



**IN THE SUPREME COURT OF
THE TURKS AND CAICOS ISLANDS**

Action No. CL 41/22

BETWEEN:

MYLANDE ALFRED

Plaintiff



-and-

VAN'S AUTO LTD

Defendant

JUDGMENT

CORAM: The Hon. Mr. Justice B. St. Michael Hylton QC (Ag)

Appearances: Mr Wendal Swann for the plaintiff
Ms Chloe McMillan for the defendant

Hearing Date: 17 August 2022

Venue: Court No. 5, Graceway Plaza, Providenciales

Date Delivered: 26 August 2022

1. The Plaintiff is the registered proprietor of a property known as Parcel 61111/28, Long Bay Hills, Providenciales (“the Land”). In or about July 2020, the Plaintiff agreed to sell the Land

to the Defendant. The Plaintiff claims that the Defendant defaulted, and it gave notice to complete, and when the Defendant did not comply, it terminated the agreement in April, 2021.

2. In this action the Plaintiff claims orders that the Defendant:
 - a. cease trespassing on the Land;
 - b. restore the Land to the condition it was in before 1 March, 2022;
 - c. pay damages for trespass;
 - d. remove the caution it lodged against the title for the Land; and
 - e. pay the costs of the proceedings.
3. In response, the Defendant has filed a summons to strike out the action or to enter judgment in its favour. That application is effectively made on two grounds: that the originating summons does not disclose a cause of action, and that the plaintiff has exhibited correspondence which is subject to without prejudice privilege.
4. The Defendant's summons also seeks an order that the Plaintiff pay it damages in the sum of \$60,000.00, being the return of the deposit and further payment.
5. Finally, at the start of the hearing I pointed out that the Defendant's submissions invite the court to make in the alternative, an order striking out the without prejudice correspondence, but its summons did not expressly include a request for that alternative relief. The Defendant's counsel then requested leave to amend the summons to include a paragraph 4 in the following terms:

That the following documents exhibited to the affidavit of Mylande Alfred be struck out;

- i. the letter dated 6 January 2021;

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- ii. the email dated 9 September 2021 at 12:30;
- iii. the letter dated 9 September 2021 with enclosed draft Deed of Settlement; and
- iv. the email trail dated 9 September 2021 to 12 September 2021.

6. I granted leave and the summons was amended to include a paragraph in those terms.
7. I will address the issues that arise on this summons under three headings – the alleged absence of a reasonable cause of action, the damages claim, and the allegedly without prejudice correspondence.

Order 18 rule 19 – no reasonable cause of action

8. In **Fatima Cox v Gloria Cox and anor.**, Action No. CL32/2021, the defendant filed a similar application relying on the same ground (that the plaintiff’s pleading did not disclose a reasonable cause of action). I dismissed the application and explained¹:

In order to succeed on an application to strike out an action on this ground, a defendant must satisfy the Court that even if the plaintiff proves all the pleaded allegations, the action would still fail. I must therefore proceed on the premise that if the action goes to trial, Fatima will be able to prove all the allegations in her statement of claim.

Royal Bank of Scotland International Ltd v JP SPC 4 is a very recent decision of the Privy Council. The learned Law Lords summarized the law in this way²:

An application to strike out should not be granted unless the court is certain that the claim is bound to fail...a claim should not be struck out unless it is effectively unarguable, has no chance of succeeding and as such is a plain and obvious case.

¹ In paragraphs 14 and 15.

² [2022] UKPC 18, at paragraph 29.

9. In the present case, the Defendant is effectively challenging the veracity of the factual allegations in the Plaintiff's affidavit. Those allegations are not incredible on their face, and on this application the court has to proceed on the basis that the Plaintiff might prove those allegations at trial.
10. This case is therefore plainly not unarguable, and I cannot say that the action is bound to fail. This ground of the summons therefore fails.

The award of damages

11. This point can be disposed of quickly. In response to an enquiry by the court during oral submissions, counsel for the Defendant indicated that they intend to apply for permission to file a counterclaim for those damages. Without expressing a view on the likely outcome of such an application, I would observe that there is no counterclaim before the court at this time, and no basis on which I could order the Plaintiff to pay those damages.

The “without prejudice correspondence”

12. Both parties cited multiple authorities on without prejudice privilege, but there is no disagreement as to the applicable legal principles: the fact that a letter or other communication is marked “without prejudice” is not enough to give rise to the principle. A communication will be treated as without prejudice and therefore privileged if it is made in the course of negotiations with a view to resolving a dispute.
13. The only issue in this case is whether there was a dispute at the relevant time. The Plaintiff contends that in June 2021 when the second letter was written, there was no dispute because the agreement had been terminated. However, it is plain that the Defendant did not accept that the agreement had been terminated. There was therefore a dispute for the purpose of the principle, and the letters were proposing ways in which the dispute might be resolved.

14. I am therefore satisfied that these communications were subject to without prejudice privilege and should not have been exhibited. However, that is not a basis to strike out the action, unless the action cannot stand without them. Not only are these communications not critical to the action; they are arguably not relevant at all.
15. What would be appropriate is an order striking out the exhibits.
16. Finally, there is the question of costs. The Defendant has succeeded in part, to the extent that I will strike out the without prejudice correspondence. However, the summons has otherwise failed. In the circumstances, the appropriate order would be no order as to costs.

Disposition

For these reasons I make the following orders:

1. The following documents exhibited to the affidavit of Mylande Alfred filed on 12 May 2022 be struck out;
 - i. the letter dated 6 January 2021;
 - ii. the email dated 9 September 2021 at 12:30;
 - iii. the letter dated 9 September 2021 with enclosed draft Deed of Settlement; and
 - iv. the email trail dated 9 September 2021 to 12 September 2021.
2. The Defendant's summons filed 12 July 2022, is otherwise dismissed.
3. No order as to costs.

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

