

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF ANTIGUA AND BARBUDA**

**IN THE HIGH COURT OF JUSTICE
CLAIM NO. ANUHCv2018/0534**

BETWEEN:

[1] YIDA ZHANG

Claimant

and

[1] LUX LOCATIONS LTD.

Defendant

APPEARANCES:

Mr. Barry Gale Q.C. with him, Dr. David Dorsett for the Claimant
Mr. Thomas Roe Q.C. with him Andrew O'Kola for the Defendant

2019: 5th June
2020: 24th January
2020: 20th March

JUDGMENT

[1] **ROBERTSON, J:** The claimant initiated these proceedings seeking to set aside a consent order entered on the 7th March 2017 in previous proceedings between Lux Locations Ltd v Yida Zhang. In these proceedings, there are four applications before the Court

[2] The applications before the court are:

- (1) The claimant's application filed on the 20th February 2019 that the court determines the terms of judgment to which the claimant was entitled in accordance with Part 12.10(5) of the Civil Proceedings Rules (CPR).
- (2) The defendant's application filed on the 8th March 2019 which seeks, inter alia, that:
 - (1) Time be extended for the defendant to file its defence to the 7th March 2019.
 - (2) The claim against the Defendant be struck out as an abuse of the process and/or on the basis that the statement of case discloses no reasonable ground for bringing the claim.
 - (3) Alternatively, that there be summary judgment for the defendant.

- (3) Prior to addressing the specific applications it would be helpful to provide a context of the dispute by providing a brief overview.

Brief Factual Overview

- [4] There are three related proceedings in respect of these parties. These proceedings are:

- (1) ANUHCV 2014/0577 Lux Locations Ltd v Yida Zhang, (hereinafter called The 2014 Action). In this matter, the Lux Locations Ltd initiated proceedings seeking a specified sum of money and damages for breach of an agreement relating to sale of property. Yida Zhang defended the claim issued and filed a counterclaim in those proceedings. A consent order entered on the 7th March 2017 (hereinafter called “the Consent Order”) in respect of these proceedings. It is this Consent Order that the claimant in the instant proceedings seeks to have set aside.
- (2) ANUHCV2017/0402 Yida Zhang v Gilbert Boustany, Smith’s Gore BVI LTD, Lux Locations Ltd., Sam Dyson and Nadia Dyson, (hereinafter called “the 2017 Action”). In this matter, Yida Zhang instituted proceedings seeking damages against a number of persons (natural and artificial), one of which is the defendant in the instant proceedings and the directors of the defendant company in these proceedings. In the 2017 Action the claimant sought damages in respect of fraudulent and/or negligent misrepresentation by Gilbert Boustany, Smith’s Gore BVI LTD, Lux Locations Ltd., Sam Dyson and Nadia Dyson in relation to the sale of certain property.
- (3) The instant proceedings within which the Claimant seeks to have the said Consent Order set aside on the grounds of *non est factum* and lack of authority on the part of Counsel for the claimant to enter into the terms of the said Consent Order.

Matters to be determined by the Court

- (1) The applications were vigorously pursued by counsel for the respective parties. The matters to be determined by this Court are:
 - (1) The order in which the applications are to be heard and determined;
and
 - (2) The findings on the applications.

The Order in which the Applications are to be considered.

- (2) The appropriate approach to determine pending applications is to determine the applications chronologically and logically.¹ The chronological approach is self-explanatory and requires no further explanation. The logical approach requires that the Court considers all relevant matters in the proceedings in the context of the administration of justice.
- (3) ***The approach of the Court in these proceedings.*** The application of the claimant that judgment be entered pursuant to Part 12.10(5) was filed first in time and depending upon how the court determines the application can influence the other applications before the Court. The Court is mindful that although the claimant in these proceedings has filed an application under the provisions of Part 12.10(5), the defendant is knocking at the proverbial doors of the Court.

The Application Filed by the Claimant Pursuant to Part 12.10(5).

- [5] **General Principles Regarding Default Judgments.** There are no expressed sanctions against a defendant in respect of a defendant's failure to file a defence within the prescribed period. The risk to the defendant is that a judgment may be entered in default of not having filed a defence.² Baptiste JA in the judgment of the Court of Appeal in the case of **Glenford Rolle v Stephen Lander**³ noted at paragraph 14 that:

*"The effect of the defence being filed after the request for entry of judgment was filed and before the master made her order. In **The Attorney General v Keron Matthews**, the Board pointed out that there is no rule which states that if a defendant fails to file a defence within the period specified by the CPR, no defence may be filed unless the court permits. The rules, however, make provision for what the parties may do if the defendant fails to file a defence within the period specified by the CPR, no defence may be filed unless the court permits. The rules, however, make provision for what the parties may do if the defendant fails to file a defence within the prescribed period. In the present matter, the claim, not being a fixed date claim, the defendant faced the risk of a request by the claim that judgment in default should be entered in his favour. That risk materialized when the claim made a request. Upon receipt of such a request the court office must enter the judgment for failure to defend if the conditions set out in rule 12.5 are satisfied. Accordingly, the filing of a defence or amended defence after the filing of a request by the claim for judgment to be entered for failure to defend will not avail a defendant."*

- [6] The above-mentioned principle is equally applicable in respect of applications for the entry of judgments under the provisions of Part 12.10(4).

¹ St. Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited (Civil Appeal NO. 2 of 2002 per Saunder JA at para18).

² The Attorney General v Keron Matthews, [2011] UKPC 38.

³ DOMHCVAP2013/0025A.

The Application Pursuant to CPR Part 12.10(4) and the Function of the Court.

- [7] A claimant seeking relief not falling under the provisions of CPR Part 12.10 (1) (a), (b) or (c) must make an application to the Court for the judgment to be entered. This application under these provisions is a judicial process and is distinct from a request for judgment under the other provisions of Part 12 which are administrative in nature.⁴
- [8] The CPR Rules require that the application be made to the Court and be supported by evidence. It is noted that the CPR Rules do not specifically indicate the nature of the evidence that is required in support of the application. However, given the nature of the relief sought through the application, the applicant must provide evidence so that the Court may be satisfied as to service, an indication that there has been a failure to file, in this case, a defence. In other words, the Court ought to be satisfied that the provisions related to default judgments have been triggered.
- [9] I have considered whether the evidence in support of the application is required to include matter relating to proof of the cause of action and in my view, it is not required for such to be included. This is primarily due to the fact that an order under the provisions of Part 12.10(4) as other judgments in default of defence are not judgments on the merits of the case. It is open to a defendant faced with such a judgment to approach a court to have the judgment set aside.
- [10] The CPR Rules require a party seeking an order under the provisions of Part 12.10(4) to invoke a judicial process as opposed to an administrative process to permit the Court to tailor orders or to “*determine the terms of the judgment*” to meet the cause of action which arises from the statement of case. Accordingly, the Court is required to address its mind to the claimant’s statement of case, the cause of action disclosed and the relief sought. The matter of the application for entry of a default judgement is a matter to which I will return later in this decision.

The Statement of Case of the Claimant

- (4) The defendant has sought, *inter alia*, to have the statement of case struck out on the grounds that:
- (1) it does not disclose any reasonable ground for bringing the claims (CPR Part 26.3(1)(b); and
 - (2) the statement of case is an abuse of the process of the court (in accordance with CPR Part 26.3(1) (c).
- (5) As it relates to an application to strike out the statement of case under the provisions of CPR Part 26.3(1) (b) the law is clear. Specifically,

⁴ Dr. Miranda Fellows v Carino Hamilton Development Co. Ltd HCVAP2011/006 at para. 11.

- (1) In considering the application, the court considers the pleaded case and all facts pleaded in the statement of case are assumed to be true for this purpose.⁵
 - (2) The principles as they relate to the exercise of, what has been termed a nuclear weapon in the Court's arsenal, may be exercised in circumstances where, the statement of case is bad in law, the claim is incoherent, makes no sense, the claim sets out no fact indicating the nature of the claim and other things of this nature.⁶
 - (3) There are stated examples in which the application to strike out are not appropriate and these include where the central issue, such as an issue of fact, is in dispute. It is clear from the evidence before the Court, the central issue of fact as to whether the claimant was aware of the nature of the document signed is highly disputed. Applications to strike out proceedings are also not appropriate where the matters at issue are likely to unfold during the process of discovery, interrogation, or the examination and cross-examination of witnesses.
- (6) Counsel for the defendant in its challenge to the adequacy of the claimant's statement of case has asked the Court to consider that the elements of *non est factum* have not been placed before the Court in the pleadings. The counsel referred the Court to the House of Lords decision in the case of **Saunders v Anglia Building Society (also known as Gallie v Lee)**⁷ and made reference to the following dicta from Lord Reid, Lord Hodson, Viscount Dilhorne, and Lord Wilberforce

(1) The dicta of Lord Reid (at p 963-964):

"There must be a heavy burden of proof on the person who seeks to invoke this remedy. He must prove all the circumstances necessary to justify it being granted to him, and that necessarily involves his proving that he took all reasonable precautions in the circumstances.

[...]

"The plea cannot be available to anyone who was content to sign without taking the trouble to try to find out at least the general effect of the document. Many people do frequently sign documents put before them for signature by their solicitor or other trusted advisers without making any enquiry as to their purpose or effect. But the essence of the plea non est factum is that the person signing believed that the document he signed had one character or one effect whereas in fact its character or effect was quite different. He could not have such a belief unless he had taken steps or been given information which gave him some grounds for his belief. The amount of information he must have and the sufficiency of the particularity of his belief must depend on the circumstances of each case.

⁵ *Didier v Royal Caribbean Cruises* 89 WIR 277.

⁶ *Ibid* at p. 289f.

⁷ [1971] AC 1004

[...]

There must, I think be a radical difference between what he signed and what he thought he was signing – or one could use the words “fundamental” or “serious” or “very substantial”.

ii.The dicta of Lord Hodson (at p 1019-1020)

“The plea of non est factum requires clear and positive evidence before it can be established. As Donovan L.J. said, delivering the judgment of the Court of Appeal in Maskham Finance Ltd. Howard [1963] 1 Q.B. 904, 912: “The plea of non est factum is a plea which must necessarily be kept within narrow limits.”

Want of care on the part of the person who signs a document which he afterwards seeks to disown is relevant. The burden of proving non est factum is on the party disowning his signature; this includes proof that he or she took care. There is no burden of the opposite party to prove want of care.

The plea of non est factum was originally available, it seems, only to the blind and the illiterate (cf Thoroughgood's Case, Thoroughgood v Cole) but by the middle of the last century the modern approach to the matter is illustrated by the leading case of Foster v Mackinnon (1869) L.R. 4 C.P. 704, 711-12, in which the judgment of the court was delivered by Byles J. I need not cite the whole passage but?y note that the judgment, at p. 711, extends the scope of the doctrine to a person

“who for some reason (not implying negligence) forebears to read, has written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force and it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature;”

iii.The dicta of Viscount Dilhorne (at pp. 1021-1023)

“What are the matters which have to be established for the plea to succeed? First in my opinion, it must be shown that the document signed was radically different in character from that which the signer thought it was.

[...]

It is, I think clearly established that the plead of non est factum cannot succeed if the signer of the document has been careless

[...]

In every case the person who signs the document must exercise reasonable care, and what amounts to reasonable care will depend on the circumstance of the case and the nature of the document which it is thought is being signed. It is reasonable to expect that more care should be exercised if the document thought to be of an important character than if it is not'

iii. The dicta of Lord Wilberforce at pp. 1026-1027

'A man cannot escape from the consequences [...] of signing a document if, being a man of ordinary education and competence, he chooses to sign it without informing himself of its purport and effect.

[...]

In my opinion, the correct rule [...] is that, leaving aside negotiable instruments to which special rules may apply, a person who signs a document, and parts with it so that it may come into other hands, has a responsibility, that of the normal man of prudence, to take care what he signs, which if neglected, prevents him from denying his liability under the document according to its tenor.'

(7) It is my view that all the matters referenced in the authority harkens to matters of evidence and do not in and of themselves go to the root of the existing claim so that the claim is invalidated. In other words, these are matters of proof. It would be an inappropriate exercise of the Court's discretion to strike out a statement of case in respect of a claim which a party may strengthen in the course of the presentation of evidence. In my view, it matters not that there is an application before the Court for entry of judgment. It is settled law that a striking out application ought not to be permitted where concerns or uncertainty might be remedied upon full investigation.⁸

(8) The Counsel for the Defendant also questions the plausibility of the case for the Claimant. Counsel postulates that:

(1) *"It is profoundly unlikely that a man sophisticated enough to do business on a scale beyond most people's imaginings (such as the US\$60m acquisition from which this case stems) would make such an elementary error.*

(2) *7 March 2017 was meant to be the first day of the trial of Lux's claim against Mr. Zhang and of Mr. Zhang's counterclaim against Lux. Mr. Zhang must have known this. He must have geared himself up for the trial. Yet, after signing the supposed release of Mr. Hesse, an entirely peripheral matter on any view, everyone went home. What on earth did Mr. Zhang think was going on? Did he not query this with anyone? He has not chosen to tell the Court.*

⁸ Kyrris v Oldham [2003] EWCA Civ 1506

(3) *Mr. Zhang's position is unsupported by even a scrap of the corroborative contemporaneous material that would surely have existed if he were telling the truth. Where, for example, are the notes or emails that he, or his lawyer, or someone in his entourage, must have produced when the appalling error Mr. Zhang had made first became apparent?*

(9) Without expressing an opinion on the strength of the claimant's case, it is noted that even where a case may be considered implausible, this consideration, in and of itself, ought not to be the basis for a statement of case to be struck out as not disclosing any reasonable ground for bringing the claim. There is a distinction to be drawn between an implausible case and an unwinnable case. In the former case, an implausible case can be strengthened by discovery, examination of witnesses and cross-examination of witnesses. In contrast, an unwinnable case goes to the root of the pleadings and the continuation of the proceedings would result in wastage of resources. The application to strike out is applicable in the latter situation.

(10) Additionally, I have noted that as a demonstration of the implausibility the defendant has raised the absence of *corroborative contemporaneous material that would have existed such as the notes or emails that he, or his lawyer, or someone else may have exchanged*. Again, these matters are matters of evidence and the absence at this juncture ought not to trouble a court.

Ostensible Authority of Counsel.

[11] The statement of case of the claimant indicates that:

"That in spite of the Claimant not being explained that the document he was signing was in fact a Consent Order, which had the effect of settling (sic) both the Defendant's claim in The 2014 action and the Claimant's aforesaid counterclaim against the Defendant. The Consent Order was nevertheless signed by both him (in total misapprehension and understanding of what he was signing and agreeing to) and his then Attorney at Law and thereafter was made an order of the Court.

[12] That in the premises, the Claimant's then Attorney-at-Law had no authority from the Claimant (though he may have thought that he had such authority in the circumstances) to sign The Consent Order on behalf of the Claimant."

[13] The contention being that, although the Attorney-at-law for the claimant and the claimant signed the Consent Order in the 2014 Action, this was done under the claimant's misapprehension and this misapprehension carried forth to the Attorney-at-law on record. The then Attorney did not have the authority to compromise the proceedings. The case law on ostensible authority is clear. The position in law is that Counsel has the ostensible authority to agree a matter on behalf of a client and

in the circumstances where this is done the other party may rely on the representation made by Counsel on behalf of his client.⁹

- [14] In my view, there may well be additional information or particulars as they relate to ostensible authority which could have been pleaded. However, their absence does not invalidate the cause of action. In the normal course of proceedings, a claimant is not barred from providing further particulars within the witness statements. In the case of ***East Caribbean Flour Mills Ltd. v Orniston Ken Boyea***¹⁰ the Court of Appeal noted that

“It is settled law that the witness statements may now be used to supply details or particulars that, under the former practice, were required to be contained in the pleadings. In deciding that it was only the pleadings that she should look at to decide what were the issues between the parties the judge erred, in my respectful view. If particulars were given, for instance, in other witness statements the judge was obliged to look at the witness statements to see what were the issues between the parties.”

- [15] In light of the foregoing, and given that an application for judgment in default of defence is before the Court, the question which arises is should the principles as they relate to striking applications under the provisions of Part 26.3(1) (b) be considered differently. In my view, the answer to that question is in the negative. It is true that a judgment being entered at this stage does not provide the Claimant an opportunity to strengthen its case however, the judgment being entered is not a judgment on the merits. In circumstances such as this, what the court is concerned about is the existence of a cause of action that is valid in law.

Part 26.3 (1) (c) - Application to strike out as an abuse of the process of the Court

- [16] The defendant seeks that the claimant’s statement of case be struck out as it is an abuse of the process of the Court. The bases of the application are:

- (1) The defendant ought not to be subjected to a “piecemeal approach” in treating with claims against it by the claimant especially in light of the fact that on an affidavit in the 2014 Action, the claimant indicated that

⁹ Waugh v HB Clifford & Sons Ltd [1982] Ch 374

¹⁰ Civil Appeal 12 of 2006.

he became aware of his misapprehension of the contents of the document on a date prior to the filing of the 2017 Action.

- (2) In the context of this case, the approach of the defendant amounted to harassment.
- (3) The matters relating to the setting aside of the Consent Order was factually bound up with the matters raised in the 2017 Action.
- (4) The issue of the lack of knowledge of the nature of the Consent Order was considered by the Court (differently constituted) during the enforcement provisions and was rejected by the Court.

- [17] Counsel for the Defendant referred to the dicta in the case of **Henderson v Henderson**¹¹ quoted with approval in **Johnson v Gore Wood & Co.**,¹²

“The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

- [18] It is accurate to state that a Court will not allow its process to be used for purposes for which it is not intended. There are a myriad of circumstances in which a court may find that there has been an abuse of the process of the court. One such example may be where there are more than one set of proceedings brought in circumstances where the Court finds that such proceedings are oppressive or deemed or amount to harassment of the defendant.¹³

- [19] In circumstances of succeeding proceedings, the primary question is not merely whether the claimant could have addressed the existing claim in the previous action but whether the claimant ought to have done so and whether that failure amounts to an abuse of the process of the Court. The test articulated is taken from the dicta of Lord Bingham of Cornhill in the House of Lords decision in the case of **Johnson v Gore Wood and Co.**¹⁴ that:

“It is however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in

¹¹ (1843) 3 Hare 100, 114-115.

¹² [2002] 2 AC 1, at page 23.

¹³ See *English Haven Limited v Registrar of Lands ANUCV2007/0227* in respect of the same subject matter amounting to harassment of the defendant. “The court will not entertain frivolous and vexatious matters. An abuse of the court’s process usually arises in circumstances in which two or more sets of proceedings are brought in respect of the same subject matter which can amount to that harassment of the defendant.”

¹⁴ [2002] 2 AC 1.

my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before”.

(11) The burden of proof that there is an abuse of the process of the Court is a burden to be discharged by the party who raises the allegation.

[20] In adopting a broad merits-based approach this Court will proceed to consider the matters before the Court in the 2014 Action, the 2017 Action and the 2018 Action, the affidavit evidence available to this court.

The 2014 Action, 2017 Action and the 2018 Action.

(12) At the commencement of this decision a brief overview has been given of the related proceedings before the Court. For the purpose of giving consideration to the merits-based approach more detailed consideration will be given to the proceedings. Since the persons who institute the related proceedings vary I will refer to the parties by their names in this section of this decision.

The 2014 Action

(13) Lux Locations initiated the proceedings in the 2014 Action. The facts are taken, in part, from the summary of the decision of the Master on an application in the 2017 Action to strike out the statement of case of the claimant 2017 Action as being an abuse of the process of the Court. The facts are summarised hereunder:

- (1) Lux Locations agreed to be an agent for the Zhang for the purpose of facilitating the purchase of land owned by Asian Village Antigua Limited at an agreed agent commission of 9% of the net purchase price. The lands were purchased for the price of USD\$ 60,000,000.00 and the said sale was completed on 29th August 2014. Ten days before the completion of the sale the first defendant expressed a difficulty with obtaining sufficient foreign exchange to pay the agent's commissions fees and attempted to propose a new agency agreement. Lux Locations rejected a new agency agreement and demanded payment.
- (2) Zhang defended the action and filed a counterclaim indicating that, *inter alia*, the payment of commission of 9% was contingent upon the claimant obtaining a sale price of USD\$30,000,000.00, that he was induced into accepting the 9% commission by Lux Locations representing to him that fees were higher than the standard 5% because the commission fees to independent third parties who were required to facilitate the transaction; the intended vendor did not receive an agent's fee since it was in liquidation and the 9% fee represented the entire agent's fee and the representations were false as a party

whom the claimant represented as independent was in fact the intended vendor's agent. The 9% was not the entire agents' fees as the intended vendor had an agreement with an agent for 7.5% agency fee which would increase the overall fees to 16.5%.

- (3) On the date of the trial, on the 7th March 2017, a consent order was entered that the Claimant in these proceedings would pay to the Defendant the sum of \$3,000,000.00.
- (4) The evidence before the court as found in the affidavit of Sam Dyson, a Director of Lux Locations is that Mr. Yida Zhang was having practical difficulties in remitting the necessary funds to Antigua however the sum of USD\$705,555.89 was cleared and to be made available between 15th and 20th May 2017.
- (5) Lux Locations initiated enforcement proceedings to recover the outstanding balance through an application for a charging order. Yida Zhang filed an affidavit in objection to the provisional charging order being made final. In this affidavit, Mr. Zhang indicated that:
 - i. Arrangements were made for the partial payment of the consent order but these arrangements were cancelled on instructions of his attorney.
 - ii. He gave instructions to his attorney on 23rd April 2017 to indicate to Lux Locations that a partial payment would be made in the sum of USD\$705,555.89.
 - iii. Efforts were made to transfer the funds for payment.
 - iv. Mr. Zhang was attempting to comply with the Consent Order of the Court and that all attempts had been made to keep the Lux Locations informed of the difficulties being experienced in transferring the funds.
- (6) In an affidavit filed by Yida Zhang on 23rd March 2018 (exhibited to the affidavit of Sam Dyson), Yida Zhang made the assertion in an affidavit in the 2014 Action, that on the 7th March 2017 when he attended court he understood that a Mr. Johann Hesse attended Court to renounce his 4% commission so that Lux Locations could proceed with their 5% Commission claim. Mr. Zhang in that affidavit indicated that he was of the view that the document signed was Mr. Johann Hesse's Release document for the 4%. It was also indicated in the affidavit of Yida Zhang that Yida Zhang did not realise that the document was a settlement agreement and that by this document he consented to pay the Claimant and the fault rests with his translator. It was on the 9th March 2017 his attorney informed him through the translator that he was required to pay the Claimant over USD\$700,000.00. He further indicated in the

affidavit that he gave instructions to his attorney at law to initiate a fresh action to set aside the consent order.

(14)The 2017 Action

- (1) The 2017 Action was filed by Yida Zhang on the 26th July 2017 against Gilbert Boustany, Smith's Gore BVI Ltd, Lux Locations Ltd, Sam Dyson and Nadia Dyson.
- (2) Yida Zhang avers that he was introduced to the first and second defendants and informed that these defendants had a working relationship with the liquidator of Stanford Estate which owned a parcel of land known as Asian Village Antigua.
- (3) Yida Zhang later took the decision to purchase the property and a letter of intent was delivered to the liquidator of the Stanford Estate by representatives of Lux Locations.
- (4) Lux Locations later signed an Agent Sales Agreement with Mr. Johann Hesse for a commission for nine percent (9%) of the purchase price for the property belonging to Asian Village Antigua Limited.
- (5) On the 22nd August 2013, Lux Locations signed an Agent Sales Agreement with the Yida Zhang which outlined the terms of the engagement of Lux Locations as a Real Estate Agent for acquiring the lands of Asian Village Antigua Limited.
- (6) Yida Zhang avers that he enquired about the sales commission to be paid by the vendor to any agent representing its interests and was informed by the representatives of Lux Locations that since the land was under liquidation there was to be no sales commission to be paid by the Vendor.
- (7) Yida Zhang further indicates that he explained though his interpreter to the first named defendant and to Lux Locations that the commission of 9% as agreed in the Agent Sales Agreement is and was contingent upon the first named defendant and the representative of Lux Locations completing the purchase of the Asian Village Lands for the sum of Thirty Million United States Dollars.
- (8) Prior to signing the Agent Sales Agreement, the Yida Zhang avers that he asked the representatives of Lux Locations to disclose any agents entitled to share in the 4% assigned under the agreement to Johann Hesse. The representatives indicated that this 4% commission was to be divided equally between Mr. Johann Hesse and the first named defendant. Further he was informed that due to the fact that a parcel of the land belonging to Asian Village was under liquidation there were no sales commission to be paid by the Seller and therefore there was no conflict of interests as it relates to the first named defendant. Yida Zhang's contention is that these representations were untrue and made negligently or made in breach of a duty of care owed to him.
- (9) Yida Zhang further avers that at the time of the closing of the purchase of the Asian Village Lands the claimant explained to the representatives

of the Lux Locations that since the purchase price exceeded the agreed sum of thirty million United States Dollars the agent sales agreement signed on the 22nd August 2012 was invalid and of no effect. Yida Zhang, however, paid to Lux Locations service fees. The purchase agreement was concluded in August 2014 and it was at this time that Yida Zhang discovered that the first defendant in that action was an agent for the second defendant and that there was a conflict of interest in the transaction.

(10) Further as early as 28th June 2013, when the representatives of Lux Locations sent a letter of intent to the liquidator for the purchase of the land which is the subject matter of the claim the Defendants held out to Yida Zhang to be acting in his best interest.

[21] Yida Zhang based its claim of misrepresentation on the assertion that:

- (1) As early as July 213 the first-named defendant in the 2017 Action retained Smith Gore/CBRE to represent them and the commission offered was 2% of the purchase price.
- (2) The first-named defendant misrepresented the facts to Yida Zhang that he was not entitled to any share of the commission as a result of the sale of the Asian Village lands when he would have known since 10th July 2013 that he was to receive a commission.
- (3) The vendor, the Liquidators of the Stanford Estate appointed Smith Gore CBRE as agent and offered a total sales commission pool of seven and a half percent as an incentive to Agents to locate a Buyer.
- (4) The Lux Locations in collusion with the first-named defendant in that action and in collusion with another raised the land purchase price to get a 7.5% commission from the Liquidator and as a result of the Agent Sales Agreement to receive a 9% commission from the sale as an agent for the Claimant.
- (5) The first-named defendant in the 2017 Action and the representatives of Lux Locations colluded with persons unknown to increase the purchase price from thirty million United States Dollars to sixty million United States Dollars in order to achieve a greater fee on the 9% commission pursuant to the Agent Sale Agreement.

[22] The 2018 Action seeks to set aside the Consent Order on the grounds hereinbefore stated.

[23] At this juncture I make the following observations:

- (1) The 2017 Action related to fraudulent and negligent misrepresentation in respect of the sale agreement against five defendants including the defendant in these proceedings.
- (2) The claimant in these proceedings at the time of filing the 2017 Action was aware that he intended to challenge the Consent Order.

- (3) The claimant signaled to the defendant in an affidavit in opposition to the enforcement application that the claimant intended to have the Consent Order set aside.
- (4) It is possible for there to be a legitimate reason for a claimant in similar circumstances to opt to file a separate claim to set aside the Consent Order and a claimant ought not to be fixed with an abuse of the process of the court without further evidence of such abuse.
- (5) The burden of proof rests on the party alleging abuse. It is clear that the defendant challenges the veracity of the claimant's contention that he was not aware of the nature of the Consent Order when it was signed. Additionally, the defendant's position is that during the course of the proceedings, the claimant has sought to frustrate the enforcement of the Consent Order and the 2018 Action is a further illustration of this course of action. In my view, the position of the defendant do not necessarily permit a finding of abuse of the process of the court and a Court has to be cautious not to limit a party's access to the court.

[24] Accordingly, having taken a broad, merits-based judgment approach and considering that there are no public and additionally private interests for consideration. I find that there is no basis for the statement of case to be struck out as being an abuse of the process of the Court.

Entry of Judgment

[25] As promised, I now return to the matter of the application by the claimant pursuant to the provisions of Part 12.10 (5). The claimant's evidence in support of the application is that the claimant served the claim form and statement of case on the defendant on the 23rd November 2018 at the Defendant's registered office of Simon Rogers Murdoch, Newgate Street, St. John's Antigua. The claimant provided the Amended Notice of Change of Address of Registered Office filed at the Intellectual Property & Commerce Office on the 6th April 2018 as evidence that the address served is in fact the registered address of the defendant. The defendant does not dispute service but offers an explanation that although the documents were served at the registered address, there were a series of challenges which included error, the fact that they were making changes in their legal representation, the bereavement of one of the legal representatives and travel plans of a legal representative. The effect of the situation which resulted in the delay in filing the defence is that an application for judgment was made.

[26] For the reasons indicated herein before I am of the view that the claim is a valid one and ought not to be struck out as disclosing no reasonable cause of action or an abuse of the process of the Court. I have formed the view that the principle outlined

in the cases **Glenford Rolle v Stephen Lander**¹⁵ relates to application under this part as it relates to requests for default judgments.

[27] I am of the view that an order should be made on the application on the following terms:

- (1) That the consent order dated the 7th March 2017 as obtained in the matter of Lux Locations Ltd v Yida Zhang ANUHCv 2014/0577 be set aside.
- (2) That all monies paid to the Defendant under the terms of the said consent order be repaid.
- (3) The matter of interest to be decided by the court.

[28] Having made the above findings it is no longer necessary for the Court to consider the application for extension of time for the filing of the defence and the application for summary judgment.

[29] Prior to concluding and for the purpose of completeness I note the application filed by the defendant that the defendant be permitted to provide further evidence on the application. The application was dismissed. The Court understands the voluminous nature of the three proceedings, however, the affidavit evidence which the Defendant requested to be placed before the Court was filed prior to the hearing of the submissions and was available, with diligence, to be placed before the Court.

[30] Accordingly, it is ordered that:

- (1) That the consent order dated the 7th March 2017 as obtained in the matter of Lux Locations Ltd v Yida Zhang ANUHCv 2014/0577 be set aside.
- (2) That all monies paid to the defendant under the terms of the said consent order be repaid.
- (3) The matter of interest to be decided by the court.
- (4) The application of the Defendant filed on the 8th March 2019 is dismissed with costs to be quantified if not agreed within 21 days.

[31] I thank Counsel for their submissions and the court indicates that the decision on the applications was delayed as a result of the Court being unable to sit for a period as a result of illness.

Marissa Robertson

¹⁵ DOMHCVAP2013/0025A

High Court Judge

By the Court

Registrar

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