



# In The Supreme Court of Bermuda

## CIVIL JURISDICTION

2014: No. 351

**BETWEEN:**

**LYNWOOD TUZO**

**Plaintiff**

-v-

**SUPERINTENDENT OF REAL ESTATE**

**Defendant**

## **EX TEMPORE RULING**

(in Chambers)

Date of Hearing: June 19, 2015

The Plaintiff appeared in person

Ms. Venous Memari, Liberty Law Chambers, for the Defendant

### **Introductory**

1. The Defendant in this matter applies by Summons dated November 18, 2014 to strike-out the Writ in this matter on three grounds:
  - (a) firstly, that it “*discloses no reasonable cause of action*”;
  - (b) secondly, that it “*is scandalous, frivolous and vexatious*”; and

(c) thirdly, that it “*is otherwise an abuse of the process of the Court*”.

2. The matters first came on for hearing on January 8, 2015 when the Defendant’s strike-out Summons was listed for hearing together with the Plaintiff’s Summons for Directions. At that time I ordered that both Summonses be adjourned generally with liberty to restore by letter to the Registrar and I reserved costs. The reason for the adjournment was that I decided to invite the parties to see whether they could resolve the matter.
3. In part I was motivated by an anxiety that the Plaintiff as a litigant in person might well be ‘penny wise and pound foolish’ and be exposing himself to a significant costs burden by pursuing a claim that was not meritorious. And on the resumed hearing today, although Ms. Memari for the Defendant sought an opportunity to formally prepare a strike-out application, I declined to grant that request. Because it seemed to me that sensible case management required the Court to deal with the matter in the most cost-effective manner way possible.

#### **The merits of the strike-out application**

4. This claim is clearly liable to be struck-out on the grounds that it discloses no reasonable cause of action. The essence of the claim is the broad complaint that the Superintendent of Real Estate, who is given certain duties alongside the Minister under the Real Estates (Licensing) Act 1976, had acted in an unlawful manner which caused substantial damage to the Plaintiff in the context of the administration of an application for a real estate agent’s license. The difficulty with the claim is that it does not identify any cause of action known to the law. One aspect of the relief, namely the prayer for the immediate reinstatement of the Plaintiff’s real estate agent’s license, was clearly relief which the Court is not legally able to grant in a civil action. But the claim for damages is a theoretically viable one, assuming a cause of action known to the law can be identified.
5. The only cause of action which could possibly be advanced to deal with this factual pattern is the cause of action of misfeasance in a public office, which I invited Ms. Memari to deal with on her feet, as it were. I referred in the course of argument, briefly, to the House of Lords decision in *Watkins-v-Home Office* [2006]UKHL 17 where Lord Bingham of Cornhill at paragraph 21 quoted the *Three Rivers (No.3)* case<sup>1</sup> where the following test for misfeasance in a public office was set out:

“(6) *Where a plaintiff establishes (i) that the defendant intended to injure the plaintiff or a person in a class of which the plaintiff is a member (limb one) or*

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<sup>1</sup> [1996] 3 All ER 558 at 632-633.

*that the defendant knew that he had no power to do what he did and that the plaintiff or a person in a class of which the plaintiff is a member would probably suffer loss or damage (limb two) and (ii) that the plaintiff has suffered loss as a result, the plaintiff has a sufficient right or interest to maintain an action for misfeasance in public office at common law. The plaintiff must of course also show that the defendant was a public officer or entity and that his loss was caused by the wrongful act.”*

6. In dealing with a strike-out application<sup>2</sup>, the Court is required to assume that the Plaintiff is able to prove all the allegations in the pleaded case. And so it is not for the Court, at this stage of the analysis, to consider the merits of the factual allegations. But looking at the case very generously and considering that the Plaintiff is a litigant in person, it does seem to me that although the claim is clearly liable to be struck-out as it is presently pleaded that the possibility that the Plaintiff might be able to plead a viable case of misfeasance in a public office, assuming everything which he says in his pleading to be capable of proof, cannot be ruled out.
7. And so, in these circumstances, I exercise my discretion by declining to actually strike-out the Specially Indorsed Writ at this stage. I simply Order that it is liable to be struck-out and give the Plaintiff leave to apply to amend his Specially Endorsed Writ, if so advised, within the period of 60 days. That may seem a long period in a case in which parties are legally represented, but having regard to the Plaintiff's being a litigant in person, it seems to me that he should be given that opportunity.
8. In addition it is obvious that the Plaintiff does have alternative remedies which may be more prudent for him to pursue having regard to the fact that pursuing a claim for misfeasance in a public office is perhaps one of the most difficult causes of action to establish. And at this stage of the analysis, in looking at the costs implications of pursuing such an action, such an action would result in costs in the tens of thousands of dollars. Those would not be costs that the Plaintiff himself would incur. They would be costs which the Defendant would incur and if the Plaintiff lost, those costs would most likely be ordered to be paid by the Plaintiff.
9. So there are many practical reasons why the Plaintiff would be well advised to resolve these matters in a cost-effective manner. And he does have, it is common ground, a fresh application for a real estate agent's license which is currently being processed, albeit not at a pace that is to the Plaintiff's liking. If that application is to be refused, the Plaintiff would have, it seems to me, a right of appeal under the 1976 Act. And his right to pursue an appeal is something which would be much more straightforward than seeking to establish that a public officer has acted in gross dereliction of his statutory duties.

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<sup>2</sup> I.e. an application based on the “discloses no reasonable cause of action ground”.

**Costs**

10. Finally there is the issue of costs. Subject to hearing Ms. Memari, I would be inclined to reserve the costs of today's application and to only deal with costs when it is clear how, if at all, this action is going to proceed. For the avoidance of doubt I decline to hear the strike-out application in respect of the other grounds of strike-out and those aspects of the strike-out Summons I would adjourn generally with liberty to restore, if necessary. To the extent that the Plaintiff's own Summons for Directions is also before the Court to today, I would also adjourn that Summons generally with liberty to restore.

**Form of Order**

[After hearing counsel as to the form of Order]

11. Perhaps the form of Order should be unless the Plaintiff applies for leave to amend the Specially Indorsed Writ within 60 days the claim shall be struck-out.

Dated this 19<sup>th</sup> day of June, 2015 \_\_\_\_\_  
IAN R.C. KAWALEY