

successfully defending the claim. The application to strike out the defence is allowed in part. The following defences cannot succeed:

- (i) An agreement with a 3rd party to indemnify Mr. Janmohamed for the debt owed to The Proprietors relieves him of his legal obligation to pay HOA fees.
- (ii) Mr. Janmohamed is no longer liable for HOA fees where an agreement with a 3rd party for sale strata lots exists, but title has not been transferred.

ISSUES

3. The following issues are raised in this application:

- Issue 1: Is Mr. Janmohamed permitted to submit new evidence at this stage?
- Issue 2: Have The Proprietors established, on a balance of probabilities, that Mr. Janmohamed has no real prospect of defending the claim?
- Issue 3: If the answer to (2) is no, should Mr. Janmohamed's defence be struck because it discloses no reasonable grounds for defending the claim?

ANALYSIS

4. Summary judgment and striking out are two distinct procedures leading to different consequences. They cannot operate simultaneously and should not be conflated.¹ Given that summary judgment would end the matter, I have considered the summary judgment application before the strike out application. Both applications, however, require that I first address a question about the evidence to be considered.

¹ *Didier et al. v. Royal Caribbean* SLUCHCVAP 2014/00240 at para 20.

Issue (1) Is Mr. Janmohamed permitted to submit new evidence at this stage?

5. The Proprietors argued that I ought not to consider three, previously undisclosed documents. The first document is a consent order issued from this court in 2019 in a claim between Mr. Janmohamed and a 3rd party that, on its face, relates to some of the strata lots that are the subject of this application. The second document is part of an email chain from July 2010 that appears to include The Proprietors. The final document purports to be a settlement agreement executed by the parties on December 8, 2006, also in relation to some of the same strata lots.

6. By filing an application for summary judgment, The Proprietors opened the door for Mr. Janmohamed to introduce new evidence in support of his defence. I am not only required to consider the evidence currently before the court in deciding a summary application, but also any evidence that may reasonably be expected to be available at trial.² Given the content of Mr. Janmohamed's statement of defence, there is a high probability that the existence of these documents will be the subject of direct and cross-examination. If their contents are disputed, an application is likely to be made and granted for their admission.

7. In addition, the Proprietors' objection to new evidence has, in effect, been heard and overruled when I granted Mr. Janmohamed an extension to file his reply to the application for summary judgment. The Proprietors do not have another opportunity to make the same objection when the new evidence is actually filed. *Supreme Court (Civil Procedure) Rules*,

² *Royal Brompton Hospital NHS Trust v Hammond* (No 5) [2001] EWCA Civ 550 at para 19.

2005 (“CPR”)15.5(2)(a) expressly directs respondents to file affidavit evidence if they wish to rely on evidence in a summary judgment application. CPR rule 30.3(2) (b)(ii) requires that an affidavit indicate the source of any matters of information and belief. Where that information or belief arises from a document, CPR rule 30.4(1) requires that the document be exhibited to the affidavit.

8. I have also considered the documents when I decided to partially strike out the statement of defence even though strike out applications are considered based on the pleadings.³ I have done so for reasons of expediency and in support of the court’s overriding objective to justly deal with cases.⁴ I have admitted the documents in the application for summary judgment and ultimately concluded that the application will be denied. To preclude them from the strike out application will only invite an application to amend the statement of defence as this matter moves to trial. The strike out application provides the court with an opportunity to triage those elements of Mr. Janmohamed’s statement of defence that disclose no reasonable grounds. It is expeditious to consider the entire defence.

9. It also does no injustice to The Proprietors to admit two documents that they should have had in their possession. Standard disclosure was ordered by this court. CPR rule 28.4 requires that parties disclose all documents which are directly relevant to the matters in question in the proceedings. It is likely that The Proprietors had a duty to disclose these documents.

³ *Didier*, *supra* note 1 at para 28.

⁴ CPR rules 1.1(1) and (2)(d).

10. Finally, I do not accept The Proprietors assertion that CPR rule 26.8(2), which outlines preconditions that must exist before the court can grant relief from sanctions, applies to my decision to consider these documents in the strike out application. Relief from the sanction imposed by CPR rule 10.7 is not being sought. As explained, The Proprietors' summary judgment application triggered Mr. Janmohamed's right, with the court's permission, to expand the evidence to be considered to support his statement of defence. Mr. Janmohamed has also not failed to defend the claim.

Issue (2) Have The Proprietors established, on a balance of probabilities, that Mr. Janmohamed has no real prospect of defending the claim?

11. Rule 15.2 (b) permits the court to grant summary judgment if Mr. Janmohamed has no real prospect of successfully defending the claim. To decide this case summarily, I am tasked with considering the legal issues on their merits. While recognizing that this review is based on untested affidavit evidence and witness statements, a summary judgment should not be entered where the defendant has a "realistic as opposed to a fanciful prospect of success."⁵ The burden is on The Proprietors to prove that Mr. Janmohamed has no real prospect of defending against this claim.

12. Mr. Janmohamed is the registered owner of 11 strata lots in a strata development commonly known as the Royal Palm Villas in San Pedro Town, Ambergris Caye, Belize. Section 6(2)

⁵ *Swain v Hillman* [2001] 1 All ER 91 quoted in *Social Security Board v Ida Herrera Civil dba Belmopan Cleaning and Sanitation Services*, No. 39 of 2010 at para 27.

of *The Strata Titles Registration Act*⁶ authorizes The Proprietors to maintain a common fund for maintenance of common spaces and other expenses of the strata plan. A lawfully enacted bylaw provides that title holders pay BZE\$500 per month towards that common fund. Unpaid invoices annexed to The Proprietor's affidavit evidence show that no fees have been paid on parcels H41, H42, H44, H45, H46, and H60 since 2015 when they obtained judgment against Mr. Janmohamed for outstanding HOA fees. Mr. Janmohamed has never paid the required HOA fees on parcels H47, H48, H49, H50 and has not paid the HOA fees on parcel H40 since 2018.

13. Mr. Janmohamed annexed the settlement agreement from Claim No. 285 of 2015 between the parties to his affidavit. On its face, the parties have agreed that no fees will be owed on parcels located in Building 12 (H46, H47, H48, H49, H50) until "they are sold and become inhabitable" and that Mr. Janmohamed "will not be responsible for making any payments for any unfinished or unsold units in the uncompleted phases until or unless such premises are used for occupation by guests." That agreement further provides that Mr. Janmohamed will be responsible for the monthly HOA fees for units that are "either sold outright or time shared which [Mr. Janmohamed] has under his control" commencing December 15, 2006, but that all other payments "will be paid by the respective Unit Owners". Mr. Janmohamed's defence speaks clearly to the fact that no fees are owing because none of these units were inhabitable. The Proprietors have not provided reasons why the settlement agreement is to be disregarded. The effect of the settlement agreement on his liability for the debt is a material fact that cannot be determined on the affidavits

⁶ R.S.B. 2011, c.196

alone, and therefore, must be investigated. This is not a matter suitable for summary judgment as a result.

Issue 3: If the answer to (2) is no, should Mr. Janmohamed's defence be struck because it discloses no reasonable grounds for defending the claim?

14. The court must use its power to strike out sparingly.⁷ Striking out is only appropriate where no recognizable legal defence to the claim is provided. Striking out is not appropriate “where the argument involves a substantial point of law which does not admit of a plain and obvious answer; or the law is in a state of development.”⁸
15. Mr. Janmohamed's defence partially relies on the existence of a consent order with a 3rd party. That agreement appears to indemnify him for any outstanding obligations for HOA fees and to assume responsibility for fees going forward. Mr. Janmohamed asserts that this agreement transferred responsibility for those fees to the 3rd party. He argues that he is not liable for these fees as a result. This aspect of Mr. Janmohamed's defence is struck in so far as it is offered as a standalone defence to the claim. It is trite law that contracts cannot bind 3rd parties. This defence is not viable and is struck. It remains open, however, for Mr. Janmohamed to rely on the consent order in his defence in so far as it may assist in interpreting the settlement agreement between Mr. Janmohamed and The Proprietors.

⁷ *Didier* supra note 1, at para 25.

⁸ *Citco Global Custody NV v Y2K Finance Inc.* BVIHCVAP2008/0022 at para 14.

16. The Proprietors have provided the relevant strata titles. The titles list Mr. Janmohamed as registered owner for each strata lot where they have claimed HOA fees. Mr. Janmohamed's defence that although he remains the registered owner of these properties, he has entered into agreements for their transfer and is no longer legally responsible for HOA fees is untenable in law and is struck. As the Proprietors correctly outlined, section 26 of the *Registered Land Act* vests absolute ownership upon registration. Section 31(1)(e) makes it clear that the registered owner is liable for "any unpaid moneys which, without reference to registration under this Act, are expressly declared by any law to be charged upon land." Section 6(2)(b) of the *Strata Titles Registration Act*⁹ provides the legal authority for the HOA fees to be charged to the registered owner of strata units. While an agreement may express an intention to transfer land, Mr. Janmohamed's liability for HOA fees does not end until that transfer has been registered in the Land Registry.

ORDER

The orders of the court shall be as follows:

- (i) The application for summary judgment is dismissed.
- (ii) Paragraphs 8 and 18 are struck from the amended statement of defence.
- (iii) The portion of the previous order that separated the main claim from the counterclaim is vacated. The inhabitability status of the strata lots may now be directly relevant to the main claim because of the settlement agreement between the parties on the previous claims.
- (iv) Trial is set for May 17 at 9 am.

⁹ R.S.B., 2011, c.196.

- (v) A Trial Bundle is to be prepared by April 25 and will include:
 - a. All appropriate documents related to the claim and counterclaim
 - b. Agreed Statements of Facts;
 - c. A summary of legal propositions to be relied upon at trial;
 - d. Skeleton arguments from each party;
 - e. Copies of authorities proposed to be cited in support of each party's position; and,
 - f. A tentative hearing schedule that outlines the approximate timing for when witnesses will be heard.
- (vi) Each party is to bear its own costs for this application.

DATED THIS 16TH DAY OF MARCH, 2022

PATRICIA FARNESE
JUSTICE OF THE SUPREME COURT