[2024] JMSC Civ 197

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015HCV02514

BETWEEN	**SONIC LIMITED**	**CLAIMANT**
AND	**RURAL AGRICULTURAL DEVELOPMENT AUTHORITY**	**1ST DEFENDANT**
AND	**DAVID BROWN**	**2ND DEFENDANT**

CONSOLIDATED WITH

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISON

CLAIM NO 2015HCV05729

BETWEEN	**SONIC LIMITED**	**CLAIMANT**
AND	**COURTNEY RICHARDS**	**1ST DEFENDANT**
AND	**ROSE HALL**	**2ND DEFENDANT**
AND	**FITZROY McPHERSON**	**3RD DEFENDANT**
AND	**TUMPA WILSON**	**4TH DEFENDANT**
AND	**GRETEL DOYLE**	**5TH DEFENDANT**
	GWENDOLYN RICHARDS	**6TH DEFENDANT**

AND	**NAUGHBERT JONES**	**7TH DEFENDANT**
AND	**DAMIAN BROWN**	**8TH DEFENDANT**
AND	**MARVIN NORRIS**	**9TH DEFENDANT**
AND	**GERALD WEST**	**10TH DEFENDANT**
AND	**JOHN BURKE**	**11th DEFENDANT**
AND	**JOHN CAMPBELL**	**12TH DEFENDANT**
AND	**ANDRE NORRIS**	**13TH DEFENDANT**
AND	**VINCENT LINDSAY**	**14TH DEFENDANT**
AND	**CONSTANTINE DYCE**	**15TH DEFENDANT**
AND	**DORRAN MERCHANT**	**16TH DEFENDANT**
AND	**GRANVILLE MERCHANT**	**17TH DEFENDANT**
AND	**LEON MUIR**	**18TH DEFENDANT**
AND	**FITZROY MERCHANT**	**19TH DEFENDANT**
AND	**VERA HARRIS**	**20TH DEFENDANT**
AND	**SUNNY HALL**	**21ST DEFENDANT**
AND	**FITZROY DUNN**	**22ND DEFENDANT**
AND	**DOREEN WHYTE**	**23RD DEFENDANT**
AND	**HUBERT MINOTT**	**24TH DEFENDANT**

PERSONS UNKNOWN **25TH DEFENDANT**

AND **WALLACE STERLING** **26TH DEFENDANT**

CONSOLIDATED WITH

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO 2015HCV05171

BETWEEN **SONIC LIMITED** **CLAIMANT**

AND **DANIEL ATKINSON** **DEFENDANT**

CONSOLIDATED WITH

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO 2015HCV05172

BETWEEN **SONIC LIMITED** **CLAIMANT**

AND **HERMINE GOLDING** **DEFENDANT**

CONSOLIDATED WITH

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO 2015HCV05174

BETWEEN SONIC LIMITED **CLAIMANT**

BRADLEY GOLDING **DEFENDANT**

CONSOLIDATED WITH

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO 2015HCV05175

BETWEEN SONIC LIMITED CLAIMANT

AND ROXROY NORRIS DEFENDANT

CONSOLIDATED WITH

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO 2015HCV05173

BETWEEN SONIC LIMITED CLAIMANT

AND EARNEST NORRIS DEFENDANT

IN CHAMBERS

Mr Franz Jobson and Mr Lawrence Phillpotts Brown for the Claimants

Mr Marcus Goffe for the 2nd, 3rd, 4th, 5th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th,19th, 20th, 21st and 22nd Defendants in **2015HCV05729**

Yualande Christopher and Shereika Salmon for 2nd Defendant in **2015HCV02514**, Defendants in **2015HCV05171**, **2015HCV05174** and **2015HCV05175**

Matthew Phillips for the Defendant in **2015HCV05173** instructed by JNW & Associates

Heard: May 29th, 2024 and June 28th, 2024

Civil Procedure and Practice – Application to Strike Out Claim – Does Statement of Case include Reply and Defence to Counterclaim - Application for Summary Judgment – Whether the Claimant has a real prospect of succeeding in the claim – Impact of Failure to comply with Rule 15.4(4) – Whether Summary Judgment can be entered on the Counterclaim filed.

T. HUTCHINSON SHELLY, J

Introduction

[1] The Applicants, the 2nd, 3rd, 4th, 5th, 8th, 9th,10th,11th,12th, 13th , 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd and 26th Defendant in Suit Number **2015HCV05729** of the Consolidated Claim, of Golden Vale, in the parish of Portland, seek the following orders:

(i) *The Claimant's statement of case is struck out;*

(ii) *Summary Judgment for the 2nd, 3rd, 4th, 5th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th,*

16th, 17th, 18th, 19th, 20th, 21st, 22nd and 26th Defendants, in terms of orders 1, 2, 3, 5, 7 and 8 sought in the Defence and Counterclaim, with damages to be assessed.

The grounds on which the Applicants are seeking the orders are as follows:

1. *The Claimant failed to pursue its claim with due expedition;*
2. *The Claimant failed to comply with an Unless Order made by the Hon. Mrs. Justice Bertram Linton on June 30, 2020 (CPR 26.4(7));*
3. *The Claimant failed to comply with an Unless Order made by the Hon. Miss Justice Nembhard on July 13, 2022 (CPR 26.4(7));*
4. *The Claimant has repeatedly and flagrantly failed over several years to comply with several orders of the Court (CPR 26.3(l)(a) and it would be an abuse of the process of the court to allow the*

Claimant's statement of case (Reply and Defence to Counterclaim) to stand or continue in those circumstances;

5. *As a result of the Claimant's repeated disregard for the orders of the courts, the Claimant's statement of case in the consolidated claims was struck out on February 16, 2023 by the Honourable Mrs. Justice Wong-Small; the Claimant therefore has no claim before the court:*
6. *The Claimant has no prospect of successfully defending the counterclaim (CPR 15.2);*
7. *It is in the interest of justice and the overriding objectives of the CPR to strike out the Claimant's Reply and Defence to Counterclaim and to grant Summary Judgment for the Applicants.*

[2] The Application is supported by two (2) Affidavits sworn to by Wallace Sterling filed on the 29th of July 2022 and 1st of February 2023 respectively which outline the history of the Applicants' possession of the property and take issue with the Claimant's assertion of ownership on the grounds of fraud and possession which defeats that of the Claimant's predecessor in title. The Affidavits also detail alleged failures to comply with orders on the part of the Claimant.

Striking Out

[3] In asking the Court to strike out the claim brought, the Applicants have placed reliance on the powers outlined at **Part 26.3(1)** of the Civil Procedure Rules (hereinafter "CPR") with specific reference to **26.3(1)(a)** which provides:

> *26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –*
>
> *(a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings*

[4] **Rule 26.3 (1)(a)** empowers the Court to strike out a Party's cause of action for instances of a single failure to comply with an order or direction. In the instant case, the Applicants assert that there are multiple failures. In the case of **Follett, Maria v Bournville Briscoe et al,** Claim No. C.L. F 076 of (1991) delivered on 16.05.2006, which was cited by the Applicants, Sykes J (as he then was) having reviewed **West Indies Sugar v. Stanley Mitchell** (1993) 30 J.L.R 542**; Wood V H.G. Liquors Ltd and Anor.** (1995) 48 WIR 24 and **Grovit v. Doctor** [1997] 2 ALL ER 417, stated as follows:

> *'These cases and other cases remain of importance because they identified factors that the court ought to take into account when deciding how to exercise its discretion under the CPR. We no longer speak of prejudice to the defendant alone. We now speak of disposing of cases justly in which prejudice to the defendant is a factor to be taken into account.* ***Under the CPR the court undertakes a review of all the circumstances of the case; the court looks at the panoply of powers available to it under the Rules and see if the powers can be used judiciously to bring about a just disposition of the matter. The court may vary from the draconian striking out to making an unless order. There is power to deprive the successful party of all or some of the cost which he would normally receive. The court can also deprive the successful party of interest either totally or in part. This does not mean and could never mean that if the just disposition of the case requires that it be struck out the court should find some less than convincing reason to avoid taking that step'. (****emphasis added).*

[5] In his text, A Practical Approach to Civil Procedure, 22nd Edition, Stuart Sime explained that the jurisdiction to strike out is to be used sparingly, because striking out deprives a party of its right to a fair trial and of its ability to strengthen its case through the process of disclosure and other court procedures. The result is that striking out is limited to plain and obvious cases where there is no point in having a trial.

[6] In order to determine whether there is sufficient reason to justify whether the Court should exercise its discretion to strike out a statement of case, certain germane factors should be taken into consideration. The authority of **Charmaine Bowen v Island Victoria Bank Limited, Union Bank Limited et al** [2014] JMCA App 14 is useful where the Court outlined the factors which should be taken into consideration in determining whether to strike out a statement of case. Phillips JA stated the following factors:

i. the length of the delay;
ii. the reasons for the delay;
iii. the merit of the case; and
iv. whether any prejudice may be suffered by the opposing side."

[7] A close examination of this claim undoubtedly shows that there has been inordinate delay on the part of the Claimant which is evidenced by their failure to comply with the orders of the Court. The issue of delay was also helpfully examined by McDonald-Bishop J (as she then was) in the case of **Branch Developments Limited Trading as Iberostar Rose Hall Beach Hotel v The Bank of Nova Scotia Jamaica Limited** [2014] JMSC Civ. 3.

Summary Judgment

[8] The starting point for considering whether Summary Judgment should be granted is Part **15** of the CPR. Rule **15.2** states that:

> *The court may give summary judgment on the claim or on a particular issue if it considers that –*
>
> *i. the Claimant has no real prospect of succeeding on the claim or the issue;*
> *ii. the Defendant has no real prospect of successfully defending the claim or issue.*

[9] The court's powers in granting Summary Judgment is outlined at Rule **15.6** and states: -

"*On hearing an application for summary judgment the court may–*

(a) Give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end; (b) Strike out or dismiss the claim in whole or in part;

(c) Dismiss the application;

(d) Make a conditional order; or

(e) Make such other order as may seem fit."

[10] The power to decide whether Summary Judgment should be granted is a discretionary one. In deciding whether to exercise this power, the court is required to assess the Claimant's prospect of success. Useful guidance is taken from paragraphs 16 and 17 of **Lorraine Whittingham v Odette McNeil et al** [2018] JMSC Civ. 5 where Palmer-Hamilton J(Ag) (as she was then) stated:

> *"The long established principle pertaining to Summary Judgments is that the decision whether or not to grant an application for summary judgment is discretionary. As Lord Hutton in the* ***Three Rivers case [2001]*** *stated: "The important words are 'no real prospect of succeeding'. It 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; that is, one where the choice whether to exercise the power lies within the jurisdiction of the judge. Secondly, he must carry out the necessary exercise of assessing the prospects of success of the relevant party. If he concludes that there is no 'real prospect' he may decide the case accordingly."*

[11] The authority of **National Commercial Bank Jamaica Ltd v Owen Campbell and Toushane Green** [2014] JMCA Civ. 19 also provides useful guidance where Brooks, JA stated:

> *"In considering applications for summary judgment, the judicial officer is not required to conduct a mini* ***trial but where the case of one party or another is untenable that party should not be allowed to go to trial on that case****. There is authority for the principle that parties to litigation must know at the earliest*

> *opportunity whether their cases have a real prospect of success. The judicial officer considering the application exercises a discretion whether or not to grant the application." (emphasis added)*

[12] An Application for Summary Judgment is decided by applying the test of whether the Claimant/Respondent has a case with a real prospect of success, having regard to the overriding objective of dealing with the case justly. The phrase "*real prospect of success*" does not mean "*real and substantial*" prospect of success. A Summary Judgment is not meant to dispense with the need for trial where there are issues which should be considered at trial and these hearings should not be mini-trials. They are simply summary hearings to dispose of cases where there is no real prospect of success.

[13] The question of whether there is a real prospect of success is not approached by applying the usual balance of probabilities standard of proof. (See for e.g. **Royal Brompton Hospital NHS Trust v Hammond** [2001] BLR 297). Also, in the locus classicus case of **Swain v. Hillman** [2001] 1 All E.R. 91, Lord Woolf MR said that the expression '*real prospect of success*' did not need any amplification, as the words spoke for themselves. The word '*real*' meant that the question for the court was whether there was a realistic prospect of success. Therefore, in order to succeed, the Applicant must satisfy the court that the Claimant/Respondent has no real prospect of proving the claim.

[14] In **Bolton Pharmaceutical Co 100 Ltd v Doncaster Pharmaceuticals Group Ltd and others [2006] EWCA Civ. 661** Mummery, L.J. stated that:

> *Summary judgment procedures, which are designed for the swift disposal of straight forward cases without trial, are only available where the applicant demonstrates that the defence (or the claim, as the case may be) has no "real" prospect of success and if there is no other compelling reason why the case or issue should be disposed of at a trial. Thus, without the assistance of pre-trial procedures, such as disclosure of documents, and without the benefit of trial procedures, such as cross examination, the court's function is to decide whether*

the defendant's prospect of successfully establishing the facts relied on by him is "real", that is more than "fanciful" or "merely arguable." The test to be applied was summarised by Sir Andrew Morritt V-C. in ***Celador Productions Ltd v. Melville*** *[2004] EWHC 2362 (CH) at paragraphs 6 and 7. 5.*

Although the test can be stated simply, its application in practice can be difficult. In my experience there can be more difficulties in applying the "no real prospect of success" test on an application for summary judgment (or on an application for permission to appeal, where a similar test is applicable) than in trying the case in its entirety (or, in the case of an appeal, hearing the substantive appeal). The decision-maker at trial will usually have a better grasp of the case as a whole, because of the added benefits of hearing the evidence tested, of receiving more developed submissions and of having more time in which to digest and reflect on the materials."

[15] It was submitted by Mr Goffe that in addition to striking out the claim, the Court should enter Summary Judgment in favour of the Applicants as the Claimant's case has no reasonable prospect of success. Mr Goffe relied on the powers of the Court as contained at Rule **15.2(a)** which provide, that the court may give Summary Judgment on the claim or on a particular issue if it considers that a Claimant or Defendant has no real prospect of succeeding on the claim or the issue.

[16] Apart from the rules, the authorities of ***Swain v Hillman etal*** (supra)***, Sagicor Bank Jamaica Ltd v Taylor-Wright*** *[2018] UKPC 12* and ***Eureka Medical Limited v Life of Jamaica Ltd 2003HCV1268*** have been reviewed by the Court and the relevant principles on what is required for Summary Judgment have been noted.

Analysis and Discussion

Application to strike out claim

[17] The thrust of the Application for Striking Out rests primarily on the successive failures of the Claimant to comply with orders of this Court since the time of its inception. The more significant instances being as follows:

i. On October 10th, 2019, the Claimant was ordered by Mr. Justice D. Fraser to file and serve Skeleton Arguments and List of Authorities in support of the Notice of Application for Court Orders to Discharge Injunction, on or before February 28th, 2020. The Claimant has failed to comply with that court order.

ii. On December 19th, 2019, subsequent to the consolidation of claim No. **2015HCV05729** with six (6) other claims based upon the application of the Claimant, Miss Justice C. Wiltshire ordered that all previous orders made by the court and statements of case were to be exchanged by Counsel representing the various parties, by March 31st, 2020. The Claimant has failed to comply with that court order. The reason advanced for this is their inability to reconstruct the file since representation has changed.

iii. Following the Claimant's failure to comply with the Court Order made on December 19th, 2019, Mrs. Justice Bertram-Linton made an Unless Order on June 30th, 2020 in terms that '*unless the said Order is complied with on or before August 14, 2020, the Claimant's statements of case are struck out'*. The Learned Judge also ordered the Claimant to clear up service on all parties specifically named in the claims and to decide who it was proceeding against. To date, these orders have not been complied

with, ostensibly for the same reason stated above. The Applicants assert that this failure by the Claimant has obstructed and prevented the Ancillary Claimants in the Counterclaim from advancing the claim and having a fair trial.

iv. It is also undisputed that the Claimant have failed to serve copies of all previous orders made by the Court and Statements of Case in the claim No. **2015 HCV 05729** on the other Defendants and their Attorneys-at-Law in the other consolidated claims.

v. On July 13th, 2022, Ms Justice Nembhard made a number of orders which included three (3) Unless Orders directed at the Claimant, to wit:

- *Unless the Claimant, Sonic Limited, and its legal representatives are in attendance on the 17th of January 2023 at 10:00am and are in a position of readiness to respond to the Notice of Application for Court Orders to Strike Out the Claimant's Claim/ Discharge of Injunction, which was filed on 29th September 2021, then the Claimant's Statement of Case shall stand struck out.*
- *Unless the Claimant, Sonic Limited, complies with the Order contained in paragraph 3 of Master Miss S. Reid, which was made on 1 June 2022, by 17 January 2023, then the Claimant's Statement of Case shall stand struck out.*

- *Unless the Claimant, Sonic Limited, files and serves, no later than 27 October 2022, affidavit evidence in proof of the service which it contends has been effected on the named and unnamed Defendants as well as the means by which it contends that that service was effected in respect of each Claim in this Consolidated matter, the Claimant's Statement of Case shall stand struck out.* These orders have also not been complied with.

vi. On January 8th, 2024, Mrs. Justice T. Mott-Tulloch-Reid ordered that the Claimant's Application for Leave to Appeal along with their Affidavit in Support filed on March 2nd, 2023, were to be served on the Defendants or their Attorneys-at-Law, where represented, on or before January 15th, 2024. The Applicants contend that compliance with this order remains outstanding.

[18] On the 8th of January 2024, the Learned Judge also made orders for the Claimant to file and serve their Affidavit and Submissions in response to this Application by the 31st of January 2024 and 20th of February 2024 respectively. These orders were similarly not complied with. As a result of this most recent failure, the evidence presented by the Applicant was unchallenged. The Claimant requested permission to make brief oral submissions at the hearing and was permitted to do so with the Applicant being allowed to respond.

[19] The submissions made by Mr Phillpotts Brown focused on the relevant rules and what was legally required to grant the orders sought by the Applicants. Heavy reliance was also placed on the Claimant's Reply and Defence to Counterclaim which had been filed on the 21st of May 2019. The position of the Claimant being

that since these documents had not been specifically referred to in the order of Wong Small J, they had not been struck out.

[20] Counsel submitted that the general rules found at Part **26** of the CPR address the circumstances in which a Court should strike out a Claimant's Statement of Case and Defence to Counterclaim. Counsel highlighted that Default Judgment was sought on the Counterclaim and it was refused. Mr Phillpotts Brown relied on the refusal in support of the assertion that any such Application for Striking Out is not properly based.

[21] Counsel contended that the order is draconian and should only be made in meritorious instances. The Court was asked to favourably consider the Reply and Defence to Counterclaim which was described as a meritorious one which should be ventilated at trial. It was not agreed that the unless order included any reference to the Reply and Defence to the Counterclaim. In respect of the Claimant's numerous failures to comply with the orders of the Court, Learned Counsel submitted that this can be the subject of an application for case management. In response to enquiries from the Court on whether a previous application had been made for relief from sanctions, in respect of witness statements, which had been refused, Counsel acknowledged that this had been the case and no other application for relief had been filed.

[22] In reviewing the Application to Strike Out claim, the question arose as to whether such an Application was necessary in light of the order made in February 2023. The Court notes that the Parties have diverging views on the effect of this order as while the Claimants accept that it would apply to the Claim Form and Particulars of Claim, they refute its application to the Reply and Defence to Counterclaim.

[23] For greater clarity on this issue, the Court considered the definition of the term *'statement of case'* which appears at Rule **2.4** of the CPR and provides as follows:

> *"statement of case" means –*

(a) a claim form, particulars of claim, defence, counterclaim, ancillary claim form or defence and a reply; and

(b) any further information given in relation to any statement of case under Part 34 either voluntarily or by order of the court;

[24] The wording at paragraphs **(a)** and **(b)** make it clear that any reference to a statement of case would of necessity include any Reply to a Claim and Defence to a Counterclaim. Given this definition, the Reply and Defence to Counterclaim which pre-dated the Application and subsequent order of Wong-Small J, would have been struck out along with the Claim Form and Particulars of Claim. Accordingly, this Application for Striking Out would be otiose as this course of action has already been taken and no Application for Relief from Sanctions has been filed or appeal granted which would change this status.

[25] If I am wrong and the Reply and Defence to Counterclaim were extant despite the order striking out the statement of case, I am satisfied that the Claimant's extensive history of failing to comply with the numerous orders, for which sanctions had previously been stated, provides more than ample justification for the Court to exercise its discretion by striking out the claim.

Summary Judgment

[26] While it is the contention of Mr Goffe that the Claimant had no real prospect of success, Mr Phillpotts Brown sought to persuade the Court that there are issues on which the Claimant has a real prospect of succeeding on Counterclaim. He relied on the case of **Swain v Hillman** (supra) as providing the relevant principles to be considered by the Court and argued that the Court should also examine the application to determine if it complies with Rule **15.4(4)** as if it fails to comply with that rule, then it cannot stand.

[27] Mr Phillpotts Brown argued that while the application makes passing reference to the issues, greater details are required. He cited the Court of Appeal decision of **Margie Geddes v McDonald Millingen** [2010] JMCA Civ.2 in which Rule **15.4(4)**

was examined by Harrison JA. Counsel submitted further that whereas the Court has power under Rule **26.9** of the CPR to rectify the document, it ought not to exercise this discretion as it would be wrong to do so, as this breach is not merely procedural but also substantive.

[28] In addressing the evidence of the Applicant which was highlighted at Pages 17 and 18 of their submissions, Counsel submitted that their claim to the land through their maroon lineage and the questions raised as to the accuracy and authenticity of the Claimant's Plan and Title were triable issues, and did not provide a proper basis on which Summary Judgment should be granted.

[29] Counsel argued that the Court is being asked to conduct a mini-trial which the authorities say ought not to be done. Mr Phillpotts Brown asked the Court not to grant Summary Judgment and to find that the application fails and the matter proceeds to trial.

[30] In his brief response on this point, Mr Goffe submitted that even if the Reply and Defence to Counterclaim could be separated from the Claim Form and Particulars of Claim, they offer nothing of merit. In respect of the Claimant's attack on the validity of this application, Mr Goffe argued that there is no application before the Court in respect of same. Counsel also asked the Court to note that the matter is now at Case Management, yet there is still no Application for Relief from Sanctions. Mr Goffe argued further that if the Court found that **15.4(4)** had not been complied with, the approach in **15.4(5)** can be adopted.

[31] Mrs Christopher in brief submissions asked the Court to find that the situation in **Geddes v McDonald Millingen** (supra) is distinguishable from the instant case. The former was complex and the issues needed to be identified per paragraph 19 of the judgment, whereas in the case at bar, the issues are narrow where this application is concerned. Mr Phillips, for his part, asked the Court to carefully consider the several transgressions on the part of the Claimant and to grant the orders sought.

[32] In dissecting these submissions which go to the root of the required procedure for a Summary Judgment Application, it is incumbent on the Court to examine the provisions of Rule **15.4** which states as follows:

> *15.4 (1) Except in the case of a counterclaim a claimant may not apply for summary judgment until the defendant against whom the application is made has filed an acknowledgment of service.*
>
> *(2) If a claimant applies for summary judgment before a defendant against whom the application has been made has filed a defence, that defendant's time for filing a defence is extended until 14 days after the hearing of the application.*
>
> *(3) Notice of an application for summary judgment must be served not less than 14 days before the date fixed for hearing the application.*
>
> *(4) The notice under paragraph (3) must identify the issues which it is proposed that the court should deal with at the hearing.*
>
> *(5) The court may exercise its powers without such notice at any case management conference.*

[33] Rule **15.4(4)** which is the subject of the Claimant's argument requires that the notice filed identifies the issues to be addressed. The language of Harrison JA in **Geddes v McDonald Millingen** (supra) makes it clear that this requirement ought to be complied with where he stated:

> *[18] In my judgment, there is merit in the submissions made by Dr. Barnett. It is abundantly clear that* ***the purpose of the Rules is to allow the Court and the party meeting the application to have adequate notice of the issues raised by the application. This is not only desirable but also necessary, as the Court has to consider the appropriateness of the application before embarking on the hearing.*** *(emphasis added)*

[34] Having made this pronouncement, his Lordship continued:

> *[19] Mr. Foster, Q.C. had urged the Court to accept his submission that the issues could be gleaned from the affidavit evidence of Mr. McDonald but I do believe that it did not state with the clarity demanded by the Rules any of the issues which arose for consideration by the Court. The application was dependent upon a construction of several emails, verbal discussions as well as an understanding of the wider context in which this particular matter took place**. I would agree with the submissions of Dr. Barnett that this would not have been a proper case for Jones, J. to have exercised his powers under rule 26.9 of the CPR which pertains to the general powers of the Court to rectify matters where there has been a procedural error.***

[35] Rule **26.9** provides that:

> *26.9 (1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order.*
>
> *(2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.*
>
> *(3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.*
>
> *(4) The court may make such an order on or without an application by a party.*

[36] In submissions on how the Court should treat with the issue raised, Mr Goffe has asked that Rule **15.4(5)** be applied given that the matter is at the Case Management stage. In my examination of the Application, I observed that while the Court is asked to grant Summary Judgment on the basis that the Claimant has no real prospect of success, the Application does not specifically address the issues joined between the parties which the Court would have to consider in

arriving at a decision. While this is significant, the Rules provide that a Court in exercising its case management powers can make an order to put matters right

where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction.

[37] It is clear that there has been such an error and in order to determine if the discretion at **26.9** of the Rules is to be exercised, the Court has to consider whether the issues would be readily apparent on the face of the Affidavit. Between paragraphs 14 and 28 of the 1st Affidavit of Wallace Sterling, the Applicants outline the basis on which they seek Summary Judgment. It is asserted in these paragraphs that their possessory title defeats that of the Claimant and any possible predecessor in Title. The plan attached to the Title is also disputed and described as erroneous and otherwise flawed. The Applicants also assert that the Title obtained is fraudulent. With the striking out of the Statement of Case, these assertions presently stand unchallenged as the Claimant has not filed any evidence in response. Additionally, on a careful review of the Reply and Counterclaim on which the Claimant relies, the Court found that they contained mere denials of these assertions with demands that they be proved.

[38] I agree with the submissions of Mrs Christopher that unlike the situation in **Geddes v McDonald Millingen** (supra) in which reliance was placed not only on the affidavit but also emails, verbal discussions and other factors; the Affidavits in support outline with distinct clarity the issues which are to be decided by the Court and the Claimants would have had sufficient notice of same. It is in these circumstances that I accept that the case at bar can be distinguished from the **Geddes v McDonald Millingen** decision and Rule **26.9** applied.

[39] The procedural issues having been addressed; the Court then considered the issue of real prospect of success. The Claimant's case having already been struck out, the question of the Applicants succeeding against them is moot as in the absence of any evidence to refute the defence, the Court is satisfied that they

cannot. In this situation however, the Applicants have filed a Counterclaim in which they asked that the following orders be made:

1. *An Order that the 2nd, 3rd, 4th, 5th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th,18th, 19th, 20th,21st and 22nd Defendants are the legal owners of lands at Golden Vale included in Volume 1379 Folio 401 of the Register Book of Titles;*
2. *Possession of the lands now contained in Certificate of Title registered at Volume 1379 Folio 401 of the Register Book of Titles;*
3. *An Order that the Certificate of Title registered at Volume 1379 Folio 401 of the Register Book of Titles be cancelled and a new Certificate of Title be issued recognising the rights of the Maroons and/or of the Defendants and the other persons and families entitled to land at Golden Vale;*
4. *A Declaration that the constitutional right to property of the 2nd, 3rd, 4th, 5th, 8th, 9th,10th, 11th,12th 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st and 22nd Defendants was breached by the Claimant;*
5. *An injunction restraining the Claimant, its servants and/or agents from entering upon or interfering with the 2nd,3rd, 4th, 5th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st and 22nd Defendants' said lands;*
6. *Damages, including constitutional/vindicatory damages, aggravated damages and exemplary damages;*
7. *Interest pursuant to the Law Reform (Miscellaneous Provisions) Act; and 8. Costs including Attorneys' costs.*

[40] In written submissions, the Applicants asked for orders to be made in terms of paragraphs 1,2,3,5, 7 and 8. In order to make these orders, the Court has to be satisfied that there is an evidential basis on which they can be granted. In conducting this exercise, the Court is mindful that Summary Judgment proceedings are not in the form of a mini-trial but to determine if the evidence on record allows for the matter to be dealt with summarily.

[41] On reviewing the affidavits of Wallace Sterling, while there is general reference to the fact that the Defendants are entitled by virtue of their maroon lineage, only the

2nd, 5th, 8th and 21st Defendants have provided affidavits outlining this lineage, the number of years during which they have resided on the land and their entitlement to possession by virtue of both factors. The other named Defendants do not have an Affidavit before the Court and Mr Sterling does not make any specific reference to their entitlement.

[42] In respect of the reliance on the names of persons appearing on the plan and their purported connection to the named Defendants, I find that while it is arguable that they are connected; the Court is unable to conclude that this information is sufficient to confirm this relationship and their entitlement to possession without more. Additionally, the Affidavit of Cherise Walcott, then Registrar of Titles, indicates that the plan in question is not the plan for the disputed property and was erroneously attached. To the Court's mind, these factors would combine to raise several triable issues. It is in these circumstances that the Court finds that this matter would not be an appropriate one for Summary Judgment and the better course of action is to set the Counterclaim for trial.

DISPOSITION

[43] Having arrived at the conclusions outlined above, I make the following orders:

1. Claimant's Statement of Case is struck out.
2. The Application for Summary Judgment on paragraphs 1,2,3,5,7 and 8 of the Counterclaim is refused.
3. Eighty (80%) percent costs of this Application is awarded to the Applicants to be taxed if not agreed.
4. The matter is scheduled for the hearing of an Application for Default Judgment on the 19th of November 2024 at 11:00am.
5. The Defendants are to file and serve their Applications and Affidavits in Support by September 20th, 2024.

6. The parties are to file and exchange Skeletal Arguments and Lists of Authorities by October 30th, 2024.

7. Applicants' Attorney to prepare, file and serve the Formal Order herein.