

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS**

IN THE HIGH COURT OF JUSTICE

CLAIM NO: SKBHCV2019/0090

BETWEEN:

IIC MANAGEMENT COMPANY LIMITED

Claimant

and

**ASHLEY ODEN
ANGIE KROEKER**

Defendants

Appearances:

Mr. Victor Elliott-Hamilton for the Defendants
Director of Claimant Mr. Paul Bilzerian in person

2020: July 16
September 30

RULING

- [1] **GILL, M.:** On November 11, 2019, the Applicants, the Defendants herein, filed an application pursuant to Rule 26.3(1) of the Civil Procedure Rules 2000 as amended (CPR 2000) that the claim and statement of claim be struck out as an abuse of the process of the court and likely to obstruct the just disposal of the proceedings; in the alternative, pursuant to Rule 26.3(1)(a), that the claim and statement of claim be struck out as the claim discloses no reasonable cause of action.

Background

[2] The grounds of this application provide the background to this matter. They are as follows:

1. On the 26th day of March 2019, the Respondent filed a Claim Form and Statement of Claim alleging breach of contract with respect to a lease entered into between the parties on the 4th day of February 2019.
2. On the 26th day of March 2019 the Respondent also filed a Claim Form and Statement of Claim in the matter of IIC Management Company Ltd v Ashley Oden and Guy Oden SKBHCV2019/0091 alleging breach of contract with respect to a lease entered into between the parties on the 12th day of February, 2018 (“the 2018 Lease Action”).
3. In the 2018 Lease Action, the First Applicant filed a defence alleging that the lease had been validly surrendered by virtue of the First Applicant giving up possession of the premises let under the lease of the 12th day of February, 2018, and entering into the lease of the 4th day of February, 2019 which is the subject of the Claim of the Respondent in the present action.
4. In response to the Defence of the First Applicant alleging surrender of the lease in the 2018 Lease Action, the Respondent pleaded in a reply filed on the 23rd day of May 2019 at paragraph 4:

“...Claimant states in an effort to help the Defendant, she was offered an opportunity to terminate the Lease and enter into another lease for a small unit for less rent on the condition that she properly terminate the Lease including sign a termination agreement; timely pay all amounts due under the Lease, including reimbursement for damages to the unit, until March 1, 2019; and pay all the amounts required under the new lease including first and last month’s rent and the security deposit. The Defendant never satisfied any of those conditions; specifically, she never signed the termination agreement; she never paid the amounts due under the Lease; she never paid the first and last month’s rent; and she never paid the security deposit for the new lease.”

5. Treating the Respondent's averments in paragraph 4 of its reply as true, as a consequence of the Applicant's alleged failure to comply with the conditions regarding the termination of the lease in the 2018 Lease Action, must necessarily mean that the lease entered into on the 4th day of February, 2019 was not validly concluded due to a failure of the Applicant to comply with the alleged conditions and/or there has been a total failure of consideration with respect to the lease.

6. The Pleading in paragraph 4 of the Respondent's Reply in the 2018 Lease Action is wholly inconsistent with the Claim and Statement of Claim filed in this Action as it is an inconsistent pleading as to the common intention between the parties as to the termination of the lease of the 12th day of February, 2018 and the entry of the lease dated the 4th day of February, 2019.

[3] The application is supported by the affidavit of a clerk employed by the legal practitioners for the Defendants.

Issue

[4] The court must decide whether the claim form and statement of claim should be struck out.

The law

[5] Rule 26.3(1)(c) empowers the court to strike out a statement of case or part of a statement of case if it appears to the court that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings.

[6] The alternative prayer of the Applicants is that the claim and statement of claim be struck out under Rule 26.3(1)(b) on the basis that the claim does not disclose any reasonable ground for bringing the claim.

[7] It is well settled that the striking out of a claim is a draconian power to be exercised only in exceptional circumstances. The oft-quoted dicta of Byron C.J. (Ag.), as he then was, in **Baldwin Spencer v The Attorney General of Antigua and Barbuda and others** spelled out the position as follows:

“This summary procedure should only be used in clear and obvious cases, when it can clearly be seen, on the face of it, that a claim is wholly unsustainable, cannot succeed or in some other way is an abuse of the process of the court.”¹

[8] In **Tawney Assets Limited v East Pine Management Limited et al**,² the Court of Appeal gave guidance on how to deal with applications to strike out a claim. At paragraph 22 of the judgment, Mitchell JA. (Ag.) stated:

“The striking out of a party’s statement of case, or most of it, is a drastic step which is only to be taken in exceptional cases. The reason for proceeding cautiously has frequently been explained as that the exercise of this jurisdiction deprives a party of his right to a trial and of his ability to strengthen his case through the process of disclosure, and other procedures such as requests for further information. The court must therefore be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of case is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial.”

[9] Specific to the jurisdiction of the court in relation to an abuse of process, I note useful pronouncements in the cases of **Hunter v Chief Constable of West Midlands and another**³ and **Sea Culture International Ply Ltd v John Allibon Scoles**.⁴ In **Hunter**, Lord Diplock gave credence to the view that it is open to a court to find abuse of process in unlimited circumstances. At the start of the judgment at page 729, His Lordship stated:

“My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not 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;...It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.”

¹ CIV. APP. NO.20A 0F 1997 at page 5 of the judgment

² HCVAP2012/007 (Territory of the Virgin Islands)

³ [1981] 3 All ER 727

⁴ [1991] FCA 523; (1991) 32 FCR 275

[10] In the latter case from the Federal Court of Australia, French J., while explaining the principle, also emphasized the non-exhaustive nature of the abuse of process concept. Paragraph 12 of the judgment is instructive. It reads:

“The Court is empowered by O.20 r.2 to stay or dismiss a proceeding where it appears to the Court that it is an abuse of process. Even without the benefit of that rule there is little doubt that the Court has an implied incidental power to control its own process and to prevent misuse of it. It is a power which ought to be very sparingly exercised and only in exceptional cases.... The possible varieties of abuse of process are only limited by human ingenuity and the categories are not closed. An unmeritorious claim brought merely in order to put pressure on a respondent for commercial or other reasons would no doubt be treated as an abuse. Such a claim might also be attacked as frivolous or vexatious or as disclosing no reasonable cause of action. Those designations are not mutually exclusive. An attempt to litigate in a Court a dispute or issue which has been resolved in earlier litigation in this or another court or tribunal may also, according to the circumstances, constitute an abuse of process even if not attracting the doctrines of res judicata or issue estoppel.”

[11] It should be noted that in each suit, a different second defendant is named. Both second defendants are guarantors, one each for the two contracts. The first defendant is the principal party in both agreements. The liability of the second defendants is secondary to liability first being established against the first defendant in each case.

Defendants’ submissions

[12] The essence of the Defendants’ submissions is that the claimant’s pleadings in the 2018 Lease Action and the claim and statement of claim filed herein are inconsistent and this constitutes an abuse of the process of the court. They contend that this claim is entirely inconsistent with the claimant’s pleaded case in its reply and, as such, must be struck out as an abuse of process. They put forward the basis for this contention as follows:

- (i) By the claimant’s own admission in formal pleadings before this court in the 2018 Lease Action, the February 2019 lease was to replace the 2018 lease. In the reply of the 2018 Lease Action, it is stated, “...in an effort to help the Defendant, she was offered an opportunity to terminate the lease and enter into another lease for a small unit for less rent”.

- (ii) In fact, it would be unreasonable to suggest that there was ever any intention on the part of the first defendant to be in sole occupation of the two premises at the same location for the same period of time.
- (iii) The claimant lists a number of conditions that were required to terminate the 2018 lease, which it contends were not performed. These conditions were not part of the February 2019 lease and are directly related to the effective termination of the 2018 lease, which the February 2019 lease was to replace.
- (iv) If those were the terms upon which the claimant was willing to terminate the 2018 lease, they must be the terms the claimant was willing to enter into the February 2019 lease, which was intended to be the replacement lease.
- (v) These conditions must therefore be treated as conditions precedent to the binding effect of the February 2019 lease as it was always intended by the parties to replace the 2018 lease. If the first defendant had not performed the conditions as alleged by the claimant to terminate, then it must mean that the claimant was not under an obligation to give her possession of Unit 3-108 under the February 2019 lease. The 2019 lease is not binding on either party.
- (vi) This is similar to the case of a landlord offering a renewal of a lease subject to the performance of certain conditions. It can hardly be said that the failure to perform those conditions entitles the landlord to sue for damages for the renewed term because there is no renewal. The claimant here says, "I will replace your lease if you carry out these conditions." The failure to carry out the conditions must mean there is no replacement lease and the tenant must abide by the terms of the original lease.
- (vii) The formal pleadings made by the claimant in the 2018 Lease Action contained in its reply at paragraph 4 are therefore inconsistent with this present action as to the enforceability of the February 2019 lease in this claim. The claimant's case that the original agreement is still in effect is simply inconsistent with its case in this action that the replacement lease is

also operative, because the conditions precedent and the 2019 lease must exist as part and parcel of the singular opportunity offered by the claimant.

- (viii) The court must take the pleadings made by the claimant as true. The first defendant pleads at paragraph 6 of her defence in the 2018 Lease Action as follows: “On or about the 28th day of January, 2019 the First Defendant approached the Claimant expressing difficulty continuing to pay rent in respect of the premises.” In response to that averment, the claimant does not specifically deny the allegation but states that [the First Defendant] wanted to move elsewhere. The claimant goes further and pleads in its reply the words in paragraph 4 of the grounds of the application.
- (ix) The claimant accepts that the 2019 lease, which is the subject of this claim, was a replacement lease to the 2018 lease. The claimant states that the first defendant was “offered an opportunity to terminate and enter into a new lease”. The reason the opportunity was offered by the claimant was “to help the Defendant”. Why would the defendant need help? It must be based on the pleading made at paragraph 6 of her defence that she could no longer continue to pay rent at the rate under the 2018 lease, a pleading which the claimant has not denied. To suggest now that the first defendant had two separate contracts is simply inconsistent with the case put forward by the claimant in its reply.
- (x) It must be treated as an abuse of the process of the court to maintain two actions for two leases against the same primary occupant, where the claimant itself has admitted that one lease was to replace the other. It is highly prejudicial and vexatious and/or embarrassing to defend two separate proceedings which are inconsistent with each other in relation to two leases for different units at the same property.
- (xi) The court is therefore duty bound to prevent the claimant from utilising the court procedure in a manner that is unfair to the defendants and which would bring the administration of justice into disrepute.

- [13] The defendants posit that it is trite law that where there are conditions precedent to a contract, which have not been performed, the contract is conditional and as such not binding unless the conditions have been so performed.
- [14] The defendants submit that the opportunity to terminate and enter into a new lease was subject to the conditions set out by the claimant in its reply. They argue that these conditions must operate as conditions precedent to the entry of the new lease, which is the subject of this claim. They insist that the court, in its analysis, must consider the legal effect of these conditions as they relate not only to the 2018 lease, but also to the 2019 lease, which the claimant itself by its pleadings has accepted was a replacement lease. They assert that the claimant's case that the original agreement is still in effect is simply inconsistent with its case in this action that the replacement 2019 lease is also operative, because those conditions and the 2019 lease must exist as part and parcel of the singular opportunity offered by the claimant.
- [15] The defendants heavily rely on the case of **United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd**⁵ to illustrate the distinction between bilateral (or synallagmatic) contracts and unilateral contracts, and to proffer that the conditions stipulated by the claimant constitute a unilateral contract in its more complex form as outlined by Lord Diplock.⁶
- [16] The defendants accept that the courts usually direct that it is inappropriate to strike out a case when it can be improved by discovery, cross-examination and requests for further information. This is usually the case where the application to strike alleges some deficiency in the pleadings. The defendants submit that this application alleges no deficiency in the claimant's pleadings and that there is nothing that can be improved by way of an unless order, there is no request for further information that can cure the claim. They point out that this application draws into focus the precise legal effect of the claimant's pleadings in the 2018 Lease Action (Claim No. 91 of 2019) and shows precisely why as a matter of law the two claims cannot co-exist.

⁵ [1968] 1WLR 74

⁶ Ibid at page 83 H

- [17] The defendants urge that the court must guard its processes against abuse and they maintain that this claim is entirely inconsistent with the claimant's pleaded case in its reply in the 2018 Lease Action and as such should be struck out as an abuse of process. They are adamant that the claimant cannot maintain two separate actions in respect of two leases for the same period of time wherein only the first defendant is permitted to occupy, and which by its own pleadings, the claimant accepts that one lease was to replace the other.

Claimant's submissions

- [18] The claimant strenuously opposes the application on the basis that the claim, on its face, establishes a cause of action for breach of contract. In response to the defendants' argument that the 2019 lease did not become effective because the 2018 lease was not terminated, the claimant states that the 2019 lease certainly does not contain any condition that the 2018 lease must be terminated in order for it to become effective. Further, paragraph 38 of the 2019 lease does not allow for any modification of the lease or any additional obligation assumed by either party to the lease unless it is evidenced in writing signed by the parties to the lease. Specifically, the paragraph reads:

38. Any amendment or modification of this Lease or additional obligation assumed by either party in connection with this Lease will only be binding if evidenced in writing signed by each party or an authorized representative of each party.

- [19] The claimant reasons that essentially, the defendants are asking the court to add a critical provision to the lease, which is not in writing and not signed by the parties, and is not supported by any testimony or admissible evidence. The claimant describes this as a meritless position based on the "language contained in a reply to the defence of a different claim on a different lease with a different guarantor in a different case". In other words, the application to strike is totally dependent on a partial section of a paragraph in another action and this cannot justify striking out the claim in this case.

Disingenuous Argument

- [20] The claimant submits that the argument of the defendants is disingenuous because the defendants have made two completely contradictory arguments in the two cases. In the 2018 Lease Action, counsel for the defendants filed a defence that argues that the lease in that case was terminated when they entered into the lease in this case and therefore the defendants have no further liability in the 2018 Lease Action. In this case, said counsel for the defendants argued **just the opposite** – that the lease in the 2018 Lease Action was **not terminated** and therefore the defendants have no liability in this case. The claimant postulates that the reason that counsel argued a directly contradictory position in this case – that the 2018 lease was not terminated – was to support his disingenuous argument that the lease in this case was conditioned upon the first lease being terminated and therefore, because it was never terminated the lease in this case was never valid.
- [21] If the court accepts this disingenuous argument, the claimant forewarns, that the lease in this case was conditioned upon the 2018 lease being terminated, and strikes out the claim in this case, the court will then find itself listening to the defendants argue the exact opposite in the 2018 Lease Action – that the lease was terminated – where the defendants seek to avoid liability for the lease in that case. The defendants seek to avoid liability for not one lease, but both valid leases by making directly contradictory arguments in each case.
- [22] The claimant submits that if the court grants the application to strike, the claimant would be clearly prejudiced as it will be deprived of its day in court to have the case decided on its merits, and will be deprived of the opportunity to present its witness statements and documentary evidence. The claimant states that it will present oral evidence that it never made nor intended to make the 2019 lease conditional on the 2018 lease being terminated.
- [23] As an example of the kind of evidence the claimant intends to produce in witness statements, the claimant, in a footnote in its written submissions, in support of the proposition that there is nothing in law that prohibits a party from signing two leases, outlines possible scenarios. The claimant explains that it has had several tenants who have signed more than one lease with concurrent

terms. Further, tenants have also subleased one unit while occupying another unit; in some cases, when a tenant wanted a larger unit and in other cases when a tenant wanted a smaller unit. The claimant must provide consent when a person other than the tenant intends to occupy a unit, but the claimant has always granted such consent and, in fact, has ever refused to give consent.

- [24] As far as the claimant is concerned, the breach of contract claim in this case could not be more straightforward. The claim alleges that the defendants signed the lease, the first defendant took possession of the premises, failed to pay the amounts required under the lease and thereby defaulted. The claimant indicates that at this point in the case, no witness statements or documents have been exchanged, and no standard disclosure has been made. It would be inappropriate for the court to strike a claim that is clearly valid on its face based solely on a section in another case on a different claim regarding a different lease and a different guarantor that does not say anything more than the defendants were given an opportunity to terminate a different lease and failed to do so. The claimant states that the court has no basis whatsoever to take the drastic step of striking out the claim.

Discussion and analysis

- [25] There can be little or no doubt that if a condition precedent existed for the termination of the old lease for the new lease to become effective, then the failure to perform the condition precedent would nullify or cause the new lease to be unenforceable. The defendants took the court through a discourse on the law in this regard and the principles highlighted by learned counsel, Mr. Elliott-Hamilton, aptly demonstrated how the court may strike out a claim which, by itself, clearly makes out a cause of action.
- [26] Therefore, I accept that the court is permitted to strike out the claim as an abuse of process if the pleadings in the side-by-side claims are inconsistent to the extent that it is difficult to see how they can exist together.
- [27] Paragraph 4 of the claimant's reply in the 2018 Lease Action is an attempt to establish that the old lease was not surrendered as the first defendant alleged in her defence. This is based on the

claim that she failed to abide by the stated conditions for her to terminate the old lease “and enter into another lease...”. Was adherence to the stipulations a condition precedent for the entry into the new lease? Can the defendants rely on this pleading in the 2018 Lease Action to establish a condition precedent?

[28] The claimant maintains that there was no condition precedent for the defendant to enter into the new lease and that paragraph 4 cannot be determined to be such in the absence of evidence led on which the court can make such a finding. In the face of contention as to whether the portion of the pleading in another case (the 2018 Lease Action), suffices as a condition precedent, I am constrained to agree with the claimant. Notwithstanding the content of the reply, the claimant signified its intention to provide evidence that it never made or intended to make the new lease conditional on the old lease being terminated. The court is not yet privy to facts which would allow it to make a determination as to existence or otherwise of a condition precedent.

[29] Further, questions arise in relation to other statements in the pleadings which appear to undermine the defendants’ contention that the contents of paragraph 4 of the reply constitute a condition precedent. In particular, the first defendant’s defence to the 2018 Lease Action reveals that she entered into the new premises on March 1, 2019, and on March 8, 2019, after she had made complaints about the conduct of an employee of the claimant, the claimant sought to enter into a termination agreement in order to terminate the old lease.

[30] It may well be that on the presentation and ventilation of the facts, a court will determine that the statements in paragraph 4 amount to a condition precedent for entry into the new lease, and declare the new lease unenforceable. In my view, this is not the appropriate stage to come to that conclusion. The claimant ought to be allowed to develop its case through the court’s processes and procedures, and be given the right to trial on issues critical to its case.

Conclusion

[31] To my mind, it would be inappropriate for the court to exercise the nuclear option in the circumstances of this case. There is no question that the claim itself discloses a cause of action. Accepting that a claim may be struck out on the basis of inconsistency with another, I cannot make

that determination at this stage of the proceedings that a condition precedent exists so as to conclude that the 2019 Lease Action is an abuse of the process of the court for inconsistency with the 2018 Lease Action.

Order:

1. Based on the foregoing, I order as follows:
 - (1) The application to strike out the claim is refused
 - (2) Costs shall be costs in the cause.

Tamara Gill
Master

By the Court

Registrar