

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



CAUSE NO. G 356 OF 2012

**BETWEEN:**

PHILLIP HYRE

FIRST PLAINTIFF

AND

KEVON HYRE

SECOND PLAINTIFF

AND:

**FIDELITY BANK (CAYMAN) LIMITED**

FIRST DEFENDANT

AND

PAUL SIMON

SECOND DEFENDANT

AND

SATIN WOOD GATE

THIRD DEFENDANT

AND

SIMON WATSON

FOURTH DEFENDANT

***Appearances:***

*Dennis Brady appearing for the Plaintiffs*

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

## **JUDGMENT**

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

### **The Parties to the Action**

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

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



## The Writ of Summons

The Writ of Summons herein was filed by the Plaintiffs in person. The indorsed Statement of Claim was an admittedly convoluted document which referred to and quoted other documents which were relied on for evidence. While it made for difficult reading, in it the Plaintiffs claimed the following relief:

- “ 1. Summary judgment and/or*
- 2. An Order (Injunction) restraining and prohibiting the First Defendant whether by himself, his servant or agent or otherwise, from any and all actions pursuant to Section 64(2) of the Registered Land Law (2004 Revision) the objective of which is to proceed to develop and or sell the several properties namely Block 20E, Parcel 83 REM1; owned by the Plaintiffs prior to, and which property the First Defendant held a legal charge over, and in relation to which, the First Defendant made a misrepresentation, knowingly, without belief in its truth, or recklessly, to the Plaintiffs, which misrepresentation was manifested by fraud and deceit, practiced by the First and Second Defendants, and which caused the Plaintiffs to unwittingly sign documents, the effect of which was to transfer the legal and beneficial title of the property identified as Georgetown East, Block 20E, Parcel 83 REM1 to the First Defendant, and who thereafter transferred the said property to the Third Defendant.*
- 3. An Order (Injunction) restraining and prohibiting the Third defendant whether by himself, his servant or agent or otherwise, from any and all actions, the objective of which is to proceed to develop the property known as Georgetown East, Block 20E Parcel 83 REM1 and to build dwelling houses thereon, and thereafter to sell the said dwelling houses.*



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



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.*
  
71. *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.*



14. *An Order for pre-judgement and post-judgement interest on General, Compensatory and Exemplary damages in accordance with the Judicature Law and at a daily rate of interest established at the discretion of this Honourable Court, together with Court costs and legal fees.*
  
15. *Such further and other relief as this Honourable Court may deem just and equitable.”*

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



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

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

### **Summons to Set Aside Service**

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

- “ 1. An order pursuant to GCR Order 12/8(1) setting aside **service** of the Writ of Summons herein on the 2<sup>nd</sup> Defendant on 15 September 2014 and on the 3<sup>rd</sup> and 4<sup>th</sup> Defendant on 17 September 2014, and to the extent may be necessary declaring that the Writ of Summons herein has not been duly served upon them.*
- 2. The costs of this application and such further and other relief as to this Honourable Court may seem just.*

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

- 1. That the Writ of Summons with Statement of Claim endorsed thereon was issued on 17 August 2012.*
- 2. No order was made at any time extending the validity of the Writ of Summons for Service.*
- 3. That on 15 February 2013 an Order was granted in the within action by Henderson J. staying all proceedings by **the Plaintiff** pending payment on account of the 1<sup>st</sup> Defendant's costs incurred in another action of \$1,500.00.*



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



Counsel for the Defendants referred to the grounds for the application contained in the Summons. It was essentially submitted that proper service had not been effected on the Second, Third and Fourth Defendants on the basis that the validity of the Writ had not been extended when it was sought to serve these defendants. Additionally due to an Order of the Grand Court made on 15<sup>th</sup> February 2013; there was a stay in the proceedings unless and until costs of another action had been paid by the Plaintiffs to the First Defendant. Although a cheque had been issued on 11<sup>th</sup> 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 27<sup>th</sup> of August 2014, was not properly served on 16<sup>th</sup> September 2014.

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

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

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

The First Plaintiffs affidavit is silent concerning the date that he made the discovery concerning the improper service and when it was he received an undertaking from Judicial Administration concerning the re-service of the documents.

### Conclusion

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



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

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

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

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

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



## 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:

- “ 7. *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.”*



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

- (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, 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).

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

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

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



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

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

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

Counsel for the Defendants challenged the assertion that there had been a misrepresentation by the First Defendant. An actionable misrepresentation 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.



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

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

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

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

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

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



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

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

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

### **The Plaintiffs' Response**

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



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

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

Counsel for the Plaintiffs submitted that the First Defendant had a duty to ensure that the Plaintiffs were fully aware of the implication of that which they were asked to do. He challenged the submission which was made that the Plaintiffs had experience in loan documentation and property development which were sufficient to cause them to proceed without the assistance of their own attorney at law. 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.

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

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



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

### **Conclusion**

As stated previously, the Defendants rely on all four limbs of paragraph 1 of GCR 0.18 r.19 which is reproduced below for ease of reference.

- (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, 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).

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

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



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

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

The specific allegation against the Second Defendants is that he along with the First Defendant urged the Plaintiffs to sign documentation which led to the transfer of their property and which ultimately was to their detriment. While such an allegation is relevant, at all times the Plaintiffs acknowledged that the Second Defendant was employed to represent the First Defendant in his professional 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.

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



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

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

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

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

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



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

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

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

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

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



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

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

The foregoing operates as a serious challenge to the assertion by the Plaintiffs 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.

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



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

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

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

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



Miss Nova Hall  
Judge of the Grand Court (Acting)  
9<sup>th</sup> May 2016.

