

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 CIVIL DIVISION BEFORE HER HONOUR ACTING JUSTICE NOVA HALL



CAUSE NO. G 356 OF 2012

5
6 BETWEEN:

7 PHILLIP HYRE

FIRST PLAINTIFF

8
9 AND

10 KEVON HYRE

11 SECOND PLAINTIFF

12
13 AND:

14 FIDELITY BANK (CAYMAN) LIMITED

15 FIRST DEFENDANT

16 AND

17 PAUL SIMON

18 SECOND DEFENDANT

19 AND

20 SATIN WOOD GATE

21 THIRD DEFENDANT

22 AND

23 SIMON WATSON

24 FOURTH DEFENDANT

25
26 ***Appearances:***

27 *Dennis Brady appearing for the Plaintiffs*

28 *Paul Keeble instructed by Hampson & Company appearing for the Defendants*

1 **JUDGMENT**

2 The Plaintiffs filed a Writ of Summons on August 17, 2012. Having been served,
3 the First Defendant filed a Defence on September 24, 2012. Service having been
4 purportedly effected on the Second, Third and Fourth Defendants in September
5 2014, an Acknowledgement of Service was filed on their behalf on September 26,
6 2014. Service on those Defendants was one of the issues raised before the Court
7 and the Acknowledgment of Service had made reference to this matter.
8

9 **The Parties to the Action**

10 The First and Second Plaintiffs are husband and wife and the registered
11 proprietors of three properties registered at George Town East, Block 20E Parcel
12 83 REM 1; Prospect, Block 22E Parcel 412 H1 and Prospect, Block 22E Parcel
13 412 H8 respectively. The First Defendant is a financial institution which has done
14 business with the Plaintiffs over several years and had registered charges over the
15 three properties owned by the Plaintiffs as security for funds advanced to the
16 Plaintiffs personally and to the Plaintiffs' company Hycam Ltd.

17 Initially, the attorneys-at-law for the First Defendant in this action was the firm of
18 Bodden & Bodden. The Second Defendant is an attorney-at-law employed by that
19 firm. The Third Defendant is a company which was incorporated to develop the
20 property registered at George Town East, Block 20E Parcel 83 REM 1 and that
21 property was eventually sold to the said Third Defendant by a Court appointed
22 Receiver. The Fourth Defendant is a Chartered Surveyor with Charterland Ltd
23 which company was hired by the First Plaintiff to prepare a valuation on George
24 Town East, Block 20E Parcel 83 REM 1. That valuation when compared to another
25 valuation became an issue in the action which was filed.
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25 valuation became an issue in the action which was filed.
26



- 1 4. *An Order (Injunction) restraining and prohibiting the First Defendant from*
2 *any and all actions, pursuant to section 64(2) of the Registered Land Law*
3 *(2004 Revision) the objective of which is to proceed to sell or otherwise*
4 *deal with the properties identified as Block 22E Parcel 412H8 and Block*
5 *22E Parcel 412H1, properties over which the First Defendant holds a legal*
6 *charge.*
- 7
- 8 5. *Exemplary damages to be assessed, against the First Defendant and*
9 *arising from Breach of Contract, and breach of the duty of mutual trust and*
10 *confidence which the First Defendant at all material times, failed to protect*
11 *and secure the best interest of the Plaintiffs, consistent with the reliance*
12 *reasonably placed in the First Defendant, by the Plaintiffs and which*
13 *breach resulted in pecuniary loss being sustained by the Plaintiffs and was*
14 *directly caused by the actions of the First Defendant.*
- 15
- 16 6. *General, Compensatory and Exemplary damages to be assessed and*
17 *arising from misrepresentations made by the First, Second, Third and*
18 *Fourth Defendants, and by which the Plaintiffs sustained pecuniary loss.*
- 19
- 20 7. *General, Compensatory and Exemplary damages to be assessed and*
21 *arising from actions of Deceit and Fraud committed jointly by the First,*
22 *Second, Third and Fourth Defendants, to the detriment of the Plaintiffs.*
- 23
- 24 8. *Exemplary and Compensatory damages against the Second Defendant for*
25 *Deceit and Negligence by his failure to inform the Second Plaintiff of her*
26 *right to seek independent legal advice prior to her signing the documents*
27 *presented to her by the Second Defendant and which had the effect of*
28 *transferring the title for Georgetown East, Block 20E, Parcel 83, REM1, to*
29 *the First Defendant.*



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- 9. *Compensatory and Exemplary damages against the Fourth Defendant for Fraud and Deceit practiced by the defendant and demonstrated by his devaluation of Georgetown East, Block 20E, Parcel 83, REM1, to the detriment of the Plaintiffs and for the benefit of himself, the First and Third Defendants.*

- 10. *An order to rescind the agreement signed by the Plaintiffs, and dated 25 November, 2011, on account of the fact that, the said agreement was signed by the Plaintiffs, only because of their belief and reliance upon misrepresentations, deceit and fraud, made by the First and Second Defendants to the Plaintiffs, in the form of several assurances, among them development housing project, between the First Defendant and the Plaintiffs. Reliance upon this negligent misstatement and or misrepresentation was manifested by the deceitful actions of the First and Second Defendants, and which deceit caused the Plaintiffs to sign all documents presented to them by the First and Second Defendants, in the absence of the Plaintiffs having the benefit of, or being advised by the First and Second Defendants to seek, independent legal advice.*

- 11. *An Order to Rectify the Land Register pursuant to section 140(1) of the Registered Land Law (2004 Revision) and the Land Adjudication Law (1977 Revision) by removing from the said Land Register, the name of Satin Wood Gate, as the registered title holder of Georgetown East, Block 20E Parcel 83 REM1.*

- 12. *An Order granting possession to the Plaintiffs, and for the Plaintiffs to be re-registered as the legal and beneficial title holders of Georgetown East, Block 20E Parcel 83 REM1.*

- 13. *An Order rescinding the transfer of Georgetown East, Block 20E, Parcel 83 REM1, by the First Defendant, to Satin Wood Gate Ltd.*



1 14. *An Order for pre-judgement and post-judgement interest on General,*
2 *Compensatory and Exemplary damages in accordance with the Judicature*
3 *Law and at a daily rate of interest established at the discretion of this*
4 *Honourable Court, together with Court costs and legal fees.*

5
6 15. *Such further and other relief as this Honourable Court may deem just and*
7 *equitable.”*
8

9 The essence of the Plaintiffs’ claim was their assertion that there had been an
10 agreement between themselves and the First Defendant to consolidate the loan or
11 overdraft facility of the Plaintiffs’ company Hycam Ltd. with the Plaintiffs’ personal
12 loan facility. Integral to this agreement was a proposed housing development to be
13 built on George Town East, Block 20E Parcel 83 REM 1. The Plaintiffs asserted
14 that the parties agreed to enter into this development as a joint-venture; however
15 the Plaintiffs were eventually *edged out of the deal* due to actions which were
16 fraudulent and dishonest. The Plaintiffs asserted that acting in good faith; they
17 signed documentation presented to them including a transfer of the property
18 registered at George Town East, Block 20E Parcel 83 REM 1 to the Third
19 Defendant.

20 The Defence of the First Defendant disputed many of the specifics of the Plaintiffs’
21 allegations. Summarised at the most basic level, it refuted the Plaintiffs’ assertion
22 that there had ever been an agreement between the parties to enter into a joint
23 venture. It was asserted that at all times the relationship between the First
24 Defendant and the Plaintiffs was that of banker and customer. Further, it
25 referenced the charges that the First Defendant held over the properties: George
26 Town East, Block 20E Parcel 83 REM 1; Prospect, Block 22E Parcel 412 H1 and
27 Prospect, Block 22E Parcel 412 H8. The First Defendant asserted that the
28 Plaintiffs had a poor repayment history and that discussions were held concerning
29 the consolidation and refinancing of the loans. The First Defendant further
30 asserted that although deep consideration was given to the Plaintiffs’ proposals
31 concerning the use of their property for development, at no point did the First



1 Defendant commit to funding any such development. Eventually, the First
2 Defendant took steps to have a Receiver appointed for all three properties. The
3 First Defendant denied that there was any fraudulence involved in the transfer of
4 George Town East, Block 20E Parcel 83 REM 1.

5

6 **Summons to Set Aside Service**

7 There were three summonses before the Court. On behalf of the Second, Third
8 and Fourth Defendants a Summons to Set Aside Service was filed on October 10,
9 2014. It applied for the following:

10 “ 1. *An order pursuant to GCR Order 12/8(1) setting aside service of the Writ*
11 *of Summons herein on the 2nd Defendant on 15 September 2014 and on*
12 *the 3rd and 4th Defendant on 17 September 2014, and to the extent may be*
13 *necessary declaring that the Writ of Summons herein has not been duly*
14 *served upon them.*

15
16 2. *The costs of this application and such further and other relief as to this*
17 *Honourable Court may seem just.*

18
19 **THE GROUNDS** for this application are as follows:

20
21 1. *That the Writ of Summons with Statement of Claim endorsed thereon was*
22 *issued on 17 August 2012.*

23
24 2. *No order was made at any time extending the validity of the Writ of*
25 *Summons for Service.*

26
27 3. *That on 15 February 2013 an Order was granted in the within action by*
28 *Henderson J. staying all proceedings by the Plaintiff pending payment on*
29 *account of the 1st Defendant's costs incurred in another action of*
30 *\$1,500.00.*



- 1 4. On 11 August 2014 the 1st Plaintiff delivered a cheque in the sum of
2 \$1,500.00 drawn on 1st Plaintiff's account with the 1st Defendant in
3 settlement of the 1st Defendant's costs so ordered.
4
5 5. On 27 August 2014 the Plaintiffs filed a Notice of Intention to Proceed
6 pursuant to GCR Order 3/6;
7
8 6. On 15 September 2014 the Plaintiffs caused the Writ of Summons to be
9 served on the 2nd and 3rd Defendants and on 17 September 2014 on the
10 4th Defendant.
11
12 7. On or about 1 October 2014 the 1st Plaintiff's cheque in the sum of
13 \$1,500.00 in settlement of the costs ordered was returned dishonoured
14 and endorsed "Refer to drawer".
15
16 8. Such further and other grounds as disclosed by the affidavit filed in
17 support of this application, and as counsel may advise and this
18 Honourable Court permit. "

19
20 Counsel for the Defendants referred to the grounds for the application contained in
21 the Summons. It was essentially submitted that proper service had not been
22 effected on the Second, Third and Fourth Defendants on the basis that the validity
23 of the Writ had not been extended when it was sought to serve these defendants.
24 Additionally due to an Order of the Grand Court made on 15th February 2013;
25 there was a stay in the proceedings unless and until costs of another action had
26 been paid by the Plaintiffs to the First Defendant. Although a cheque had been
 issued on 11th August 2014, it was subsequently dishonoured. It was submitted
 that as a result, the Notice of Intention to Proceed which was filed by the Plaintiffs
 on 27th of August 2014, was not properly served on 16th September 2014.



1 Affidavits of Service filed by a Bailiff of the Grand Court, established that the
2 Second and Third Defendants were served with the Writ of Summons and
3 Affidavits of the Plaintiffs on the 15th September 2014 and that copies of these
4 documents were served on the Fourth Defendant on 16th September 2014.

5
6 In his Affidavit filed on 23rd October 2014, the First Plaintiff acknowledged that
7 grounds "3", "4" and "7" as stated in the Summons was accurate. He explained
8 that the cheque was dishonoured due to the negligence of an employee who had
9 not made deposits to the relevant account on which the cheque was drawn in a
10 timely manner.

11
12 The First Plaintiff also explained that having issued the Writ of Summons on 17th
13 August 2012, he had paid the relevant fees to ensure that all of the Defendants
14 would be served by Bailiff. He stated that he had only later learned that all copies
15 of the Writ of Summons had been served on the First Defendant. He stated that
16 the error having been discovered, Judicial Administration had given him an
17 undertaking to ensure that the relevant documents would have been copied and
18 served on the other Defendants.

19
20 The First Plaintiff's affidavit is silent concerning the date that he made the
21 discovery concerning the improper service and when it was he received an
22 undertaking from Judicial Administration concerning the re-service of the
23 documents.

24
25 **Conclusion**

26
27 Order 6 Rule 8 of the Grand Court Rules is clear. The Writ of Summons having
28 been issued on 17 August 2012, it would expire within four months of that date
29 unless its validity was extended by Order of the Court. There is no assertion that
30 any such application for an extension was ever made.



1 It is not clear when the First Plaintiff discovered that an error had been made.
2 Previous Counsel filed an Acknowledgment of Service and a Defence on behalf of
3 the First Defendant on 7th September 2012 and 24th September 2012 respectively.
4 There is no suggestion that any such documents were filed on behalf of any of the
5 other Defendants. Nor were any steps taken by the Plaintiffs to capitalise on any
6 default by the other Defendants.

7
8 According to an Affidavit filed in support of this Summons, on 24th September
9 2014, over two years later, new Counsel for the First Defendant wrote to Counsel
10 for the Plaintiffs and pointed out the irregularity of service on the other Defendants.

11
12 The filing of the Notice of Intention to proceed on 27th August 2014 did not extend
13 the validity of the Writ of Summons. Additionally, this step was of no effect on the
14 date of filing, the cheque for costs, which had to be paid so as to lift the stay of
15 proceedings, having been dishonoured.

16
17 There is no basis on which it can be found that when the Plaintiffs sought to serve
18 the Second, Third and Fourth Defendants with the Writ of Summons and Affidavits
19 of the Plaintiffs on the 15th and 16th September 2014, the Writ of Summons was
20 still valid. It had long expired with no effective action having been taken to extend
21 its validity.

22
23 An order is made setting aside service of the Writ of Summons on the Second,
24 Third and Fourth Defendants with costs to be taxed or agreed awarded to those
25 Defendants.



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First Defendant's Summons to Strike

The main summons before the Court was the First Defendant's Summons to Strike which was filed on March 6, 2015. It applied for the following as set out below:

- “ 1. *An order pursuant to GCR Order 18/19(1) (a), (b), (c) and/ or (d) striking the Writ of Summons and Statement of Claim herein on the grounds that the Statement of Claim discloses no reasonable cause of action against the First Defendant, is scandalous, frivolous or vexatious, may prejudice, embarrass or delay the fair trial of the action, and/or is an abuse of the process of the Court; and*
2. *The First Defendant's costs of this application and such further and other relief as to this Honourable Court may seem just.*

THE GROUNDS for this Summons include the following:

1. *The Statement of Claim is based on allegations of misrepresentation, fraud and deceit allegedly on the part of the First Defendant, but despite a Request for Further and Better Particulars, the Plaintiffs have failed to provide cogent or any facts, much less evidence to support these serious allegations.*
2. *The Plaintiffs' fundamental claim that they were led by misrepresentation, fraud or deceit to believe they were entering into some form of joint venture with the First Defendant, is plainly and obviously unsustainable; is contradicted by the documentary record including express agreements signed by the Plaintiffs, has no chance of success and should be struck.*
3. *The proceedings herein and the allegations made are plainly scandalous, frivolous, vexatious and/or an abuse of process of the Court and should be dismissed.”*



1 The following is taken from Order 18 rule 19 of the Grand Court Rules:

2 (1) The Court may at any stage of the proceedings order to be struck out or
3 amended any pleading or the indorsement of any writ in the action, or
4 anything in any pleading or in the indorsement, on the ground that –

5 (a) it discloses no reasonable cause of action or defence, as the case
6 may be; or

7 (b) it is scandalous, frivolous or vexatious; or

8 (c) it may prejudice, embarrass or delay the fair trial of the action; or

9 (d) it is otherwise an abuse of the process of the court,

and may order the action to be stayed or dismissed or judgment to be
entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under
subparagraph (1)(a).



14 Counsel for the Defendants submitted that the Defendants sought to rely upon all
15 the subsections of paragraph (1).

16 Counsel submitted, with reference to paragraph 1(c), that the Statement of Claim
17 was rambling and incoherent and it was difficult to determine the factual
18 allegations upon which the Plaintiffs relied, in order to ground their claim. With
19 reference to paragraph 1(b), Counsel submitted that the allegations of fraud and
20 dishonesty which were made against the Defendants; particularly the Second,
21 Third and Fourth Defendants, were done without a shred of evidence and as such
22 were scandalous and vexatious.

23 The First Defendant particularly sought to rely upon sub-paragraphs (1)(a) and
24 (1)(d). Counsel submitted that notwithstanding the provisions of paragraph 2, the
25 Court was entitled to consider such evidence as the Plaintiffs had chosen to
26 incorporate into their Statement of Claim. Counsel asserted additionally, that under

1 sub-paragraph (1)(d) the Court was entitled to consider the documents which were
2 exhibited to the affidavit of Roger Brett Hill, which were described as being
3 contemporary and fairly uncontroversial.

4 It was noted by the Court that the Statement of Claim referred to documents,
5 correspondence and emails. Much of these were exhibited to the affidavit of the
6 First Plaintiff filed on August 17, 2012, and the Statement of Claim made reference
7 to those exhibits.

8 Counsel for the Defendants stated that the Statement of Claim asserted a
9 misrepresentation by the First Defendant and as a result of this, the Plaintiffs
10 signed the Consent Order dated April 26, 2011 and the agreement dated 28th
11 November 2011. It was also submitted that the Plaintiffs could not point to any
12 contract which had been concluded between themselves and the First Defendant.

13 Counsel for the Defendants challenged the assertion that there had been a
14 misrepresentation by the First Defendant. An actionable misrepresentation
15 requires four elements:



- (i) a statement of existing fact;
- (ii) on which the plaintiffs relied;
- (iii) which statement was false; and
- (iv) so that damage was caused.

20
21 According to Counsel for the Defendants, the Plaintiffs were complaining that
22 representations were made that the First Defendant would provide "some
23 unspecified finance on some unspecified terms and enter into some (unspecified)
24 joint-venture". Further, that after the appointment of the Receiver, the Plaintiffs
25 would have some "(unquantified) share in a company which would develop the
26 land". Counsel argued that the foregoing were not statements of existing fact and
27 were at best promises. Consequently this element of misrepresentation was not
28 satisfied. It was further argued that the Plaintiffs' alleged vague and ambiguous

1 statements as to what their position might be. However, a representation had to be
2 clear and unambiguous (Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce
3 Marketing Co Ltd [1972] AC 741).

4 Reference was made to emails dated April 11, 2011, exhibited by the Plaintiffs and
5 referred to in their Statement of Claim. As these emails preceded the signing of a
6 Consent Order dated April 26, 2011 (which order will be referred to later); it was
7 submitted on behalf of the Defendants that the content of those emails established
8 that at the last meeting, there had been the discussion of the project. Counsel
9 submitted that the contemporaneous documents contrasted with the oral
10 assertions of the Plaintiffs. The documents established that up to that point there
11 was no agreement on a joint venture. Further, the emails established that there
12 had been no misrepresentation.

13 Counsel further submitted that since the terms of any joint venture were not
14 specified, the Plaintiffs would not be able to establish that they had relied upon a
15 statement that there would be a joint venture with the First Defendant; further even
16 if any such statement of any intention was made; it could not be proved that the
17 statement was a false one.

18 Counsel for the Defendants also challenged the assertion by the Plaintiffs, that
19 having signed a Consent Order in April 2011 and the agreement dated 20th of
20 November 2011 which led to the sale of George Town East, Block 20E Parcel 83
21 REM 1; due to misrepresentations made to them, they suffered detriment and
22 damage due to their inability to proceed to develop the property with other
23 investors. It was submitted that documentation established that the Plaintiffs had
24 no other investors to partner with.

25 Further, pursuant to the Consent Order of April 2011 and the agreement of
26 November 2011, the relevant property was sold by the Receiver acting as the
27 Plaintiffs' agent. It was submitted that the Plaintiffs chose to ignore the
28 appointment of the Receiver whose position, status and actions were an absolute
29 bar to their claim.



1 Counsel for the Defendants described the claim of the Plaintiffs as being vexatious
2 and abusive as well as incredible based on the facts and the documents before the
3 court. It was asserted that the Plaintiffs had been in default under their loans for
4 many years and the First Defendant had an absolute right to appoint a Receiver in
5 April 2011 and the documentation referred to in the Statement of Claim establish
6 this. It was submitted that the Plaintiffs could not point to any advantage to the
7 First Defendant due to any misrepresentation and pressure. Any profit would be
8 received by the Third Defendant. It was submitted that there was not any factual
9 support or evidence for the Plaintiffs' assertion that there was a conspiracy
10 between all the Defendants.

11 It was also asserted again with reference to the Statement of Claim and the
12 documentation, that after signing the agreement in November 2011 the Plaintiffs
13 did nothing to suggest that they believed that they had a continuing role to play in
14 the development. It was submitted that all enquiries were done in reference to the
15 repayment of the loan which had been reduced to CI \$304,000.

16 Citing National Westminster Bank plc v Daniel [1994] 1 All ER 156, it was
17 submitted that due to inconsistencies between contemporaneous documents and
18 the claim being made, the assertions of the Plaintiffs were incredible and there
19 was no reasonable probability that they had a reasonable or bona fide claim.



20
21 **The Plaintiffs' Response**

22
23 Counsel for the Plaintiffs based his response on the assertion by the Plaintiffs that
24 the parties had agreed to develop George Town East, Block 20E Parcel 83 REM 1
25 as a joint-venture; however the Plaintiffs acting in good faith, were tricked out of
26 their property. According to Counsel the action before the courts was meant to
27 rectify an injustice which had been done.

1 Counsel for the Plaintiffs submitted that the application filed by the First Defendant
2 to strike out the Plaintiffs' action was the latest in a series of events by which the
3 Defendants sought to frustrate and further victimise the Plaintiffs.

4 Counsel for the Plaintiffs submitted that much of the content of the supporting
5 affidavit filed on behalf of the Defendants was untrue. Additionally, he contended
6 that even where the Plaintiffs entered into agreements or signed documents, they
7 did this on the assurance of the Defendants that these were the correct
8 procedures. Over and over again Counsel emphasised that the trust which the
9 Plaintiffs had in the First Defendant was misplaced and continually abused. He
10 disputed the claim that the First Plaintiff was "an astute businessman" as the First
11 Defendant claimed.

12 Counsel for the Plaintiffs submitted that the First Defendant had a duty to ensure
13 that the Plaintiffs were fully aware of the implication of that which they were asked
14 to do. He challenged the submission which was made that the Plaintiffs had
15 experience in loan documentation and property development which were sufficient
16 to cause them to proceed without the assistance of their own attorney at law.
17 Counsel cited the case of Barclays Bank v O'Brien [1994] 1 A.C. 180 as authority
for the proposition that a wife in particular should be encouraged by financial
institutions to seek independent legal advice prior to signing mortgage documents.
It was Counsel's position that the ethical and professional thing for the First
Defendant to have done was to insist that both Plaintiffs seek independent legal
advice before entering into any transactions with it.

23 Counsel submitted that the stress and frustration suffered by the Plaintiffs due to
24 the Defendants' actions resulted in their inability to continue to maintain the family
25 financially within the Cayman Islands. As a result of this, the family was forced to
26 relocate.

27 Counsel emphasised that the First Plaintiff was an honest witness and that this
28 would be obvious at any trial of the issues. It would be clear that when the First
29 Plaintiff asserted that he acted to his detriment due to verbal assurances which



1 were given to him, this would be accepted by the courts. Consequently, it was the
2 contention on behalf of the Plaintiffs that justice required that the matter go through
3 to trial so that evidence could be heard from the witness box. This it was submitted
4 would be the best test of obtaining the truest understanding of what took place.

5
6 **Conclusion**

7 As stated previously, the Defendants rely on all four limbs of paragraph 1 of GCR
8 O.18 r.19 which is reproduced below for ease of reference.

9 (1) The Court may at any stage of the proceedings order to be struck out or
10 amended any pleading or the indorsement of any writ in the action, or
11 anything in any pleading or in the indorsement, on the ground that –

12 (a) it discloses no reasonable cause of action or defence, as the case
13 may be; or

14 (b) it is scandalous, frivolous or vexatious; or

15 (c) it may prejudice, embarrass or delay the fair trial of the action; or

16 (d) it is otherwise an abuse of the process of the court,

17 and may order the action to be stayed or dismissed or judgment to be
18 entered accordingly, as the case may be.

19 (2) No evidence shall be admissible on an application under subparagraph
20 (1)(a).

21 As is often the case with these applications, there is some overlap with the
22 grounds.

23 With respect to paragraph 1(b) Counsel for the Defendants referred to the lack of
24 evidence to ground the allegations of fraud and dishonesty; as being scandalous
25 and vexatious, especially towards the Second, Third and Fourth Defendants. The



1 Plaintiffs alleged that the Third Defendant was the beneficiary of the sale of their
2 property and stood to realise profits from its development, which idea had been
3 promulgated by the Plaintiffs. The Plaintiffs also alleged that the parties who were
4 involved with the Third Defendant were persons who had been involved with the
5 First Defendant and as such, had played a part in the scheme to defraud the
6 Plaintiffs.

7 The Plaintiffs alleged that the Fourth Defendant, having previously produced one
8 valuation for the property which was in excess of two million dollars, subsequently
9 produced another valuation for a much lower figure to the detriment of the
10 Plaintiffs. Based on the documentation before the court, it would appear that the
11 Plaintiffs have quite a hurdle to overcome in order to prove these allegations. It
12 cannot be said however, that these allegations are not relevant to the Plaintiff's
13 claim. Consequently I do not find that as it relates to the Third and Fourth
14 Defendants that the allegations are scandalous or vexatious.

15 The specific allegation against the Second Defendants is that he along with the
16 First Defendant urged the Plaintiffs to sign documentation which led to the transfer
17 of their property and which ultimately was to their detriment. While such an
18 allegation is relevant, at all times the Plaintiffs acknowledged that the Second
19 Defendant was employed to represent the First Defendant in his professional
20 capacity as an attorney-at-law. As such, it cannot be credibly argued that the
Second Defendant owed any duty to the Plaintiffs. This is compounded by the fact
that throughout the voluminous allegations and documentation contained in and
attached to the Statement of Claim, there is no specific reference to any act
carried out by the Second Defendant which could be described as fraudulent.

25 In *Barclays Bank v O'Brien* the court held that a wife who was induced by
26 misrepresentation or other legal wrong to stand as surety for her husband's debt
27 had an equity as against him to set aside the transaction and that right was
28 enforceable against a third party which had actual or constructive notice of the
29 circumstances giving rise to the equity. *In that particular case*, the bank, on the
30 facts, was fixed with constructive notice of the misrepresentation and as such it



1 was determined that the wife was entitled as against the bank, to set aside the
2 legal charge on the matrimonial home.

3 Here, one has to *surmise* that the Second Defendant, acting in his professional
4 capacity as advisor to the First Defendant, made or facilitated a misrepresentation.
5 There are no specifics given. Taken at its highest the allegation is that the Second
6 Defendant urged the Plaintiffs to sign documents in their capacity as customers of
7 the First Defendant, who he represented. To describe this as fraudulent, without
8 more, is scandalous and it is concluded that it is wholly improper to allow the
9 action to stand against the Second Defendant.

10 With reference to paragraph 1(c), it cannot be denied that the Statement of Claim
11 is a convoluted and rambling document. Although Counsel for the Defendants
12 submitted that the Plaintiffs had access to legal advice, the document was not filed
13 by an attorney-at-law. While the allegations are difficult to make out, this is a
14 matter which could perhaps be cured by an amendment to the documents. I do
15 find that the allegation that the pleadings "*may prejudice, embarrass or delay the*
16 *fair trial of the action*" falls just short of proof.

17 A stronger claim is presented that the pleadings disclose no reasonable cause of
18 action. Pursuant to paragraph "(2)" and the case law, it is well settled that only the
19 content of the Statement of Claim can be considered when dealing with paragraph
20 1(a). The manner in which the instant Statement of Claim was put together
21 involved quotations from and the exhibition of, documents which were part of the
22 evidence in the case. This resulted in all of these matters falling for consideration
23 as a part of the Statement of Claim.

24 As between the Plaintiffs and the First Defendant, there were disputes concerning
25 some of the facts. Additionally, it was hardly surprising that each side rendered its
26 own interpretation concerning the agreed facts in the case. The issue however
27 was whether or not the First Defendant had satisfied the court concerning the
28 provisions of GCR Order 18 rule 19(1)(a).



1 It is clear from the documentation produced that there was discussion between the
2 parties about the development of the property registered at George Town East,
3 Block 20E Parcel 83 REM 1 against the background of the Plaintiffs' indebtedness
4 to the First Defendant. There are questions about what was said and the
5 circumstances of such discussion. This however is not the venue to answer those
6 questions.

7 Even taking an expanded view of the pleadings by interpreting the documents
8 included in the Statement of Claim, this does not lead to a determination that the
9 Statement of Claim discloses no reasonable cause of action. Admittedly, this is
10 applying the most minimal standard for determination.

11 This Court was restricted to a consideration of the content of the Statement of
12 Claim when considering the provisions of GCR Order 18 rule 19(1)(a). I concur
13 with the submissions of Counsel for the Defendants that GCR Order 18 Rule
14 19(1)(d) allows for an examination of the evidence. In particular I refer to the
15 content of the Affidavit of Roger Brett Hill filed on July 3, 2015 and the documents
16 exhibited thereto.

17 While the documents exhibited with the Statement of Claim included the
18 Originating Summons filed by the First Defendant against the Plaintiffs in another
19 Cause, seeking the appointment of a Receiver and the Acknowledgments of
20 Service signed by each of the Defendants consenting to such said appointment,
21 the Formal Consent Order filed with the Court and signed by both Defendants was
22 missing.

23 This was a significant lapse because the Consent Order was perfected by the
24 Grand Court of the Cayman Islands on 19th May 2011 and this was never
25 challenged. By the Originating Summons, the First Defendant had sought to
26 exercise the powers granted to it by charges over all three properties; which
27 charges had been signed by the Plaintiffs as collateral for loans. As such, the First
28 Defendant was exercising a remedy that it was entitled to use.



1 Under the Consent Order, the First Defendant was granted the right to appoint a
2 Receiver to act as agent for the Plaintiffs herein and to act as an officer of the
3 Court. That Receiver, as is usual with such orders, had the power to enter into
4 possession of the three properties and to market and sell the said properties.
5 There is no dispute that Mr. Leonard Ebanks was appointed as Receiver.
6 Thereafter it was the Receiver who sold the Plaintiffs' property to the Third
7 Defendant in satisfaction of most of the debt owed to the First Defendant by the
8 Plaintiffs. The agreement to sell and the Transfer were also signed by the
9 Plaintiffs.

10 There is no suggestion that the Order of the Grand Court was ever sought to be
11 overturned. Further there is no suggestion that any steps were taken to remove
12 the person appointed as Receiver. Finally, despite the fact that it was the Receiver
13 who sold the property and not the First Defendant, the Receiver was not joined as
14 a Defendant in this action.

15 The foregoing operates as a serious challenge to the assertion by the Plaintiff's
16 that they signed documents only at the urging of the First and Second Defendants.
It also establishes that the First Defendant merely pursued its rights in relation to
the collateral that it held. Thereafter, the acquiescence of the Plaintiffs as signified
by the signatures on the Acknowledgements of Service, the Consent Order, the
agreement to transfer the property to the Third Defendant and the actual transfer
of land to the Third Defendant stands in stark contrast to their assertions that they
did this while thinking that they would play a part in the development of the
property.

22 It is noted that in his email dated April 11, 2011 to officers of the First Defendant,
23 the First Plaintiff expressed disappointment with a meeting held on April 7, 2011.
24 The email stated that the details that he had expected to discuss did not arise and
25 that instead he was asked to sell his land. He expressed a hope that he could
26 develop the land as had been previously discussed. As submitted by Counsel for
27 the Defendants, it is clear that as of that date, the Plaintiffs were aware that no
28 terms had been agreed for any joint venture with any of the Defendants.
29
30



1 Since the Consent Order can be considered upon a review of all the
2 circumstances of the case, it changes the nature of what was previously regarded
3 as merely weaknesses in the Plaintiffs' action against the Defendants.

4 The lack of particularization of any fraud on the part of the Second Defendant, the
5 clear exercise of existing powers by the First Defendant in seeking the
6 appointment of a Receiver, the subsequent sale of the relevant property to the
7 Third Defendant by the Receiver and not the First Defendant and the email of April
8 11, 2011; significantly weaken the allegations made by the Plaintiffs. All of the
9 foregoing, coupled with the Plaintiffs' acquiescence to the Consent Order, which
10 they rather obviously omitted to exhibit, further weakens the Plaintiffs' case. All of
11 this significantly weakens the Plaintiffs' chances for success at trial.

12 To allow the matter to go forward in light of all the foregoing would amount to an
13 abuse of the process of the court. Consequently, this action is dismissed with
14 costs to be agreed or taxed awarded to the Defendants.

15 In the third Summons before the Court which was filed on November 3, 2014, the
16 First Defendant sought an Unless Order should the Plaintiffs fail to provide further
17 and better particulars as requested. In light of the findings on the Summons to
18 Strike, no order is made on this third Summons.

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20 

21
22 Miss Nova Hall
23 Judge of the Grand Court (Acting)
24 9th May 2016.
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