

**EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim Number: **SLUHCV2019/0276**

Between:

**(1) JASDIP LIMITED
(2) DAVID JACKSON**

Claimants/Respondents

and

**(1) SEA BREEZE HILLS DEVELOPMENT COMPANY LIMITED
(2) CAP ESTATE ST. LUCIA LIMITED**

Defendants/Applicants

Appearances:

Ms. Patricia Augustin of Counsel for the Claimants/Respondents

Mr. Dexter Theodore Q.C. and Ms. Sueanna Frederick of Counsel for the Defendants/Applicants

**2020: March 17;
2020 May 20;
2020 June 10.**

JUDGMENT

Introduction

- [1] **SANDCROFT, M. [Ag.]**: The matter before the Court is an application for strike out by the Defendants/Applicants who submit that the claim should be dismissed as having disclosed no cause of action as against the 2nd defendant. The application was vehemently resisted by the Claimants/Respondents.
- [2] The settled legal position in respect of striking out a statement of case is found in **S & T Distributors Limited and S & T Limited v. CIBC Jamaica Limited and Royal & Sun Alliance**

SCCA 112/04, delivered 31st July, 2007, a decision of the Court of Appeal in which Harris, J.A. said at page 29:

“The striking out of a claim is a severe measure. The discretionary power to strike must be exercised with extreme caution. A court when considering an application to strike out is obliged to take into consideration the probable implication of striking out and balance them carefully against the principles as prescribed by the particular cause of action which sought to be struck out. Judicial authorities have shown that the striking out of an action should only be done in plain and obvious cases.”

[3] In **Drummond Jackson v British Medical Association and Others** [1970] 1 WLR 688, Lord Pearson said at page 695 that:

“Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases.”

[4] The Rules declare that its overriding objective is to empower the court to save time and costs by dealing with matters expeditiously. If there are no reasonable grounds for bringing an action, the court ought to strike it out, pursuant to rule 26.3(1) (b).

[5] The claimants are not required, for the purpose of these proceedings to particularize how the companies, the defendants, have wronged them; they simply rely on the claim that the defendants have breached their duty to the 1st claimant as a share-holder of the 1st defendant. The claimants are not making a claim based on fraud but are mounting a claim based on breach of duty. Both sides have raised triable issues which may require a hearing.

[6] The test for summary judgment is whether the respondent has a case with a real prospect of success, which is considered having regard to the overriding objective of dealing with cases justly.

[7] The dicta of Lord Wolfe in **Swain v Hillman** [2001] 1 All ER 91 provides guidance on how a judge should exercise his discretion in deciding whether or not to grant summary judgment. In assessing the provisions of Part 24 of the Civil Procedure Rules of the United Kingdom, which are similar to Part 15 of the Civil Procedure Rules of the Eastern Caribbean States, Lord Wolfe MR enunciated at paragraph 7 of that decision:

"It enables the court to dispose summarily of both claims and defences which have no real prospect of being successful. The words 'no real prospect of succeeding' do

not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success ... they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

At paragraph 14 he continued:

"It is important that a judge in appropriate cases should make use of the powers contained in Part 24. In so doing he or she gives effect to the overriding objectives contained in Part 1. It saves expenses; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose and I would add, generally that it is in the interest of justice."

Background/Chronology

- [8] The 1st defendant is a company incorporated by the 2nd defendant on or about the 5th day of August 2005 for the purposes of maintaining the viability of the "Development" known as Sea Breeze Hills Development Limited, with the intention that the 1st defendant would have the responsibility for repair and maintenance of common areas, garbage collection, pest control and all incidents incurred in the normal course of property maintenance.
- [9] The 2nd defendant is a land development Company which developed 29 lots in a "Development" known as Sea Breeze Hills Development, of which it has sold lots to various land owners.
- [10] On or about 3rd June 2008 the 1st claimant, acting and represented by the 2nd claimant purchased two lots from the 2nd defendant, as a result of which the 1st claimant was given two shares in the 1st defendant and consequently the 1st claimant is a shareholder of the 1st defendant.
- [11] The claimants/respondents commenced proceedings claiming breach of duty owed by the defendants/applicants. The 1st claimant is a shareholder of the 1st defendant company; the 1st claimant was represented by the 2nd claimant in the purchase of two lots from the 2nd defendant as a result of which the 1st claimant was given two shares in the 1st defendant.
- [12] The claimants/respondents requested of the 1st defendant that they view several documents in its possession and that the 2nd defendant, being the agent of the 1st defendant and custodian of the records, and transacting business on behalf of the 1st defendant, legally had in its possession all the documents relating to the business of the 1st defendant.

[13] The claimants/respondents stated that notwithstanding the continued request for records from the 2nd defendant, the defendants/applicants had failed and or refused to provide to the 1st claimant and or the 2nd claimant the records of documents relating to the business of the 1st defendant.

[14] As a result of the failure of the defendants to provide the claimants with the records requested and access to the said records and documentation relating to the business of the 1st defendant, the claimants brought a claim on the basis that the defendants were in breach of their duty to the 1st claimant as a shareholder of the 1st defendant.

[15] By further Court Order dated 25th May 2020, the parties were instructed to file legal submissions on sections 58, 97, 177, 187, 190 and 238 through 244 of the Companies Act of St. Lucia (hereinafter referred to as “The Companies Act”) and their application in relation to the application to strike out filed by the 2nd defendant on January 22, 2020.

2nd Defendant’s/Applicant’s Submissions

[16] Counsel for the 2nd defendant/applicant, Mr. Dexter Theodore Q.C. argued that:

- i. The claimants/respondents had no real prospect of succeeding on the claim and that the claim did not disclose any reasonable cause of action.
- ii. The matter in dispute is a matter of law. The claimants had no locus standi to bring the claim against the 2nd claimant in that neither the 1st nor the 2nd claimants are members of the 2nd defendant.
- iii. The Amended Statement of Claim disclosed no reasonable ground for bringing the claim for breach of duty against the 2nd defendant by the said claimants, neither of whom was a shareholder of the 2nd defendant.
- iv. The Amended Statement of Claim disclosed no reasonable ground for bringing the claim, in that since the Claimants alleged that the 2nd defendant was the agent of the 1st defendant, any cause of action that existed can only exist against the 2nd defendant’s principal, Sea Breeze Hills Development Ltd, the 1st defendant and not the 2nd defendant.

[17] Mr. Theodore Q.C. also submitted inter alia that the law was clear as to the distinction between the summary judgment rule and the strike out rule. The summary judgment rule, while not to be a mini-trial, is a determination on the issue before the court. The issue before this Honourable Court was whether there was a breach of duty by the 2nd defendants on the face of the pleadings that would create a reasonable prospect of succeeding if this claim were to proceed.

[18] Mr. Theodore Q.C. further contended inter alia, that the pleadings before this court were deficient; the particulars of breach in the claim stated that the defendants/applicants had breached their duty to the 1st claimant as a shareholder. Notwithstanding this complaint, there were no obligations that the 2nd defendant had under any alleged agency relationship with the 1st defendant, which would have been owed to the 1st defendant and not to the claimants. Therefore, it would be the 1st defendant which would have the legal standing to institute those proceedings and not the claimants as in this case. Hence, the claimants had no locus standi to institute the claim against the 2nd defendant because there was no relationship of agency existing between the claimants and the 2nd defendant.

[19] Mr. Theodore Q.C. also posited that the essence of the claimants'/respondents' case is that there was a breach of duty owed to the 1st defendant based on a purported agency arrangement; where the 2nd defendant was alleged to have been the agent of the 1st defendant. The claimant's position was not complex on the law or the facts. The essence of the case is for the court to determine whether this claim rises to the level of creating a reasonable prospect of winning at trial.

[20] Counsel further posited that the ground for the application to strike out the claim against the 2nd defendant was that the claimant lacked locus standi to bring a claim against the Second Defendant as (1) neither claimant is a member nor shareholder of the 2nd defendant, and (2) any obligations arising under the alleged agency would be owed solely to the 1st defendant.

[21] Counsel finally stated that if there was any alleged breach by the 1st defendant, an action would need to be maintained solely against the 1st defendant, in whom the claimants held shares.

Claimant's/Respondent's Submissions

[22] Ms. Augustin, counsel for the claimants/respondents, submitted that the claimants/respondents, as the promisee, has offered consideration by taking the loan at the request of the defendant/applicant (the promisor), and the defendant's/applicant's oral promise to pay the monthly payments was to his detriment, loss or responsibility given or suffered as he had undertaken the contractual liability and provided security for obtaining the loan from the bank. The claimant/respondent averred that he obtained the loan in paragraph 4 of his Statement of Claim and as such, by obtaining the loan the claimant/respondent accepted the offer and had provided consideration.

[23] Ms. Augustin also submitted that the 2nd defendant between the periods of August 2005 to the present has continuously acted as the agent of the First Defendant performing deeds and making decisions on behalf of the First Defendant.

Particulars of acts done by the Second Defendant on behalf of the First Defendant

- (1) Charges are being levied on all share-holders of the First Defendant – by the Second Defendant to contribute to and defray the expenses of maintaining common areas of the Development known as Sea Breeze Hills.
- (2) Utilities are paid on behalf of the First Defendant by the Second Defendant.
- (3) Legal work is undertaken on behalf of the First Defendant at the instructions of the Second Defendant.
- (4) Maintenance of the common areas of Sea Breeze Hills Development.
- (5) Maintaining the accounts and/or financial records of the First Named Defendant.

[24] Counsel posited that the 2nd defendant is the agent of the 1st defendant and by virtue of that agency relationship, owes a duty to the 1st claimant represented by the 2nd claimant to provide access to all documents to the 1st claimant in its capacity as a shareholder of the 1st defendant.

[25] Counsel also posited that In accordance with section 187 of the Companies Act of Saint Lucia, as a shareholder of the 1st defendant, the 1st claimant, represented by the 2nd claimant, is entitled to view documents and make copies of all documents relating to the business of the 1st defendant. However all records are in the possession of the second named defendant.

[26] Counsel submitted that on or about the 29th day of March 2018, at the Annual General meeting of the 1st defendant the 2nd defendant purported to hand over the business of the development to the 1st defendant, but to date the 2nd defendant continues to conduct business on behalf of the 1st defendant and as a consequence the 2nd defendant continues to act as the agent of the 1st defendant.

[27] Counsel posited that the 2nd defendant as agent for the 1st defendant has failed to provide information to the 1st claimant through the 2nd claimant concerning the affairs of the 1st defendant and how the charges levied are being spent, notwithstanding request by the 1st claimant in its capacity as a shareholder of the 1st defendant.

[28] Counsel also posited inter alia that the 2nd defendant's/applicant's submission in urging the Court to try the case on an issue of fact could only be determined by a trial Judge where witness statements, cross examinations and other documents would be produced.

[29] Ms. Augustin further posited that this was a case of mixed fact and law, as it was only in determining the facts that one could conclude whether or not a duty existed and was owed to the claimants/respondents. More so, as this was a case which dealt with a breach of duty and it appeared that the parties disputed the facts, such a case must be ventilated in a trial to determine the matter. Therefore, this was not a case for striking out of the claim.

[30] Ms. Augustin additionally submitted that the overriding objective of the rules of the CPR (as amended 2000) is to ensure that cases are dealt with justly, ensuring that justice is done by all the parties involved, Mrs. Jeffers also submitted that if the claim was struck out at this stage, the claimant would be the one to be prejudiced, the claimant would have been deprived of the right to a hearing on the merits of the case before the court.

[31] Ms. Augustin therefore submitted that the present Application be dismissed to further the overriding objective of the CPR, that costs be granted to the claimants/respondents and that further directions be given for the matter to proceed to trial.

Issue

[32] The main issue for me to determine is

- (i) whether or not the claimants'/respondents' case should be struck out as disclosing no reasonable cause of action for bringing the claim; and
- (ii) whether or not Summary Judgment should be given on the Court's initiative.

Court Analysis

[33] **The Eastern Caribbean's CPR 26.3 (1) (b)** is the equivalent of England's present **CPR 3.4 (2)**.

There is no doubt that the court's jurisdiction to strike out a party's statement of case is a jurisdiction which ought to be exercised sparingly. It makes no difference, in that respect, whether or not the court is minded to the possibility of making such an order, upon a hearing scheduled as regards same, as a matter of its own motion, or upon written application to this court. Striking out should be done, in respect of either a part, or the whole of a party's statement of case, only in plain and obvious cases. The law in that regard, pre-CPR and post-CPR, remains the same. This point is made in the text – **Blackstone's Civil Practice (2014)**, at para. 33.6 (p. 527). As such, as was made clear in the case – **Wenlock v Moloney** – [1965] 1 WLR 1238, it is generally improper to

conduct what is, in effect, a mini-trial involving protracted examination of the documents and facts as disclosed in the written evidence on a striking – out application. The case: **Three Rivers District Council v Bank of England (No. 3)** – [2003] 2 A.C. 1, esp. at paras. 96-97, has applied the aforementioned principles.

[34] If the court is hearing an application to strike out, pursuant to CPR 26.3(1) (b) of the CPR, it is to be assumed that the facts alleged by the respondent, are true. See: **Morgan Crucible Co. plc v Hill Samuel and Co. Ltd.** – [1991] Ch 295. In the circumstances, adapting that legal approach to the present legal scenario, it is this court's view that this court is not, at this time, entitled to disbelieve the claimants'/respondents' statement of case. Indeed, it is equally not entitled to disbelieve the defendant's statement of case. The issue as to whether either of same ought to be believed, is one which will have to be determined at a trial, if this court orders that this claim shall proceed to trial. In any event though, it must not be forgotten, that whilst the 2nd defendant will have an evidentiary burden at trial – that being a burden to lead sufficient evidence capable of supporting its defence, the legal burden to prove their claims, rests squarely and solely on the claimants' shoulders.

[35] As long as the claimants'/respondents' case herein, is therefore, one which raises some question fit to be tried by this court, then, striking out of their case, would neither be appropriate in law, nor warranted. See: **Chan U Seek v Alvis Vehicles Ltd.** – [2003] EWHC 1238. The test is one as to whether, as far as the claimants' case is concerned, that case is not one which as a matter of law, can properly constitute a case for the claim instituted by the claimant against the 2nd defendant. Even if the claimants' case were to be perceived by this court, as being one which is, 'fraught with difficulty,' nonetheless, the claimants' statement of case should not be struck out, on that basis. See: **Smith v Chief Constable of Sussex** – [2008] EWCA Civ 39. As such, the apparent implausibility of a case on paper, is not in itself, a sufficient basis to justify striking out that case. See: **Merelie v Newcastle Primary Care Trust** – [2004] EWHC 2554. Also, it would be improper for this court to strike out a claim in circumstances wherein the central issues are in dispute. See: **King v Telegraph Group Ltd.** [2003] EWHC 1312.

[36] This is the legal difference in approach, between an application to strike out a claim, pursuant to rule 26.3 (1) (b) of the CPR 2000, and an application pursuant to rule 15.2 of the CPR, for summary judgment. This was made clear in para. 14 of the Court of Appeal's Judgment in the case - **Gordon Stewart and John Issa** – op. cit. It is not for this court, to divine what will be the outcome of a properly filed defence. Such should be the primary consideration for this court, if and

when considering an application for summary judgment, since in that respect, it will be for this court to determine, as the case may be, whether the claim or defence, has a realistic prospect of success.

[37] CPR 15.2 gives the court the power to grant summary judgment on the claim or on a particular issue if it considers that, either the claimant has no real prospect of succeeding on the claim or the issue or that the defendant has no real prospect of successfully defending the claim or the issue. In dealing with evidence for the purpose of the summary judgment hearing, CPR 15.5 requires an applicant to file affidavit evidence in support of the application as well as it requires a respondent who wishes to rely on evidence to file affidavit evidence.

[38] In **Celador Productions Limited v Melville and another and Conjoined Cases** [2004] EWHC 2362 (Ch), Sir Andrew Morritt V-C in his examination of the principles which govern applications for summary judgment said:-

“...The relevant test is laid down in CPR r 24.2. The court may give summary judgment against a claimant or a defendant if it considers that the claimant or defendant has “no real prospect of succeeding” on its claim or defence as the case may be and that “there is no other compelling reason why the case or issue should be disposed of at a trial”. I have been referred to a number of relevant authorities ...namely Swain v Hillman [2001] 1 All ER 91, 94-95, Three Rivers District Council v Bank of England (No.3) [2003] 2 AC 1, 259- 261, [2000] 3 All ER 1 paras. 90-97 and ED&F Man Liquid Products Ltd v Patel [2003] EWCA Civ. 472 paras. 8-11. In addition I was referred to the notes in Civil Procedure 2004 Vol.1 paras. 24.2.1, 24.2.3-24.2.5. [7] From these sources I derive the following elementary propositions: a) it is for the applicant for summary judgment to demonstrate that the respondent has no real prospect of success in his claim or defence as the case may be; b) a “real” prospect of success is one which is more than fanciful or merely arguable; c) if it is clear beyond question that the respondent will not be able at trial to establish the facts on which he relies then his prospects of success are not real; but d) the court is not entitled on an application for summary judgment to conduct a trial on documents without disclosure or cross-examination.”

[39] In the early days of **CPR 1998** in the United Kingdom, in **McPhilemy v. Times Newspapers Ltd.**

¹Lord Woolf MR gave guidance upon the statements of case (and the Court dares to add similarly where an affidavit is used to support a fixed date claim instead of a statement of claim) under the CPR 1998 regime when he said:

“The need for extensive pleading including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of the party’s witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader.”

[40] CPR 15.6 (1) sets out the power of the court on an application for summary judgment, and confirms that the court has a discretion whether to grant summary judgment. It provides that on hearing an application for summary judgment-

“The court may give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end.”

[41] An application for summary judgment is a process for ridding the courts of cases that are doomed to fail. Parties are therefore obliged to demonstrate, upon such an application that the prospect of their case succeeding is realistic.

[42] At page 64 of the **Commonwealth Caribbean Civil Procedure**, 3rd edition, the learned authors pointed out that: “[On] an application for summary judgment the claimant must satisfy the court of the following:

- (a) All substantial facts relevant to the claimant's case, which are reasonably capable of being before the court, must be before the court.**
- (b) Those facts must be undisputed or there must be no reasonable prospect of successfully disputing them.**
- (c) There must be no real prospect of oral evidence affecting the court's assessment of the facts.”**

¹ [1999] 3 AER 775, p.792-793.

[43] It is now settled that cases that are hopeless should not be allowed to continue. The foremost issue in this case is whether the claimant's/respondent's case has a real prospect of succeeding. If it has, the judge would be correct in determining that it is not an appropriate case for summary disposal.

[44] Lord Woolf's MR oft cited statement in the English case, **Swain v Hillman and another** [2001] 1 All ER 91 reads:

"... The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success ... they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

[45] More recently in **Sagicor Bank Jamaica Limited v Marvalyn Taylor Wright** [2018] UKPC 12, the Privy Council provided further clarification on the issue. Lord Briggs, who delivered the judgment on behalf of the Board, said at paragraphs 16 and 17:

"16. Part 15 of the CPR provides, in Jamaica as in England and Wales, 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.

17. 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." (Emphasis added)

[46] The Board examined "the criterion for deciding whether a trial is necessary" as stated in Part 15.2 of the CPR above and concluded at paragraphs 18 through 21 that:

“18. That phraseology does not mean that, if a defendant has no real prospect of defending the claim as a whole, that there should nonetheless be a trial of an issue. The purpose of the rule in making provision for summary judgment about an issue rather than only about claims is to enable the court to confine and focus a necessary trial of the claim by giving summary judgment on particular issues which are relevant to the claim, but which do not themselves require a trial.

19. The court will, of course, primarily be guided by the parties' statements of case, and its perception of what the claim is will be derived from those of the claimant. This is confirmed by Part 8.9 which (so far as is relevant) provides as follows:

(1) The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies.

(2)...

(3) The claim form or the particulars of claim must identify or annex a copy of any document which the claimant considers is necessary to his or her case.

Para.8.9A further provides: The claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission.

20. Nonetheless the court is not, on a summary judgment application, confined to the parties' statements of case. Provision is made by Part 15.5 for both (or all) parties to file evidence, and Part 15.4(2) acknowledges that a summary judgment application may be heard and determined before a defendant has filed a defence. Further, it is common ground that the requirement for a claimant to plead facts or allegations upon which it wishes to rely may be satisfied by pleading them in a reply, not merely in particulars of claim: see para 61 of the judgment of the Court of Appeal in this case.

21. The Board considers it axiomatic that, if a pleaded claim is met with a defence (whether pleaded or deployed in evidence) on a summary judgment application

which, if true, would still entitle the claimant to the relief sought, then generally there cannot be a need for a trial. If the pleaded claim justifies granting the relief sought then, if the claimant proves that claim, it will succeed. If the alleged defence also justifies the relief sought, then the claimant will succeed even though the defendant proves the facts alleged in her defence. In either case, the defendant will have no real prospect of successfully defending the claim, within the meaning of Part 15.2(b)." (Emphasis added)

[47] As plainly stated by the Board, summary judgment hearings are designed to determine whether a trial of the "issues will generally be nothing more than an unnecessary waste of time and expense". And to deal with issues which "do not themselves require a trial." Their Lordships therefore drew a clear distinction between a summary judgment hearing and a trial.

Whether the Claimants/Respondents have a reasonable cause of action

[48] The burden of proof in applications for summary judgment rests on the applicant. In **ASE Metals v Exclusive Holidays of Elegance Limited** [2013] JMCA Civ. 37 Brooks JA sets out what he found to be the requisite burden of proof in this fashion:

"The overall burden of proving that it is entitled to summary judgment lies on the applicant for that grant (in this case ASE). The applicant must assert that he believes that that the respondent's case has no real prospect of success. In **ED & F Man Liquid Products Ltd v Patel and Another** [2003] EWCA Civ. 472, Potter LJ, in addressing the relevant procedural rule, said at paragraph 9 of his judgment: "...the overall burden of proof rests upon the claimant to establish that there are grounds for his belief that the respondent has no real prospect of success..." [15] Once an applicant/claimant asserts that belief, on credible grounds, a defendant seeking to resist an application for summary judgment is required to show that he has a case "which is better than merely arguable" (see paragraph 8 of **ED & F Man**). The defendant must show that he has "a 'realistic' as opposed to a 'fanciful' prospect of success."

[49] The granting of summary judgment is an exercise of a discretionary power conferred on a judge by way of CPR 15. In exercise of this power I must concern myself with whether or not the claimant has a real prospect of successfully defending the claim. Among the material presented by the claimant in support of his application is the signed transfer of land which is not being challenged by

the defendants. In a summary judgment application based on the wording of CPR 15 it is incumbent on the court to consider not only the pleadings but also the supporting affidavits.

[50] The question now to be answered by this court, is, as is clearly suggested by the wording of rule 26.3 (1) (b) of the CPR, whether the claimants' statement of case ('claim' for this purpose), discloses no reasonable grounds for bringing this particular claim. This is, as earlier stated, to be entirely distinguished from a consideration as to whether or not the claimants' claim is one which has a realistic prospect of success. A party's claim may disclose reasonable grounds for bringing a claim, but yet, may be one which has no realistic prospect of success, such as for instance, if that claim cannot be supported by the evidence expected to be relied on by either party, during a trial of that claim, or, if, for example, that claim is expressly contradicted by documentary materials – **Blackstone's Civil Practice 2014**, at para. 34.25.

[51] Thus, a consideration as to whether a claimant to a claim has filed a claim which discloses reasonable grounds for bringing that claim must, of necessity, be a consideration which would first have to be considered, if this court were to be simultaneously considering an application for summary judgment against that claimant, with an application to strike out that claimant's case on the ground that the said claim discloses no reasonable grounds for bringing the claim. The latter would then have to be considered, prior to the former.

[52] This court has emphasized the distinction between this court's correct legal approach to an application for summary judgment and an application under rule 26.3 (1) (b) of the CPR 2000, because, as it seems to me, both the claimants' counsel and the 2nd defendant's counsel have not recognized that distinction. To my mind, it is not proper for this court, in considering whether to strike out the claimants' claim against the 2nd defendant because it discloses no reasonable grounds for bringing the claim, to consider whether the claimant will lead evidence at trial, such as would serve to satisfy this court, that the claimants claim, is one which has a realistic prospect of success.

[53] This court has not only given careful consideration to the primary issue as to whether the 2nd defendant's amended statement of claim, filed on November 13, 2019 should be struck out, but also, to the secondary issue as to whether any part thereof, should be struck out. This court has given careful consideration to each of those issues, in accordance with the express wording and undisputable intendment of **rule 26.3 (1) of the CPR 2000**, which is the rule that permits this court to strike out a statement of case or part of a statement of case. As such, even if this court were to

accede to the 2nd defendant's submissions and while acting of its own motion, refuse to strike out the entirety of the claimants' amended statement of case, it would still be open to this court to strike out any part thereof which discloses no reasonable ground for bringing the claims made by the 2nd defendant against them.

[54] The amended claim form and statement of claim of the claimants were both filed on November 13th, 2019 and the amended notice of application by the 2nd defendant to strike out the amended statement of claim was filed on January 22nd, 2020. It is these documents that this court has paid special regard to, in deciding as whether the claimants' claim is one which 'discloses reasonable grounds for bringing the claim. In other words, this court has paid special regard to the issue as to whether, when considered in the context of the claimants' claim against the 2nd defendant is one which can constitute, as a matter of law, a valid and reasonable basis for bringing the claim. This is precisely the approach adopted by another Judge- Mr. Justice David Batts, in a similar legal context, in the case – **City Properties Ltd. v New Era Finance Ltd.** – [2013] JSC Civ. 23.

[55] The question to be determined by the court is would it be correct to find that there was an agency relationship between the 2nd defendant and the 1st defendant, and hence whether a duty was owed to the 1st claimant as shareholder of the 1st defendant. In order to answer that question it is necessary to consider whether there was any relevant material which would not be considered, or having been considered, would be misinterpreted by a judge, from which it could have reasonably been concluded that there was an agency relationship between the 2nd defendant/applicant and the 1st defendant whether expressed or implied. It is also necessary to consider whether, if there was such a relationship, there was an intention to create legal relations at the time it was made.

[56] How should a court approach the issue of considering whether there is an agency relationship in existence? Firstly, if it is in writing, then it is normally not necessary to look beyond the four corners of the document to find the terms of the agreement. In the absence of any written document, where the agency relationship is alleged to be oral, the court must look for the intention of the parties in the words said at the time the agency relationship was alleged to have been made, the conduct of the parties to the relationship and any evidence of negotiations at the time of the agency relationship. What the court cannot do is create an agency relationship where none existed. However, as in this case, where one party is asserting that there was such a relationship of agency, it is the duty of the court to thoroughly examine all the circumstances and determine

whether or not the parties, by their words, conduct and negotiations, intended their actions to have legal consequences.

[57] Ms. Augustin had submitted that the 1st claimant/respondent as the shareholder of the 1st defendant was owed a duty by the 1st defendant and that the 2nd defendant's/applicant's control of the 1st defendant created an agency relationship and hence was also obligated to the 1st claimant as a shareholder of the 1st defendant. It was the claimants'/respondents' claim that when the 1st claimant procured the lots from the 2nd defendant that they received two shares in the 1st defendant which was incorporated by the 2nd defendant to repair and maintain the new development in order that the value of the development would be maintained over successive years to come.

Access to Records and documentation relating to the business Issues

[58] The Companies Act of Saint Lucia in section 190 states:

190. ACCESS TO RECORDS

(1) The directors and shareholders of a company, and their agents and legal representatives, may, during the usual business hours of the company, examine the records of the company referred to in section 177 and may take extracts therefrom free of charge. (Emphasis added)

(2) A shareholder of a company is, upon request and without charge, entitled to one copy of the articles and bye-laws of the company and any unanimous shareholder agreement, and to one copy of any amendments to any of those documents.

Section 177 states:

177. RECORDS OF COMPANY

(1) A company shall prepare and maintain at its registered office records containing—

(a) the articles and the bye-laws, and all amendments thereto, and a copy of any unanimous shareholder agreement and amendments thereto;

(b) minutes of meetings and resolutions of shareholders; and

(c) copies of all notices required by section 69, 77 or 176.

(2) A company shall prepare and maintain a register of members showing—
(a) the name and the latest known address of each person who is a member;
(b) a statement of the shares held by each member;
(c) the date on which each person was entered on the register as a member,
and the date on which any person ceased to be a member.

(3) A company shall prepare and maintain a register of its directors and secretaries and a register of its directors' holdings in accordance with sections 178 to 180.

(4) A public company shall prepare and maintain a register of substantial shareholding in the company in accordance with sections 181 to 185.

(5) A company that issues debentures shall prepare and maintain a register of debenture holders showing—

- (a) the name and the latest known address of each debenture holder;**
- (b) the principal of the debentures held by each holder;**
- (c) the amount or the highest amount of any premium payable on redemption of the debentures;**
- (d) the issue price of the debentures and the amount paid up on the issue price;**
- (e) the date on which the name of each person was entered on the register as a debenture holder; and**
- (f) the date on which each person ceased to be a debenture holder.**

(6) A company that grants conversion privileges, options, or rights to acquire shares of the company shall maintain a register showing the name and latest known address of each person to whom the privileges, options or rights have been granted, and such other particulars in respect thereof as are prescribed.

- (6) A company may appoint an agent to prepare and maintain the registers required by this section to be prepared and maintained by the company; and the registers may be kept at the registered office of the company or at some other place in Saint Lucia designated by the directors of the company.

[59] Section 187 of the said Companies Act of Saint Lucia also states:

187. OTHER RECORDS

(1) In addition to the records described in section 177, a company shall prepare and maintain adequate accounting records and records containing minutes of meetings and resolutions of the directors and any committees of the directors.

(2) The records required under subsection (1) shall be kept at the registered office of the company or at some other place in Saint Lucia designated by the directors; and those records shall at all reasonable times be available for inspection by the directors.

(3) When any accounting records of a company are kept at a place outside Saint Lucia accounting records that are adequate to enable the directors to ascertain the financial position of the company with reasonable accuracy on a quarterly basis shall be kept by the company at the registered office of the company or at some other place in Saint Lucia designated by the directors.

(4) For the purposes of section 177 (1) (b) and of this section, when a former-Act company is continued under this Act, “records” includes similar registers and other records required by law to be maintained by the company before it was continued under this Act.

[60] The early English case of **Dominus Rex v. The Fraternity of Hostmen in Newcastle-Upon-Tyne** 2 Str. 1223, 93 Eng. Rep. 1144 (K.B. 1745) was one of the first cases to recognize the right of stockholders to inspect corporate books. In a dictum the court said,

It does not seem settled how far corporators have a right to apply a mandamus for a general inspection and copying of the books of the corporation. Vide *Rex v. G. Babb*, 3 Term Rep. 579. But tenants of a manor have this right as to the court rolls, &c. *Rex v. Shelly*, 3 term Rep. 141.

The last sentence possibly indicates that the right was originally recognized upon an analogy to the old quasi-feudal right of the tenants of a manor to inspect the court rolls. Whatever may be the validity of this surmise as to the origin of the right, the common law right became well established in this country prior to the beginning of this century. The rule was generally stated as being that the shareholder had the right to inspect the books of the corporation at reasonable times, if the inspection was in good faith and for a proper purpose. Without access to books and records of the corporation, shareholders would be hard-pressed to use derivative litigation effectively for this watchdog function.

[61] The statutory regime created by the Act lays down specific rights and obligations for the company and its shareholders, but does not expressly provide for a shareholder to be given documentation including financials relating to the business of the company. In other words, the Act does not confer a broad right to documentation relating to the business of the 1st defendant and its financial information.

[62] Whilst the importance of shareholder rights cannot be discounted, it must be firmly recognised that directors are ultimately the persons tasked to run the company. Unduly onerous burdens ought not to be placed upon directors, especially considering the stringent duties that the law imposes on directors. For instance, directors are also under the duty to consider whether acceding to members' requests for information would be in the best interests of the company (***Lonrho Ltd v Shell Petroleum Co Ltd*** [1980] 1 WLR 627). Furthermore, as Aedit Abdullah JC held at [31], **a general right for shareholders to access company information (especially when considering the suite of rights already available to shareholders) may well introduce additional costs and burdens on the company and its directors. The Court will thus be slow to extend shareholder rights beyond what is expressly provided by the present statutory regime.**

[63] In ***Edman v Ross*** (1922) SR (NSW) 351 ("***Edman***"), Street CJ held that a shareholder enjoys a limited right at common law to inspect the books of a company. That right is limited to cases where the shareholder could show that he or she had a particular interest in a particular dispute, and where inspection would be limited to documents relevant to that dispute (see *Edman* at 358). This

decision was cited by Andrew Ang J in **Lian Hwee Choo Phebe and another v Maxz Universal Development Group Pte Ltd and others** [2010] SGHC 268, where the learned judge suggested at [89] (albeit in the context of a minority oppression application) that **that ‘there is in principle no absolute bar against granting shareholders, in limited circumstances, access to specified financial information’**.

[64] The Saint Lucian legislative framework is pellucid and the claimants/respondents are limited by the statutory framework to view the records as they fall within the ambit of section 177 of the Companies Act of Saint Lucia.

Striking Out & Summary Judgment Discussion

[65] Much of the law on striking out of statement of case is now settled. It is admittedly a largely draconian step which a court ought to be reluctant to take and should take only in the clearest of cases. The consequence of a striking out is that the party against whom such an order is made is effectively barred from proceeding with his case. Usually this step will be taken either by way of sanction for a breach of the rules or non-compliance with an order which carries a consequential sanction or under rule 26.3 of the CPR. Rule 26.3(1) (b) and (c) of the CPR grants the power in the court to strike out a statement of case or part thereof which is an abuse of the process of the court or which disclosed no reasonable grounds for bringing or defending the claim. The first will be granted where the court’s processes are engaged more than once in pursuit of the same subject matter or cause, unless in the interest of justice, the court determines it should not be struck down. The second will be granted where the claim is hopeless and has no chance of being successful or where there is no more than an arguable claim. **See S&T Distributors Ltd. v CIBC Jamaica Ltd** [2007] Civ. App. 112/04 CA, per Harris J for a disposition on the broad based approach the court ought to take where a party seeks to pursue a claim after they had previously been embroiled in another suit and the second suit was not an “obvious endeavour by the claimant to revive an earlier action”.

[66] The scope of the power of a court to grant summary judgment was considered by the House of Lords in **Three Rivers District Council v Bank of England (No. 3)** [2001] 2 All ER 513 in which it was held that a claim may be fanciful where it is entirely without substance, or where it is clear beyond question that the statement of case is contradicted by all the documents or other material on which it is based. Specifically Lord Steyn in discussing the criteria for granting summary judgment at paragraph 95 enunciated:

“For example it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money and it is proper that the action should be taken out of the court as soon as possible”

[67] On a proper consideration of all the information before the court in the instant case, I find that the claim is more than just ‘fanciful’, bearing in mind the contention that the 2nd defendant/applicant did not owe an obligation to the claimants/respondents.

[68] On hearing an application for summary judgment under Part 15 the court is given several options. In **rule 15.5** it provides that a court on hearing an application for summary judgment may:

(a) Give summary judgment on any issue of fact or law whether or not such judgment will bring proceedings to an end;

(b) Strike out or dismiss the claim in whole or in part;

(c) Dismiss the application;

(d) Make a conditional order; or

(e) Make such other order as may seem fit.

The Principles of Agency

[69] **Halsbury Laws of England** paragraph 817 states the general rule relating to the liability of principals in the following terms;

“As a general rule, a principal is responsible for all acts of his agent within the authority of the agent, whether the responsibility is contractual or tortuous. Similarly the principal will be bound by many dispositions of property made by the agent. In some exceptional instances, a principal may be criminally liable even where he does not himself take part in, authorize or connive at the act or default of the agent.”

[70] It goes on to state at paragraph 820 that;

“Where an act done by an agent is not within the scope of the agents express or implied authority, or falls outside the apparent scope of his authority, the principal is not bound by, or liable for, that act, even if the opportunity to do it arose out of the agency, and it was purported to be done on his behalf, unless he expressly adopted it by taking the benefit of it or otherwise.”

And at paragraph 821

“As a general rule, any contract made by an agent with the authority of his principal may be enforced by or against the principal where his name or existence was disclosed to the other contracting party at the time when the contract was made.”

[71] In **Jacobs v Morris** [1902] 1Ch. 816 where the agent went outside of his actual and ostensible authority and borrowed money in the name of the principal which he then applied to his own use, it was held at page 832 that the principal was not liable. However, the court pointed out that if the principal had received the benefit of the money by its loan being used to pay its debt, he would, pro tanto, have adopted the loan and so be liable. Where the agent commits a fraud, acting outside the scope of his authority, the principal cannot be held liable. The agent's knowledge of his own fraud and knowledge of his breach of duty cannot be imputed to his principal unless ratified by him. See **Newsholme Brothers v Road Transport and General Insurance Company Limited**, [1929] 2 KB 356, which involved an insurance contract. The actions of the agent have to be within his apparent, actual or ostensible authority or otherwise must be ratified.

[72] It may be that in a particular case, an individual may act as agent for both parties, but when the court comes to analyze his legal position, it may find that he is an agent for one at a particular point in the contract to perform certain functions and for the other at a different point. In making a decision as to the legal consequences of his actions therefore, the court must ask itself whose agent he was at the material time. See **St. Margaret's Trusts, Ltd v Navigators and General Insurance Co. Ltd.** [1949] 82 Ll.L.R. 752 at 765. In the case of a contract for sale and purchase, the same individual cannot be both vendor and purchaser at one and the same time. Therefore, the agent may be agent for the vendor at one point and agent for the purchaser in performing some other function.

[73] The general principle was enunciated by the House of Lords in the case of **Briess v Wooley & ors**, where a director of the company was authorized to conduct negotiations on behalf of the directors of the company to sell their shares to the claimants, he was held to be an agent of the shareholders for the purpose of the negotiations and in those circumstances they were responsible for any fraudulent representations he made in the course of those negotiations, actions which they were held to have adopted and taken the benefit of. The House of Lords having examined the

various authorities and the principles derived therefrom, highlighted the following statements of law;

- I. **An innocent principal was civilly responsible for the fraud of his authorized agent, acting within his authority, to the same extent as if it was his own fraud.**
- II. **In the making of a contract a principal undertakes that his agent will not act fraudulently in the exercise of his authority.**
- III. **No principal can take advantage of the fraudulent acts of his agent**

[74] There is little doubt that the claimants have a cause of action based on the transfer agreement. The question is whether they can bring that action against the 2nd defendant, Cap Estate. The general rule is that the master is liable for the wrongful actions of his servant or agent as committed in the course of the service and for the master's benefit. There is no doubt that Cap Estate was as much Sea Breezes' (1st defendant) agent as it was Jasdip's (1st claimant). It had the authority given by both companies to act on their behalf. Its selection formed part of the transfer agreement between them as to how the shares would be given. Is there any justification for denying the claimants the same remedy which would have been available to a third party to the transfer party? The answer lies in the functions performed by Cap Estate.

[75] I noted that the Transfer of Land instrument signed between or among Cap Estate (St. Lucia) Limited to JASDIP LTD. with Sea Breeze Hills Development Limited as the Development Company provides for inter alia that **"responsibility for the repair and maintenance of the Common Property shall be assumed by the Development Company which shall be entitled to levy an annual maintenance charge upon all the owners of property for the time being within the Development."** The said Transfer then goes on to state in the section titled the **"Third Schedule"** that the **"Maintenance Contribution: To pay a fair proportion to be determined by the Vendor's Accountant of the cost of:-**

- (a) **Repairing and maintaining the estate roads and road reserves over which rights of way have been granted to the Purchaser;**
- (b) **Maintaining and cleansing the beaches; and**
- (c) **Maintaining the general amenities of the Vendor's said estate.**

[76] The aforesaid section appears after the section which commences: **“For the benefit of the owners and occupiers from time to time of the remainder of the Vendor’s Cap Estate Development Lands and so as to impose a servitude or servitudes upon the Property into whomsoever hands the same may come, the Purchaser hereby covenants with the Vendor that the Purchaser and the persons deriving title under the Purchaser and the persons deriving title under the Purchaser will at all times hereafter observe and perform all and singular the covenants, restrictions and stipulations herein contained to wit.**

[77] At this point, I wish to register my disagreement with Mr. Theodore, Queen’s Counsel, that there was no agency relationship between the 2nd defendant and the 1st defendant, the aforesaid statement that **fair proportion to be determined by the Vendor’s Accountant of the cost of:-**

- (a) Repairing and maintaining the estate roads and road reserves over which rights of way have been granted to the Purchaser;**
- (b) Maintaining and cleansing the beaches; and**
- (c) Maintaining the general amenities of the Vendor’s said estate.**

The aforesaid clause reveals that the determination of the “fair proportion” was done by an accountant from the Vendor; Cap Estate which does not exclude that there is no agency relationship between the 1st defendant and the 2nd defendant.

[78] In **Three Rivers DC v Bank of England** [2002] EWHC 1118 (Comm) the question was whether the Bank of England had within its “control” documents which were held by the Public Records Office relating to an inquiry conducted by Bingham LJ into the supervision by the Bank of England of a bank which collapsed. It was accepted on all sides that this depended on whether the Bank of England had a present right to possession or to take copies of the documents. Tomlinson J at first instance said that he took the word “right” in CPR 31.8 to be used in the sense explained by Lord Diplock in **Lonrho v Shell** [1980] 1 WLR 627. There was no argument to the contrary in the Court of Appeal.

[79] In **Lonrho v Shell** the issue was whether documents in the possession of a company’s foreign subsidiary were within the “power” of the parent company for the purposes of order 24, rule 2(1) of the Rules of the Supreme Court. That rule provided that each party to an action must,

“...make and serve on [the] other party a list of the documents which are or have been in his possession, custody or power relating to any matter in question between them in the action.”

[80] Disclosure of documents was sought for the purposes of an arbitration in which Lonrho alleged that Shell and BP had conspired with others to cause loss to Lonrho by supplying oil to Zimbabwe (then Southern Rhodesia) in breach of the Southern Rhodesian (Petroleum) Order 1965. The documents in question were in the possession of companies in which Shell and BP each had a 50% interest through intermediate subsidiaries. The articles of association of all the subsidiaries vested the management of the company in its board of directors. Those subsidiaries that were resident in South Africa or Zimbabwe would have required under local law to obtain a ministerial licence before being lawfully permitted to disclose the documents to Shell or BP. It was argued by Lonrho that the documents were within the “power” of Shell and BP because those companies were in a position to obtain possession of the documents by taking a series of steps. The steps would have involved Shell and BP exercising their powers to procure alteration of the articles of association of the relevant subsidiaries so as to entitle Shell and BP to inspect and take copies of the subsidiaries’ or sub-subsidiaries’ documents and, where necessary, to procure application for ministerial licences permitting the disclosure.

[81] The House of Lords rejected Lonrho’s argument. Lord Diplock (with whom the other members of the Judicial Committee agreed) said at 635:

“...in the context of the phrase “possession, custody or power” the expression “power” must, in my view, mean a presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else.”

[82] The same would apply in my view if the true nature of the relationship was that the litigant was to be the puppet master in the handling of money entrusted to him for the specific purpose of defeating the claim of a creditor. The situation would be akin to agency.

[83] The 1st claimant as a shareholder of Sea Breeze Hills Development Company Limited, and their agent and legal representative, may, during the usual business hours of the company, examine the records of the company referred to in section 177 of the Companies Act of Saint Lucia and may take extracts therefrom free of charge.

Discussion & Findings

[84] The court’s power to strike out statements of case is exercisable under its inherent jurisdiction and is also governed by rules of court. In **Biguzzi v Rank Leisure Plc** [1999] 4 All ER 934, the English

Court of Appeal noted that the English Rules of Civil Procedure, 1999, confer a very wide discretion upon judges to strike out statements of case. According to Lord Woolfe MR:

“The fact that a judge has the power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of the case. The advantage of the CPR over the previous rules is that the Court’s powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out.”

However, the Court has frowned upon statements of claim or defence or parts therein that are frivolous and vexatious, that are likely to obstruct the just disposal of the proceedings.

[85] In **Blackstone’s Civil Practice, 2010**, the learned authors in commenting on Rule 3.4(2) (a) of the English Civil Procedure Rules, which is the equivalent of our CPR Rule 26.3(1) (b), state at paragraph 33.7 that:

“Applications ... may be made on the basis that the statement of case under attack fails on its face to disclose a sustainable claim or defence. Traditionally, this has been regarded as restricted to cases which are bad in law, or which fail to plead a complete claim or defence...”

[86] In discussing the court’s power to strike out pleadings, the learned authors of Halsbury’s, Laws of England, 4th Edition, at paragraphs 430-435, stated, inter alia, that:

“... the powers are permissive...and they confer a discretionary jurisdiction which the court will exercise in light of all the circumstances concerning the offending pleading. . . Where a pleading discloses no reasonable cause of action... it would be ordered struck out or amended, if it is capable of amendment. . . No evidence including affidavit evidence is admissible on an application on this ground and since it is only the pleading itself which is being examined, the court is required to assume that the facts pleaded are true and undisputed. . . .However, summary procedure... will only be applied to cases which are plain and obvious, where the case is clear beyond doubt, where the cause of action or defence is on the face of it obviously unsustainable, or where the case is unarguable. . .Nor will a pleading be struck out where it raises an arguable, difficult or important point of law.”

[87] The claim at bar, therefore should not be struck out since it discloses a cause of action. In **Baptiste v Attorney General** GD 2014 HC 15, and. in **Tawney Assets Limited v. East Pine**

Management Limited and Ors Civ Appeal HCVAP 2012/007, Mitchell JA at paragraph 22 stated:

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“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 court must thus 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.”

[88] Lord Kilbrandon, in giving the advice of the Board in **Yat Tung Investment Co. Ltd. v Dao Heng Bank** [1975] AC 581 at 590, noted that the court has a duty not to deny a litigant his or her right to bring a claim before the court **‘without scrupulous examination of all the circumstances.’**

[89] Striking out of a claim, should always be a matter of last resort and thus, should only be ordered by a court in plain and obvious cases: **Three Rivers District Council v Bank of England** (No. 3) – [2003] 2 AC 1, esp. at 96 – 97.

[90] In determining whether the claimant’s statement of case or part thereof does not disclose any reasonable cause of action, it ought to first be recognized that rule 26.3 (1) (b) gives this court the power to strike out a statement of case or part thereof if it does not disclose any reasonable ground for bringing or defending the claim. As stated in **Hunter v Chief Constable of the West Midlands Police**, by Lord Diplock – [1982] AC 529, at 536,

“this is a power, ‘which any court of justice must possess to prevent misuse of it 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.’

[91] This court cannot though, at this stage of these proceedings, strike out the claimant’s claim as not disclosing a cause of action. This is so because, as stated by the authors, in the text – **Blackstone’s Civil Practice, 2014**, at paragraph 33.12 – ‘Applications to strike out for abuse of process and disclosing no cause of action should be made shortly after service.’

[92] Where a statement discloses no reasonable grounds for bringing or defending it, it will be ordered struck out or amended, if it is capable of amendment. Rule 26.3 (1) (b) however, will only be applied to cases which are “plain and obvious, where the case is clear beyond doubt, where the

cause of action or defence is on the face of it obviously unsustainable , or where the case is unarguable.”

[93] In considering the issue of whether the present claim does not disclose any reasonable ground for bringing or defending the claim, I am guided by the authorities that show that a litigant ought not to be denied his or her right to bring a claim before the court “without scrupulous examination of all the circumstances.”

[94] Cause of action has been held to mean every fact which is material to be proved to entitle the plaintiff to succeed, or all those things necessary to give a right to relief in law or equity. See **Letang v Cooper** (1965) 1 Q.B. 232 at p.242. It cannot be seriously contended because the defendant/applicant did not provide consideration is a necessary ingredient in the claimant's/respondent's proof of the oral agreement or contract complained of. The foundation of the claimant's/respondent's action is the oral agreement entered into by the defendant/applicant and himself based on an oral promise by the Defendant to repay the loan by monthly installments. It is not the oral agreement per se. There would have been no cause of action if the oral agreement had been breached- See **Chotterton v. Secretary of State for India in Council** (1893) 2 Q.B. 189. Therefore, I have not been persuaded that there is no cause of action in the case at bar.

[95] Wooding CJ in **Baptiste v. Supersad** 1967 12 WIR 140 p. 144, which was cited in the Montserrat case of **Kevin Weste et al v. Shamrock Industries Ltd.** by Redhead J. stated:

“The law is not a game nor is it an arena. It is the function and duty of a judge to see that justice is done as far as may be according to the parties.”

Redhead J also said in that case that the attainment of true justice is “over the highway of reality and not through the alley of technicalities.”

[96] Saunders J. in CCJ CD 2 of 2006 **G Watson v Fernandes** at paragraph 39 said:

“Courts exist to do justice between litigants, through the balance of interest, an individual litigant against the interest of litigants as a whole. Justice is not served by depriving parties of the ability to have their cases decided on the merit because of a technical procedure breach committed by their attorney. With the greatest of respect to the court below we disagree that anything in the rules suggest that there is a time limit on the court's ability to excuse non-compliance with the rules or permit to be

remedied if the interest of justice so required. The Court retains that jurisdiction at all times.”

[97] I find that the court is not minded to strike out the claim as disclosing no reasonable cause of action for bringing the claim the court should exercise its discretion to strike out the claim as having disclosed no cause of action. The claim is grounded in breach of a duty and the only way to sustain that claim is to find that an agency agreement existed. I am able to come to this conclusion on the facts and pleadings before me.

[98] An examination of the pleadings, in my view shows that plenary issues have been raised and these can only be properly determined at a trial ‘on the hearing of the evidence’. The amended statement of case as pleaded by the claimants, in my opinion, could not be said to be ‘obviously unsustainable’ and neither is it ‘unarguable’. In fact, if I understand correctly the gravamen of the 2nd defendant’s/applicant’s submission, the contention is not that the amended statement of case discloses no reasonable grounds for bringing a claim, but rather that there is no cause of action as against the named 2nd defendant.

[99] Additionally, I have considered, as Bingham and Millett LLJ stated in the case of **Johnson v Gore Wood Co. Limited** 1 All ER 481, 2 WLR 72, UKHL 65, that a court must hesitate, think deeply and carefully, before turning away a litigant who has not had his claim heard on the merits. I therefore accept that striking out is a draconian measure which a court should be reluctant to take and should only take in the clearest of cases as the consequence is that a party who has had his claim struck out is barred from proceeding and find that the claimant’s statement of case discloses some cause of action and raises some questions fit to be decided by the court and it therefore ought not to be struck out.

[100] Accordingly, the amended claim, as pleaded, clearly shows that the claimants are seeking a declaration that the defendants forthwith provide to the 1st claimant and or the 2nd claimant all records relating to the business of the 1st defendant held in their possession in particular the documents particularized at paragraph 23 of the claim.

Conclusion

[101] The 2nd defendant/applicant also contended that the present amended claim did not disclose a cause of action and that there are no reasonable grounds for bringing the claim. The court is therefore being asked to examine the conduct of the claimant in filing the instant claim. The

claimant on the other hand is asking the court to consider that the issues raised in the claim have not been litigated.

[102] In considering the issue of whether the present amended claim discloses any reasonable ground for bringing the claim, I am guided by the foregoing authorities which demonstrably show that a litigant ought not to be denied his or her right to bring a claim before the court “without scrupulous examination of all the circumstances.”

[103] In conclusion, it is therefore not appropriate for present purposes, for this court to give any consideration to either the 2nd defendant’s defence, or his counterclaim if any, or the respective parties’ witness statements, for the purpose of determining whether the claimant’s statement of case discloses any reasonable grounds for bringing the claim. It is either that the claimant’s statement of case discloses reasonable grounds for bringing the claim, or it does not. The answer as to whether the same does so or not, must be found from a careful consideration of only that which is, to use a descriptive phrase, ‘within the four (4) corners of the claimant’s statement of case.’

[104] I wish to reiterate for emphasis at this juncture that where a statement (amended statement of case) of case discloses no reasonable grounds for bringing or defending it, it will be ordered struck out or amended, if it is capable of amendment. Rule 26.3 (1) (b) however, will only be applied to cases which are “**plain and obvious, where the case is clear beyond doubt, where the cause of action or defence is on the face of it obviously unsustainable , or where the case is unarguable**”.

[105] In the final analysis, it is apparent to this court, that the claimants’/respondents’ amended statement of case does disclose reasonable grounds for bringing this claim against the 2nd defendant/applicant. I have borne in mind that the Court should only exercise its power to strike out in “plain and obvious” cases. This power is to be exercised with caution, as striking out will have the effect of depriving a litigant of the opportunity to have his claim tried by the court: **Kwa Ban Cheong**, citing **North West Water Ltd v Binnie & Partners** [1990] 3 All ER 547 at 553.

[106] I am also fully cognisant that the role of the court at this stage is not to carry out a minute and protracted examination of the documents and the facts of the case: see **Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others** [1997] 3 SLR(R) 649 at [18] and The “**Osprey**” [1999] 3 SLR(R) 1099 at [6]. Otherwise, the Court hearing the striking out application would effectively be usurping the proper function of the trial court, and conducting a trial of the case in

chambers on affidavits only, without discovery and without evidence tested by cross-examination in the ordinary way: see **Ko Teck Siang and another v Low Fong Mei and another and other actions** [1992] 1 SLR(R) 22 at [15], citing **Wenlock v Moloney** [1965] 2 All ER 871 at 874. Instead, the correct question for the Court to ask is whether the commencement of the present suit constitutes a plain and obvious case of a claimant bringing a claim which discloses no reasonable ground for bringing the claim.

[107] Additionally, unlike applications to strike out pleadings under **CPR 26.4**, where the court is concerned solely with the form of the pleading and where, if the application is successful, leave may be granted to amend to plead in proper form, in applications under this rule the court is not limited to a consideration of the form of the pleading but receives evidence to determine whether the claimant's claim has any prospect of success. If it has, but the claim is not adequately expressed in the pleading, the court should not dismiss the proceedings or the particular claim, but should grant leave to the plaintiff to file an amended statement of claim or cross-claim (in the case of an application in respect of a cross-claim).

[108] I have also borne in mind that while the claim, as filed, is only an allegation at this stage and could be completely cleared away at a trial; there may be a need for a full hearing on the merits so it would be unwise to shut the claimants out at this stage.

[109] The courts exist to adjudicate and determine disputes between parties and therefore litigants ought not to be denied the opportunity of having their issues decided on the merits by the court. In light of the fact that there was no trial in the present claim, I am of the view that it would be a draconian step to strike out the claim as disclosing no reasonable ground for bringing the claim.

[110] In view of the foregoing, I find that it would be unjust in all the circumstances to strike out the claim on grounds that it discloses no reasonable ground for bringing the claim. The point being made by this court is that the CPR is a new procedural code (it is not an updated version of the old) with expanded powers to manage cases in such a manner that cases that should not go to trial are identified and disposed of early. Striking out is not the only way of stopping cases from going forward. The power of active case management exists, at all times the case is within the court system. It is time we left behind the notion of trying to fit the old Civil Procedure Code with all its defects into CPR, New means new.

[111] Rule 25 of the CPR pushes the court to identify issues at an early stage. Resolve those that can be resolved at the time the case is before the court. The issues can be identified through pleadings;

they can be identified with greater precision during various applications. This court has had experience where during applications the parties see both their case and other side's with greater clarity and that has led to settlements and in some cases discontinuance of the claim. If this happens then the objectives of the new rules are being met. The trial-at-all-cost mentality is behind us. It cannot be that because a particular application is being made the court must sit like a zombie or like Aladdin's genie popping up to do the bidding of he or she who rubbed the lamp, ignore the possibility of clarifying the matters so that a settlement on some or even all issues can be arrived at. Why this can happen is that the litigants are under the specific obligation of assisting the court to further the overriding objective. One way of doing this is admitting facts when the party so doing knows that what is being said is true. We are long past the days of mechanical judicial responses to applications and blinkered vision. The new rules empower the courts to seek to resolve as many issues as possible on each occasion the case comes before the court. This is what active case management looks like.

[112] Lord Woolf indicated in **Kent** that there may be cases where the critical facts need examination in detail but this is not because it arises in any particular corner of the law but because the pleaded cases show that there are important facts to be determined which cannot be decided on the pleadings.

[113] Having looked at the facts and circumstances of this case and examined the issues and allegations before the court in the claim, and having given careful consideration to the written submissions of both counsel, I will adopt the approach of the Court of Appeal in **Rudd v Crowne Fire Extinguishers Services**, SCCA 48/89, unreported, delivered 20th December 1989, where Downer JA, while making reference to the case of **Dyson v The Attorney General**, stated, inter alia, that:

“Even if the case is not a strong one, it merits an examination of the law and facts...”

[114] Finally, I wish to thank learned counsel for their written submissions in this matter.

[115] The 2nd defendant's/applicant's application to strike out the claimants'/respondents' amended statement of claim is not granted and these are the orders that follow:

[116] Orders

- (i) The 2nd defendant's/applicant's application to strike out the claimant's statement of case as against the 2nd defendant is refused and as such, the claimants' statement of case stands against the 2nd defendant.
- (ii) Summary judgment is also granted in favour of the claimants. The defendants are to provide access to the 1st claimant or his legal representative, access to the records related to the 1st defendant within the ambit of section 177 of the Companies Act of Saint Lucia and underpinned by section 190 of the said Companies Act of Saint Lucia.
- (iii) The costs of \$ECD2, 500.00 of the 2nd defendant's/applicant's application to strike out are awarded to the claimants and such costs shall be assessed, if not sooner agreed.
- (vii) The claimants shall file and serve this order.

**Ricardo Sandcroft
Master [Ag]**

By the Court

Registrar