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IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN – Civil

CAUSE NO. 249 OF 2005

BETWEEN: **SOUTHDOWN REGENCY DEVELOPMENT LTD.**

PLAINTIFF

AND: **CAYMAN NATIONAL BANK LTD.**

DEFENDANT

Appearances: **Mr. Stephen Hall-Jones with Mr. Stuart Diamond of Diamond Law Associates for the Plaintiff**
Ms. Colette Wilkins of Truman Bodden & Company for the Defendant

Before: **Hon. Justice Levers**

Heard: **February 28 and March 5, 2007**

JUDGMENT

The Defendant Bank brings this application under *Grand Court Rule Order 18 Rule 19* 1 (b) alternatively under the *Grand Court Rules Order 14 Rule 12* on the basis that the Plaintiff's case is without any solid basis and is frivolous or vexatious or in the alternative, that the primary documents in the case show the Plaintiff's case to be unsustainable and that to allow it to proceed would be a waste of costs and time.

The Grand Court Rules

Order 18 Rule 19 (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that –

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

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

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

(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).

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.

Order 14 Rule 12 reads (1) Where in an action to which this rule applies a defence has been served by any defendant, that defendant may, on the ground that the plaintiff's claim has no prospect of success or that the plaintiff has no prospect of recovering more than nominal damages, apply to the Court for the plaintiff's claim to be dismissed and judgment entered for that defendant.

(2) An application under this rule may not be made on the ground that part only of the plaintiff's claim has no prospect of success or that a plaintiff has no prospect of recovering more than nominal damages in respect of part only of his claim.

(3) This rule applies to every action begun by writ in the Court other than one of a kind mentioned in rule 1(2).

Against those rules it is now convenient to look at the Statement of Claim.

The allegations in the Statement of Claim are that the Plaintiff and the Defendant came to an agreement in the Defendant's standard form of banking agreement and that the express and/or implied terms of the said banking agreement were that the Defendant would conduct itself in performing its duties and obligations to the Plaintiff under the said banking agreement; namely (1) to act in good faith pursuant to the fiduciary duty owed by a bank to its customers; (2) at all times to act reasonably and fairly towards the Plaintiff in the conduct of the said banking affairs; and (3) not to unjustly enrich itself at the expense of the Plaintiff. Further, the Plaintiff alleges that there was a subsidiary oral agreement during the relationship and that as a result of that oral agreement two things should have come about.

First that the Plaintiff was allowed to sell a property known as the Lime Tree Bay which was also charged to the Defendant and secondly that the Plaintiff would be allowed to retain for its use the proceeds of the sale at the Lime Tree Bay property in the sum of $42,000 and that the balance of the sale proceeds would be applied to reducing the arrears in respect of the said loan that was obtained initially on the 20th of June, 2002. That upon receipts of the proceeds of sale, the Defendant would apply the normal rate of interest to the said loan. It is further alleged by a second oral agreement, the initial written agreement in June 2002 was further varied to extend the period of repayment to twelve years and to reduce the monthly payments due to the Defendant by agreed sums.

The allegation in the Statement of Claim is that there was a breach of contract and a breach of duty of utmost good faith resulting in injury particulars of which are given at paragraph 15 of the Statement of Claim.

15. By reason of the breaches of contract and fiduciary duty owed to the Plaintiff by the Defendant hereinbefore pleaded the Plaintiff has suffered injury, loss and damage:

PARTICULARS OF INJURY LOSS AND DAMAGE

A. Under paragraph 10.2

The monthly payments charged from September through December should have been US $16,000 but instead the Plaintiff was charged US $19,542 for each said month. Therefore the Plaintiff was overcharged approximately US $10,626.00

B. Under paragraph 10.3
The difference between the interest charged to the Loan at the default rate and the interest which the Defendant ought to have charged in discharge of its duties and contractual obligations to the Plaintiff in the sum of US $29,000

C. Under paragraph 12
The loss of three month's rental income from the leased premises in the Property in the sum of US $81,000

D. Under paragraph 13
CI $558,387 x 2 cents = a loss of CI $11,167.74 or US $13,619.20 (converted at .82)

E. Under paragraph 14
The amount of additional stamp duty payable in respect of the mortgage obtained to effect the repayment of the Loan in the sum of US $12,753

The Defendant comes before this court and submits that based on that Statement of Claim and looking at the evidence presented to the court the allegations in the pleading are scandalous, frivolous, vexatious and/or an abuse of process and that the Plaintiff has no chance whatsoever of

succeeding on this claim. It is true to say that Order 18 Rule 19 (a) prohibits the court from looking at evidence if the ground for striking out is that there is no reasonable cause of action. However, on the other grounds namely that it is scandalous, frivolous or vexatious or that it is an abuse of process the court is entitled to look at the evidence and decide on the evidence whether it supports the cause of action or whether it is unsustainable. The points raised are as follows:

> (1) that the Plaintiff has no chance whatsoever of succeeding on this claim;
>
> (2) that it is not sufficient for the Plaintiff to plead that there was a duty of good faith but that the Plaintiff would have to plead and prove actionable bad faith on the part of the bank;
>
> (3) that the Plaintiff, a commercial concern seeks to avoid the provisions of the contractual and security arrangements between it and the Defendant by pleading that the Defendant must act reasonably and fairly but that this is an unsustainable argument.

The Defendant relies on the principal enunciated by Sir Wilfred Green in the case of *Knightsbridge Estate Trust Limited v. Byrne (1938)* 4 All ER at page 618:

> "an argument such as this requires the closest scrutiny a decision to that effect would in our view involve an unjustified interference with the freedom of businessmen to enter into agreements best suited to their interests and would impose upon them a term of reasonableness laid on by the courts without reference to business realities of the case. Equity, however,

> does not reform mortgage transactions because they are unreasonable. It is concerned to see two things
>
> (1) that the essential requirements of a mortgage transaction are observed and;
>
> (2) that oppressive unconscionable terms are not enforced subject to this it does not in our opinion interfere."

The Plaintiff is saying that the Bank in charging interest at a high rate was indeed being oppressive and unconscionable (although those words are not used). The claim is for a breach of duty of utmost good faith.

The Defendant is now saying that there is nothing pleaded to the effect that the bank was unjustly enriched in this case and that the evidence will show that great indulgence was shown by the bank to the Plaintiff because the account was never up to date. The emails however, seem to require interpretation. In September 2004, for example, the bank's actions may indicate that the loan was up to date.

The Defendant is also saying that the alleged breaches in the Statement of Claim caused no injury or loss and that the breach alleged (the sum of $42,000 not being paid over) caused no injury as the bank had expected at least $200,000 from the sale. Secondly, it says that the loan was never

extended and that the documents make it clear that it wasn't. That in the premise there could be no breach of the oral agreement. Thirdly, that the default interest charged was due and payable under the terms of the Debenture. Fourthly, that there is no allegation that the interest charged was set out dishonestly, capriciously and/or arbitrarily and that there can be no term which can be implied that the interest rate charged was unlawful. No submissions have been made on the fact that the interest rates charged could amount to penalty interest rates which would not be allowed by the court. This latter point has not been directly pleaded but it has been pleaded generally that under paragraph 14 where a general breach of fiduciary duty is alleged in applying the default rate of interest to the entire balance of the said loan.

The Plaintiff, on the other hand, makes the following submissions: It submits that paragraph three of the Statement of Claim makes it clear that there was an agreement between the bank and Plaintiff. Mr. Hall-Jones concedes that it was not necessarily a fiduciary agreement initially but a contractual one. Although he does not place a great deal of reliance on the question of fiduciary obligations or duty, he says that this relationship developed into a fiduciary one. On behalf of the Plaintiff, he further submits

that his case is more than that and that even if the fiduciary duty aspect of the case is a weak one, paragraph 4 (b) of the Statement of Claim alleges that the bank had a duty at all times to act reasonably and fairly towards the Plaintiff in the conduct of the banking affairs. That four affidavits that had been filed were diametrically opposed to each other which requires a trial to ascertain the truth of the matter. He says that at this stage the merits of the case need not be gone into in great detail but that the email exchanges go to show that there is an arguable case to be met. That Mr. Carter on behalf of the Defendant bank had the authority to come to an oral agreement with the Plaintiff's representative, Mr. Menkes. He submits that all the emails between the parties were predicated on the basis that they had reached an agreement with each other. He says that the evidence confirms that Mr. Menkes, can be said to have believed that there was an agreement. If that is an inference that a trial judge could reach he says, then there is an arguable case. If indeed it can be a reasonable inference on the evidence that there was an agreement, then there is an arguable case. He says the Defence crystallizes the issues. He strenuously urges the court to rule that it cannot hold that there is absolutely no possibility of success. None of the emails he submits can bear only one inference.

An example given by him is that despite the bank's policy being that delinquent accounts are not to be put on the internet (the evidence confirms this), this account had been put on the internet, thereby confirming that the account was up to date. The court could therefore reasonably hold that the Plaintiff's case can succeed on the unnecessary interest charged. Another example is the question of the breach regarding the insurance payments being an arguable case because of the Defendant's connection with the insurance company and the Defendant's admitted desire to protect the insurance company thereby resulting in the delay in the insurance settlement which caused the Plaintiff's a loss.

The Law

The court may order the proceedings to be struck out or amended in a pleading or the endorsement of any writ in the action or anything in any pleading or in the endorsement on the grounds that:

(a) it discloses no reasonable cause of action or

(b) it is scandalous, frivolous or vexatious;

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

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

The court of course has inherent jurisdiction to strike out pleadings which are an abuse of its process. It is well settled that the jurisdiction to strike out must be sparingly used, as its exercise deprives the party of the normal procedure for establishing rights by way of trial with the discovery and oral evidence tested by cross-examination. On an application, the court's function is to decide whether the case is so plainly unarguable that there is no point in having a trial.

Allegations in a pleading are scandalous if:

(a) they impute dishonesty, bad faith or other misconduct against another party or anyone else;

(b) they are immaterial or irrelevant.

"The mere fact that these paragraphs state a scandalous fact does not make them scandalous," Brett L. J. in *Millington v. Loring (1881)* 6 Q.B. D. 190. Striking out for abuse of process is a power which any court of justice must possess to prevent misuse of its procedure in a way which although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it or would otherwise bring the administration of justice into disrepute among right thinking people." Lord Diplock in *Hunter v. The Chief Constable of the West Midlands Police (1982)* A.C. 529 at page 536.

The power to strike out is a draconian remedy and I anticipate that it would be fairly unusual for a case to be clear and obvious enough to be struck out on this basis. The reluctance to strike out on the merits in this way is reiterated by Rattee, J. in *Re Bank of Credit and Commerce International S.A. 1994* (the Times 5th of May, 1994).

According to *McDonald Corporation v. Steele 1995* (3 All ER at page 615 C.A.), it is an abuse of process to plead a case which was incurably incapable of proof. It must be the test for striking out under the headings brought by the Defendant in this case.

The Defendant also asks for Summary Judgment. A litigant may claim for Summary Judgment only after the Defendant has filed either an acknowledgement of service or Defence. The standard for entering Summary Judgment is decided applying the test of whether the Respondent has a case with a real prospect of success which is considered having regard to the overriding objective of dealing with the case justly.

The question whether there is a prospect of success is not approached by applying the usual balance of probabilities standard of proof. It appears to be settled by *E.D. and F. Man Liquid Products Limited v. Patel (2003)* (CPLR page 384) that the burden rests on the Applicant to prove that the Respondent's case has no real prospects of success. In *Swain v. Hillman (2001)* (1 All ER at page 91) Lord Woolfe M.R., said that the words "no real prospect of succeeding" did not need any amplification as they spoke for themselves. The word "real" directed the court to the need to see whether there was a realistic as opposed to a fanciful prospect of success. The phrase does not mean real and substantial prospect of success. Nor does it mean that Summary Judgment will be granted only if the claim of a Defence is bound to be dismissed at trial." The learned judge went on to say that Summary Judgment applications have to be kept within their proper role. They are not meant to dispense with the need for a trial where there are issues which should be considered at trial dealing with the question of abuse of process. In my view the court is to make a broad brush based judgment taking account of all the interests involved and all the facts focusing on the crucial question whether in all the circumstances the claimant is misusing or abusing the process of the court.

In this case the debt has been paid in full. The bank has been satisfied. The Plaintiff does not reap any benefit by mounting this litigation save and except the risk that it could go against him. I hold that this is not an abuse of process. Are the actions frivolous and vexatious? In *Wenlack v. Maloney (1965)* 1 WLR at page 1238 the application was refused as it required a minute and protracted examination of documents. The only way the Defendant could succeed is if on the documents in this case it was abundantly clear that the case will not succeed.

Where several of the grounds stated in the rules in striking out were urged as in this case, the court must take a broad brush approach and simply ask whether the case was a plain and obvious one for striking out rather than considering each ground in detail. The court must also ask itself whether the pleadings are scandalous, frivolous or vexatious. Whether a pleading is frivolous or vexatious, depends, on all the circumstances at play and the considerations of public policy and the interest of justice which may be very material.

In this case whether there was an oral agreement or not must be a matter for *viva voce* evidence and whether in fact based on the agreement and the belief

of the Plaintiff's representative that an agreement had been concluded he acted in accordance with that agreement, or in part performance of it.

The emails will have to be examined carefully, the emails will have to be explained by both parties and in the absence of any definitive evidence this court would find itself in some difficulty in holding that the Plaintiff's case was frivolous or vexatious. The fact that it is weak in certain aspects on the documents does not mean that there is an unarguable case. It must be plainly and obviously unarguable for this application to succeed. Counsel for the Defence, for example, states that the Defendant denies that there is an oral agreement and that the documents prove that there was not, but that cannot possibly be stated as simply as that. The emails could be interpreted to mean that Mr. Carter himself fulfilled the alleged oral agreement and submitted it in writing to the bank Loan Board for approval. The Defendant's counsel submits that as the bank's Loan Board did not come back with a response, the Plaintiff's could not possibly allege that there was a breach of that oral agreement. However, the Plaintiff's case is that Mr. Carter had the authority to come to this oral agreement and based on that belief, the Plaintiff's representative acted to his detriment. He believed the request to the Loan Board was purely to affirm what Mr. Carter had assured

him was a binding agreement. Evidence would have to be lead to show that this was not the case by Mr. Carter giving *viva voce* evidence. The Plaintiff would need to be cross-examined to show that the Plaintiff did not act as alleged in the affidavit to his detriment but that he knew from his various letters and actions that there was no binding agreement. That must be arguable and triable. Bearing in mind that a cause of action with some prospect of success should not be struck out, the court must look at the allegations as to the interest charged, the default interest charged and the need for the bank to act reasonably and fairly towards the Plaintiff in the conduct of the said affairs. If that has not been pleaded as oppressive, it can be covered by an amendment.

Counsel for the Defence once again says that that cannot be so because the Plaintiff is merely seeking to avoid the provisions of the contractual and security arrangement between them. Counsel also says that the insurance payment being slightly delayed did not cause any prejudice or harm to the Plaintiff and that in fact it was only a question of four weeks delay in payment. Can it be said that the evidence will reveal that the insurance company's interest was being protected by the bank and not the Plaintiff's interest as evidenced in Mr. Carter's email and that therefore the bank

breached its contractual duty as per the banking agreement which had certain expressed and implied terms, to protect its customer? The answer could be in the affirmative and arguable.

I need also to address briefly the timing of this application. These should normally be made promptly within the time for delivering the next pleading. In *Halliday v. Shoesmith (1993)* 1 WLR 1 (C.A.) the Plaintiff successfully applied to strike out a substantial part of the defence in the counter claim at the start of the trial. On appeal it was held that an application made as late as the trial should only be entertained in very exceptional circumstances with clear consent by the other side and only if there is a valid explanation for applying at that late stage. The pleading was restored and the case remitted back for trial. In the case at hand, the summons to strike out was taken a year after the pleadings were closed. The reply was filed on 19th of July, 2005. The summons was filed on 20th of June, 2006. I make no point of the fact that from the date of the filing of the summons to strike out to the hearing, is also inordinately long. Counsel has explained to me that was no fault of either party. Whilst it is not material in this case, the court wishes to emphasize that expedition is important as not only does it save costs but it also saves administrative time.

The close of pleadings meant that there was a Summons for Directions to be taken out and the matter could have gone to trial as early as 2005. Some two years later the court has been faced with having to deal with the Summons to strike out in a matter that is ready for trial.

Having reviewed the evidence and having read the submissions, I rule that:

(a) the Summons to strike out is dismissed;

(b) the application for Summary Judgment is refused;

(c) the cost of the application to be the Plaintiff's to be taxed or agreed.

Dated this 12th day of March, 2007

Levers, J.
Judge of the Grand Court