IN THE SUPREME COURT OF **Action No. CL 51/16**

THE TURKS AND CAICOS ISLANDS

BETWEEN:

FRANK GEDEUS

Plaintiff

-and-

GILBERT FITZROY SELVER

Defendant

JUDGMENT

CORAM:	**The Hon. Mr. Justice B. St. Michael Hylton QC (Ag)**
Appearances:	**Ms Chloe McMillan for the plaintiff** **Mr George C Misick for the defendant**
Hearing Date:	**29 July 2022**
Venue:	**Court No. 5, Graceway Plaza, Providenciales**
Date Delivered:	**26 August 2022**

Background

1. In 2006, the Plaintiff and the Defendant entered into an oral agreement for the sale by the Defendant to the Plaintiff of Lot No. 4 on Title No. 60501/179 Block No. 01, Parcel 179, Blue Hills & Stamers Run, Providenciales, for the sum of $26,000.00. In

2007 the agreement was varied and the Defendant agreed to sell the Plaintiff Lot No. 6 on Title No. 60501/179 Block No. 01, Parcel 179, Blue Hills & Stamers Run, Providenciales ("the Land") instead.

2. Subsequently, in or around September 2007 the Plaintiff asked the Defendant to execute transfer documents, but he refused to do so. At that time the Plaintiff had made payments totalling $23,330.00. The Plaintiff thereafter decided not to make any further payments towards the purchase of the Land, as "it became clear to him that the Defendant would not provide him with the transfer documents for the Land to be transferred and registered in his name".

3. In or around 2012 or 2013, the Plaintiff entered into possession of the Land and began construction on it. Sometime in February or March 2015, a representative from Meridian Mortgage Corporation Ltd ("Meridian") informed the Plaintiff that Meridian owned the Land. On or about 31 July 2015, the Plaintiff and his wife, agreed to purchase the Land from Meridian.

4. The Plaintiff then commenced these proceedings by a writ and statement of claim filed on 9 March 2016, in which he claimed repayment of the sum of $23,330.00 he had paid to the Defendant. The Defendant filed a defence to the original statement of claim in May 2016. Both parties were unrepresented at the time, and the defence was largely comprised of bare denials.

5. Neither party took any steps in the matter for some years, until September 2020 when the Plaintiff (who had by then secured legal representation) obtained leave to file an amended statement of claim, which he filed on 13 October of that year. The Defendant has not filed an amended defence in answer to the amended statement of claim.

6. The action was set down for trial, but the trial was adjourned. On 10 May 2022, the Plaintiff filed the summons which is the subject of this judgment. In that summons

the Plaintiff seeks orders striking out the defence and entering judgment in his favour, or alternatively, summary judgment against the Defendant.

7. The Defendant (who is now represented and apparently has been represented since January 2017) filed an affidavit in response to the summons on the day of the hearing.

Preliminary Objections

8. The Defendant raised two preliminary objections to the hearing of the Plaintiff's summons. Firstly, the Defendant argued that the Plaintiff filed the application for summary judgment some 6 years after commencement of this action, which makes it unsuitable for summary judgment. The Defendant relies on the following passage from the White Book[1]:

> "It is inconsistent to apply for judgment under O.14 after directions for a speedy trial have been given and such judgment will be refused in the Court's discretion unless there has been a change in circumstances after the order for a speedy trial…"

9. Although no directions have been given for a speedy trial of this action, it has been previously set down for trial. However, it is plainly not ready for trial. The Defendant has made an application to add a party. He would have to file an amended defence. He has not filed a list of documents or a witness statement.

10. Summary judgment applications should be made early in the proceedings for the obvious reason that the intention is to save time and costs, and the earlier they are made, the more time and costs would be saved. However, delay should not in itself be a bar. In fact, the paragraph the Defendant quoted from the White Book went on to

[1] The Supreme Court Practice 1997, page 148.

state: “On the other hand, in a proper case, a summons for summary judgment under O.14 may be issued after the issue of a summons for directions following the close of pleadings”.

11. Time and costs will still be saved if the court properly disposes of an entire action on a summary judgment application instead of allowing it to proceed to trial, and as I have indicated, this matter is not ready for trial in any event.

12. This objection therefore fails.

13. Secondly, the Defendant argues that these proceedings are irregular as the Plaintiff has failed to file a notice of intention to proceed pursuant to Order 3, rule 6 of the Rules of Supreme Court 2000. Order 3, rule 6 provides:

> Where a year or more has elapsed since the last proceeding in a cause or matter, the party who desires to proceed must give to every other party not less than one month's notice of his intention to proceed.

14. The Defendant relies on two “gaps” in the proceedings. He submits that there was a gap of 3 years between a directions order made in 2017 and the filing of the amended statement of claim in 2020, without the requisite notice of intention being filed. He also says that since 2020, more than a year has elapsed again without the Plaintiff taking a step in the proceedings yet the Plaintiff has still not given notice under Order 3, rule 6.

15. I would observe first, that the Defendant appears to be factually incorrect in relation to the latter alleged gap. Between filing the amended statement of claim in October 2020 and the summons in May 2022, the file indicates that the Plaintiff filed:

- A summons for directions on 20 January 2021, which was apparently heard and led to the action being fixed for trial;
- A list of documents on 8 July 2021, and
- A witness statement on 1 November 2021.

16. However, even if there had in fact been a one-year delay immediately before the Plaintiff filed the present summons, I would have rejected this objection. Order 2 rules (1) and (2) provide:

> (1) **Where,** in beginning or purporting to begin any proceedings or **at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules,** whether in respect of time, place, manner, form or content or in any other respect, **the failure shall be treated as an irregularity and shall not nullify** the proceedings, **any step taken in the proceedings**, or any document, judgment or order therein.
>
> (2) Subject to paragraph (3) **the Court may, on the ground that there has been such a failure** as is mentioned in paragraph (1**) and on such terms as to costs or otherwise as it thinks just,** set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or **exercise its powers under these rules** to allow such amendments (if any) to be made and **to make such order (if any) dealing with the proceedings generally as it thinks fit.**
>
> (emphasis mine)

17. On 6 January 2021, the Plaintiff filed an affidavit of service in which Kandi Selver swore that on 16 October 2020, she served the amended statement of claim on the

Defendant. On 26 July 2022, the Plaintiff filed an affidavit by Lelia Rodney in which she swore that on 29 June 2022, she served the Plaintiff's summons on the Defendant. The Defendant has not denied that he was served with either document, or that he had adequate notice of this hearing.

18. Even if the Plaintiff failed to comply with Order 3, rule 6, there is no automatic sanction for non-compliance and the Defendant has not provided any evidence or made any argument that he was prejudiced. This objection therefore also fails.

Order 18 rule 13 – Summons to strike out Defence

19. Relying on Order 18, rule 13 the Plaintiff argues that the defence should be struck out as it constitutes a "bare denial and statement of non-admission and does not disclose a reasonable ground for defending the claim". Order 18, rule 13 provides:

> 13. (1) Any allegation of fact made by a party in his pleading is deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under rule 14 operates as a denial of it.
> (2) **A traverse may be made either by a denial or by a statement of non-admission** and either expressly or by necessary implication.
> (3) **Every allegation of fact made in a statement of claim** or counterclaim **which the party on whom it is served does not intend to admit must be specifically traversed by him in his defence** or defence to counterclaim, as the case may be, and **a general denial of such allegations, or a general statement of non-admission of them, is not a sufficient traverse of them.**

20. In **SPI North Ltd v Swiss Post International (UK) Ltd and another** [2019] 2 All ER 512, Henderson LJ considered the effect of the identically worded RSC Order 18,

rule 13 (UK), which after reforms in the United Kingdom were replaced by modern rules of Civil Procedure. He stated:

> [36] Those provisions thus enabled a defendant to 'traverse' any allegation of fact in the statement of claim either by denying it or by not admitting it, and although there was authority to the effect that a defendant ought to admit facts which were not controversial, or were known to him, practitioners whose memory stretches back that far will remember the stonewalling defences, replete with non-admissions, which obstructive defendants were prone to plead, relying on the choice of response afforded to them by r 13.

21. In Trinidad and Tobago, after their Supreme Court had implemented new rules for civil procedure, the Court of Appeal dismissed an appeal against a trial judge's decision to strike out a defence containing denials without reasons. In **M.I.5 Investigations Ltd v Centurion Protective Agency Ltd** TT 2008 CA 52, Mendonca JA cited the learned author Adrian Zuckerman stating:

> In view of the provisions of 10.5 it is clear that **the days when a defence may be filed containing a bare denial** are over. As Adrian Zuckerman in Civil Procedure wrote (at page 217):
>
> > "**The old system of bare denials and "holding defences"** was wasteful and is no longer acceptable. Today, the function of the defence is to provide a comprehensive response to the particulars of claim so that when the two documents are read together one can learn precisely which matters are in dispute."
>
> (emphasis mine)

22. New rules governing civil procedure have not yet been enacted in the Turks and Caicos Islands. Although the Defendant's defence would likely be struck out in jurisdictions that have rules similar to those now in force in Trinidad and Tobago, I would not be prepared to strike it out based on the present rules in the Turks and Caicos Islands.

23. Furthermore, and in any event, given the history of the pleadings by, and legal representation of both parties, I would have been prepared to grant the Defendant leave to file an amended defence.

Order 14, rule 1 – Summons for Summary Judgment

24. Order 14, rule 1 provides:

> Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that the defendant has no defence to the claim included in the writ, or to particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the court for judgment against that defendant.

25. The Plaintiff has applied for judgment pursuant to this rule. In **Fatima Garcia Cox v Gloria Cox and James Cox** [2022] TCASC 19 and **Jennings v Pierre** CL21/22 I commented on this Court's approach to applications for summary judgment. To succeed on this application, the Plaintiff would have to satisfy the Court at this stage that the Defendant has no defence which has a realistic prospect of success.

26. On a summary judgment application, the parties and the court are not restricted to a consideration of the pleadings. The court may (and indeed, should) consider all the available evidence. The Plaintiff's case is the Defendant agreed to sell him the Land for $26,000.00 and that he paid the Defendant $23,330.00. Further, that the Defendant did not transfer the Land to him and cannot do so as it is owned by Meridian. The Defendant's affidavit does not dispute any of those allegations. Instead, it offers two defences to the claim: first, that the Plaintiff breached the agreement by defaulting in payment, and second, that Meridian beached its agreement with the Defendant by failing to transfer the Land to the Plaintiff. In fact, the Defendant has applied to join Meridian as a party to the action.

27. Neither would be a good defence to the claim. There is no evidence or even suggestion that if the Plaintiff had paid the balance of the purchase price the Defendant would have been able to transfer the Land. Also, the Plaintiff was not a party to the alleged agreement with Meridian. The outcome of the Defendant's dispute with that company would not affect the simple issue in this case: the Plaintiff paid a sum of money to the Defendant to purchase a property that he could not then (and cannot now) transfer to the Plaintiff.

28. In his written submissions the Defendant also relies on section 37 of the Registered Land Ordinance CAP 9.01, which provides that "…no action may be brought upon any contract for the disposition of any interest in land unless the agreement upon which such action is brought, or some memorandum or note thereof is in writing, and is signed by the party to be charged or by some other person thereunto by him duly authorised…"

29. The Defendant argues that as a result of this provision, the oral agreement with the Plaintiff is unenforceable. This argument betrays a misunderstanding of the claim, or the section or both. The Plaintiff is not attempting to enforce the oral agreement and

force the Defendant to transfer the Land. He accepts that the agreement cannot be completed, and seeks the return of the money he paid pursuant to it.

30. Contrary to the Defendant's submission, section 37 does not assist his case. Instead, it provides a further reason why the action should succeed. If, as the Defendant contends, the agreement is unenforceable, that is all the more reason why the money paid pursuant to it should be repaid.

31. The observations by the Privy Council in **Sagicor Bank Jamaica Limited v Taylor Wright** [2018] UKPC 12 are equally applicable to this case. Lord Briggs said:

> **[17]** There will in almost all cases be disputes about the underlying facts, some of which may only be capable of resolution at trial, by the forensic processes of the examination and cross-examination of witnesses, and oral argument thereon. But a trial of those issues is only necessary if their outcome affects the claimant's entitlement to the relief sought. If it does not, then a trial of those issues will generally be nothing more than an unnecessary waste of time and expense.

32. The learned Law Lord continued:

> **[21]** The Board considers it axiomatic that, if a pleaded claim is met with a defence (whether pleaded or deployed in evidence) on a summary judgment application which, if true, would still entitle the claimant to the relief sought, then generally there cannot be a need for a trial.

33. A trial of the issues raised in the Defendant's affidavit would not affect the Plaintiff's right to claim the return of the money paid. The application for summary judgment is therefore granted.

Disposition

34. It is declared and ordered that:

a. There be summary judgment in favour of the Plaintiff against the Defendant for the sum of $23,330.00.
b. The Defendant to pay the costs of the summons, to be taxed if not agreed.

B. St. Michael Hylton QC
Acting Judge of the Supreme Court
26 August 2022