The Republic of Trinidad and Tobago

In the High Court of Justice
Sub-Registry, San Fernando

Claim No. CV2018-00017

Between

STERLING RICHARD SAMUEL

(By his lawful Attorney PETER WALTER BOSTIC)

Claimant

And

PAUL RAMON LEWIS

RITA BELGROVE-HEADLEY

(As Legal Personal Representatives of the Estate of

HELAH JAMES THORPE, Deceased)

First Defendants

And

PAUL RAMON LEWIS

Second Defendant

Before the Honourable Mr. Justice Robin N. Mohammed

Date of Delivery: Tuesday 19 January 2021

Appearances:

Allayania Hendricks for the Claimant

Abdel Ashraph instructed by Zeik Ashraph for the First of the First Defendants and the Second Defendant

Carol-Anne Foderingham for the Second of the First Defendants

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DECISION ON CLAIMANT'S AMENDED NOTICE OF APPLICATION TO STRIKE OUT DEFENCE & COUNTERCLAIM AND FOR SUMMARY JUDGMENT

I. Introduction

[1] The Claimant has brought an Application to strike out the First of the First Defendants' as well as the Second Defendant's[1] Defence and Amended Defence and Counterclaim. Within the same application, he seeks summary judgment against both the First and Second Defendants. The Claimant brings this action by way of his lawful attorney, Peter Walter Bostic.

[2] The Claimant filed his Fixed Date Claim Form and Statement of Case on 3 January 2018. Rita Belgrove-Headley entered an Appearance on 15 January 2018. No appearance was entered on behalf of Paul Ramon Lewis either in his capacity as Legal Personal Representative or in his personal capacity as Second Defendant.

[3] The matter was set for hearing on 9 March 2018. However, when the matter was called neither party appeared. The matter was then relisted for hearing on 23 April 2018.

[4] Paul Ramon Lewis filed a Defence on 20 March 2018 in his capacity as Legal Personal Representative and in his personal capacity as Second Defendant. On 20 April 2018, the Claimant filed a Notice of Application to strike out the Defence. An affidavit in support was filed on even date. A supplemental affidavit was filed on 10 September 2018.

[5] The First Case Management Conference ("the CMC") came up on 23 April 2018. All parties were present with their attorneys at law. The Court gave directions for the service of the Claimant's Notice of Application on the Defendants, and response by the Defendants to be filed and served on or before 25 May 2018. The CMC was adjourned to 11 June 2018.

[6] On the morning of 11 June 2018, Paul Ramon Lewis filed an Amended Defence and Counterclaim. On even date, the matter was relisted to 28 September 2018, with

[1] For ease of reading, hereinafter called Paul Ramon Lewis

attorneys at law being informed in Court. No directions or orders were given by the Court.

[7] On 28 September 2018, the Court granted permission for the Claimant to file and serve an Amended Notice of Application, to include the striking out of the Amended Defence and Counterclaim, which said Amended Application was filed on 2 November 2018. Any response to the Amended Notice of Application was to be filed and served by Paul Ramon Lewis on or before 21 November 2018. He filed his response on 23 November 2018. Rita Belgrove-Headley was granted permission to file and serve a reply affidavit to the affidavit of the Claimant's lawful attorney filed on 10 September 2018. She filed her affidavit on 1 October 2018.

[8] The Court also ordered that written submissions were to be filed and served by the Claimant and Paul Ramon Lewis.

[9] The Court adjourned the CMC to 1 February 2019.

II. Factual Background

The Claimant's case

[10] The Claimant pleads that by Deed of Assignment dated the 14 day of December, 1998 registered as No. 2257 of 1998 made between HELAH JAMES THORPE (now Deceased) of No. 29 Oleander Drive, Pleasantville Housing Scheme, in the City of San Fernando, in the Island of Trinidad and STERLING RICHARD SAMUEL of the aforesaid address and the said HELAH JAMES THORPE (hereinafter called "the Assignor") became seised and possessed of an undivided share together with the Assignor as Joint Tenants of the residue of a thirty (30) year lease made between the Government of Trinidad and Tobago and the Assignor on the 1 day of January, 1995 and registered as No. 1319 of 1995 in All and Singular that certain piece or parcel of land situate at Pleasantville in the Ward of Naparima in the Island of Trinidad comprising Four Thousand Seven Hundred and Twenty-Nine superficial feet (4,729') be the same more or less delineated and with the abuttals and boundaries thereof shown on the Plan on Diagram marked "A" annexed

to a certain Deed of Lease dated the 13th day of March, 1964 and registered as No. 4574 of 1964 and thereon numbered 293 and which said parcel of land together with the dwelling house thereon known as Lot 293 of the Pleasantville Housing Scheme. The Assignor had first leased the said premises from the Government of Trinidad and Tobago by a Deed of Lease dated the 11th day of May, 1964 and registered as No. 14980 of 1964 (hereinafter called "the Subject Premises").

[11] On the 17 day of June 2010, the Assignor made and executed her last Will and Testament naming the First Defendants as her Executors therein and among other things, she devised the Subject Premises to Paul Ramon Lewis and the Claimant as Tenants in Common.

[12] The Assignor died on the 24 day of June 2010 at the San Fernando General Hospital, and the First Defendants applied for and obtained a Grant of Probate of her estate in the High Court of Justice of the Republic of Trinidad and Tobago on the 13 day of April 2012 and the same is registered in the office of the Registrar General as No.W201200147916.

[13] The First Defendants, wrongfully and negligently, by Deed of Assent dated the 12 day of July 2012 and registered as No. 201201720621 made between themselves as Executors and Paul Ramon Lewis and the Claimant as the Beneficiaries, assented and assigned the Subject Premises to the Beneficiaries as Tenants in Common, without first carrying out a title search on the subject premises.

[14] The Assignor, prior to the above matters, by Deed registered as No. 2257 of 1998 dated the 14 day of December, 1998, had assigned the leasehold interest in the Subject Premises to the Claimant and herself as joint tenants. Accordingly, the Claimant contends that the Assignor held an undivided share, title, interest and or estate with the Claimant as Joint Tenants and sought to divest the same during her lifetime by way of Will instead of by Deed of Assignment. As a result, no interest could pass to Paul Ramon Lewis upon her death due to the right of survivorship which takes precedence over any disposition made by a joint tenant's will. Upon her

death her interest, share, title and/or estate in the Subject Premises immediately passed to the Claimant by operation of law. The Claimant is therefore the sole owner of the Subject Premises and is entitled to possession thereof.

[15] Paul Ramon Lewis is in occupation of the Subject Premises since on or around January 2010 and wrongfully and illegally remains thereon since the death of the Assignor, and wrongfully holds possession to date thereby depriving the Claimant use and enjoyment of the same.

[16] By letters dated the 29 day of September 2017 the Claimant's Attorney communicated, with the First Defendants and the Second Defendant informing them of the situation and called upon Paul Ramon Lewis to vacate the Subject Premises on or before the 31 day of October 2017 and to pay damages for trespass. A reasonable sum for the use and occupation of the Subject Premises is $2,500.00 per month.

[17] The First Defendants and Paul Ramon Lewis were each delivered the said letters on the 20 day of September 2017. The said Defendants spoke by telephone with the Claimant's Attorney-at-Law on the said day. Further, Attorney-at-Law acting for the Second Named and the First Defendants, last communicated with the Claimant's Attorney-at-Law orally on the 20 day of November 2017.

[18] The First Defendants and Paul Ramon Lewis have made no further contact with the Claimant to date. And Paul Ramon Lewis remains in occupation of the subject premises. The Claimant fears that Paul Ramon Lewis shall persist in his claim, and intends to remain in occupation of the Subject Premises.

[19] The Claimant has suffered and continues to suffer loss and damage by reason of the wrongful occupation of the Subject Premises by the Second Defendant.

Paul Ramon Lewis' Defence, Amended Defence and Counterclaim

[20] In his Defence, he denies that the Deed of Assent was done wrongfully and negligently and contends that the said Deed of Assent conveyed the Subject Premises to the Claimant and himself as tenants in common.

[21] He contends that the Head Lease made between Sir Solomon Hochoy and the deceased on the 11 May 1964, is binding on the lessee and her permitted assigns and Clause 2(i) of the said lease contains an absolute prohibition against assignment without consent in writing of the sub-intendant acting on behalf of the lessor being first had and obtained. He further contends that the assignment was made without the consent in writing of the sub-intendant being had and obtained and is ineffectual in passing any right, title and/or interest in the assignee.

[22] He contends that he is in lawful possession and/or occupation of the Subject Premises.

[23] In his Amended Defence and Counterclaim, he contends that he is entitled to a licence and/or interest coupled with an equity in the Subject Property and by virtue of proprietary estoppel, the Claimant is prohibited from asserting any legal right he may have to possession of the Subject Property.

III. The Claimant's Amended Notice of Application

[24] As against Paul Ramon Lewis, the Claimant sought the following relief:

(i) That the Defence filed on the 20 March, 2018 and the Amended Defence and Counterclaim filed on the 11 day of June, 2018 on behalf of the First named Defendant namely Paul Ramon Lewis be struck out pursuant to **Part 26.2 (1) (a) of the Civil Proceeding Rules 1998 (CPR)** as amended because he failed to comply with **Part 10.3 and Part 26.7 of the CPR** and pursuant to **Part 26.2(1) (b) and (c) of the CPR** because the said Defence and Amended Defence disclose no ground for defending the Claim and the Counterclaim discloses no ground for bringing the Claim is therefore

frivolous and vexatious and an abuse of the Court's process and that Judgement be entered for the Claimant for the reliefs as claimed in his Fixed Date Claim Form filed on the 3 January 2018.

(ii) Alternatively, because the aforesaid Defence has no realistic prospect of success, an order for Summary Judgement for the Claimant pursuant to **Part 15.2 CPR** for the reliefs claimed in the Statement of Case filed herein on the 3 January 2018.

(iii) That the Defendant do pay the Claimant Costs of this Application and the Costs of the action to be assessed in default of agreement.

(iv) Such further and/or other reliefs as this Honourable Court deems fit.

[25] As against the second of the First Named Defendants namely Rita Belgrove-Headley:

(i) An order for Summary Judgement for the Claimant under **Part 15.2 CPR,** no Defence having been filed in this matter for the reliefs claimed in the Statement of Case filed herein on the 3 January 2018.

(ii) Costs

(iii) Such further and/or other reliefs as this Honourable Court deems fit.

[26] The grounds of the application can be summarised as follows:

(i) Paul Ramon Lewis filed his Defence outside of the 28-day period as provided for by **Rule 10.3(1) CPR**.

(ii) The Defence and Amended Defence and Counterclaim are not legally tenable.

(iii) Paul Ramon Lewis failed to respond to the Claimant's Notice of Application dated 20 April 2018.

(iv) The Claimant has not been served with an application to extend time for filing and serving of the Amended Defence and Counterclaim.

(v) The Amended Defence and Counterclaim discloses no grounds for defending and the Counterclaim discloses no grounds for bringing the Claim.

(vi) The Defence has no realistic prospect of success.

(vii) Rita Belgrove-Headley has filed no Defence.

IV. Issues for determination

[27] The issues for determination in this Amended Application are as follows:

Issue 1- Should the Defence to the Claimant's Claim be struck out pursuant to **Part 26.2 (1) (a) of the CPR** on the basis that he failed to comply with **Part 10.3 and Part 26.7 of the CPR?**

Issue 2- Should the Defence be struck out pursuant to **26.2(1) (b) and (c) of the CPR** on the basis the said Defence is an abuse of the Court's process and discloses no ground for defending the Claim?

Issue 3 - Should the Amended Defence and Counterclaim be struck out pursuant to **Part 26.2 (1) (a) of the CPR?**

Issue 4- Should the Amended Defence and Counterclaim be struck out pursuant to **26.2(1) (b) and (c) of the CPR** because the said Amended Defence and Counterclaim is an abuse of the Court's process and discloses no ground for defending or bringing the Claim?

Issue 5- Should the Court grant an order for Summary Judgement for the Claimant pursuant to **Part 15.2 CPR** against the First and Second Defendants?

V. Law and Analysis

[28] The Court's power to strike out a Statement of Case (which includes a Defence) is set out in **Part 26.2(1) of the CPR** which states as follows:

"26.2(1) The Court may strike out a statement of case or part of a statement of case if it appears to the Court –

(a) that there has been a failure to comply with a rule, practice direction or with an order or direction given by the Court in the proceedings;

(b) that the statement of case or the part to be struck out is an abuse of the process of the court;

(c) that the statement of case or the part to be struck out discloses no grounds for bringing or defending a claim; or

(d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10."

Issue 1- Should the Defence to the Claimant's Claim be struck out pursuant to Part 26.2 (1) (a) of the CPR as amended because he failed to comply with Part 10.3 and Part 26.7 of the CPR?

[29] The main issue giving rise to the Claimant's Application is that the Defence of the Second Defendant was filed outside of the 28-days' time limit pursuant to **Part 10.3(1) CPR. Part 10.3 CPR** states:

"The period for filing defence

10.3 ***(1) The general rule is that the period for filing a defence is the period of 28 days after the date of service of the claim form and statement of case.***

(2) However—

(a) where permission has been given under rule 8.2 for a claim form to be served without a statement of case; or

(b) where a statement of case is amended pursuant to rule 20.1, the period for filing a defence is the period of 28 days after the service of the statement of case or the amended statement of case, as the case may be.

(3) In proceedings against the State the period for filing a defence is the period of 42 days after the date of service of the claim form and statement of case.

(4) Where the defendant within the period set out in paragraph (1) (2) or (3) makes an application under section 7 of the Arbitration Act (Chap. 5:01) to stay the claim, the period for filing a defence is extended to 14 days after the determination of that application.

(5) A defendant may apply for an order extending the time for filing a defence.

(6) The parties may agree to extend the period for filing a defence specified in paragraph (1), (2) or (3) up to a maximum of three months after the date of service of the claim form (or statement of case if served after the claim form).

(7) Only one agreement to extend the time for filing a defence may be made.

(8) The defendant must file details of such an agreement.

(9) Any further extensions may only be made by court order.

(10) The general rule is subject to rule 9.7."

[30] **Part 26.2 (1) CPR** states:

"(1) The court may strike out a statement of case or part of a statement of case if it appears to the court—

(a) that there has been a failure to comply with a rule, practice direction or with an order or direction given by the court in the proceedings;"

[31] **Part 26.7 CPR** deals with relief from sanctions.

[32] The Claimant submitted that the Second Defendant was in breach of **Rule 10.3 (5) and (6) CPR.**

[33] In his affidavit in response filed on 23 November 2018, the Second Defendant deposed that no application for judgment in default of his appearance or filing a Defence was made, and in any event, no such application could have been made before the first date of hearing and he was at liberty to file his Defence at any time before judgment was entered against him.[2]

[34] Both the Claimant and Paul Ramon Lewis referred the Court to the Privy Council decision in **AG V Keron Matthews.**[3]

[35] Lord Dyson stated in **Keron Matthews** (supra):

"14. ***First, a defence can be filed without the permission of the court after the time for filing has expired. If the claimant does nothing or waives late service, the defence stands and no question of sanction arises.***

[2] Paragraph 7
[3] [2011] UKPC 38

16. ***There is no rule which states that, if the defendant fails to file a defence within the period specified by the CPR, no defence may be filed unless the court permits.*** *The rules do, however, make provision for what the parties may do if the defendant fails to file a defence within the prescribed period:* ***rule 10.3(5) provides that the defendant may apply for an extension of time****;* *and* ***rule 12.4 provides that, if the period for filing a defence has expired and a defence has not been served, the court must enter judgment if requested to do so by the claimant. It is straining language to say that a sanction is imposed by the rules in such circumstances. At most, it can be said that, if the defendant fails to file a defence within the prescribed period and does not apply for an extension of time, he is at risk of a request by the claimant that judgment in default should be entered in his favour."*** [Emphasis mine]

[36] From the above passages in **Keron Matthews**, it is clear that Paul Ramon Lewis could file a Defence outside of the 28-day time limit prescribed by the Rules. Any failure by him to do so means only that he runs the risk of default judgment being entered against him.

[37] The instant matter was brought by way of Fixed Date Claim Form. Pursuant to **Rule 12.2(1) (a) CPR**, a Claimant cannot obtain default judgment where the claim is a fixed date claim. Therefore, no application for default judgment could have been made by the Claimant.

[38] The other option, which was utilised by the Claimant, is the filing of an application to strike out the Defence, alternatively an application for summary judgment on the filing of the Defence.

[39] From **Keron Matthews**, it is clear that no permission was needed from the Court for the filing of the Defence out of time. **Keron Matthews**, however contains a proviso, that is, for the Defence to stand, "***the claimant must do nothing or waive late service."***

[40] The question then is whether the act of filing the application to strike out the Defence, amounts to the Claimant taking some form of action which could be construed as doing something to deny Paul Ramon Lewis the opportunity for his Defence to stand.

[41] As stated by Lord Dyson, ***"It is straining language to say that a sanction is imposed by the rules in such circumstances."*** The rules therefore impose no sanction for failure to file a defence within the time specified.

[42] **Keron Matthews**, specifically states that the Court must enter default judgment if requested. This is provided for in **Part 12.4 CPR**. This is different from an Application to strike out. There is no rule, which provides that the Application to strike out must be granted. Rather, this is a discretion of the Court, to which the law as developed relevant to **Part 26.2 CPR** must be applied and a decision arrived at.

[43] Unlike default judgment, striking out is considered a draconian measure and one to be used sparingly. The Court has to take into account the overriding objective and the opportunity of a Defendant to defend the matter. The Court is tasked with balancing the interests of the parties, in the interest of fairness and justice.

[44] Having read the Defence of Paul Ramon Lewis, I do not believe it would be a proper use of the Court's discretion to grant the Claimant's Application to strike out the Defence at this stage. Firstly, the Court's permission was not necessary, and secondly, Paul Ramon Lewis received a gift under the Last Will and Testament of the deceased, and he is entitled to have the Claimant prove that the Deed of Assignment is sufficient to deny him this entitlement under the Will. I can see no prejudice, surprise or disadvantage to the Claimant in proving same.

[45] Therefore, it cannot be said that Paul Ramon Lewis' failure to file his Defence pursuant to **Part 10.3(1) CPR,** equates to a breach of **Parts 10.3(5) and (6) CPR**, for which his Defence ought to be struck out. Nor did he have to apply for relief from sanction pursuant to **Part 26.7 CPR** since no sanction had been imposed by the late filing of the defence.

Issue 2- Should the Defence be struck out pursuant to 26.2(1) (b) and (c) of the CPR because the said Defence is an abuse of the Court's process and discloses no ground for defending the Claim?

[46] The law on abuse of process was considered by this Court in **Rivulet Investment Group Limited v Arabco Company Limited & Ors:**[4]

> *"[32] The term "abuse of the court's process" is neither defined in* ***the CPR 1998*** *nor the English Counterpart nor in any practice direction. Lord Bingham in* ***Attorney General v Barker***[5] *albeit in a different context, explained "abuse of the court's process" as "using that process for a purpose or in a way significantly different from its ordinary and proper use". I am of the view that this is a fitting explanation for the concept of "abuse of the process of the court".*
>
> *[33] The categories of abuse of process are many and are not closed or exhaustive. The Court has the power to strike out a prima facie valid claim where there is abuse of process. However, there has to be an abuse and striking out has to be supportive of the overriding objective*[6] *. Jamadar J (as he then was) in the case of* ***Danny Balkissoon v Roopnarine Persaud & Another***[7] *stated as follows:*
>
> *"While the categories of abuse of the process of the court are many and depend on the particular circumstances of any case, it is established that they include: (i) litigating issues which have been investigated and decided*

[4] CV2019-03986
[5] [2000] 1 FLR 759
[6] Jamadar J (as he then was) in Danny Balkissoon v Roopnarine Persaud and another CV2006-00639
[7] CV2006-00639

in a prior case; (ii) inordinate and inexcusable delay, and (iii) oppressive litigation conducted with no real intention to bring it to a conclusion."

[34] From ***The White Book 2013, Civil Procedure Volume 1, Part 3: The Court's Case Management Powers, under the heading, Power to Strike out a Statement of Case and Blackstone's Civil Practice 2016, Part H: Interim Applications, under the heading Abuse of Process****, the following categories of abuse of the process of the court have been recognised in case law: (i) vexatious proceedings; (ii) attempts to re-litigate decided issues; (iii) collateral attacks upon earlier decisions; (iv) pointless and wasteful litigation; (v) improper collateral purpose; and (vi) delay."*

[47] The Claimant relied on the third category stated in **Danny Balkissoon** (supra) that is "*oppressive litigation conducted with no real intention to bring it to a conclusion."*

[48] He submitted, *"From the inception of the instant matter, Mr. Lewis has engaged in a course of conduct aimed at dragging out these proceedings, by filing frivolous and vexatious defences out of time and on the very day that the matter was to be heard. The Claimant has suffered additional loss and expense to respond to these pleadings which have no realistic prospect of success."*

[49] In **Attorney General v Barker**[8] Lord Bingham of Cornhill CJ, with whom Klevan J agreed, said, at p 764, para 19, that "vexatious" was a familiar term in legal parlance. He added: *"The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be****, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is***

[8] [2000] 1 FLR 759

significantly different from the ordinary and proper use of the court process.*"* [Emphasis mine]

[50] He also stated that Paul Ramon Lewis only responded to the Claimant's application of 20 April 2018, on 23 November 2018.

[51] Inherent in the Claimant's application is delay on the part of the Second Defendant. Filing his Defence one month after the due date, should not be considered such an inordinate delay so as to use the draconian measure of striking out. Further, while I agree that he did not respond to the Claimant's Application in a timely manner, I am satisfied that any loss and expenses incurred by the Claimant in such delay, can be recovered once proven.

[52] The Court must be mindful of the overriding objective and the interests of justice in a striking out application.

[53] In deciding whether to strike out as an abuse of process, the Court must have regard to the affidavit evidence presented. The Claimant's affidavit in support of the Application does not provide any evidence from which this Court can come to the conclusion that there has been an abuse of the Court's process, for which striking out is warranted.

[54] Therefore, based on the learning above, and the lack of evidence before the Court, without more, I am not satisfied that the Defence should be struck out as being an abuse of process.

[55] As it relates to **Part 26.2(1)(c) CPR**, according to **Zuckerman on Civil Procedure Principles of Practice**, Third Edition at page 373, para 9.36:

> *"The full pre-trial and trial process is appropriate and useful for resolving serious or difficult controversies, but not where a party advances a groundless claim or defence or abuses the court process. There is no justification for investing court and litigant resources in following the pre-*

trial and trial process where the outcome is a foregone conclusion...In such cases the court has therefore the power to strike out the offending claim or defence and thereby avoid unnecessary expense and delay."

[56] The **White Book on Civil Procedure 2013** considers what constitutes a Statement of Case, which discloses no reasonable grounds for bringing or defending the claim. At page 73, the authors of **The White Book** state that Statements of Case which are suitable for striking out (on the basis that they disclose no reasonable grounds for bringing or defending the claim) include those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides.

[57] Kokaram J (as he then was) in **Brian Ali v The Attorney General**[9] explained as follows:

*"12. The principles in striking out a statement of case are clear. A court will only seek to strike out a claim pursuant to **Rule 26.2(1)(c) of the CPR** 1998 as amended on the basis that it discloses no ground for bringing the claim. The language and wording of our **Rule 26.2(1)** is very generous in that so long as the Statement of Case discloses a ground for bringing the claim, it ought not to be struck out. See **UTT v Ken Julien and ors CV2013-00212.***

*13. It is a draconian measure and is to be sparingly exercised always weighing in the balance the right of the Claimant to have his matter heard and the right of the Defendant not to be burdened by frivolous and unmeritorious litigation. The Court in the exercise of its discretion to strike out a claim must always ensure to give effect to the overriding objective. See: **Real Time Systems Ltd v Renraw Investment Ltd Civ. App. 238 of 2011.***

[9] CV2014-02843

> *14. It is for the Defendant to demonstrate that there is no ground for bringing the claim. The Defendant can demonstrate for instance that the claim is vague, vexatious or ill-founded.* ***Porter LJ in Partco Group Limited v Wagg [2002] EWCA Civ. 594*** *surmised that appropriate cases that can be struck out for failing to disclose a reasonable ground for bringing a claim include:*
>
> *"(a) where the statement of case raised an unwinnable case where continuing the proceedings is without any possible benefit to the Respondent and would waste resources on both sides Harris v Bolt Burden [2000] CPLR 9;*
>
> *(b) Where the statement of case does not raise a valid claim or defence as a matter of law."*

[58] According to **Potter LJ in Partco Group Ltd v Wragg**,[10] cases where striking out under **CPR, r. 3.4(2)(a)** [our equivalent in **Part 26.2(1)(c) of the CPR**], is appropriate include:

(a) where the statement of case raises an unwinnable case where continuing the proceedings is without any possible benefit to the respondent and would waste resources on both sides: **Harris v Bolt Burdon [2000] CPLR 9**; and

(b) where the statement of case does not raise a valid claim or defence as a matter of law: **Price Meals Ltd v Barclays Bank plc [2000] 2 All ER (Comm) 346**.

[59] The Defence states that the clause against assignment is binding on the lessee and the assignment did not bear the Lessor's prior consent in writing in breach of the covenant not to assign without the Lessor's consent. He contended that the Deed of Assignment is therefore ineffectual in passing any right, title and/or interest to the assignee. He also contended that the Deed of Assent conveyed the subject premises to the Claimant and himself as tenants in common.

[10] [2002] EWCA Civ 594

[60] The Claimant relied on the case of **Old Grovebury Manor Estates v Seymour**[11] which provides that an assignment in breach of a covenant not to assign without the Lessor's prior consent is valid to transfer the assignor's term to the assignee.

[61] The Claimant submitted that although the Deed of Assignment by which the Claimant and the deceased held the subject property as joint tenants does not have the attached consent of the Lessor, it did validly pass title to the Claimant. As such at the time of the Testatrix's death, she held the property as joint tenants and the Defence advanced is unwinnable.

[62] He further submitted that in any event, the Deed of Assignment is twenty years old and the Lessor has to date been accepting rent from the Claimant/assignee. Therefore, even if there was a breach of the covenant not to assign, the landlord is deemed to have waived it: **Matthews v Smallwood**[12].

[63] Since the application to strike out is that of the Claimant, he is tasked with demonstrating to this Court that the Second Defendant has no ground for defending the claim.

[64] This Court then is tasked with determining whether the Defence is an unwinnable Defence or does not raise a valid defence as a matter of law.

[65] This Court is of the opinion that even if the Lessor has waived its rights the Claimant must prove this. This is supported by the learning in **Smallwood** (supra) where Parker J stated:

> *"**A right to re-enter under a lease is not waived by the lessor unless, knowing the facts on which the right arises, he does something unequivocal which recognizes the continuance of the lease.***

[11] No.2 [1979] 3 All ER 504
[12] [1910] 1 Ch 777,786

> ***The question whether there has been a waiver in such a case is one of law, and <u>the onus is on the lessee</u> to adduce some evidence of the lessor's knowledge****, and proof of an act shewing recognition of the tenancy does not throw the onus of proving want of knowledge on the lessor."* [Emphasis mine]

[66] Paul Ramon Lewis is under the belief that he is entitled to the subject property by virtue of the Last Will and Testament of the deceased. As pleaded by the Claimant, a Grant of Probate was granted followed by a Deed of Assent.

[67] Therefore, Paul Ramon Lewis is entitled to know whether the gift, which he received under the Will, is valid, and accordingly, within his right to question the validity of the Deed of Assignment since there was no written consent of the Lessor attached and no evidence of the Claimant that the Lessor has waived its rights.

[68] As such, Paul Ramon Lewis does have a valid ground for defending the Claim. The Defence would not be struck out pursuant to **<u>Part 26.2(1)(c) CPR</u>**.

<u>Issue 3</u> - Should the Amended Defence and Counterclaim be struck out pursuant to <u>Part 26.2 (1) (a) of the CPR?</u>

[69] In deciding whether the Amended Defence and Counterclaim[13] ought to be struck out, a determination of what stage of proceedings they were filed needs to be made. This is dependent on the Case Management Conference (CMC).

[70] From the Court's record, the first CMC began on the 23 April 2018. The first CMC was on that date adjourned to 11 June 2018 at 10:30am in Courtroom SF04.

[13] Statement of case includes a counterclaim- Part 2.3 CPR

[71] The Amended Defence and Counterclaim were filed on 11 June 2018. No application was made to the Court for permission to file same.

[72] On the 11 June 2018, the matter was relisted to 28 September 2018 at 10:30am in Courtroom SF09.

[73] **Part 20.1 CPR** is relevant here:

"Changes to statements of case

20.1 (1) A statement of case may be changed at any time prior to a case management conference without the court's permission.

(2) The court may give permission to change a statement of case at a case management conference.

(3) The court shall not give permission to change a statement of case after the first case management conference, unless it is satisfied that—

(a) there is a good explanation for the change not having been made prior to that case management conference; and

(b) the application to make the change was made promptly.

(3A) In considering whether to give permission, the court shall have regard to—

(a) the interests of the administration of justice;

(b) whether the change has become necessary because of a failure of the party or his attorney;

(c) whether the change is factually inconsistent with what is already certified to be the truth;

(d) whether the change is necessary because of some circumstance which became known after the date of the first case management conference;

(e) whether the trial date or any likely trial date can still be met if permission is given; and

(f) whether any prejudice may be caused to the parties if permission is given or refused."

[74] For the purposes of determining when permission of the Court is necessary for changes to a Statement of Case (which includes a Defence), the Court of Appeal in **EMBD v SAISCON Limited**,[14] considered (i) what is a CMC; (ii) when does the first CMC start; and (iii) when does the first CMC end.

[75] Jamadar JA (as he then was) stated:

"*36. For all of these reasons, 'the first case management conference' is presumed to have ended at the close of the first hearing specified for that purpose, once there has in fact been the occurrence of a single act of active judicial case management.* ***The onus is always on the parties to seek changes to their pleaded cases at the appropriate times, given the regime prescribed by Part 20, CPR, 1998, and to stand the consequences of a failure to do so.***

37. ***This is subject only to one exception. That exception is if it has been specifically stated and ordered/directed by the CPR Judge that 'the first case management conference' is adjourned and a fixed date, time and place for the adjourned first case management conference are scheduled."***[15] [Emphasis added]

[76] Jones JA in a separate judgment of the Court of Appeal stated at paragraph 22:

"22. ***The rule has been interpreted to require a party to obtain permission from the judge to change its statement of case during or after the first case management conference.*** *If the application for permission is made after the first case management conference then the applicant must first satisfy the judge that there is a good explanation for the change and that the application was made promptly."*[Emphasis mine]

[14] Civil Appeal No. S 104 of 2016
[15] Rule 27.8(1)

[77] From the Court's record, the filing of the Amended Defence and Counterclaim occurred during the First CMC, since the First CMC was adjourned and not concluded at the time the Amended Defence and Counterclaim were filed.

[78] The correctness of adjourning the first Case Management Conference was endorsed in **Chantal Rigaud v. Anthony Lambert**[16], a judgment of Justice Devindra Rampersad and upheld by the Court of Appeal[17]. At the first hearing Rampersad J adjourned the first CMC to facilitate the attendance of the Defendant and to allow the parties to consider their pleadings

[79] At paragraph 16 of his judgment, Rampersad J stated:

> *"This court was of the respectful view that there can be no contention, and there was none, that* ***the first CMC had not yet come to an end. The issue for determination, therefore, was whether or not permission was required for the amendment at the stage of the proceedings which had been reached."*** [Emphasis mine]

[80] He decided at paragraph 17.2:

> *"17.2. Was the amendment sought to be made* ***during*** *the course of the first CMC? If so, then permission* ***is*** *required and can be granted at a CMC pursuant to a purposive interpretation of part 20.1(2). However, if the application is made* ***at*** *the first CMC, the application for permission does not need to meet the requirements of parts 20.1 (3) and (3A). Consequently, the court has a fairly liberal rein to deal with any application for permission, constrained only by the exercise of its judicial discretion and the furtherance of the overriding objective."*

[81] Rampersad J continued:

[16] CV 2015-01091
[17] Civil App. No. 112 of 2016

*"21…**this court is now of the respectful view that once the court is seized of the matter under the auspices of the first CMC, or any case management conference at all, it makes for the good management of the case and for the furtherance of the overriding objective that permission be sought from the court.** Bearing in mind the fact that an amendment may very well impact on the other side's case i.e. whether they wish to pursue a defence or not, or may result in consequential amendments to the defence or other pleadings, such as ancillary claims filed prior to the first CMC, counterclaims against 3rd parties and other matters for consideration, this court can see the wisdom in ensuring that it controls the manner in which amendments are made once the parties are before it in case management conference mode.*

*22. **As mentioned, the test for an amendment at the first CMC is not as onerous as the one after the conclusion of the first CMC but it still requires the court to consider the overriding objective at that point and the interests of the parties before it along with the reasons for the amendment being sought at that stage rather than earlier on. The court must, at that stage, consider the impact that any potential amendment would have on the obligations and deadlines in respect of the other parties to the action and therefore must balance the needs of all of the parties in a fair manner in accordance with the overriding objective.***

*23. **The court is of the respectful view that it makes absolute good sense to construe the rule in this manner. Otherwise, there is the potential for a party to attend each adjourned hearing of the first CMC with a new version of their pleading rendering the court powerless to proceed without affording the other side an adjournment to consider whether, for example, a consequential amendment is required. This could not have been the intention of the rule or the rule makers and, to my mind, would be contrary to the court driven approach of the CPR.** As pointed out by the claimant, the CMC is designed to treat with many aspects of the case*

which include identifying the issues and ensuring that no party gains an unfair advantage by reason of his/her failure to give full disclosure of all relevant facts prior to the trial or hearing of any application under rule 25.1. How can the court do this if, as the claimant suggests, a litigant can arbitrarily make amendments to the statement of case before the hearing of every instance of an adjourned first CMC? How can the court meaningfully achieve its goal and address its duty under part 25.1 if the goalposts keep changing?" [Emphasis mine]

[82] Dean-Armorer J (as she then was) in **Patricia Herry v Port Authority of Trinidad and Tobago**[18], agreed with Rampersad J's analysis.

[83] I agree with the like conclusions of Jones JA (as she then was), Jamadar JA (as he then was) and Rampersad J, and conclude that the first CMC had not come to an end at the time of the filing of the Amended Defence and Counterclaim.

[84] Accordingly, the applicable rule is **Rule 20.1(2) CPR**. Paul Ramon Lewis was therefore required to make an application to the Court to amend his Defence. This was not done, and to date no application is before the Court for permission to amend.

[85] As it relates to the Counterclaim, **Part 18.5 CPR** is applicable:

"18.5 (3) The defendant may make a counterclaim-

(a) without the court's permission if he files and serves it at the same time as the defence; or

(b) with the court's permission at any other time.

(4) ***The court may give such permission at a case management conference."***

[18] CV2017-02566

[86] On a literal interpretation of the rule, it is clear that where a CMC has been convened, and the Defendant has not filed a Counterclaim with his Defence, the Defendant will require the permission of the Court to file a Counterclaim. No such permission was sought and to date no application for permission has been placed before this Court.

[87] In the circumstances, I rule that the Amended Defence and Counterclaim filed by the Second Defendant on 11 June 2018, be struck out for failure to comply with **Rule 20.1(2) CPR** and **Rule 18.5(3)(b) CPR**.

Issue 4- Should the Amended Defence and Counterclaim be struck out pursuant to 26.2(1) (b) and (c) of the CPR because the said Amended Defence and Counterclaim is an abuse of the Court's process and discloses no ground for defending or bringing the Claim?

[88] In light of my conclusion on **Issue 3**, resulting in the striking out of the Amended Defence and Counterclaim, **Issue 4** has become otiose.

Issue 5- Should the Court grant an order for Summary Judgement for the Claimant pursuant to Part 15.2(a) CPR against the First and Second Defendants?

[89] I must now determine whether the Claimant's Application for summary judgment against the Defendants is with merit.

[90] **Part 15 of the CPR** governs the application for summary judgment. In particular, **Part15.2** provides as follows:

> *"The court may give summary judgment on the whole or part of a claim or on a particular issue if it considers that—*
>
> *(a)* ***on an application by the claimant, the defendant has no realistic prospect of success on his defence to the claim, part of claim or issue****; or*

(b) on an application by the defendant, the claimant has no realistic prospect of success on the claim, part of claim or issue."

[91] The fundamental principles of summary judgment are well-established and settled in case law. The authority of **Western United Credit Union Co-operative Society Limited v Corrine Ammon**[19] which referred to the decisions of **Toprise Fashions Ltd v Nik Nak Clothing Co Ltd and ors**[20] and **Federal Republic of Nigeria v Santolina Investment Corp.**[21] , is often cited for its comprehensive outline of the basic principles as follows:

(i) The Court must consider whether the defendant has a realistic as opposed to fanciful prospect of success: Swain v Hillman 2001 2 All ER 91;

(ii) A realistic defence is one that carries some degree of conviction. This means a defence that is more than merely arguable: ED & F Man Liquid Products v Patel 2003 E.W.C.A. Civ 472 at 8;

(iii) In reaching its conclusion the court must not conduct a mini trial: Swain v Hillman;

(iv) This does not mean that the court must take at face value and without analysis everything that a defendant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel 2003 E.W.C.A. Civ 472 at 10;

(v) However in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond No. 5 2001 E.W.C.A Civ 550;

(vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without fuller investigation into the facts

[19] Civ App No 103 of 2006 [3] per judgment of Kangaloo JA
[20] 3 (2009) EWHC 1333 (Comm)
[21] (2007) EWHC 437 (CH) Page 12 of 18

at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd 2007 F.S.R. 63.

[92] Lord Hope in **Three Rivers District Council v Governor and Company and Bank of England No. 3**[22] explained a judge's duty in respect of the test in summary judgment applications in the following way:

> *"The rule… is designed to deal with cases which are not fit for trial at all'; the test of 'no real prospect of succeeding' requires the judge to undertake an exercise of judgment; he must decide whether to exercise the power to decide the case without a trial and give summary judgment; it is a discretionary power; he must then carry out the necessary exercise of assessing the prospects of success of the relevant party; the judge is making an assessment not conducting a trial or a fact-finding exercise; it is the assessment of the case as a whole which must be looked at; accordingly, 'the criterion which the judge has to apply under CPR Pt 24 [our Rule 15] is not one of probability; it is the absence of reality."*

[93] This Court is therefore mindful of its duty not to conduct a mini trial while also considering the evidence placed before it.

[94] The covenant against assignment is contained in the Head Lease dated 11 May 1964 at Clause 2(i). It is a qualified covenant, which provides that the lessee is not to assign without the consent in writing of the Sub-Intendant on behalf of the Lessor for such purpose first had and obtained.

[95] The Head Lease also contains a forfeiture clause at Clause 4.

[22] [2001] UKHL 16

[96] The Claimant in his Amended Notice of Application for summary judgment relies on **Seymour** (supra) for the proposition that the assignment in breach of the covenant not to assign does not make the assignment invalid or ineffectual. It only makes the assignor open to an action for forfeiture by the Lessor.

[97] He also states that the Lessor is deemed to have waived the breach of the covenant by the fact that the Deed of Assignment is twenty years old and the Lessor has to date been accepting rents from the assignee/Claimant.

[98] He also relies on the law[23] on joint tenancy as it relates to the right of survivorship, and avers that on the death of the deceased, the Claimant became the sole owner.

[99] At the outset, the Court agrees that **Seymour** (supra) provides that the Deed of Assignment does not void the assignment to the Claimant but makes it voidable subject to the landlord's right of forfeiture.

[100] In **Seymour** (supra) the Court of Appeal stated:

> *"A notice was served, the terms of which I need not refer to, on 1 October 1976, purporting to be a notice under s 146(1) of the 1925 Act.* ***That section requires that before any proceedings are launched for forfeiting the term on the ground of breach of covenant such a notice should be served. That notice was served on the second defendant; and the one short point is whether it is correct to hold, as the learned judge held, that the notice should have been served on the first defendant, namely the assignee.***
>
> *…**The person who is interested and concerned whether the term should be forfeited or not is clearly the person to whom the term has been assigned;** and, as I have said, and I agree with the learned judge, it is perfectly clear that this term was assigned to the first defendant; it ceased*

[23] Swift v Roberts 97 ER 941 (K.B. 1764)

to be vested in the second defendant; it became vested in the first defendant."

[101] Accordingly, any forfeiture proceedings would have to be against the Claimant, or since the Claimant and the deceased purportedly held as joint tenants, to both when the deceased was alive. This principle was cited with approval in this jurisdiction by Nelson J.A. (as he then was) in **Heather Blackman & Anor v Taurus Services Limited**.[24]

[102] The Second Defendant relies on the fact that no consent in writing was attached to the Deed of Assignment.

[103] The Claimant relies on what it says is waiver by the Lessor for having continued to collect rents from the Claimant.

[104] Accepting rents is not considered a waiver.

[105] The authors of **Hill and Redman's Law of Landlord and Tenant** state:

> *"**Where the breach of covenant which gives the right of re-entry is a continuing breach there is a continually recurring cause of forfeiture, and receipt of rent** or the levying of distress **is only a waiver of the forfeiture incurred up to the date when the rent was due**, or the distress was levied **and the lessor is not precluded from taking advantage of the breach continuing since that date."*** [Emphasis mine]

[106] The above was cited with approval by Jones J (as she then was) in **Jean Mackay & Ors v Jesse Henderson Company Limited**.[25] This principle was also applied by Pemberton J (as she then was) in **Kameel Khan v C.G.A.S. Development Company Limited**.[26]

[24] Civ. A No 66 of 1999
[25] CV2009--1602
[26] CV2011-003545

[107] Lord Templeman in **Billson v Residential Apartments Limited**[27], at p.534 said as follows:

> *"By the common law, when a tenant commits a breach of covenant and the lease contains a proviso for forfeiture, the landlord at his option may either waive the breach or determine the lease. In order to exercise his option to determine the lease the landlord must either re-enter the premises in conformity with the proviso or must issue and serve a writ claiming possession."*

[108] Therefore, without evidence, this Court is not satisfied that the Lessor has waived the breach of the covenant not to assign by the deceased by accepting rent. In any event, the Claimant has not provided any evidence to this Court to show that the Lessor has been accepting rents in the name of the Claimant or that the Lessor knows that the deceased has died and that she assigned the lease to the Claimant as a joint tenant by way of Deed of Assignment, thereby making the Claimant the new lessee since her death.

[109] Further, no evidence has been provided by the Claimant to show that the Lessor has not instituted forfeiture proceedings against the Claimant or against the deceased when she was alive.

[110] The fact that the Deed of Assignment is effective in passing title to the Claimant does not mean that the matter stops there. The Claimant must still prove that the Lessor has not instituted forfeiture proceedings and/or that the Lessor has **knowingly**[28] waived the breach of the covenant. In other words, there must be some unequivocal act by the Lessor, which recognises the continuance of the lease.

[111] In this regard, the Claimant has not succeeded in proving that the Defence does not have a realistic prospect of success.

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[27] [1992] 1 AC 494
[28] **Smallwood** (supra)

[112] Unless and until the Claimant can provide evidence to show that the Deed of Assignment takes precedence over the Will, no summary judgment can be granted. This applies equally to the Application against both the First and Second Defendants.

[113] Accordingly, the Claimant's Application for summary judgment against the First and Second Defendants is dismissed.

VI. Costs

[114] Where a party is successful in an application to strike out a statement of case (inclusive of a defence), the general rule is that the losing party is to pay the costs of the application.

[115] In the instant matter, the Claimant was successful on only one aspect of his application. Accordingly, the Court is minded to award **fifty percent (50%)** of his costs, to be assessed, in default of agreement.

[116] Further, it would be unfair to the Second of the First Defendants to have her pay costs to the Claimant. Although she did not file a Defence in the matter, she did enter an appearance and complied with the Order of the Court to file a response affidavit, in which she agreed to abide by any decision the Court makes as to the ownership of the property. I am further supported in this decision by the fact that the Claimant's application for summary judgment against her has been dismissed. The Claimant must prove his case.

VII. Disposition

[117] Given the analyses and findings above, the Order of the Court is as follows:

ORDER

1. **The Claimant's Amended Notice of Application to strike out the First of the First Defendants' and the Second Defendant's Defence and Amended**

Defence and Counterclaim, and for summary judgment against the First and Second Defendants, filed on 2 November 2018, be and is hereby granted in part as hereunder stated:

(i) The Defence filed on 20 March 2018 is not struck out and shall stand.

(ii) The Amended Defence and Counterclaim filed on 11 June 2018 be and is hereby struck out.

(iii) The Claimant's application for summary judgment against the First and Second Defendants be and is hereby refused and accordingly dismissed.

2. The First of the First Defendants and the Second Defendant shall pay to the Claimant fifty percent (50%) of his costs of the Amended Notice of Application filed on 2 November 2018, to be assessed in accordance with Part 67.11 of the CPR 1998, in default of agreement.

_____

Robin N. Mohammed
Judge