different appraisers in 2018 prior to placing it on the market. The appraisers noted as follows:

    a. The 27 June 2018 valuation by The Property Group stated that "*neither building is up to code and that will require the wiring and plumbing*", quoted estimated renovations costs at $500,000 and set a market value of $550,000.
    b. The 29 June 2018 valuation by MainPoint Real Estate ("**MainPoint**") found that "*this property requires extensive renovation costs to make its operable [which renovations] are further hindered by the Grade 2 listing set on the property*" and set a market value of $540,000; and
    c. The 5 September 2018 valuation by Rego Sothebys found that the "*property needs a substantial amount of refurbishment [and] as an investment property, the capital expenditure required to repair the property may not be economically feasible in the short term*" and set a value of $660,000

18. In addition, all of the valuations recommended that a structural survey be undertaken due to its poor condition.

19. A series of marketing efforts and negotiations took place leading to the sale of the Property on 7 November 2018 when the Bank accepted the offer that produced the highest net sale value. Also, the Bank forgave over $80,000 in debt interest to the estate of Mr. Trew.

20. In the Second Affidavit of Lavonne Brown for the Bank, the evidence sets out the details of the marketing, negotiations and sale of the Property some of which includes as follows:

    a. A real estate agent Alkon Realty inquired on behalf of an interested client Ms. B eventually making an offer on 6 and 7 August 2018 of $595,000 for the Property.
    b. The Bank engaged MainPoint to handle offers for the Property.
    c. On 7 August 2018, MainPoint received two formal offers for consideration:

i. Coldwell Banker on behalf of their client, Mr. D, made an offer in the amount of $650,000;
ii. Alkon Realty, on behalf of their client Ms. B, made an offer in the amount of $696,000; and
iii. MainPoint was then instructed to request best offers from their clients.

d. On 7 August, Coldwell Banker's client increased their offer to $710,000, however, Alkon Realty's client did not modify their offer. The Bank accepted the offer of $710,000, but on 30 August 2018, the client reduced his offer to $550,000, based on details in the appraisal that revealed significant depreciated building cost. The offer was declined and the Property placed back on the market.

e. On 1 October 2018, MainPoint presented a cash offer of $500,000 from Mr. S for consideration. The Bank counter offered at $600,000 to which Mr. S countered at $525,000, which he increased to $560,000 gross on 3 October 2018 and which was accepted by the Bank.

f. On 17 October 2018, prior to entering a sales and purchase agreement with Mr. S, the Bank received another cash offer for $550,000 'net net' from Mr. G. The Bank then asked both potential purchasers for their best and final offers. On the same day, Mr. S advised that he did not wish to proceed with the purchase.

g. On 23 October 2018, the Bank proceeded with the offer form Mr. G, recognizing that due to the 'net net' offer from Mr. G, the offer would result in higher sale proceeds than the offer by Mr. S.

h. On 31 October 2018 Mr. S made a new offer of $575,000 gross which was declined by the Bank. On 1 November 2018 he upped his offer to $585,000 gross.

i. On 5 November 2018 the Bank finalized and exchanged a sales and purchase agreement with Mr. G.

j. On 5 November 2018 Mr. S made a new offer of $595,000 gross. The Bank decided to proceed with Mr. G's offer as the sales and purchase agreement was imminent and Mr. G was in a position to close the sale quickly, paying all associated costs. Further, the net sale proceeds would still be higher than Mr. S's offer and were in fact higher.

k. The $550,000 “net net” offer was greater because the buyer was paying the stamp duty of $16,000, the purchaser’s legal costs in preparing the dee of conveyance of $9,600 and the agent’s commission of $22,000. Therefore the “net net” offer amounted to a purchase price of $597,600 whereas Mr. S’s last offer was $595,000. Mr. S had not offered to pay the entirety of the $22,000 commission all the legal fees, disbursements or stamp duty.

l. On 7 November 2018 the sales and purchase agreement was executed and the sale closed on or about 27 June 2019.

21. In light of the sales details set out above, Lavonne Brown asserts that the duty to obtain the best price was fulfilled to the Plaintiff, although the Bank owed no duty to the Plaintiff. Even if the Bank owed a duty to the Plaintiff, it was fulfilled as the Bank received the maximum amount of sale proceeds possible at the time.

22. On 19 August 2019, Chancery Legal, counsel for the Executor Mr. Dwyer, wrote to Mr. Scott on behalf of the Plaintiff informing him that the Bank had confirmed that following enforcement of their judgment, order for possession and actual sale of the Property, surplus of the net proceeds of sale that was payable to the Estate was $164,207.96. The letter also informed that the Executor’s positon was that the surplus sum was now an asset of the Estate and the Executor was desirous of administering the Estate and making a distribution to the residuary beneficiaries and closing off the estate pursuant to the terms of Mr. Trew’s Will. The letter also informed that as the Plaintiff was simply granted a life interest in the Property, that life interest ceased once the property was disposed of, as such the Plaintiff had no legal basis whatsoever to assert a claim to the surplus funds. It urged the Plaintiff to cease legal proceedings so that the surplus funds could be placed in the Executor’s possession for proper administration and distribution to the residuary beneficiaries. The Executor sought to avoid expensive litigation and to minimize any drain upon the surplus funds to which the residuary beneficiaries were entitled.

The Plaintiff's Claims against the Bank

23. In the Statement of Claim dated 18 September 2019, the Plaintiff made the following claims against the Bank:
    a. That the Bank did not have the power to convey the Property pursuant to the December 2017 Order;
    b. In the alternative, that the December 2017 Order (granting the Bank the power to sell the Property) was invalid; and,
    c. That the Bank acted in bad faith in selling the Property at an alleged undervalue and that the Bank delayed in selling the Property; and
    d. The Bank's alleged bad faith caused the Plaintiff damage.

24. At paragraph 12 of the Plaintiff's Affidavit in Reply to the First Defendant sworn on 4 February 2021, the Plaintiff withdrew the first part of her claim and now admits that the conveyance and December 2017 Order were valid. (the "**Affidavit in Reply**").

25. In the Affidavit in Reply, the Plaintiff further states that the four claims that she is now pursuing against the Bank are as follows:

    a. "Failure to provide [the Plaintiff] … adequate proper or full account of the sale transactions it carried out in relation to [the property in question]";
    b. "Breach of the First Defendant's duty to exercise good faith, fairness and reasonableness by its neglect failure or refusal to sell the property known as the Old Armoury Building, St. George's (the "Property") subject to the Order at a) above at the highest market price offered in writing by bidders";
    c. "The First Defendant breached its statutory duty under section 36C of the Conveyancing Act 1983 ("**the 1983 Act**") [as the] First Defendant ... disposed of the said Property under the Court ordered sale, with the requisite intention to sell the property at an under value"; and
    d. "The conduct of the First Defendant in relation to the sale of the Property was the proximate cause of acute financial distress and my default as defendant/mortgagor

in a separate loan foreclosure action 2018 No. 315 Molly White et al v Denise P Trew for a relatively modest sum secured by my home in Warwick which I am losing a foreclosure process rendering me homeless. The foregoing prejudice therefore is a 4th cause of action against the Defendant."

26. The third claim above in relation to the 1983 Act was not in the original Writ and Statement of Claim.

The First Defendant's Application to strikeout the action against it

27. The Bank submits that the action should be struck out against it for several reasons. First, Mr. Hindess submits generally that the Bank owes no duty to the Plaintiff who is not the mortgagor or an encumbrancer. The Bank owed a duty to the Second Defendant alone. This is on the basis that the mortgagor was the Estate of Mr. Trew as represented by his Executor, the Second Defendant who had beneficial title and interest in and to the Property. There were no other mortgagors or encumbrancers. According to the evidence and pleadings before the Court, the Bank fulfilled its duty to the Second Defendant by acting on good faith and for the sole purpose of procuring the best price reasonably obtainable which it ultimately did. Even if the Court found that such a duty was owed to the Plaintiff by the Bank, the Bank has clearly fulfilled the duty and the Plaintiff's case is unsustainable. Mr. Hindess relies on several cases including the Privy Council cases of *Downsview Nominees Ltd v First City Corpn Ltd* and *China and South Sea Bank Ltd v Tan* which set out the duties owed by a mortgagee of a mortgaged property.

28. Second, Mr. Hindess submits that upon a review of the marketing and sales process of the Property, the Bank clearly acted in good faith for the sole purpose of procuring the best price reasonably obtainable, such that in fact, the Bank did obtain a price that produced the highest net value. Mr. Hindess relies on the case of *Keerome Maybury v Keetha Lowe et al* [2016] SC (Bda) 84 Civ on the duty of the mortgagee to obtain the best price reasonably obtainable. Therefore, in respect of the two reasons above, Mr. Hindess submits that each

of the Plaintiffs claims should be struck out as they show no reasonable cause of action, are frivolous or vexatious or they are an abuse of process.

Failure to provide an accounting

29. Third, Mr. Hindess submits that in respect of the Bank failing to provide an accounting to the Plaintiff, the Bank owes no duty to the Plaintiff in regards to its dealings with the Property, therefore the Plaintiff has no claim against the Bank in such regard. Mr. Hindess again relies on several cases including the Privy Council cases of *Downsview Nominees Ltd v First City Corpn Ltd* [1993] 3 All ER 626 and *China and South Sea Bank Ltd v Tan* [1989] 3 All ER 839. Mr. Hindess also submits that even if a duty was owed to the Plaintiff, such duty was fulfilled.

30. Fourth, Mr. Hindess submits that it is an abuse of process to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings. The Plaintiff should have sought the 'accounting' in the matter No. 150 of 2016 proceedings or any of the other subsequent proceedings which she began but she chose not to.

31. Subsequently, in respect of the above two reasons, Mr. Hindess submits that these parts of the action against the Bank disclose no reasonable cause of action and are frivolous or vexatious because they are obviously unsustainable. Mr. Hindess submits that it is plain and obvious that the claims should be struck out under RSC Order 18/19(a), 19(b) and 19(d) for presenting no reasonable cause of action, being frivolous, vexatious and for being an abuse of process. Also, the action should be struck out pursuant to the inherent jurisdiction of the Court as it is clearly frivolous, vexatious and/or unsustainable.

Duty to exercise good faith, fairness and reasonableness in the sale of the property

32. Fifth, Mr. Hindess submits that in respect of this part of the action, the Bank owed no duty to the Plaintiff and therefore the Plaintiffs claim should be struck out pursuant to RSC Order 18/19(a) as it discloses no reasonable cause of action and even if it did owe a duty, it was fulfilled and it should be struck out as being obviously unsustainable. When considering only the allegations in the pleadings, including the affidavits already before

the Court, it is plain and obvious that this part of the Plaintiff's claim against the Bank will fail. Mr. Hindess submits that the Bank has repeatedly shown that it obtained the highest amount possible in the sale of the Property, although the Plaintiff continues to ignore that the offer by Mr. S was lower than the ultimate amount obtained by the Bank and applied to the debt. Mr. Hindess stresses that this is a fact and not a complicated calculation, and therefore, this part of the action should be struck out as it is obviously not capable of being proved and has no foundation. At a trial, this fact will merely be repeated and the claim will fail. Therefore, following good case management and the Overriding Objective, this part of the claim should be struck out.

33. Sixth, although the Bank has pleaded that the Bank forgave the amount of $84,263.91 in interest, in the Statement of Claim, the Plaintiff alleges that she was "prejudiced" by the Bank applying $63,365.08 in interest to the debt. Mr. Hindess submits that these two reasons above are examples of the mythical nature of the Plaintiff's claims and why they are bound to fail, are frivolous and an abuse of process, and therefore in respect of the Court's obligation to case manage and justice, these parts should be struck out pursuant to RSC O.18r.19. Also, under the inherent jurisdiction of the Court, the Court can review all of the facts and evidence and dismiss this part of the claim as it is obviously frivolous and vexatious and it cannot succeed. Mr. Hindess submits that, in this matter, as in the House of Lords case of *Dow Hager Lawrance v Lord Norreys and others HL* 1890 [Vol XV] 210 which was relied upon in the Bermuda case of *David Lee Tucker v Hamilton Properties Limited* [2017] Sc (Bda) 110 CIV, all of the pleadings filed by the Plaintiff over the last 3 years demonstrate that the Plaintiff's claim against the Bank has "*no solid basis capable of proof, but that the story told in the pleadings is a myth, which has grown with the progress of the litigation, and has no substantial foundation*".

Breach of Section 36C of the Conveyancing Act 1983

34. Seventh, Mr. Hindess submits that the Plaintiff is not an "*eligible creditor*" as defined under section 36A of the Act and therefore, the Plaintiff's claim discloses no cause of action and should be struck out pursuant to O.18r.19(a) or the inherent jurisdiction of the Court. The law as stated by the Privy Council is clear that the Bank as mortgagee owed no duty

or obligation to the Plaintiff and therefore the Plaintiff cannot be an "*eligible creditor*" under the 1983 Act. Also, from the facts and evidence, it is clear that the requisite intention necessary for the Plaintiff to advance a claim under this part of the 1983 Act did not exist. Also, from the pleadings, facts and evidence, it is also plainly obvious that he Property was not sold at an undervalue. Therefore, even if the Plaintiff was an "*eligible creditor*", pursuant to section 36C(5)(a), the Plaintiff's claim is unsustainable. Mr. Hindess submits that on this basis, this part of the Plaintiff's claim against the Bank should be struck out under each of O.18r.19(a), (b) or (d) and/or the inherent jurisdiction of the Court.

35. Mr. Hindess further added that the Bank had the statutory power to sell relying on sections 30(1)(i) and (ii) and section 32(1) of the 1983 Act.

The Plaintiffs' Reply

36. The Plaintiff opposes the strike out application for several reasons. First, Mr. Scott submits that the Bank owed a duty to the Plaintiff on the basis that she was a life tenant and that the residuary estate was to be to her benefit under the Will. He relied on an extract "Torrens Title Jurisdictions" which stated in the first paragraph "*In most Torrens Title jurisdictions a life tenant has, like in UK and US, the right to possession and enjoyment of the property, but once the tenant dies the property will return to the remainderman. The main difference is that, the life estate will be registered by the Registrar general of that jurisdiction, and will appear on the registered title. This has the effect of making them one of the 9 types of recognised interest in land, and one of the four that confirm possession.*" Mr. Scott therefore states that the Plaintiff became an equitable owner and the Bank owed a duty of care to her. Mr. Scott submits that the Bank should not be allowed to evade its obligations to make an accounting as the Bank was aware that the residual estate should have gone to meeting the debts and obligations of the Estate. He accepted that the Bank's obligation was to pay the surplus to the Estate and that the Plaintiff was entitled to benefit from it, but that was a matter for the Second Defendant.

37. Mr. Scott submits therefore, that there is a cause of action in that the Plaintiff has been prejudiced by the Bank's bad faith in that she has been denied an accounting of the balance of the proceeds which were under the Will of her late husband, which were meant to be used by his Executor and Trustee, the Second Defendant, to pay off mortgage and all other debts under the Estate. He referred to Clause 6 of the Will as exhibited in evidence. He also referred to the First Defendant's Defence at paragraph 33 which states "*In any event, it is unclear whether section 6(b) of the Will is applicable in these circumstances and the First Defendant puts the Plaintiff to strict proof thereof*". However, the Second Defendant was now saying that the Plaintiff was not even entitled to the existing surplus funds because she no longer enjoyed a life tenancy. The failures of both the First and Second Defendant are linked and represent a combination of minds to harm and prejudice the Plaintiff, such conduct which should be answerable to the Court by way of an accounting. Mr. Scott says none of this is mythical as the Plaintiff was indeed prejudiced by the Bank accepting the lower offers.

38. Second, Mr. Scott submits that the Writ discloses a reasonable cause of action in respect of the Bank. He complains that in August 2018, the Bank ignored an offer of $696,000 from an interested purchaser. Therefore, this refusal is actionable against the Bank for an accounting. He stated that he was not taking issue with the facts of the offers, but that the issue is with the surpluses that could have been realized from any purchase by Ms. B or Mr. S. He stated that Mrs. Brown's evidence of the '*net net*' effect was disputed and it was not a settled point by any means. Further, the highest offer is usually the best offer. Further, the Plaintiff never received an accounting of her deceased husband's estate from the Second Defendant. Mr. Scott submits that the failure to account by the Second Defendant is equal to the failure of the Bank to account to the Plaintiff for its unlawful handling of the property sale.

39. Third, Mr. Scott submits that the Bank looked to the Plaintiff for payment, and as she made repayments to the Bank for several years, she is owed a duty by the Bank. He submitted that if the Plaintiff had fully repaid the mortgage then the Property would be conveyed to her, to which Mr. Hindess immediately countered that that was not correct as she was still

a life tenant. Mr. Scott relied on an article from the *University of Queensland Law Journal* authored by Edward Sykes entitled "*Equitable Securities Over Land*" and the passage "*The equitable mortgage of an equitable estate on the other hand is dependant not on contract but on assignment (though it could conceivably be created by contract). As equitable estates can be assigned they can also be assigned by way of mortgage. The only requirement is that of the Statute of Frauds that they be in writing. They have always taken the form of an absolute assignment coupled with a proviso for reassignment on repayment*."

40. Mr. Scott submits that the Bank's submissions that there is no reasonable cause of action is a bald assertion which is not backed up by facts. Whilst he was not alleging fraud, he was concerned that an appraisal and at least 2 offers were for $550,000, thus there would be serious cross-examination on the appraisal process. He lobbed out the words "collusion, harm, damages and prejudice", stating that these were all issues to be tried. Accordingly, these failures are proper to be subjected to the pleaded complaint of a failure to account together with the complaint of breach of fiduciary duty to obtain the best market price, matters which go to the heart of the Plaintiff's complaint. Mr. Scott submits that sworn independent evidence has been filed by a professional buyer offering $595,000 for the Property which the Bank sold for $550,000.

41. Fourth, Mr. Scott submits that although the sale of the Property was sanctioned by the Court, the action should not be struck out, but amendments should be allowed to cure any defects.

42. Fifth, Mr. Scott submits that the sale of the Property at an undervalue by the Bank was at the direction of the Second Defendant and/or with its co-ordination. Therefore, the Plaintiff is entitled to an accounting and discovery as to how the Estate of Mr. Trew with a value in excess of $4,048,326.73 gross less deductions of $3,611,326.73, such deductions having never been accounted for over a long period of time, has resulted in a the claim by the Second Defendant that the Estate was insolvent such that the beneficiaries received nothing. For these reasons, the Plaintiff was unable to receive a modest sum to satisfy a third party loan and is at risk of losing her home at another property.

43. Sixth, Mr. Scott submits that per the various definitions in Section 36A of the 1983 Act, the Bank breached Section 36C as it sold the Property at an undervalue with the requisite intention. Therefore, the disposition of the property should be voided as the Plaintiff was an eligible creditor at the material date.

The Law on Strike-Out

44. The power to make an order striking out a pleading under the RSC Order 18/19 is discretionary. It provides:

> ***"18/19 Striking Out pleading and indorsements***
> *"(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)."*

45. As stated in the White Book commentary at 18/19/10:

> *"A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleadings are considered (per Lord Pearson in Drummond-Jackson v British Medical Association [1970] 1 W.L.R. 688. So long as the statement of claim or particulars (Davey v Bentinck [1893] 1 QB 185) discloses some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak, and not likely to succeed, is no ground for striking it out …"*

46. The law on strike-out was summarised by the Court of Appeal in *Broadsino Finance Co Ltd v Brilliance China Automotive Holdings Ltd* [2005] Bda LR 12 where Stuart-Smith JA stated as follows:

> *"There is no dispute as to the applicable principles of law. Where the application to strike-out on the basis that the Statement of Claim discloses no reasonable cause of action (Order 18 Rule 19(a)), it is permissible only to look at the pleading. But where the application is also under Order 18 Rule 19(b) and (d), that the claim is frivolous or vexatious or is an abuse of the process of the court, affidavit evidence is admissible. Three citations of authority are sufficient to show the court's approach. In Electra Private Equity Partners (a limited partnership) v KPMG Peat Marwick [1999] EWCA Civ 1247, at page 17 of the transcript Auld LJ said: 'It is trite law that the power to strike-out a claim under Order RSC Order 18 Rule 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 where there has been no discovery or oral evidence. In such cases, as Mr Aldous submitted, to succeed in an application to strikeout, 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….. There may be more scope for an early summary judicial dismissal of a claim where the evidence relied upon 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 Lawrence and Lord Norreys (1890) 15 Appeal Cases 210 per Lord Herschell at pages 219–220'. In National Westminster Bank plc v Daniel [1994] 1 All ER 156 was a case under Order 14 where the Plaintiff was seeking summary judgment, but it is common ground that the same approach is applicable. Glidewell LJ, with whom Butler-Sloss LJ agreed, put the matter succinctly following his analysis of the authorities. At page 160, he said: 'Is there a fair and reasonable probability of the defendants having a real or bona fide defence? Or, as Lloyd LJ posed the test: 'Is what*

the defendant says credible'? If it is not, then there is no fair and reasonable probability of him setting up the defence'."

47. In *Electra Private Equity Partners* referred to by Stuart-Smith, JA in *Broadsino*, the Court stated:

"... 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 state of development. It should only strike out a claim in a clear and obvious case. Thus, in McDonalds's Corp v. Steel [1995] 3 Al ER 615 at 623,Neill LJ, with whom Steyn and Peter Gibson LJ agreed, said that the power to strike out was 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."

48. Auld LJ's observations in *Electra Private Equity Partners* were quoted with approval by Hellman J in *Kingate Global Fund Limited (In Liquidation) v Kingate Management Limited* [2016] Bda LR 4. Hellman J also quoted the above passages from the judgment of Stuart-Smith in *Broadsino* with approval and made the following additional point:

"... a strike out application should not become a mini-trial on the documents. See eg Wenlock v Moloney [1965] 1 WLR 1238 per Dankerts LJ at 1244 A-C, with whom Diplock LJ (as he then was) agreed at 1244 D-E:

But this summary jurisdiction of the court was never intended to be exercised by a minute 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 in 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."

49. The principles of law applicable to strike out applications were also set out more recently in the matter of *David Lee Tucker v Hamilton Properties Limited* [2017] wherein Subair Williams AJ (as she then was) stated that "*a strike out application, in reality, is a component of good case management. Where the pleadings are so bad on its face and so obviously bound for failure, the Court should strike out.*"

No reasonable cause of action

50. A reasonable cause of action under Order 18/19(a) means a cause of action with some chance of success. In evaluating whether there is a reasonable cause of action, the Court considers only the allegations in the pleadings. However the prohibition in Order 18/19(2) against adducing evidence on an application pursuant to Order 18/19(1)(a) does not apply to affidavits already put before the Court.

51. In *E (a minor) v Dorset CC* [1994] 4 All ER 640 at 649, [1995] 2 AC 633 at 693-694, Sir Thomas Bingham MR stated:

> *'It is clear that a statement of claim should not be struck out under RSC Ord 18, r 19 as disclosing no reasonable cause of action save in clear and obvious cases, where the legal basis of the claim is unarguable or almost incontestably bad…I share the unease many judges have expressed at deciding questions of legal principle without knowing the full facts. But applications of this kind are fought on ground of a plaintiff's choosing, since he may generally be assumed to plead his best case, and there should be no risk of injustice to plaintiffs if orders to strike out are indeed made only in plain and obvious cases. This must mean that where the legal viability of a cause of action is unclear (perhaps because the law is in a state of transition) or in any way sensitive to the facts, an order to strike out should not be made. But if, after argument, the court can be properly persuaded that no matter what (within the reasonable bounds of the pleading) the actual facts the claim is bound to fail for want of a cause of action, I can see no reason why the parties should be required to prolong the proceedings before that decision is reached."*

Frivolous or Vexatious

52. In *David Lee Tucker v Hamilton Properties Limited* Subair William AJ considered the meaning of frivolous and vexatious and made the following observations:

> *Frivolous and Vexatious*
>
> *22. Justice Meerabux in The Performing Rights Society v Bermuda Cablevision Limited 1992 No. 573 at page 31 considered the meaning of 'frivolous' and 'vexatious':*
>
> > *"…It is pertinent to mention that the words "frivolous or vexatious" mean cases which are obviously frivolous or vexatious or obviously unsustainable. Per Lindley L.J. in Attorney-General of Duchy of Lancaster v L. & N. W. Railway [1892] 3 Ch. 274 at 277. Also when "one is considering whether an action is frivolous and vexatious one can, and must, look at the pleadings and nothing else… One must look at the pleadings as they stand." Buckhill L.J. in Day v William Hill (Park Lane) Ld. [1949] 1 K.B. 632 at page 642."*
>
> *However, Day pre-dates the 1985 Supreme Court Rules and the new CPR regime which introduced the Overriding Objective. RSC O.18/19(2) only excludes the admissibility of evidence on the grounds that no reasonable cause of action or defence is disclosed. Evidence may now be filed in support of grounds that the pleadings are 'scandalous, frivolous or vexatious'."*

Abuse of Process of the Court

53. A Court may also strike out a case that is considered an abuse of process of the court which must be used bona fides and must not be abused. Also, in *David Lee Tucker v Hamilton Properties Limited* Subair William AJ considered the meaning of abuse of process and stated:

"Misuse of procedure

23. In Michael Jones v Stewart Technology Services Ltd [2017] SC (Bda), Hellman J considered the meaning of 'abuse of process' by reference to Lord Diplock's passage in Hunter v Chief Constable [1982] AC 529 at 536 C: "It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although 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 very varied…""

54. It is in abuse of process if the allegations in the pleadings have no substantial foundation. The House of Lords in *Dow Hager Lawrance v Lord Norreys and others HL* held:

"It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved. But the Court of Appeal did not proceed on that ground. They took into consideration all the circumstances of the case. We have, to begin with, a statement of claim which, if it discloses a concealed fraud within the meaning of the statute, does so in the barest fashion, with much that is most material left vague and undefined, when there ought to have been distinctness and precision. Moreover, this is not the first but the third edition of a statement of claim delivered with the object of recovering the Towneley estate; and when we review the history of the litigation there is much to lead to the belief that important allegations now made were an afterthought, the result of criticisms of the earlier form in which the charges of fraud were presented, and that the charges thus raised against persons long dead are wholly incapable of proof. These impressions might have been dissipated by the affidavits filed on behalf of the appellant; but they have not been. On the contrary, I think they have been strengthened. Both in what it says and in what it does not say, Colonel Jaques' affidavit confirms in my mind the impression that the case has not a solid basis capable of proof, but that the story told in the pleadings is a myth, which

has grown with the progress of the litigation, and has no substantial foundation. For these reasons, I concur with the Court of Appeal in thinking that the action is an abuse of process of the Court…"

Active Case Management

55. A strike out application is also a component of active case management by the Court beginning with the Overriding Objectives. In *David Lee Tucker v Hamilton Properties Limited* Subair William AJ considered the Court's case management powers in the context of a strike out application:

"14. The Court's determination of a strike-out application is a component of active case management. Essentially, the Court is required to identify the issues to be tried at an early stage of the proceedings and to summarily dispose of the others. This is aimed to spare unnecessary expense and to ensure that matters are dealt with expeditiously and fairly.

Inherent jurisdiction of the Court

56. The Court has an inherent jurisdiction to stay all proceedings before it which are obviously frivolous or vexations or an abuse of process. The power to strike out a pleading under the inherent jurisdiction of the Court is separate and apart from the power set out in RSC Order 18/19, but it is also a discretionary. Similar to Order 18/19 (c) through (d), when an application is made under the inherent jurisdiction the Court to strike out a pleading on the basis that it is obviously frivolous or vexations or that it is bound to fail, affidavit evidence is admissible.

The Law on Duty of Care

57. In *Halsbury's Laws of England/Mortgage (Vol 77 (2021)/8 Rights and Liabilities of the Mortgagee … Duty of mortgagee on exercise of power of sale* it stated:

"A mortgagee owes a duty in equity to exercise the power [of sale] in good faith for the purpose of obtaining repayment and to take reasonable precautions to secure a 'proper price'."

58. In *Downsview Nominees Ltd v First City Corpn Ltd*, the Privy Council held that:

"a mortgagee, whether under a legal or equitable mortgage created by a charge on property or under a debenture issued by a company for its debts, owed a duty to the mortgagor and to all subsequent encumbrancers of the mortgaged property to act in good faith for the special purpose of enabling the assets comprised in the security for the debt to be preserved and realized for the purpose of obtaining repayment of the debt. That duty was owed to both the mortgagor and any subsequent encumbrancers because if a mortgagee committed a breach of his duties to the mortgagor, the damage inflicted by that breach of duty would be suffered by any subsequent encumbrancers and the mortgagor, depending on the extent of the damage and the amount of each security. However, provided a receiver and manager appointed under the debenture acted in good faith for the purpose of enabling the assets comprised in the debenture holder's security to be preserved and realized for the benefit of the debenture holder his decisions could not be impeached even if they were disadvantageous to the company for other encumbrancers, and he was subject to no further or greater liability: in particular, he owed no general duty of care in negligence since if such a duty were to be imposed that would be inconsistent with the specific duties which the courts, applying equitable principals, had imposed on a mortgagee and which permitted him to manage the company without risk of suit instead of merely selling assets as quickly as possible to repay the mortgage debt." [emphasis added]

59. In *Parker Tweedale v Dunbar Bank plc and others (No. 1)*, in applying the reasoning in the Privy Council case of *China and South Sea Bank Ltd v Tan*, the Court of Appeal in England and Wales held that:

"The duty owed by the mortgagee of property to the mortgagor to take reasonable care when exercising his power of sale to obtain a proper price for the property did not extend to a beneficiary under a trust of the mortgaged property of which the mortgagor was the trustee even if the mortgagee had notice of the trust, since the duty owed by the mortgagee to the mortgagor arose under the rules of equity by reason of the particular relationship between the mortgagee and the mortgagor and not from any duty of care owed by the mortgagee to the mortgagor in negligence which could extend to the beneficiary." [emphasis added]

The Law on what is a proper price

60. In the Supreme Court case of *Keerome Maybury v Keetha Lowe et al* Hellman J stated as follows.

"39. The Bank was under an equitable duty to the mortgagors to take reasonable precautions to obtain the "fair" or "true market value" of the Property at the date of sale. See Silven Properties Ltd v Royal Bank of Scotland [2004] 1 WLR 997 EWCA at para 19. Lightman J (as he then was), giving the judgment of the Court, stated at para 19:

"He must take proper care whether by fairly and properly exposing the property to the market or otherwise to obtain the best price reasonably obtainable at the date of sale.""

61. In *Michael v Miller* [2004] EWCA Civil 282, the Court held that:

"131 It is well settled that in exercising his power of sale over mortgaged property a mortgagee is under a general duty to take reasonable care to obtain the best price reasonably obtainable at the time (see Fisher and Lightwood's Law of Mortgage 11th edn. para 20.23) . In this context, 'the best price reasonably obtainable' is synonymous with 'a proper price' (the expression used by Lord Templeman in Downsview Nominees at p.315 and by Robert Walker LJ in the Yorkshire Bank case at p.1728F) and with 'the true market

value of the mortgaged property' (the expression used by Salmon LJ in Cuckmere Brick at p.966) ."

The Conveyancing Act 1983

62. Section 30(1) states as follows:

Powers incident to estate or interest of mortgagee

30 (1) A mortgagee shall have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further—

(i) A power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as the mortgagee thinks fit, with power to vary any contract for sale, and to buy in an auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss occasioned thereby; and

(ii) A power, at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire and windstorm any building or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money; and

(iii)…

63. Section 32(1) states as follows:

Conveyance, receipt on sale

32 (1) A mortgagee exercising the power of sale shall have power, by deed, to convey the property sold, for such estate and interest therein as is the subject of the mortgage,

freed from all estates, interests and rights to which the mortgage has priority, but subject to all estates, interests and rights which have priority to the mortgage.

64. Section 36A sets out the definitions including as follows:

"eligible creditor" means a person to whom—

(a) on, or within two years after, the material date the transferor owed an obligation and on the date of the action or proceeding to set aside the relevant disposition that obligation remains unsatisfied;

(b) on the material date the transferor owed a contingent liability and since that date the contingency giving rise to the obligation has occurred and on the date of the action or proceeding to set aside the relevant disposition that obligation remains unsatisfied; or

(c) on the date of the action or proceeding to set aside the relevant disposition, the transferor owes an obligation in consequence of a claim, made by that person against the transferor, arising from a cause of action which accrued prior to, or within two years after, the material date.

"material date" means the date on which a relevant disposition is made;

"requisite intention" means an intention of a transferor to make a disposition the dominant purpose of which is to put the property which is the subject of that disposition beyond the reach of a person or a class of persons who is making, or may at some time make, a claim against him;

"undervalue", in relation to a disposition of property, means a disposition in respect of which—

(a) no consideration is given; or

(b) the value of the consideration given is, in money or money's worth, significantly less than the value, in money or money's worth, of the property.

65. Section 36C states as follows:

Avoidance of dispositions made with the requisite intention, etc

36C(1) Subject to subsection (2) and the provisions of this Part, every disposition of property made with the requisite intention and at an undervalue shall be voidable at the instance of an eligible creditor thereby prejudiced.

(2) Where a person seeking to set aside a relevant disposition was not, on the material date, a person to whom an obligation was owed by the transferor, the Court shall not set aside that disposition unless the Court is satisfied that that person was, on the material date, reasonably foreseeable by the transferor as a person to whom an obligation might become owed by him.

(3) Subject to subsection (4), no action or proceeding to set aside a disposition shall be commenced pursuant to this Part unless such action or proceeding is commenced—

(a) in the case of an eligible creditor referred to in paragraph (a) of the definition of that expression, within six years after the material date or within six years after the date when the obligation became owed, whichever is the later date;

(b) in the case of an eligible creditor referred to in paragraph (b) of that definition, within six years after the material date;

(c) in the case of an eligible creditor referred to in paragraph (c) of that definition, within six years after the material date, or within six years after the date when the cause of action accrued, whichever is the later date.

(4) Except as provided in subsection (3), nothing contained in this section shall be construed as in any way affecting the operation of the Limitation Act 1984.

(5) For the avoidance of doubt it is hereby declared—

(a) that a disposition to which this Part applies shall not, by reason only that it was made at an undervalue, be set aside by the Court; and

(b) the Court shall, for the purpose of setting aside such a disposition determine, on a balance of probability, whether it was made with the requisite intention.

Analysis of the Defendant's Applications

66. In my view, the action should be struck out for several reasons. First, the Privy Council cases of *Downsview Nominees Ltd v First City Corpn Ltd* and *Parker Tweedale v Dunbar Bank plc and others (No. 1)* which are binding on this Court establish that the duty of care by the Bank is to the mortgagor and to all subsequent encumbrancers of the mortgaged property and not to a beneficiary of the mortgagor. In my view, I agree with Mr. Hindess that the mortgagor was the Estate of Mr. Trew as represented by his Executor, the Second Defendant. The Plaintiff was not the mortgagor or an encumbrancer of the Property. I am obliged to reject Mr. Scott's submission that the Plaintiff obtained an equitable interest because the Bank looked to her for payments. The affidavit evidence states that the Bank tried to work with the Plaintiff for several years in order to have the mortgage repaid. There is no authority to support the contention that this changed the Plaintiff's position in respect of the mortgage. The extract about the "*Torrens Title Jurisdictions*" is an article that is not relevant to this application as it is not an authority on anything material or otherwise. On this basis, the Plaintiff does not have standing for this part of the action against the Bank. In my view, the claim is bound to fail and therefore should be struck out as against the Bank as it is discloses no reasonable cause of action and is frivolous or vexatious because it is obviously unsustainable.

67. Second, on the same basis as set out above, I extend similar reasoning to the arguments about the lack of an accounting. There is no duty owed by the Bank to the Plaintiff for the value of the Estate of Mr. Trew as that is a matter of the Second Defendant. In respect of the sale of the Property, the Bank's duty was to inform the Second Defendant about the details of the sale and forward any surplus to the Estate. In my view, it is plain and obvious that this part of the claim should be struck out for presenting no reasonable cause of action, and being frivolous or vexatious and an abuse of the process of the Court.

68. Third, again on the basis as set out above, I extend my reasoning to the arguments about the Bank's duty to exercise good faith, fairness and reasonableness in the sale of the Property as well as to the aspects of the claim about the interest. The pleadings and affidavit evidence set out the conduct of the bank. The decisions were a matter of simple mathematics in comparing offer prices to purchase the Property. On the basis that Mr. Scott is not challenging the factual basis of the offers, in my view he will be hard pressed to overcome the hurdle before him to show that the Bank did not exercise good faith, fairness and reasonableness in the conduct of the sale of the Property. The Plaintiff in Trew 1 alleges an indication of collusion, possible corruption, asset manipulation and improper selection of purchasers by the Bank. Accordingly, Mr. Scott has dived off the high board with fine form to create a splash about fraud in respect of an appraisal and some offers all landing on $550,000 but then he resurfaces to state that he does not actually allege fraud, which in any event is not pleaded generally or specifically. In doing this, in my view, the Plaintiff and Mr. Scott have leapt into the pool of the mythical as anticipated in the case of *Dow Hager Lawrance v Lord Norreys and Others,* such myth which appears to have grown with the process of the litigation.

69. Fourth, in my view, the Bank complied with its duty to obtain the best price. The start point is that the Bank does not have a duty to the Plaintiff for the reasons as set out above. The next point is that I disagree with Mr. Scott's extensive submissions about the sale price of the Property. The evidence gives a chronology of the offers and the reasons why they were approved or rejected. Mr. Scott stated that he accepted the facts of the offers but challenged why the Bank accepted the offer that he did on the basis that it was not the highest offer. The evidence shows that the Bank carried out a comparable analysis of the "net net" offer with the "gross" offers and exercised their discretion as to what was the proper price. In following the case authorities of *Keerome Maybury v Keetha Lowe et al* and *Michael v Miller* the exercise of the discretion of the Bank to accept the price that it did was unimpeachable such that in my view this part of the action is bound to fail. There is no other evidence to counter the facts or the reasoning in reaching the price. In my view, this part of the action should be struck out as it discloses no reasonable cause of action, is frivolous and vexatious and is an abuse of process.

70. Fifth, in respect of Section 36C of the 1983 Act, in my view, I accept that the law as stated by the Privy Council is clear that the Bank as mortgagee owed no duty or obligation to the Plaintiff and therefore the Plaintiff cannot be an "*eligible creditor*" under the Act. Also, from the facts and evidence, there is insufficient evidence to support the contention that the requisite intention necessary for the Plaintiff to advance a claim under this part of the Act did exist. Furthermore, for the reasons set out above, the claims about the sale price are bound to fail. In light of these reasons, this part of the Plaintiff's claim against the Bank should be struck out as no reasonable cause of action, is frivolous and vexatious and is an abuse of process.

Conclusion

71. For the reasons above, the Plaintiff's claims against the Bank should be struck out for the reasons stated. Further, in my view, good case management requires that in claims such as the present, which are bound to fail, they should be struck out and I am obliged to use the inherent jurisdiction of the Court to do so. I have taken into account all the circumstances of the Plaintiff's case against the Bank and I note that the power to strike out should be exercised sparingly and only in plain and obvious cases per the authorities and principles set out above. In my view, these are the kinds of claims as against the Bank, which as a result of the mortgage had the authority to sell the property for a proper price and pay any surplus to the estate, which should be struck out.

72. Mr. Scott has submitted that rather than striking out the action against the Bank, that the Court should grant leave to amend the Writ and Statement of Claim. In my view, any amendments will not change the critical facts of this case, namely that the Bank did not owe a duty to the Plaintiff and the Property was sold for a proper price within the bounds of the authorities. On that basis, any amendments will be of no material significance or merit to ward off a strikeout application. On that basis, I decline to grant leave to amend.

73. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that costs shall follow the event in favour of the First Defendant against the Plaintiff on a standard basis, to be taxed by the Registrar if not agreed.

Dated 28 July 2021

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HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT