

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

MONTSERRAT

CLAIM NOS. MNI HCV 2013/0020; HCV 2013/0024; HCV 2013/0026; HCV 2013/0027; HCV 2013/0028; HCV 2014/0002; HCV 2014/0005

CLAIM NO. MNI:HCV 2013/0020

- (1) PROVIDENCE ESTATE LIMITED
(2) OWEN ROONEY

Claimants

AND

- (1) WALTER WOOD III
(2) WARREN M CASSELL (doing business as Cassell & Lewis Inc)
(3) DAVID S. BRANDT
(4) TROPICAL ISLAND REAL ESTATE LIMITED
(5) THE ATTORNEY GENERAL OF MONTSERRAT

Defendants

CLAIM NOS. MNI HCV 2013/0024

- (1) PROVIDENCE ESTATE LIMITED
(2) OWEN ROONEY

Claimants

AND

- (1) KENNETH ALLEN
(2) KHARL MARKHAM
(3) KATHLEEN ALLEN FERDINAND
(4) YVONNE DALY-WEEKES
(5) WARREN M. CASSELL
(6) MERIDITH LYNCH
(7) DAVID BRANDT

Defendants

CLAIM NO. MNI:HCV 2013/0026

- (1) PROVIDENCE ESTATE LIMITED
(2) OWEN ROONEY

Claimants

AND

- (1) DION WEEKES
(2) JANINE DEBORAH CARR WEEKES
(d/b/a Engineering Design and Construction Ltd)
(3) WARREN M CASSELL (d/b/a Cassell and Lewis)
(4) KHARL MARKHAM

Defendants

CLAIM NO. MNI:HCV 2013/0027

(1) PROVIDENCE ESTATE LIMITED
(2) OWEN ROONEY

Claimants

AND

(1) CLEO CASSELL
(2) WARREN CASSELL
(3) MERIDITH LYNCH
(4) DAVID BRANDT

Defendants

CLAIM NO. MNI:HCV 2013/0028

(1) PROVIDENCE ESTATE LIMITED
(2) OWEN M. ROONEY

Claimants

AND

(1) INA M. J. FARRELL
(2) KEITH D. E. FARRELL
(3) WARREN M. CASSELL (doing business as Cassell & Lewis)
(4) MERIDITH LYNCH

Defendants

CLAIM NO. MNI:HCV 2014/0002

(1) PROVIDENCE ESTATE LIMITED
(2) OWEN ROONEY

Claimants

AND

(1) ALLEN RUSSELL KRAUSSE
(2) GAIL ANN CIMONO- KRAUSSE
(3) WARREN M. CASSELL
(4) DAVID BRANDT
(5) KENNETH CASSELL (d/b/a as Tropical Island Real Estate Limited)
(6) MERIDITH LYNCH
(7) VIOLETTE SILCOTT
(8) AMELIA DALEY

Defendants

(1) PROVIDENCE ESTATE LIMITED
(2) OWEN ROONEY

Claimants

AND

(1) PHILLIP BRELSFORD
(2) WARREN M. CASSELL
(3) DAVID BRANDT
(4) KENNETH CASSELL (d/b/a as Tropical Island Real Estate Limited
(5) MERIDITH LYNCH
(6) VIOLETTE SILCOTT
(7) AMELIA DALEY

Defendants

Appearances:

No appearance by or on behalf of the claimants, the Court is satisfied that the claimants' representative - the 2nd claimant, acknowledged notice of the date of hearing but was unavailable for teleconference.

Mr. Sylvester Carrott for defendant/applicant :David S. Brandt

Mr. Kharl Markham for defendants/applicant: Kenneth Allen Q.C.

Ms. Chivone Gerald for defendant/applicant: Kharl Markham

Mr. Sylvester Carrott for defendant/applicant :Dion Weekes and Janine Deborah Carr Weekes

Ms. Marcelle Watts for the defendants/applicants Ina M.J. Farrell and Keith D. E. Farrell

Applicants present

Warren Cassell in person

Cleo Cassell in person

2015: May 18th 2015
13th August 2015

JUDGMENT

- [1] **COMBIE MARTYR, J. (Ag.):** - These are four applications to strike out the seven statements of case by way of Fixed Date Claim Forms and supporting Affidavits filed by the claimants in the above-captioned matters on diverse dates between 30th October 2013 and 13th February 2014.
- [2] For ease of reference the names of the applicants/defendants have been underlined. All four applications raise substantially the same grounds for striking out and the submissions of counsel for the defendants refer to the deficiency of the filed pleadings and raise essentially the same issues of law. On that basis and

to avoid the repetition in dealing with each application separately, I propose to deal with all four applications in this one Judgment.

- [3] Memorandum in opposition to the application of Ina Farrell and Keith Farrell dated 9th May 2015 and statement of Carol Anne Ireland dated 29th April 2015 filed by the claimants on the 14th May 2015 were not served on the defendants Ina Farrell and Keith Farrell. No other documents were filed by the claimants in response to the three other applications to strike.
- [4] The written applications for security for costs were not pursued during oral argument of counsel and accordingly were not considered in this Judgment.
- [5] ISSUES FOR THE COURT'S DETERMINATION

[5.1] Application by David S. Brandt by way of Notice, Affidavit and Exhibits filed on the 20th January 2015;

- (a) Non compliance with CPR 8.1, no valid address for service on claimants given and copies of exhibits referred to in affidavit have not been served on the Applicant;
- (b) Actions of the claimants are in breach of the Order of the court in MNIHCV 2012/008 dated 27th April 2012;
- (c) 2nd claimant lacks the requisite locus standi to bring proceedings in the name of the 1st claimant or alternatively claimants have not provided any evidence to support their alleged entitlement in law to ownership of the land at the material time;
- (d) Fraud not particularly and properly pleaded in that: (a) allegations not supported by clear statements of facts relied upon (b) allegations of constructive notice or belief of commission of fraud insufficient to amount to fraud in law and (c) as such no valid cause of action;
- (e) The claims are scandalous, frivolous, vexatious and as such an abuse of the process of court and filing of the claims are in breach of Order of the court;

[5.2] Application by Kenneth Allen and Kharl Markham by way of Notice, Supplementary Affidavit and Exhibits filed on the 20th January 2015;

- (a) Kathleen Allen Ferdinand and Yvonne Daly-Weekes were not served with the claim;
- (b) The 2nd claimant has not established that he has the requisite standing to bring a claim against the defendants as director of the 1st claimant;
- (c) Facts pleaded cannot lead to a finding of misfeasance against Kharl Markham;
- (d) Claimants have failed to clearly and with any degree of particularity provide the basis for any unequivocal allegation of actual knowledge or

constructive notice against the defendants and the allegations of fraud are vague;

- (e) Allegations of recklessness and negligence against Khari Markham acting as a Notary Public lack the proximity and policy requirements which are barriers to negligence claims against persons acting as public officers;

[5.3] Application by Dion Weekes and Janine Deborah Carr Weekes by way of Notice and Affidavit filed on the 12th January 2015:

- (a) Janine Deborah Carr Weekes has not been served with the claim in which she is described as director of Engineering design firm which is not joined as a party. No allegations against her personally;
- (b) Claim constitutes a breach of the order of Honourable Justice Rhudd dated 27th April 2012 in claim no. MNIHVC 2012/008;
- (c) The 2nd claimant has not established that he has the requisite standing to file a claim on behalf of the 1st claimant;
- (d) Claim form filed not in compliance with CPR 8.1, post office box not valid address for service, not filed an affidavit for validating alternative form of service, and copies of exhibits referred to in affidavit have not been served on the defendants; affidavit of 2nd claimant unsworn and therefore not evidence before the court;
- (e) No allegations of fraud against the defendants and bare allegations of criminal fraud with no particulars on the face of pleadings;
- (f) In the absence of fraud, negligence and breach of fiduciary duty, the defendant Janine Deborah Carr Weekes incurs no personal liability;
- (g) No cause of action against the defendant Janine Deborah Carr Weekes if sued in her capacity as director;
- (h) Allegations of fraud against the defendant Dion Weekes lack proper particulars and pleadings disclose that claimants have no reasonable prospect of discharging the burden of proof of criminal conduct of defendant Dion Weekes;
- (i) Issues in [5.2] above and submissions of counsel are adopted;

[5.4] Application by Ina M.J. Farrell and Keith D. E. Farrell by way of Notice and Affidavit filed on the 28th April 2015:

- (a) Main issues as identified in the previous applications [5.2] and [5.3] above;
- (b) No valid cause of action disclosed or no reasonable ground for bringing the action;
- (c) No particulars of fraud pleaded;
- (d) Illegible seal on transfer document cannot impute fraud on the defendants;
- (e) Claim is frivolous and vexatious;
- (f) Claimants have no locus standi;

- (g) No service of memorandum filed 14th May 2015 on the defendants and in any event the statement of Carole Ireland does not relate to the defendants- Ina M.J. Farrell and Keith D. E. Farrell.

[6] The Principles of Striking out of statement of case

CPR 26.3 has replaced the old RSC Or. 18 r 19, which empowered the court "to strike out any pleading on the ground that it discloses no reasonable cause of action or is frivolous or vexatious or is otherwise an abuse of the process of the court." The court notes that authorities both pre and post CPR, are instructive and offer guidance on the principles to be applied by the court in the interpretation of the CPR.

- [7] In ***Baldwin Spencer v The Attorney General for Antigua Barbuda et al Civil Appeal No. 20A of 1997*** a case which preceded the CPR on the interpretation of RSC O18 r19, Byron CJ (Ag) reasoned that "... the operative issue for determination must be whether there is a scintilla of a cause of action. If the pleadings disclose any viable issue for trial then the court should order the trial to proceed but if there is no cause of action, the court should be equally resolute in making the declaration and dismissing the appeal 'or statement of case' (my emphasis).
- [8] The principles upon which this jurisdiction is exercised are very well settled and the learned Chief Justice's reasoning continues to be applicable to the interpretation of CPR rule 26.3 (1) (b) & (c) as he expounds further on those principles to say " *the court is empowered to dismiss an action in a summary way without a trial where the statement of claim discloses no cause of action, or is shown to be frivolous or vexatious or is otherwise an abuse of the process of the court. This summary procedure should only be used in clear and obvious cases, when it can clearly be seen, on the face of it, that a claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court.*"
- [9] It is generally accepted that the court's jurisdiction to strike out is to be used sparingly. "... courts proceed cautiously in exercising the power to summarily strike out pleadings. The reasons for this are not difficult to fathom. The unsuccessful litigant was wholly deprived of the right to a trial and of its ability to strengthen its case through the process of disclosure and other court procedures such as requests for information. Striking out was limited to plain and obvious cases where there was no point in having a trial.." Byron CJ op.cit.
- [10] Recent authorities ***Bernadette Hector et al v Neville Joseph Dominica- Civil Appeal No. 6 of 2003*** and ***Christabel Antoine v Bernard Antoine Dominica - Civil Appeal No. 8 of 2003*** relating to the interpretation of the CPR regarding strike out applications, remain consistent with the reasoning in *Baldwin Spencer v The Attorney General* supra.

- [11] In **Headstart Class F Holdings Limited et al v Y2K Finance - BVIHCV 2007/0278** Hariprashad Charles J reasoned that "On a strike out application, the court must determine whether the claim is bound to fail and in that regard the court is only concerned with the statement of case. The court will have regard to the overriding objective and to its general power of case management, should concentrate on the intrinsic judgment of the case in the light of the overriding objective and take into account all relevant circumstances and make a broad judgment, after considering the available possibilities."
- [12] In **Citco Global Custody NV v Y2K Finance Inc -HCVAP 2008**, Edwards, J.A held that " On hearing an application made pursuant to CPR 26.3 (1)(b) the trial judge should assume that the facts alleged in the statement of case are true. "Despite this general approach, however, care should be taken to distinguish between primary facts and conclusions or inferences from those facts. Such conclusions or inferences may require to be subjected to closer scrutiny."
- [13] It is on the basis of these principles that the court will consider the applications to strike out the statements of case, made pursuant to the inherent jurisdiction of the court and CPR 26.3 (1) (a) (b) (c) and (d) as stated hereunder:-

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

- (a) there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings;
- (b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;
- (c) the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings; or
- (d) the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10.

The Statements of Case

The pleadings can be summarized as follows.

- [14] Prior to the transfers to the defendants (excluding the defendant Brandt) and others, the claimants were the owners of lands situate at St Peters/Providence Estate;
- [15] Properties of the claimants were illegally obtained by the defendant Warren Cassell and illegally sold or fraudulently transferred to defendants (excluding defendant Brandt) and others by deception, as part of an underlying fraudulent transaction wide ranging conspiracy to commit fraud, implicating public officials,

involving Notaries Public, public officers, Attorneys at law including defendants Allen, Markham and Brandt and other defendants.

- [16] Underlying all claims filed and set out in the statements of case, is the undisputed fact that the defendant Warren Cassell- Attorney at Law and Cassell and Lewis Inc. were convicted in February 2012, on counts of Conspiracy to defraud the claimants of certain property at St Peters/Providence Estate and several counts of procuring the execution of valuable securities by deception and alleged fraudulent transfers to defendants (excluding the defendant Brandt).
- [17] The essence of the claims is that the defendants assisted defendant Warren Cassell by committing various acts of fraud, including notarizing documents and complicity in the alleged fraudulent transfers.
- [18] The failure by the defendants Markham and Brandt who notarized land transfers with execution defects or procedural improprieties of sufficient consistency, regularity and gravity, provides for inferences of fraud and misfeasance to be drawn or recklessness or negligence to be established against the Notary Public/Attorneys in failing to observe the formalities set out in the Companies Act Cap 11.12 and Registered Land Act Cap 8.01 Revised Edition of the Laws of Montserrat.
- [19] Reference was made to fraudulent misrepresentations, collusion, fraud, forgery, reckless or negligent acts of misfeasance in public office by the defendants Markham, Brandt and others
- [20] The claimants seek relief, inter alia, declarations that the transfers of title to the defendants (excluding the defendant Brandt) and others, clients/co- clients of defendants, Attorneys - Allen, Markham and Brandt, are null and void, declarations of ownership and transfer of title in properties to the claimants, rectification of land registers and restitution of lands to the claimants, various other declarations relating to filed company documents, injunctions and damages.

Application by David S. Brandt

- [21] In his affidavit in support the defendant Brandt expounded on the grounds stated in the Notice and deposed that the 2nd claimant made complaints and filed civil actions against any person who had any dealings or involvement with the St Peters/Providence Estate lands, including bona fide purchasers.
- [22] The defendant Brandt deposed that the claimants accused innocent persons of fraud, accused the defendant Brandt without evidential or factual foundation, of the commission of criminal fraud and has failed to specify the basis of any fraud against the defendant Brandt in particular and most of the other defendants. Reference was made in the affidavit to other persons against whom other

baseless allegations were made by the 2nd claimant and claimants later abandoning the claim.

- [23] The defendant Brandt considered that those allegations are designed to and did cause him professional embarrassment and deliberate delays associated with the claimants' requests for adjournments and failure to comply with court orders.
- [24] Learned counsel for the defendant Brandt -Mr. Carrott at the commencement of his submissions filed May 18th 2015, informed the court that the application was made pursuant to CPR 26.3 (1) (a) (c) and (d). Counsel reiterated what was expressed in the affidavit of the defendant Brandt and impressed upon the court that the lack of any or any specific particulars of fraud or any real particulars of conspiracy, supports the defendant Brandt's case that the claim discloses no cause of action against the defendant Brandt and that the proper parties before the court are the defendants Warren Cassell, Cassell & Lewis and the Government of Montserrat.
- [25] Counsel referred to an email dated 23rd March 2015 in which the 2nd claimant is purported to have redacted all references to fraud in the pleadings, but the court notes that a copy of the email was not produced as evidence or as an exhibit in these proceedings. Counsel invited the court to find that the claimants have not established their ownership of the lands in dispute and furthermore mere allegations of what the defendant Brandt 'knew or ought to have known' does not amount to fraud.
- [26] Of significance to this application according to counsel, is that the 2nd claimant has failed to comply with orders of the court in particular the orders of the Honourable Justice Rhudd in MNIHCV 2012/008 dated 27th April 2012 and on injunction of the Honourable Justice Redhead dated 23rd March 2015, in that, he failed to withdraw allegations made about the defendant Brandt, intent to embarrass and frustrate the defendant Brandt personally and professionally and which amounted to harassment of the defendant Brandt.
- [27] As a matter of admissibility, counsel pointed to the inclusion in the 2nd claimant's affidavit in support and pleadings before the court, of excerpts from the transcript in the criminal trial of the defendant Warren Cassell and his failure to produce or exhibit it.
- [28] Counsel relied on Sections 238 and 239 of the Companies Act relating to Civil Remedies and Derivative Actions in support of the ground that the 2nd claimant has no locus standi to bring proceedings before the court on behalf of the 1st claimant.
- [29] Finally counsel summarized his submissions and urged the court to strike out the claims against the defendant Brandt on grounds that (1) there were no reasonable grounds for bringing the claim (2) the defendant Brandt is not a proper

party before the court (3) the 2nd claimant has no locus standi pursuant to the Companies Act (4) properties in dispute are not owned by the 2nd claimant (5) claim is an abuse of process of court and (6) pleadings are scandalous and vexatious.

Application by Kenneth Allen and Kharl Markham

- [30] In his submissions learned counsel Mr. Markham informed the court that the fixed date claim form and affidavit in support filed on 30th October 2013, were not served on defendants Kathleen Allen Ferdinand and Yvonne Daly-Weekes. That notwithstanding, counsel's application to strike and submissions are in respect to the defendants Allen and Markham only.
- [31] In his affidavit in support deposed to on behalf of the defendants Allen and Markham, defendant Markham stated that (1) in his capacity as a Notary Public, he witnessed the signatures of persons on the transfer documents as persons who were known to him for several years (2) he knew that the signatories had the mental capacity to understand the nature and effect of the transfer (3) 1st claimant was the intended beneficiary of the stated remuneration (4) he was satisfied that signatories for the 1st claimant were lawfully appointed.
- [32] Counsel maintained that (1) the parties relied on the "*indoor management rule*" and that transactions were conducted and documents were properly executed (2) the exercise of power as Notary Public was lawful and in good faith (3) the exercise of power as Notary Public was not reckless or recklessly indifferent as to any harm or likely harm (4) the facts pleaded cannot lead to malice (5) defendant Markham did not act as attorney for unnamed persons (6) he had no knowledge regarding the issue of land being landlocked and (7) the pleadings were insufficient to establish the tort of misfeasance.
- [33] Counsel informed the court that the application was made pursuant to CPR 26.3 (a) (b) and (c) and in accordance with the inherent jurisdiction of the court as it relates to the Companies Act. Learned counsel Mr. Markham stated that the 2nd claimant had no right to bring an action for the 1st claimant and relied on the rule in ***Foss v Harbottle [1843], 2 Hare 460, 67 ER 189*** and application of the 'proper plaintiff rule'. Counsel stated that the claims filed are for relief on the basis that the 1st claimant was deprived of its assets and as such the 2nd claimant has no locus standi to bring such an action on behalf of the 1st claimant.
- [34] Counsel represented that the properties purchased by the defendants were owned and registered in the name of the 1st claimant and not the 2nd claimant and as such the 2nd claimant has no interest in the property and cannot therefore file a claim in his personal capacity. Counsel relied on the case of *Foss v Harbottle* supra as authority for saying that an action can only be brought by the 1st claimant.

- [35] According to counsel, in order to do so, the 2nd claimant must satisfy the court that (1) he qualifies as a complainant within the meaning of section 238 of the Companies Act and (2) that he has applied for and obtained leave to bring an action in the name and on behalf of the 1st claimant pursuant to section 239 of the Companies Act. He argued that the 2nd claimant has not met those requirements and as such claims cannot be maintained.
- [36] Counsel reiterated that allegations of fraud were not particularly pleaded and as such are insufficient to establish fraud against the defendants. So too are the allegations of misfeasance in public office based on witnessing of signatures on transfers of title.

Application by Dion Weekes and Janine Deborah Carr- Weekes

- [37] Counsel for the defendants Dion Weekes and Janine Deborah Carr- Weekes - Mr. Carrott, represented that the fixed date claim form and affidavit in support filed on 30th October 2013, was not served on defendant Janine Deborah Carr Weekes who resides in Trinidad. Counsel stated that the defendant Janine Deborah Carr Weekes was joined merely because she is a director of Engineering Design which was not itself joined as a party to the claim and that there are no allegations in the pleadings against her.
- [38] Counsel adopted the submissions of Mr. Markham in its entirety and argued that (1) claim form does not comply with CPR 8.1 (2) affidavit of 2nd claimant is unsworn (3) exhibits referred to are not exhibited (4) no address for service, as post box is not a valid address and no affidavit validating alternative form of service has been filed.
- [39] As to allegations of fraud counsel posited that no particulars of the fraud are given and that the pleadings do not disclose that the defendant Dion Weekes is guilty of criminal conduct or criminal fraud and that no proper case has been made out against the defendants.

Application by Ina M.J. Farrell and Keith D. E. Farrell

- [40] Counsel for the defendants Ina M.J. Farrell and Keith D. E. Farrell, Ms Watts, commenced her submissions by adopting the submissions of Mr. Markham and Carrott. Counsel expounded on the grounds set out in the application and the evidence in support filed before the court on the 28th April 2015. Counsel stated that the statement of case does not set out a valid cause of action and that there are no particulars of the allegations of fraud against the defendants. Counsel pointed out that allegation of fraud based merely on the illegible imprint of the seal on the land transfer document cannot be attributed to the defendants and does not amount to fraud on the part of the defendant.

- [41] Counsel further argued that the claim is frivolous, vexatious and an abuse of process of court and does not disclose any reasonable ground for bringing the claim against the defendants as fraud is not specifically and particularly pleaded. Counsel noted that the memorandum in opposition and affidavit of Carol Anne Ireland filed by the claimants on 14th May 2015, which although not served on the defendants, but the court having had sight of the documents, counsel persuaded the court that the affidavit of Carol Anne Ireland did not specifically identify this claim filed against those defendants and ought to be disregarded.
- [42] Counsel's submissions related to locus standi, the rule in *Foss v Harbottle* and Section 238 and 239 provisions of the Companies Act. Counsel relied on the case of ***Macaura v Northern Assurance Co. Ltd 1925 AC 619 at 633*** as per Lord Wrenbury, HL as authority for saying that '*... the corporator even if he holds all the shares in not the corporation and that neither he nor any creditor of the company has any property legal or equitable in the assets of the corporation...*' As such counsel reiterated that the 2nd claimant has no legal or equitable interest in the property of the 1st claimant and therefore cannot be said to have an interest in securing property of the 1st claimant.
- [43] Finally counsel noted the claimants' failure to comply with Section 513 of the Companies Act and CPR 5.7 in that a post box is not a proper address for service.

Written submissions to that effect were filed by counsel Ms Watts, on May 26th 2015.

Summary of Grounds, Analysis and Application of the Law

GROUND 1: Non compliance with the CPR 30.2, 8.1, 8.12, 5.7, 8.7 (3) and Orders of the Court CPR 26. 3 (1) (a);

- [44] The court notes that the fixed date claim form and affidavit in support filed on 30th October 2013, was not served on defendants Kathleen Allen Ferdinand, Yvonne Daly-Weekes and Janine Deborah Carr Weekes within the six (6) months after the date of issue of the claim form, in accordance with CPR 8.12.
- [45] At the outset the court must dispel any doubt in respect to claim No. 0026/2013 and the alleged unsworn affidavit of Owen Rooney filed in support of the fixed date claim on October 2013. The court has perused that affidavit and can confirm that it was sworn to by Owen Rooney on the 25th October 2013 before BIJAN SANI Notary Public in Los Angeles California. As such that ground for striking out the claim against Dion Weekes and Janine Deborah Carr Weekes for failure to comply with CPR rule 30.2 is unfounded.
- [46] However, the court is satisfied that no order extending the time for serving the claim form or extending the validity of the claim form pursuant to CPR 8.13 was

made by the court. Accordingly the court agrees with counsel that the claim form is no longer valid against defendants Kathleen Allen Ferdinand, Yvonne Daly-Weekes and Janine Deborah Carr Weekes and grants the application of learned counsel Mr. Carrott to strike out the claim against Janine Deborah Carr Weekes and all references to Janine Deborah Carr Weekes in the statement of case. The court considers it therefore unnecessary to address the submissions of counsel in respect to the defendant Janine Deborah Carr Weekes.

- [47] The court notes that the defendants have not specifically identified the claimants' failure to comply with CPR 8.1. However the court has noted that the seven claims under consideration were commenced by fixed date claim forms and affidavits in support.
- [48] CPR 8.1 expressly stipulates the proceedings in which fixed date claim forms must be used. The pleadings in these proceedings although seek inter alia, declarations of title and ownership, rectification of land registers and restitution of title and ownership in lands to the claimants, which to my mind, would in effect if claims are successful, result in the transfer of possession of the said lands to the claimants. In that regard filing of a fixed date claim form would be in keeping with CPR 8.1 (5) and properly brought.
- [49] Moreover, the court notes that affidavits in support and not statements of claim were filed. The court considers that the claimants have not complied with CPR rule 8.1 (b) but the court is of the view that Practice Direction 8 No. 2 of 2011 provides that a court may direct that an affidavit or statement of claim be served and court can exercise its case management powers under CPR 26.9 to direct the manner in which a claim initiated by claim form or fixed date claim form could continue.
- [50] Furthermore, the court has reviewed the filings following the service of the fixed date claim forms and affidavits and notes that the defendants have filed affidavits in reply/defence and as such the court holds the view that in so doing, the defendants have accepted the pleadings as filed. In any event, if I am wrong in coming to the conclusion that the claim has been properly brought as a fixed date claim, the approach that this court will take is not to strike out the claim on the ground that it does not comply as to form, but rather the manner in which the proceedings are to continue can be determined and regularized at the next case management hearing.

Texan Management Ltd & Ors v Pacific Electric Wire & Cable Company [2009] UKPC 46 followed.

- [51] This approach had been approved by the court in ***HCVAP 2009/001A: [1] Intrust Trustees (Nevis) Limited [2] Intrust Limited [3] Steven Slom v Haim Samet Steinmetz, Haring & Co. and Naomi Darren also known as Naomi Darabaner in the Judgment of George-Creque, J.A*** when she stated that: '..... as correctly

stated by the master, it would be quite a draconian approach to strike out the claim in such circumstances and were it properly to have been brought by way of Form 2, it would have been quite right in the exercise of her discretion under CPR 26.9 (3) to order that the matter proceed as if by fixed date claim and thereby put matters right. This would be wholly in keeping with the overriding objective of CPR. To sacrifice substance by way of slavish adherence to form for the purpose of defeating a genuine claim defeats the overriding objective of the CPR rather than gives effect to it.

- [52] CPR 5.7 which provides for service of a 'claim form' on a limited company states that:

Service on a limited company may be effected:

(a)

(b) by sending the claim form by prepaid post or cable addressed to the registered office of the company.

CPR 5.13 provides for an affidavit validating alternative form of service of a 'claim form' on a party.

However the court notes that CPR Part 5 and in particular the rules cited above and Practice Direction 5 No. 1 of 2011, are inter alia, with respect to the service of a '**claim form on a an individual or company**' to include electronic means, as distinct from the manner in which service on the claimants of a document in the court process '**other than a claim form**' can be effected. These rules bear no relevance to the address for service to be included on the claim form to effect service on the claimants of a document in the court process, 'other than a claim form'.

- [53] Section 513 of the Companies Act states that:

A notice or document may be served on a company (a) by leaving it at or sending it by telex or telefax or by prepaid post or cable addressed to the registered office of the company (b) by personally serving any director, officer, receiver,

The court is of the view that the CPR provides for service on a company of a claim form and a document in the 'court process' other than a claim form' and in that regard Section 513 is not relevant. Effectively, where the CPR provides a procedure for matters before the court, then the provisions therein take precedence.

- [54] The court has perused the fixed date claim forms issued from the registry of the High Court. The issue before the court does not relate to the service of the claim form on the claimants/company, but rather **the service of a document 'other than a claim form on the claimants'**. The court finds that the claimants have complied with the rules by providing a postal address within the jurisdiction as well as an electronic address. These forms of service of documents other than a claim

form, are in accordance with CPR Part 6 Rule 6.3 in particular. The court also notes that the defendants have filed affidavits in reply/defence and effected service on the claimants despite the alleged defect regarding address for service.

[55] CPR rule 8.7 (3) *as amended by Eastern Caribbean Supreme Court Civil Procedure (Amendment) Rule Act No. 92 of 2011* provides that: "*The claim form or the statement of claim must identify any document which the claimant considers is necessary to his or her case*". There is no duty on the claimants to annex or exhibit the documents referred to in the claim form or affidavit in support at the date of filing. The defendants have the option to avail themselves of the provisions of CPR Part 34 or 28 in order to assess the sustainability of the claims if matters were to proceed to trial.

[56] With respect to non compliance with the orders of the court pursuant to CPR 26. 3 (1) (a) the court is not persuaded in that regard, as the orders relate to claims MNIHCV 2012/008 and MNIHCV 2009/0018 and not 'these proceedings' herein. Furthermore the court was informed by counsel that the claimants did comply with the order dated 19th December 2014.

GROUND 2: 2nd claimant lacks the requisite locus standi to bring the claim in the name and on behalf of the 1st claimant and breach or non compliance of Sections 238 and 239 of the Companies Act;

[57] It is not in dispute that at the date of filing of claim, the 1st claimant was a limited liability company registered under the Companies Act of Montserrat as No. 39 of 1989. In the affidavits in support of the claims, the 2nd claimant alleges that he is the Director of the 1st claimant, continues to be a lawful director and is authorised to swear to the affidavit on behalf of the 1st claimant in claims to recover the property of the 1st claimant.

[58] The 2nd claimant alleges that he was at the material time an owner of one of the lots of the subject property, the subject matter of the claims and also that he is a shareholder of the company. He further alleges that the 1st claimant was at the material time, proprietor of the subject property. The claimants identified in paragraphs of the affidavits in support of the claims, the documentary evidence that will be relied upon to establish at trial, the prior ownership of both claimants to the subject property.

[59] In submissions before the court, learned counsel for the defendants submitted that the 2nd claimant has failed to demonstrate in the claims that he has the requisite locus standi to bring these proceedings in the name and on behalf of the 1st claimant or alternatively, that each claimant was entitled according to law to ownership of the subject property at the material time. Counsel posited that the claims filed and remedies sought, constitute derivative actions requiring an order from the court to bring such actions. Counsel cited Sections 238 and 239 of the

Companies Act Cap 11.12 Revised Edition of the Laws of Montserrat, as authority for so submitting.

[60] **Section 238 provides: In this Part—**

- (a) **“action”** means an action under this Act;
- (b) **“complainant”** means— (i) a shareholder or debenture holder, or a former holder of a share or debenture of a company or any of its affiliates; (ii) a director or an officer or former director or officer of a company or any of its affiliates; (iii) the Registrar; (iv) any other person who, in the discretion of the court, is a proper person to make an application under this Part.

[61] **Derivative actions- Section 239 provides:**

- (1) Subject to subsection (2) a complainant may, for the purpose of prosecuting, defending or discontinuing an action on behalf of a company, apply to the court for leave to bring an action in the name and on behalf of the company or any of its subsidiaries, or intervene in an action to which such company or any of its subsidiaries is a party.
- (2) No action may be brought, and no intervention in an action may be made, under subsection (1) unless the court is satisfied—
 - (a) that the complainant has given reasonable notice to the directors of the company or its subsidiary of his intention to apply to the court under subsection (1) if the directors of the company or its subsidiary do not bring, diligently prosecute or defend, or discontinue, the action;
 - (b) that the complainant is acting in good faith; and
 - (c) that it appears to be in the interests of the company or its subsidiary that the action be brought, prosecuted, defended or discontinued.

[62] The law is well established that neither a director nor shareholder has any legal or equitable interest in property owned by a company. The court does not find that the statements of case disclose allegations that the 2nd claimant is claiming to have an interest in the property owned by the 1st claimant, other than a percentage shareholding in the 1st claimant.

[63] It is settled law that if a wrong is done to a company then the company is the proper plaintiff and that the shareholders are not competent to bring the action unless he is suing on behalf of the company in a derivative action. The decision to bring a claim must therefore be made by the company and this means a decision of directors.

Foss v Harbottle (1843) 2 Hare 461 and (1) Elvis Wyre (Personal Representative of the estate of Arnold Wyre deceased) (2) Elvis Wyre v (1) Alvin Edwards (2) Leon Maundy as Personal Representative of the estate of Cyril Maundy) -ANUHCVP 2014/0008 followed.

- [64] This rule has its origin in the courts reluctance to interfere in the management or internal affairs of a company. The rule in *Foss v Harbottle* must be adhered to and that nothing connected to *internal disputes, management or affairs* of the company can be made the subject of an action by a shareholder on behalf of himself or others, by way of a derivative action, unless there was an issue of illegality, oppression or fraud.
- [65] These actions filed by the claimants certainly do not relate to the *internal disputes, management or affairs* of the 1st claimant amongst the shareholders or directors of the 1st claimant. The claims by the 1st claimant are not instituted by the 2nd claimant as shareholder, but by the 2nd claimant as Director of the 1st claimant on its behalf inter alia for restitution of its property allegedly fraudulently transferred by the Defendant Warren Cassell to certain defendants as established by the criminal convictions.
- [66] This court has had sight of a Notice of Directors filed at the Registry of Companies on February 20th 2012 in which the 2nd claimant is one of the persons appointed director of the 1st claimant and was so appointed at the date of filing of the claims in 2013 and 2014. The court does not accept that these are actions in connection with *the internal disputes, management or affairs* of the 1st claimant and as such do not constitute '**actions under this act**' ('*the Companies Act*') for civil remedies, brought by a '**complainant**' as defined in Section 238 of the Act. The court accordingly rejects the submission that these actions in their present form constitute derivative actions to which the provisions of Section 239 and 239 apply.
- [67] In any event the court is of the view that in order to justify striking out the claims taking into consideration the issues raised in the applications, as to (i) ownership of the subject property, (ii) the capacity and (iii) authority in law of the 2nd claimant to bring the claim on behalf of the 1st claimant, would require findings of facts and law by the court at this stage of proceedings. The court is fortified in its position that to do so would require holding a mini trial of the claims which a court is not required to do at this stage of proceedings.

Julian Prevost v Rayburn Blackburn DOMHCV 2005/0177 followed.

GROUND 3: Allegations of fraud vague and not particularly and properly pleaded; allegations not supported by clear statement of facts relied upon; mere allegations of constructive notice or belief of commission of fraud are insufficient to amount to fraud in law; no valid cause of action and no reasonable ground for bringing the claim and

GROUND 4: Facts pleaded do not amount to negligence, recklessness or misfeasance in public office and as such no reasonable ground for bringing claim.

- [68] Counsel submitted that the 2nd claimant has not produced the transcript from the criminal trial and uses excerpts from the criminal trial and statements made by the

Judge at the trial as facts to ground the allegations of fraud in the claims. Counsel posited that no specific particulars of fraud have been pleaded, allegations are not supported by clear facts and mere allegations of belief or commission of fraud are insufficient to amount to fraud in law.

[69] Counsel argued that the facts pleaded do not amount to negligence, recklessness or misfeasance in public office. Accordingly says counsel, the claimants have not established a valid cause of action and statements of case disclose no reasonable ground for bringing the claims.

[70] The principle that " *The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer*" was established by Saville LJ in *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd* (1994) 72 BLR 26, 33-34 and was approved in **Civil Appeal No. 12 of 2006- (1) East Caribbean Flour Mills v Ormiston Ken Boyea and (2) East Caribbean Flour Mills v Hudson Williams** in which case Barrow J A cited with approval Lord Woolf MR in *McPhilemy v Times Newspapers Ltd* [1993] 3 All ER 775 who had this to say about the general approach to pleadings under the CPR :

"...The need for extensive pleadings 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 that party's witness statement, will make the detail of the nature of the case the other side has to meet obvious..... In particular they are still critical to identify the issues and the extent of the dispute between parties. What is important is that the pleadings should make clear the general nature of the case of the pleader....."

[71] The principle is now grounded in CPR 8.7 (1) where it states that "*The claimant must include in the claim form or in the statement of claim all the facts on which the claimant relies.*"

[72] In particular, the aphorism that 'where an allegation of fraud is made particulars must be given', is a long and well settled principle which has its origin in the case of **Wallingford v Mutual Society and Official Liquidator (1880) 5 App Cases 685** in the dictum of Lord Selbourne LC at page 697 where he states:

"With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which that are stated, are insufficient even to amount to an averment of fraud of which any court ought to take notice" .

- [73] The principle was further enunciated in **Belmont Finance Corporation Ltd. v. Williams Furniture Ltd.** [1979] Ch. 250, 268 Buckley L.J. said:

"An allegation of dishonesty must be pleaded clearly and with particularity.... This does not import that the word 'fraud' or the word 'dishonesty' must be necessarily used. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be so clear, and in such a case it is incumbent upon the pleader to make it clear when dishonesty is alleged...."

- [74] In **Thomas v Stoutt and others** 1997 55 WIR 112 Byron J (as he then was) at page 117 stated: "The mere averment of fraud in general terms, is not sufficient for any practical purpose in the prosecution of a case. It is necessary that particulars of the fraud are distinctly and carefully pleaded. There must be allegations of definite facts or specific conduct. A definite character must be given to the charges by stating the facts on which they rest".

This case was cited with approval in **Saint Lucia Motor & General Insurance Co. Ltd v Peterson Modeste Civil Appeal HCVAP 2009/008**.

- [75] The arguments of counsel are that the facts required to establish the essential elements of the torts of fraud and misfeasance in public office and also that negligence and recklessness of the defendants Markham and Brandt have not been made out. In short the arguments raised the issue of the adequacy of the pleadings and whether the grounds for the claim have been properly particularized.

- [76] The essential elements of the tort of misfeasance in public office was established by the House of Lords in **Three Rivers DC v. Governor and Company of Bank of England** 2001 UKHL 2 AER 513. The House of Lords in a majority decision granted leave to the claimant to re-re-amend the pleadings to more properly plead the particulars of misfeasance relied on in support of the claim. The court stated "Of course the allegation of fraud dishonesty or bad faith must be supported by particulars. The other party is entitled to notice of the particulars on which the allegation is based. If they are not capable of supporting the allegation, the allegation itself may be struck out. But it is not a proper ground for striking out the allegation that the particulars may be found after trial to amount not to fraud, dishonesty or bad faith, but to negligence."

- [77] The court's preference would have been for the claimants to express their pleadings in a less verbose and convoluted manner. These allegations have not been restricted to fraud and misfeasance, dishonesty and bad faith, but also recklessness and negligence on the part of the defendants. However, the court has reviewed its summary of the claimants' case as set out above and considered as a whole, and as far as is requisite at this stage of the proceedings, the fixed date claim forms and affidavits in support filed and the principles laid down in the authorities cited.

- [78] The court is obliged to acknowledge as significant and as alleged in the pleadings, that Warrell Cassell and Cassell & Lewis Inc. (represented by Warrell Cassell) defendants in the matters under consideration by this court, were convicted by a jury in Montserrat on nine counts of conspiracy to defraud and procuring the execution of valuable securities by deception, as per Baptiste J A in *Warren Cassell v The Queen* and *Cassell & Lewis v the Queen* -HCRAP 2012/001 & 2012/002.
- [79] The court is by the same token obliged to acknowledge as significant and as alleged in the pleadings, that other public officers against whom allegations of fraud have been made and by some of whom admissions of unlawful or improper acts were made at the criminal trial, are defendants in the statements of case under consideration.
- [80] The court is of the view that a proper determination of the applications to strike must be considered against the backdrop of the pleadings of the criminal convictions of the defendant Warrell Cassell and allegations of admissions in the criminal trial which preceded the filing of these claims. The court is also mindful of the fact that case management directions in all of the cases filed are still ongoing.
- [81] The court is satisfied that the claimants have pleaded a reasonable cause of action. Taken as whole, the court is persuaded that the alleged facts before it, provide the defendants with sufficient to make clear, the general nature of the case being alleged against them. The particulars of claim plead the case in fraud and misfeasance in public office in reasonably clear terms and in sufficient detail to enable the defendants to prepare a defence by way of affidavits in reply, which they have done.
- [82] The court does not think it appropriate at this stage to attempt to detail every allegation by which the claimants seek to establish the facts in support of the claims and considers that the allegations are so bound up with the facts that it is best left until trial. Further the court is persuaded that discovery and cross examination at a trial will produce evidence which may assist the claimants in the furtherance of their case and that they ought to be given an opportunity so to do. These are cases that "should be examined and tested with the procedural advantages of a fair and public trial". *Three Rivers D C supra followed*.

The court therefore declines to exercise the jurisdiction to strike out the claims on those grounds.

GROUND 5: The claims are scandalous, frivolous, vexatious and an abuse of process of court:

- [83] The court's power to strike out a claim under its inherent jurisdiction and CPR Part 26.3 (1) (c) on the ground that it is an abuse of process, has already been stated above and the court is guided by the principles in *Baldwin Spencer supra*. The

term 'abuse of the process' is not defined in the CPR, but it had been explained by Lord Bingham in **Attorney General v Barker** -**The Times March 2000** as meaning "using that process for a purpose or in a way significantly different from its ordinary and proper use".

- [84] The court cites with approval Blenman J. in **English Haven Limited v (1) Registrar of Lands (2) Anglo Swedish Developments Limited and (3) Attorney General of Antigua and Barbuda** -**ANUHCV 2007/0277** in which the learned Judge stated of CPR Part 26.3 (1) (c) that "*This limb requires that the process of the court must be used properly and must not be abused. 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 an harassment of the defendant...*"
- [85] In **Richard Frederick v Owen Joseph et al Civil Appeal No. 32 of 2005 Rawlins, J A** applying the principle in *Choraria v Sethia* [1998] ECWA Civ 24 which stated that before a court strikes out a case for abuse of process, the court must be satisfied that it is fair to do so.
- [86] The court is acutely aware that counsel submitted, that the allegations in the claims and filing of the claims constitute an abuse of process of court. Counsel Mr. Carrott in particular in his submissions on behalf of the defendant Brant contended, that the nature of the allegations pleaded in the claims against the defendant Brandt, amounts to harassment of the defendant Brandt and as such is an abuse of the process of court.
- [87] This court however takes a different view of those proceedings and prefers to draw a distinction on the basis that although the general subject matter comprise lands of the claimants situate at St Peter/Providence estate, but the claims are set in a different context and seek to identify the specific transactions involving transfers of different parcels. Furthermore, the court is of the view that a reduction or consolidation of the claims would lead to loss of clarity in identifying the causes of action on which the claimants base their claims.
- [88] The court is satisfied that the claimants have not issued proceedings for an improper purpose. The claimants are seeking to use the machinery of the court process to restore legal title in properties which they allege were fraudulently transferred to some of the defendants, execution of which was witnessed by and in the presence of the defendants Brandt and Markham as Notaries Public in circumstances which they further allege involve procedural improprieties.
- [89] The court is guided by the principles established in the authorities cited and does not consider the filing of the claims and the allegations therein, scandalous and vexatious and an abuse of process. The court considers that is not satisfied, it is fair and just in these circumstances, to strike out the claims for abuse of process

and again declines to exercise the jurisdiction to strike out the claims on that ground.

Conclusion

- [90] The court's conclusion that the requirement for striking out has not been satisfied is justified particularly given the nature of the allegations in the claims. It seems to me, that in the exercise of its discretion under these rules, buttressed by the underlying principle of giving effect to the overriding objective, the interests of justice of these claims require that details of the facts and evidence, should be permitted to be ventilated at a trial.

The court's order is as follows:

1. The application to strike out Claim Nos. MNI HCV 2013/0020, HCV 2013/0024, HCV 2013/0027, HCV 2014/0002 and HCV 2014/0005 against the defendant David S. Brant is dismissed.
2. The application to strike out Claim Nos. MNI HCV 2013/0024 against the defendants (1) Kenneth Allen and (2) Kharl Markham and HCV 2013/0026 against the defendant Kharl Markham is dismissed.
3. The application to strike out Claim No. MNI 2013/0026 against the defendant Janine Deborah Carr Weekes is granted and against the defendant Dion Weekes is dismissed.
4. The application to strike out Claim No. MNI HCV 2013/0028 against the defendants Ina M.J. Farrell and Keith D. E. Farrell is dismissed.
5. The matters are adjourned for further case management directions to be given by a Judge of the High Court to be held on a date to be determined by the Registrar.
6. I make no order as to costs



Cynthia Combie Martyr
High Court Judge (Ag)