

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA
IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2022/0141

BETWEEN:

[1] ERIC PIQUENET
[2] ISABELLE PIQUENET

Claimants

and

ANTIGUA SLIPWAY LTD

Defendant

Before:

The Honourable Master Carlos Cameron Michel

Appearances:

Ms. Michelle Sterling for the Claimant
Mr. Kemar Roberts for the Defendant

2023: June 2;
June 29

DECISION

[1] **MICHEL M:** The claimants commenced these proceedings against the defendant by claim form and statement of claim filed on 26th April 2022 for breach of a lease agreement between the parties. The defendant has now applied to strike out parts of the claimants' statement of claim for failing to disclose any reasonable grounds for bringing part of their claim that the defendant has unreasonably withheld its consent to their request for the sale of their restaurant business in breach of the agreement. The defendant has also applied for summary judgment to be entered for the defendant on the issue arising on the claimants' claim that the defendant breached clause 3.8 of the agreement for unreasonably withholding consent.

Background

- [2] The claimants operate a restaurant business located on the dock of the defendant's commercial compound at Nelson's Dockyard, English Harbour. In 2021, the claimants as lessees and the defendant as lessor entered into a five-year sub-lease agreement to lease a space on the dock of the defendant's commercial compound with an option to renew. Clause 3.8 of the lease provided that:

"the Lessee shall have the right to sell the said restaurant business to a third party during the term of this lease provided that the third party purchaser must first receive the written approval of the Lessor (which approval shall not be unreasonably withheld) and the said third party must agree to the terms and conditions of this lease upon which, the Lessor shall lease the demised premises to the said third party for the remainder of the term of the lease and upon the terms and conditions of the said lease."

- [3] Sometime in March 2022, the claimants verbally indicated to the defendant their intention to sell their restaurant business to a third-party purchaser and requested the defendant's consent to the sale. It is sufficient to say at this point that the parties dispute the defendant's position in relation to the claimants' indication of their intention to sell their restaurant business. Purportedly acting in accordance with clause 3.8 of the lease agreement, the claimants issued two written notices to the defendant both dated 23rd March 2022, to express their intention to renew the lease and to request the defendant's written consent within seven days, for the sale of their restaurant business to a third party. The defendant responded to the claimant's written notice by letter dated 22nd April 2022 (which the claimants allege was received on 26th April 2022) and requested that the claimants furnish details of the potential purchaser so that it could appropriately respond to the request.

- [4] On 26th April 2022, the same day that the defendant's correspondence was allegedly received, the claimants commenced the present action against the defendant seeking, amongst other relief, specific performance of the sub-lease dated 19th July 2021, damages for breach of contract in lieu of or in addition to specific performance and damages for loss of bargain. The claimants averred that the defendant unreasonably withheld its consent to the sale of the claimant's

restaurant business in breach of the said agreement and that as a result of the defendant unreasonably withholding consent, they have lost the bargain and suffered loss and damage.

- [5] In its defence, the defendant set out the alleged facts of the prior verbal discussions between the parties in March 2022, during which the claimants informed the defendant of their intention to sell their restaurant's good will. The defendant alleged that it responded by requesting details of the third-party purchaser to determine whether it was able to give written approval to the third-party purchaser in keeping with clause 3.8 of the lease agreement but the claimant never provided the requested details. The defendant denied the claimants' allegations that it unreasonably withheld its consent to the sale of the claimant's restaurant business in breach of the said agreement and averred that it has never withheld its written approval in breach of the lease agreement and put the claimant to strict proof of same. The defendant averred that by its letter dated 22nd April 2023, it requested details of the third-party purchase which would allow it to give effect to clause 3.8 of the lease agreement. The defendant alleged that the claimants have failed to disclose their request in their statement of claim and that the claimants have refused to provide the details of the third-party purchaser and that any loss of bargain suffered by the claimants is owing to their own failure to provide the third-party purchaser details and not to any alleged breach of the lease agreement.
- [6] The claimants filed a reply to the defendant's defence denying its assertions and setting out details of an alleged course of conduct by the defendant following their discussions, which, they alleged, showed bad faith on the defendant's part and led to the breakdown of the relationship between parties. This breakdown, they alleged, led to the written notice request to the defendant of 23rd March 2022.
- [7] The defendant subsequently filed its present application to strike out paragraphs 4, 5, 6, 7, and 8 of the claimant's claim relating to the defendant's alleged breach of clause 3.8 of the lease agreement. In the same notice of application, the defendant has also applied for summary judgment on the issue of it unreasonably withholding consent to the claimant's request. The application was accompanied

by the affidavit of Roberto Falangola, Managing Director of the defendant in support. The claimants thereafter filed an affidavit in response.

The Court's Approach to Strike Out and Summary Judgment Applications

[8] From the outset, I must state that the defendant's application in parts seems to have intertwined the court's strike out and summary judgment procedures; however, the defendant is seeking to engage the court on two different and distinct procedures: striking out pursuant to CPR 26.3(1) (b) and summary judgment pursuant to CPR 15.2(a). In **Dr. Martin Didier et al v Royal Caribbean Cruises Ltd**,¹ Pereira CJ warned that the strike out and summary judgment procedures ought to be treated with separately. The learned Chief Justice noted:

"[20] ...The strike out and summary judgment procedures...ought not to be conflated in this way. One procedure should not be viewed as being "just as good as the other". These are two distinctly different procedures which have different requirements and would be used in different circumstances leading to different legal consequences. In particular, the two certainly cannot operate simultaneously.

[21] The legal tests for entering summary judgment under Part 15 of CPR and for striking out a party's statement of case under rule 26.3(1) (b), while closely worded, are not the same. They should not be confused with each other."

[9] Her Ladyship explained² that on the strike out procedure, if the court finds that a party's pleadings are untenable as a matter of law, that party may have their claim or defence struck out, but the party would be perfectly entitled to remedy the faults of their statement of case and bring fresh proceedings in relation to the same dispute. However, on the other hand, the summary judgment procedure gives a judgment on the merits which operates as issue estoppel.

[10] The learned Chief Justice went on to explain that 'one cannot contemplate that both a strike out and a summary judgment application can be successful at the same time since, due to the nature of the two procedures, if the legal test of one is satisfied, then the legal test of the other will necessarily not be satisfied.'³

¹ SLUHCVP2015/0024 consolidated with SLUHCVP/0004 (delivered 6th June 2016, unreported).

² At para. 28.

³ At para 29.

Particularly, the Chief Justice explained that if an application to strike is made by the defendant and the claim is successfully struck out, then there are no proceedings remaining for summary judgment to be entered in favour of the successful defendant. Her Ladyship however recognised that there is merit in seeking to apply for the entry of summary judgment as an alternative to striking out if the initial strike out application is not successfully, but that it is important that the specific requirements for each application are satisfied.

[11] Bearing the above guidance in mind, I will now consider the issues raised on the defendant's application.

[12] Based on the defendant's application, the court will first have to consider whether paragraphs 4, 5, 6, 7, and 8 of the claimants' statement of claim should be struck out on the basis that these paragraphs do not disclose a case against the defendant. Considering the guidance in **Dr. Martin Didier**, I am of the view that if the court finds that those paragraphs ought to be struck out, then there would be no further proceedings remaining in relation to the issue of whether the defendant has unreasonably withheld its consent in breach of the agreement for summary judgment to be entered in favour of the defendant. However, if the court declines striking out the abovementioned paragraphs, based on the way the defendant has brought its application, as an alternative, the court can consider whether the defendant is entitled to summary judgment on the issue on the basis that the claimants have no real prospect of success.

The Defendant's Strike Out Application

[13] CPR 26.3(1) (b) gives the court the discretion to strike out a statement of case or any part thereof where it is demonstrated that the statement of case or part of it does not disclose any reasonable ground for bringing or defending a claim. The rule states:

26.3(1) In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that –

(a) ...

- (b) The statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;”

[14] The principles which guide the court in exercising its discretion to strike out all or part of a statement of case have helpfully been summarized in the decision of the Court of Appeal in **Ian Hope-Ross v Martin Dinning et al.**⁴ At paragraph 21 of the judgment, Farara JA [Ag.] explained:

“As with every discretion conferred upon the court by the CPR, the discretion to strike out must be exercised in accordance with law and with a view to furthering the overriding objective. [See rule 1.2 of the Civil Procedure Rules 2000]. The central principles which undergird the court’s jurisdiction to strike out all or part of a statement claim are now settled, have been consistently cited and applied by this Court, and need not be extensively recited. In brief, these principles are as follows:

- (i) The court must be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of claim is incurably bad; or that it discloses no reasonable ground for bringing or defending the case in the sense that it has no real prospect of succeeding at trial. [*CITCO Global Custody NV v Y2K Finance Inc* [2009] ECSCJ No. 165 (delivered 19th October 2009)].
- (ii) A statement of claim is not suitable for striking out if it raises a serious live issue of fact which can only be determined by hearing oral evidence. Further, a statement of claim should not be struck out where the dispute between the parties involves a substantial point of law which does not admit of a plain and obvious answer, or the law is in a state of development, or where the strength of the case may not be clear because it has not been fully investigated. [*Ian Peters v Robert George Spencer* [2009] ECSCJ No. 212 (delivered 22nd December 2009), per Pereira CJ; *Tawney Assets Limited v East Pine Management Limited and others* [2012] ECSCJ No. 284 (delivered 17th September 2012) per Gordon JA [Ag.]].
- (iii) On hearing an application to strike pursuant to CPR 26.3(1) (b), the pleadings alone are to be examined. The trial judge should assume that the facts alleged in the statement of claim are true unless they are manifestly incapable of proof. [*CITCO Global Custody NV v Y2K Finance Inc* [2009] ECSCJ No. 165 (delivered 19th October 2009) per Edwards JA at para. 13, and

⁴ AXAHCVP2020/0005 consolidated with Christopher Liss et al v Martin Dinning et al AXAHCVP2020/0006 and Satay Limited et al v Martin Dinning et al AXAHCVP2020/0007 (delivered 30th April 2021, unreported).

Martin Didier G.C et al v Royal Caribbean Cruises Ltd. SLUCVAP consolidated appeals 2014/0024 and 2014/0004 (delivered 6th June 2016, unreported) per Pereira CJ at para. 28].

- (iv) Striking out is a draconian step or “nuclear option” and ought only to be deployed sparingly, in the clearest of cases. The reason for proceeding cautiously is that the exercise of the jurisdiction to strike out deprives a party of its right to a trial and of its ability to strengthen its case through the process of disclosure, the filing of witness statements or witness summaries and other procedures such as requests for further information. [*Ian Peters v Robert George Spencer ANUHCVP2009/0016 (delivered 22nd December 2009) per Creque JA; see also HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd and another [2014] EWCA Civ 1106.*]
- (v) As striking out is a draconian step, the court must consider whether the interests of justice are better served by permitting an amendment, to pleadings or deploying some other sanction, instead of striking out the statement of claim. [*Pereira CJ in The Attorney General of Saint Lucia v Darrel Montrope [2020] ECSCJ No. 235. (delivered 9th July 2020); See also Peerless Limited v Gambling Regulatory Authority and others [2015] UKPC 29 and Real Time Systems Limited v Renraw Investments Limited and Others [2014] UKPC 6.*].”

[15] In **Baldwin Spencer v The Attorney-General of Antigua and Barbuda et al**,⁵ Byron CJ [Ag.] recognised the principle that the striking out procedure should be used sparingly but observed that where there is no cause of action the court should be just as decisive in striking out. His Lordship explained that:

“Regardless of the length or difficulty of the argument, which has already been concluded the operative issue for determination must be whether there is ‘even a scintilla of a cause of action’. If the pleadings disclose any viable issue for trial then we should order the trial to proceed but if there is no cause of action we should be equally resolute in making that declaration and dismissing the appeal.”

[16] With the above principles in mind, I will consider the claimants’ pleadings only, and in so doing assume that the facts alleged in the statement of claim are true

⁵ Antigua and Barbuda Civil Appeal No. 20A of 1997 (delivered 8th April 1998, unreported) at p. 8.

to determine whether taken at its highest, what has been pleaded by the claimants discloses a reasonable cause of action capable of proceeding to trial.

[17] Although the defendant seeks to strike out paragraphs 4 to 8 of the claimants' statement of claim, to place the matter into proper context, I believe it is necessary to set out in full paragraphs 3 to 8.

"3. By Agreement dated 19th day of July 2021, the parties entered into a sub-lease agreement for a period of five years with an option to renew, the terms of the agreement include inter alia:

Clause 2.1 states the Lessor shall grant to the Lessee an option to renew this lease for a further term of five (5) years at a rent to be agreed and that the rent shall reflect an aggregate increase of no more than 10% for each year of the expired term. The Lessee shall give notice of their intention to exercise the said option to renew at least 3 months prior to the expiration of this lease.

Clause 3.8 states that the Lessee shall have the right to sell the said restaurant business to a third party during the term of this lease provided that the third party purchaser must first receive the written approval of the Lessor (which approval shall not be unreasonably withheld) and the said third party must agree to the terms and conditions of this lease upon which, the Lessor shall lease the demised premises to the said third party for the remainder of the term of the lease and upon the terms and conditions of the said lease.

Clause 2.2 states that the Lessee paying the rents hereby reserved and observing and performing the several covenants and stipulations herein on the part of the Lessee contained shall peaceably hold and enjoy the demised premises throughout the said term (or sooner determination) without any interruption by the lessor or any person rightfully claiming under the Lessor.

4. Pursuant to clauses 2.1 and 3.8, the Claimants gave the Defendant written notice dated 23rd March, 2022 of their intention to renew the lease and to request consent for a pending sale of their restaurant business.

5. By the said Notice, the Defendant was required to provide its written consent on or before March 30 2022.

6. To date, the Defendant has unreasonably withheld its consent in breach of the said agreement.

7. As a result of the Defendant's unreasonably withholding consent, the Claimants have lost the bargain and suffered loss and damage.

Particulars of Loss and Damage

8. There was an acceptance of the Claimants offer to sell La Brasserie's good will, along with the equipment, appliances and furnishing for the sum of USD\$400,000.00."

Discussion on Strike out Application

[18] Having considered the pleadings, I am of the view that paragraphs 4 to 8 of the claimants' statement of claim disclose a cause of action against the defendant. The claimants have set out the provisions of the lease agreement on which they rely and have pleaded the facts which they allege have given rise to the breach of clause 3.8. They have also pleaded the loss allegedly suffered because of the alleged breach.

[19] It would be for the claimants to prove the facts they rely on and for the court to determine whether by the letter dated 23rd March 2023 a request was made in keeping with the provisions of clause 3.8, and whether the defendant by its actions has withheld its consent and if so, whether it was unreasonable to do so, and critically, in construing the lease, whether this amounts to a breach of the lease agreement. The court would then have to decide whether the alleged breach has led to loss of a bargain by the claimant and caused it to suffer loss and damage. In my view the claimants have sufficiently pleaded facts to enable this issue on its claim to proceed.

[20] As has been stated in the authorities cited above, striking out is a draconian step, described by the Judicial Committee of the Privy Council in **Real Time Systems Ltd v Renraw Investments Ltd** and others as the nuclear option. It would clearly be inappropriate to deploy the nuclear option and strike out parts of the claimants' case which on the face discloses more than a 'scintilla of a cause of action' against the defendant. I would therefore refuse to strike out paragraphs 4 to 8 of the claimants' statement of claim.

The Defendant's Application for Summary Judgment

[21] Rule 15.2 of the **Civil Procedure Rules 2000** ("CPR") provides the grounds for summary judgment. The rules states that:

“15.2 The court may give summary judgment on the claim or on a particular issue if it considers that the –

(a) claimant has no real prospect of succeeding on the claim or the issue; or

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

[22] The law as it relates to applications for summary judgment was helpfully summarized by Pereira CJ in the case of **Myett’s Enterprises Limited v Kimberley Cooke Leigh et al.**⁶ I will therefore adopt the following passages in full:

[“12] ...The summary judgment procedure is designed to deal with cases which are not fit for trial. It was aptly described by Lord Briggs in the Privy Council decision in *Sagicor Bank Jamaica Limited v Taylor-Wright*⁴ [[2018] UKPC 12] in the following way:

“Part 15 of the CPR provides...a valuable opportunity (if invoked by one or other of the parties) for the court to decide whether the determination of the question whether the claimant is entitled to the relief sought requires a trial. Those parts of the overriding objective (set out in Part 1) which encourage the saving of expense, the dealing with a case in a proportionate manner, expeditiously and fairly, and allotting to it an appropriate share of the court’s resources, all militate in favour of summary determination if a trial is unnecessary.”

[13] As a general principle, summary judgment should not be granted unless it is apparent that the claimant or defendant has no real prospect of succeeding on or defending the claim. This principle is embodied in rule 15.2 of the CPR. In *Swain v Hillman*⁶ [[2001] 1 All ER 91] Lord Woolf MR stated that the words ‘no real prospect of succeeding’ required no explanation as they spoke for themselves. The words do not connote a ‘surefire’ case or even a substantial prospect of success. Nor do they suggest that summary judgment will only be granted if the claim or defence will invariably fail. The word ‘real’ takes on its plain and ordinary meaning, being a realistic, as opposed to fanciful, prospect of success.

[14] The proper approach of the court to these applications is well-established. In determining whether the claimant or defendant has a real prospect of success, the judge or master must critically examine the pleadings and such evidence which has been adduced by the parties. However, he or she must refrain from conducting a mini-trial and making factual findings on important issues. In *Saint Lucia Motor and General Insurance Co. Ltd. v Peterson Modeste*,⁷ [[2010] ECSCJ No. 8 (delivered 11th January 2010)] this Court explained the proper approach as follows:

⁶ BVIHCVAP2020/0005 (delivered 19th May 2021, unreported) at para. 12 to 15.

“...Summary judgment should only be granted in cases where it is clear that a claim on its face obviously cannot be sustained, or in some other way is an abuse of the process of the court. What must be shown in the words of Lord Woolf in *Swain v Hillman* is that the claim or the defence has no “real” (i.e. realistic as opposed to a fanciful) prospect of success. It is not required that a substantial prospect of success be shown. Nor does it mean that the claim or defence is bound to fail at trial. From this it is to be seen that the court is not tasked with adopting a sterile approach but rather to consider the matter in the context of the pleadings and such evidence as there is before it and on that basis to determine whether, the claim or the defence has a real prospect of success. If at the end of the exercise the court arrives at the view that it would be difficult to see how the Claimant or the Defendant could establish its case then it is open to the court to enter summary judgment.”⁸

- [15] At the outset, the judge or master should identify from the pleadings the real issues in the claim and thereafter determine whether, on the pleadings and the evidence provided, these issues can properly be disposed of summarily. It is only those issues which disclose no real prospect of success that ought to be disposed of using the summary procedure under Part 15 of the CPR. It follows that, as Saunders CJ [Ag.] cautioned in *The Bank of Bermuda Ltd. v Pentium (BVI) Ltd. and Landclev Limited*,⁹ [[2004] ECSCJ No. 94 (delivered 20th September 2004)] the court should not permit a matter to proceed to trial where the defendant [or claimant] has produced nothing to persuade the court that there is a real prospect that he or she will succeed in defeating [or will succeed on] the claim brought by the claimant. Furthermore, as Farara JA [Ag.] stated recently in *International Trading Holding Co. Ltd. and Anor v Med Trading Limited*¹⁰ [BVIHCMAP2020/0002 (delivered 11th February 2021, unreported)] citing with approval the decision of the English Court of Appeal in *Doncaster Pharmaceutical Group Ltd. and Ors v Bolton Pharmaceutical Company Ltd*,¹¹ [[2006] EWCA 661 Civ] in considering an application for summary judgment the court should be alert to the defendant [or claimant] who seeks to avoid summary judgment by making a case look more complicated or difficult than it really is.”

- [23] In the decision of the Judicial Committee of the Privy Council in **Sagicor Bank Jamaica Limited v Taylor-Wright**,⁷ Lord Briggs, noted:

“There will in almost all cases be disputes about the underlying facts, some of which may only be capable of resolution at trial, by the forensic processes of the examination and cross-examination of witnesses, and oral argument thereon. But a trial of those issues is only necessary if their outcome affects the claimant’s entitlement to the relief sought. If it does not, then a trial of those issues will generally be nothing more than an unnecessary waste of time and expense.”

⁷ [2018] UKPC 12 at para. 17.

[24] He further commented on the rule relating to summary judgment under the Jamaica CPR (which are identical to our rules on summary judgment) at paragraph 9 of the Board's judgment that the rule provides for the court to not only grant summary judgment in relation to a claim as a whole but also in relation to an issue. It is therefore evident that the court is empowered to grant summary judgment if it considers that the claimant has no realistic prospect of success on its claim as a whole or on a particular issue.

[25] Finally, in **Comodo Holdings Limited v Renaissance Ventures Limited**,⁸ Blenman JA observed that:

“It is trite that the summary judgment procedure is unsuitable for claims or issues which would necessitate the court embarking upon a “mini-trial” or to resolve issues which ought to be properly tried. Indeed Lord Woolf in *Swain v Hillman* stated that the summary trial procedure should be kept to its proper role. ‘It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial.’”

[26] With the above principles in mind, I shall now go on to consider the substance of the defendant's application.

The Parties' Submissions on Summary Judgment

The Defendant's Submissions

[27] The defendant contends that the claimants' claim that it has unreasonably withheld its consent to the potential third-party purchaser of the claimants' restaurant in breach of clause 3.8 of the lease agreement is irredeemable and discloses no reasonable ground for bringing the case. The defendant argues that for it to act pursuant to clause 3.8, it requested from the claimants, details of the third-party purchaser and, it contends, there has been no response from the claimants. This, the defendant argues, evidence that there is no real prospect of the claimants succeeding at trial given that the defendant has not been provided with details of the 3rd party purchaser; therefore, the defendant further argues, it cannot be held to have breached the lease agreement.

⁸ BVIHCVAP2014/0032 (delivered 3rd May 2016, unreported).

[28] Mr. Kemar Roberts, learned counsel for the defendant, submitted that based on the learning in **Chitty on Contracts**,⁹ the defendant is bound to the terms of clause 3.8 of the lease agreement. He submitted that the plain words of clause 3.8 of the lease agreement reflect the claimants' right to sell their restaurant business to a third-party during the terms of the lease is subject to the fact that the third party must first receive written approval from the defendant and the third-party must also agree to the terms of the lease. He submitted therefore that the plain words reflect the common intention of the parties and reflect a reasonable construction of the clause in a situation where a sub-tenant of a commercial space (the claimants) desires to sell its business interest during the existing lease term and there are terms of an existing headlease (with the Government of Antigua and Barbuda) with which the sub-landlord (the defendant) must comply. He argued therefore that given the commercial nature of the landlord-tenant relationship between the parties and the fact that the defendant would gain a new tenant should the claimants sell their restaurant business during the term of the lease, this meaning/construction of the clause is a reasonable one in the circumstances and exemplifies the common intention between the parties.

[29] Mr. Roberts argued that, considering the common intention of the parties based on the meaning of clause 3.8 above, the defendant cannot be said to have breached the terms of clause 3.8 in circumstances where it has asked for and has never actually received the identity and/or details of the third-party purchaser whom the claimant alleges to be in negotiations with. Mr. Roberts submitted that based on the defendant's affidavit evidence, even to date, the defendant is still unable to give its written consent as it remains unaware as to the identity/details of the third-party purchaser. This state of play he argued cannot give rise to the conclusion that the defendant breached clause 3.8.

The Claimant's Submissions

[30] Ms. Michelle Sterling, learned counsel for the claimants, submitted that this matter is not suitable for summary judgment. She argued that the claimants have raised

⁹ (13th edn.) vol. 1, para. 12-002, pp. 815-816.

an important issue of fact concerning the reason for the defendant's refusal to provide its consent for the proposed sale by the claimants. This, she submitted, is a triable issue which, if proved in favour of the claimants, may result in judgment being entered for the claimants, therefore, she submitted, it is an issue which must be properly investigated and ventilated at the trial of this matter.

[31] Ms. Sterling further submitted that there is a broader issue between the parties relating to the conduct of the parties which must be considered in determining whether the defendant unreasonably refused to give the consent necessary under 3.8. She argued that the defendant is alleging that it requested information about the third party that was never provided to them; however, the claimants' position is that the defendant's request for the information was not as simple as they now argue it to be. She submitted that the claimants' assertion is that what was requested by the defendant was not pertinent to the defendant to give consent. The evidence of the claimants she argued is that the information requested by the defendant was sensitive details about the sale of the property and not information relevant to the third party and that the behaviour of the defendant towards the claimants gave rise to the claimants believing that the defendant was not acting in good faith and this led to the breakdown in the relationship between the parties in respect of clause 3.8 of the lease agreement.

[32] Learned counsel for the claimants also pointed out to the court that the affidavit evidence of the claimants indicates that even though the correspondence was sent to the defendant in March 2022 seeking the defendant's written consent, the defendant's reply did not come until a month later in April 2022. She submitted that this demonstrates the breakdown of the relationship between the parties and that because of the defendant's delay in responding, the claimants lost the bargain.

Discussion on Summary Judgment Application

[33] The central issue that arises on this aspect of the claimants' claim is whether the defendant unreasonably withheld its consent and in so doing breached clause 3.8 of the lease agreement. Whilst the claimants argue that consent was unreasonably withheld, the defendant's position is that it was unable to give consent as the details of the third-party purchaser were not provided to it.

[34] In **Sequent Nominees Ltd (formerly Rotrust Nominees Ltd) v Hautford Ltd**¹⁰ the UK Supreme Court recently approved three overriding principles in considering reasonableness of a refusal of consent to an assignment. The first is that:

“A landlord is not entitled to refuse his consent to an assignment on grounds which have nothing whatever to do with the relationship of landlord and tenant in regard to the subject matter of the lease”

The second:

“... In any case where the requirements of the first principle are met, the question whether the landlord’s conduct was reasonable or unreasonable will be one of fact to be decided by the tribunal of fact. There are many reported cases. In some the landlord’s withholding of consent has been held to be reasonable ... in others unreasonable ... These cases are of illustrative value. But in each the decision rested on the facts of the particular case and care must be taken not to elevate a decision made on the facts of a particular case into a principle of law.”

And the third:

‘... The landlord’s obligation is to show that his conduct was reasonable, not that it was right or justifiable...’

[35] Their Lordships also endorsed the view that ‘reasonableness’ should be read in the general sense and the expression should be given a broad, commonsense meaning in this context as in others.

[36] In discussing the court’s approach to a fully qualified covenant in a lease, similar in nature to clause 3.8 of the lease signed by the parties, their Lordships in **Sequent Nominees Ltd**¹¹ adopted the dicta of Lord Denning MR in **Bickel v Duke of Westminster**¹² that:

“When those words come to be applied in any particular case, I do not think the court can, or should, determine by strict rules the grounds on which a landlord may, or may not, reasonably refuse his consent. He is not limited by the contract to any particular grounds. Nor should the courts limit him. Not even under the guise of construing the words.”

¹⁰ [2019] UKSC 47 at para. 21 to 24.

¹¹ At para. 25.

¹² [1976] 3 All ER 801 at 804–805, [1977] QB 517 at 524.

[37] Accordingly, their Lordships observed in construing reasonableness based on a clause in the lease that:

“It is over-simplistic, and contrary to the principles as laid down in the Ashworth Frazer case, to approach this question in any rigid or doctrinaire way, still less solely by reference to original purposes of the covenant in cl 3(19) which may have been within the contemplation of the parties when the lease was granted. It will in every case be a question of fact and degree measured as at the date upon which the relevant consent is sought by the tenant.”

[38] It is clear from the guiding principles and authorities that deciding reasonableness in withholding consent is to be decided on a case-by-case basis by considering the factual circumstances of each case. As stated by their Lordships in **Sequent Nominees Ltd**, reasonableness in refusing consent will in every case be a question of fact and degree measured as at the date upon which the relevant consent is sought by a tenant.

[39] In the present case, learned counsel for the defendant in his oral submissions readily accepted that there is a dispute between the parties in respect of the defendant’s position in response to the claimants negotiating the sale of its business, but he submitted the evidence points to the defendant asking for the details of the third-party purchaser and it was reasonable to do so to provide the consent. However, in my view, when one considers the contentions of the claimants, that (1) a formal request by notice was made to the claimants, and that (2) no response was received until the day the claim was filed, that (3) in their discussions prior to the notice the defendant had requested sensitive details not relevant to granting consent and that (4) the course of conduct of the defendant has led to a breakdown in the relationship; there are clearly factual circumstances in this case which require further inquiry by the court.

[40] The reasonableness of the actions of both parties in the context of the lease agreement can only be determined by testing and evaluating the evidence of the parties – the evidence already before the court and evidence which potentially will become available to the court. After carrying out this exercise, the court will have to make certain factual findings including whether the details sought by the defendant were irrelevant and the defendants’ conduct resulted in the breakdown

the relationship of the parties. Thus, the matter of whether the claimant provided details of the third-party purchaser to the defendant to consider whether it would consent to the sale to third-party must be considered in the context of all the factual circumstances raised in the claim and ought not to be viewed in isolation.

[41] The court is also mindful that the defendant's application for summary judgment has been made before the usual pre-trial procedures of disclosure and the filing of witness statements. As was noted in the cautionary statements of Mummery LJ in **Doncaster Pharmaceutical Group Ltd and others v Bolton Pharmaceutical Company 100 Ltd**,¹³ even in circumstances where there is no obvious conflict of fact, the court should hesitate to make a final determination without a trial where 'reasonable grounds exist to believe that a fuller investigation into the facts of the case would add or alter the evidence available to a trial judge and so affect the outcome of the case'.¹⁴ I am of the considered view that this is a case in which pre-trial procedures should be allowed to provide for this fuller investigation into the facts so as to expose the full extent of the case. In my view, it would be inappropriate for this court, on the material before it, to simply make a finding of fact that the defendant could not give consent.

[42] I have also considered the submission made by the defendant that the claimant has misunderstood what was meant by clause 3.8 of the lease based on statements in their reply to the defence and in the affidavit in opposition to the defendant's application. This contention does not displace the court's view as outlined above. In light of the authorities which have been referred to, the court will no doubt have to evaluate the purpose of clause 3.8 in the parties' contemplation at the time the relevant consent was sought by the claimants.

[43] Summary judgment ought to be granted only in the clearest of cases where the other party has no real, as opposed to fanciful prospect of success.¹⁵ In my view, in light of the foregoing, it cannot be said that the claimants' prospects of success on the issue of the unreasonableness of withholding consent is fanciful. I would therefore also refuse the defendant's application for summary judgment.

¹³ [2006] EWCA 661 Civ 661.

¹⁴ International Trading Holding Co. Limited et al v Med Trading Limited BVIHCMA2020/0002 (delivered 11th February 2021, unreported).

¹⁵ See: Saint Lucia Motor & General Insurance Co. Ltd. v Peterson Modeste.

Conclusion

[44] The defendant has been unsuccessful on both aspects of its application and therefore the application must be refused in its entirety.

[45] As it relates to the issue of costs, the general rule is that in making an order about the costs of any proceedings, the court must order the unsuccessful party to pay the costs of the successful party. I see no reason why I should depart from the general rule, and I would therefore order that the defendant pay the claimants the costs of this application, such costs to be assessed if not agreed.

Disposition

[46] I would therefore make the following orders:

- (1) The defendant's application to strike out paragraphs, 4, 5, 6, 7, and 8 of the claimants' statement of claim, is refused.
- (2) The defendant's alternative application for summary judgment on the issue that the defendant breached clause 3.8 of the lease agreement dated 19th July 2021 for unreasonably withholding consent, is refused.
- (3) The defendant shall pay the claimants' costs of this application to be assessed at the next case management conference if not agreed within 28 days of the date of this order.
- (4) The matter shall be set down for further case management conference on a date to be fixed by the Registrar of the High Court.

[47] I wish to thank learned counsel on both sides for their helpful submissions.

Carlos Cameron Michel
Master

By the Court

Registrar