



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2021 No: 413

BETWEEN:

(1) WANDA BOOTH
(2) SHADDI SOMERSALL
(3) EMPRESS SOMERSALL

Plaintiffs

-v-

(1) HSBC BANK BERMUDA LIMITED
(2) MARSHALL DIEL & MYERS LIMITED
(3) THE COMMISSIONER OF POLICE
(4) AMICUS LAW CHAMBERS LIMITED

Respondents

JUDGMENT

Date of Hearing: 23 September 2025

Date of Judgment: 29 September 2025

Appearances: Paul Wilson of Marc Geoffrey Limited, for the Plaintiffs
Sean Dunleavy of MDM Limited, for the 1st and 2nd Defendants
Brian Myrie of The Attorney Generals Chambers, for the 3rd Defendant

**Jaymo Durham of Amicus Law Chambers Limited, for the 4th
Defendant**

JUDGMENT of Elkinson, AJ

INTRODUCTION

1. In this matter, I ruled ex tempore at the hearing of the Applications brought by each of the Defendants under Order 18 rule 19 of the Rules of the Supreme Court 1985 that, in respect of the First, Second and Third Defendants, the claims set out in the Generally Indorsed Writ of Summons and Memorandum of Appearance be struck out. I now set out my reasons why those Defendants' Applications succeed. I will also deliver my judgment and reasons in respect of the Application brought by the 4th Defendant for the same relief, which has also been successful.

FACTS

2. The Applications are to strike out the Plaintiff's claims set out in the Generally Indorsed Writ of Summons dated 23rd December 2021 and Statement of Claim dated 26th January 2022. The Plaintiff in this action is, as set out in the Generally Indorsed Writ of Summons, Wanda Booth, Shaddi Somersall and Empress Somersall. The Court was informed that this is a mother and two children, both now adults. I shall refer to pleadings and the claim generally as "the Proceedings"
3. Ms. Booth had occupied a property at 25 Sofar Lane, St David's ("the Property") which had been purchased further to a mortgage provided by the First Defendant bank. Due to lack of payment, a mortgage action was commenced by the bank in 2016 (2016 no.196). Eventually, after discussions, Ms. Booth signed a Consent Order on 14th February 2018 ("the First Consent Order") which allowed the bank to have judgment and to enforce the mortgage by way of sale. They then allowed her the opportunity to stay in occupation. However, further non-payment eventually led to further court applications, including an application by Ms. Booth to set aside the Writ of Possession. This was resolved with a Second Consent Order which gave possession to the Bank and also provided for a month-to-month tenancy which allowed her to stay in the Property. Non-payment of the rent under that arrangement resulted in Magistrates' Court proceedings and an Order for Ejectment. Ms. Booth then brought an appeal against that Order which was subsequently not prosecuted. There was ejectment from the property on 21st March 2021, with the involvement of the Bermuda Police Service to assist in enforcing the Warrant to Evict dated 2nd March 2021.

ORDER 18/19 - STRIKING OUT PLEADING AND INDORSEMENTS

4. The ability to bring to an end at an early stage an action lacking any meritorious factual or legal basis is afforded to the Defendants through this Order. Litigation can be a lengthy and expensive process. A defendant should not be required to have to defend an obviously unmeritorious action but equally the power to strike-out is balanced against access to justice concerns. Striking out does shut a plaintiff out from the courts without an opportunity to orally present the case, however weak. However, where it is plain and obvious that there is no meritorious factual or legal basis for the claim, the court is obligated to consider the possibility of striking out the action. The rule is clear in its terms: -

Order 18/19 -

- (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that—**

- (a) it discloses no reasonable cause of action or defence, as the case may be; or**
- (b) it is scandalous, frivolous or vexatious; or**
- (c) it may prejudice, embarrass or delay the fair trial of the action; or**
- (d) it is otherwise an abuse of the process of the court;**

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

- (2) No evidence shall be admissible on an application under paragraph (1)(a).**

- (3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.**

THE CLAIMS AGAINST THE DEFENDANTS

5. The allegations made by the Plaintiff in the proceedings are wide-ranging:- in relation to the Second Defendants as attorneys for the First Defendant bank, it is alleged that they owed duties of care to the Plaintiff because Ms. Booth was a litigant in person and that the First Consent Order, which had been executed by her personally, should be set aside as the attorneys had induced Ms. Booth to sign the First Consent Order; to a further claim that the

First Consent Order should be set aside as the system for dealing with Consent Orders by the court effectively requires the court to do a full analysis of what the parties have consented to before the court can sign the order.

6. Mr. Paul Wilson, counsel on behalf of the Plaintiff, made a valiant attempt to try and justify on a legal basis the allegations set out in the Proceedings, which it is to be noted had not been drafted by him or his firm, but even he could not give support to the issues raised in the pleadings with any legal principle or authority. It was a hopeless task which he had been given. He accepted that the matter could have been better pleaded. Not least, there was no answer to the argument made by Mr. Myrie, counsel for the Commissioner of Police, that there could be no vicarious liability on his client as I explain below.
7. The Commissioner of Police, the Third Defendant, was made a defendant in the Proceedings for matters relating to what officers of the Bermuda Police Service did in enforcing the Warrant to Evict and in assisting the bank in getting vacant possession of the Property.
8. At the outset of the hearing, I was informed that agreement had been reached between the Plaintiff's counsel and Mr. Myrie to the effect that the claim as against the Commissioner of Police could be struck out. In seeking clarification from Mr. Wilson that the order I should make is that by consent the claim as against the Commissioner of Police was struck out, he informed the court that he had never met the two Somersalls, he had only met Ms. Booth. On that basis, he did not feel that it was appropriate for him to consent on behalf of the Somersalls. A discussion then ensued as to whom exactly he was representing as his firm had entered a Notice of Change of Attorney on 5th February 2024 to be the attorneys for 'the Plaintiff'. The Notice states that his firm represents 'the Plaintiff'. As set out in the title of the Generally Endorsed Writ of Summons, 'the Plaintiff' is described as 'Ms. Booth, Shaddi Somersall and Empress Somersall'.
9. As regards the fact shared by Mr. Wilson that he had never met Shaddi or Empress Somersall, the effect of that and its consequences is a matter for the attorney to consider. In circumstances where there is more than one person named as the Plaintiff and the attorney only deals with one of those persons named as the Plaintiff, the attorney has to determine whether the one person he has met has actual authority or just ostensible authority to instruct the attorney on behalf of all those named. It may be that the person has full authority and so represented that or it may be that that person has none – it is an inquiry which the attorney should undertake so that the attorney may properly fulfil his/her obligations under the Barristers Code of Conduct and his/her duties to the client(s).

10. In any event, no consent was then forthcoming from Mr. Wilson so the court invited Mr. Myrie to advance his submissions as to why the Commissioner of Police was not an appropriate Defendant and the action against him should be struck out. He proceeded to do that.
11. It is established in Bermuda, albeit obiter, by the Court of Appeal in the case of **Khamisi M Tokunbo v The Commissioner of Police and The Attorney General** [2024] CA (Bda) 25 Civ, that the Commissioner of Police is not himself the employer of the officers of the Bermuda Police Service and he cannot be vicariously liable for any of their actions. Sir Christopher Clarke, as President of the Court of Appeal, said:

"He has the command of the Police Service and is responsible for its administration: see section 3 of the Police Act 1974. But that does not, as it seems to me, render him vicariously liable for the acts of police officers any more than a general is responsible for the acts of his soldiers. The position is different in the UK where section 88 of the Police Act 1996 makes the chief officer of police for a police area liable in respect of torts committed by constables under his direction and control and provides for payment of any damages out of the police fund."
12. The officers were in any event acting further to a lawfully issued Warrant and the fact that Shaddi and Empress Somersall were arrested related to obstruction. In response, Mr. Wilson's submissions focused on the Warrant.
13. I was satisfied having heard both counsel and having considered their written and oral submissions on this point, that this is the legal position in Bermuda and that there can be no claim against the Commissioner of Police for the alleged tortious actions of officers of the Bermuda Police Service. These actions, in any event, appeared to me to be lawfully within the scope of their duties. I held that the claim against the Third Defendant should be struck out.
14. Having struck out the claim as against the Commissioner of Police, Mr. Myrie applied for his costs and that they be measured at \$5000. It was agreed by counsel for the Plaintiff to be a reasonable figure in the circumstances of the case, not least the lengthy history of exchanges of pleadings and the many appearances to date. I ordered that the Plaintiff is to pay the sum of \$5000 in respect of the costs of the Third Defendant forthwith.

THE CLAIMS AS PLEADED

15. In relation to both his oral and his newly drafted written submissions, counsel for the Plaintiff attempted to address the court on allegations which had not been pleaded. There was no application before the court to amend any of the pleadings. I did not allow him to

raise new issues through submissions. A strike-out application has to proceed on what is set out in the pleadings and, having read and heard the submissions from the parties, the pleadings failed to establish that the Plaintiff's case had merit. As was aptly said by Mrs Justice Shade Subair-Williams acting as Registrar in the case of **Tucker v. Hamilton Properties Limited** [2017] SC (Bda) 110 Civ: -

"The Court's determination of a strike-out application is a component of active case management. Essentially, the Court is required to identify the issues to be tried at an early stage of the proceedings and to summarily dispose of the others. This is aimed to spare unnecessary expense and to ensure that matters are dealt with expeditiously and fairly."

16. As regards the pleaded case against Amicus Law Chambers, the Fourth Defendant, this arose as the attorneys had understood they were to represent the Plaintiff having had, at a very late stage, email exchanges and discussions with Ms. Booth which they understood instructed them to do so. Their position was they had executed the Second Consent Order on instructions. Ms. Booth alleged that there was no Retainer Agreement with them and that they were not her attorneys. There was a further allegation relating to a failure of a duty of care by those attorneys and that the attorneys had failed to file the notice which showed them as attorneys of record. This, it was pleaded, had the effect that the Plaintiff was entitled to Orders setting aside the Second Consent Order and Damages.
17. It is clear from the short affidavit of Ms. Keiva T Maronie and its exhibits that the law firm signed the Second Consent Order on the instructions of Ms. Booth. No Retainer Agreement is necessary to establish the attorney's authority to act on behalf of a client. There is no doubt that, as in many interactions where a relationship is created, if there is corroborative material which exists this will assist in the event of any disagreement or a need for clarification. However, contrary to the argument made that a written retainer agreement is required, the legal position is that an attorney can be instructed orally. An attorney can even act for free or without a retainer payment, never mind a retainer agreement. The failure to file a Notice of Change of Attorney is not a matter which undermines the fact that they were the instructed attorney for the party. I am satisfied from the evidence that they were the Plaintiff's attorneys at the time they signed the Second Consent Order. Accordingly, Amicus Law Chambers' Application to strike-out the action of the Plaintiff against them also succeeds.
18. In respect of the case being made by the Plaintiff against all the Defendants, this is best comprehended, or not, from an extract from the 25 pages of Plaintiff's written submissions. I set these out below (typographical errors if any are from the original):-

“Summary of Complaints

14. At the crux of this matter, the chief complaint is that the First Plaintiff had no understanding of how the Consent Orders affected her legal rights as owner of the Property. In tandem with that complaint is that the Second Defendant did not discharge its duty, in the circumstances, to ensure that the First Plaintiff had the opportunity to consult independent counsel, and the Court did not conduct a hearing to explain the implications of either of the Consent Orders to the First Plaintiff before they were entered into or to ascertain the First Plaintiffs understanding.

15. As such because of the above-mentioned occurrences the February Consent Order should be set aside due to the absence of oversight by the Court and its failure to achieve the overriding objective by positively managing the case and actively considering how litigation should proceed, especially given that the First Plaintiff was a litigant in person. The Court should have exercised its judiciousness; ensuring the parties were on equal footing, especially as it was dealing with major dispute such as a mortgage and the February Consent Order which would have highlighted the issues at an early stage.

16. The 2016 Action was initially handled administratively. As the First Plaintiff was never before the Courts for this matter, she was always guided by the Second Defendant in their offices, and it was the Second Defendant that always delisted the hearing between the First Plaintiff and the First Defendant. The absence of oversight to manage is plain on its face as the First Plaintiff was never served with any summons to appear, in relation to the First Consent order, despite the Court knowing the First Plaintiff was a litigant in person; in direct contravention of IA/4(g).

17. The First and/or Second Defendant induced the First Plaintiff to sign the February Consent Order. The First Plaintiff asked or sought to write conditions pertaining to said Consent Order for her protection, but the Second Defendant deterred her from so doing, and did so at a time when it knew or ought to have known that the First Plaintiff was a litigant in person. Accordingly, it is further complained that the Second Defendant deliberately decided not to - or negligently failed to - ensure that the First Plaintiff received independent legal advice prior to signing the February Consent Order.

18. The Second Defendant also promised the First Defendant that by signing the Consent Order as it was, construction would be completed within three (3) months and the outstanding property debt would be re-financed for the Property.

19. The Fourth Defendant signed the October Consent Order when it was not an attorney representing the First Plaintiff in the 2016 Action. Accordingly, it did so at a time when it had no authority, and the signing of the October Consent Order caused the First Plaintiff to lose an opportunity to set aside the Possession Order.

20. The Second and Third Plaintiffs, though occupiers of the Property at all material times, had no notice of the First Defendant's intention to seek possession of the Property in the Supreme Court civil jurisdiction 2019/297: HSBC Bank of Bermuda Ltd. v Booth.

21. Equally they were never named in any proceedings in the Magistrates' Court, though they were evicted from the Property by the Provost Marshall, wrongly; acting pursuant to a possession order that only named the First Plaintiff as a tenant and there was no service or summons to attend mass court regarding eviction."

22. Consequently, the Third Defendant and/or its duly authorised agents (the Bermuda Police Service) violated the Second and Third Plaintiffs' constitutional rights insofar as they were unlawfully arrested.

23. At no time was the First Plaintiff issued nor did she receive a 'letter of intention to proceed'. The first writ of possession was served on 11th October 2018. The second writ (which was unsigned) was utilized to remove the First Plaintiff from the property.

24. Precedence demands that when a writ of possession is filed and used in an eviction proceeding it must be provided (given) to every occupant in the property. Precedence also mandates, the Court will not grant permission without the occupants having the opportunity to apply to the Court for relief."

THE FIRST CONSENT ORDER

19. A substantial part of the case against the First and Second Defendants relies on how the First Consent Order came about and how the order was dealt with by the Court. The Plaintiff's submission was that it was for the Court to have vigilant oversight of the Consent Order and that it should be appreciated that the failure of a litigant in person to understand their effect would lead to the order either being of no effect or be overturned. Counsel for the Plaintiff invoked the Overriding Objective set out in Order 1A of the 1985 Rules of the Supreme Court in support. It was submitted that the Court had to ensure that the Plaintiff had understood the effect of the Consent Order '*...on her legal status as it related to the Property, whether by a hearing in chambers or otherwise.*'

20. I am satisfied that this is not a sustainable submission in the context of this case. There may be instances where a pleaded case gives rise to a consideration of the true effect of a consent order but this is not this case. The First Consent Order had been in place for 3 years before these proceedings were brought and there is no pleaded allegation of duress or undue influence. I think it is evident that this was an attempt to find some basis, any basis, to mount a claim against the First and Second Defendants and those claims which are pleaded are, after consideration, unsustainable.

21. There had been a previous application in these proceedings brought by the Plaintiff which was to restrain the Second Defendants from acting as attorneys for the first Defendant, reported at [2023] SC (Bda) 5 Civ. There Chief Justice Mussenden referenced the First Consent Order in the context of the application to injunct the attorneys and submissions made by the Plaintiff in support. He recited in his Judgment the fact that it had been signed on 14th February 2018, eviction took place on 21st March 2021 and that there had been an inordinate delay in bringing the application for an injunction four years after the date of the Consent Order and one and a half years after the eviction. There is no reference in that judgment to any submission from the Plaintiff that the First Consent Order was signed in circumstances where the Court had failed to comply with the Overriding Objective or that there had been a failure of the Plaintiff to comprehend its legal effect.
22. In any event, as Mr Dunleavy for the First and Second Defendants submitted, there are principles of *res judicata* based on **Henderson and Henderson** (1843) 3 Hare 100 and that the Plaintiff, if it was truly believed that the Consent Order was not valid, should have raised these issues in the proceedings for the Injunction. The principle in **Henderson and Henderson** is that a party must bring out all of their case when they have the opportunity to do so and cannot do so piecemeal. This is what gives rise to an estoppel and the application of the principle of *res judicata*. The principle applies to points not only on which the court has made a determination but to every point which could have and should have put before the court. This is a principle which is law in Bermuda following a line of cases dealt with by the Privy Council – see **Hoystead v Commissioner of Taxation** [1926] AC 155 and **Yat Tung Investment Co Ltd v Dao Heng Bank Ltd** [1975] AC 581.
23. I do not need to recite all the arguments made on behalf of the First and Second Defendants as they all lead to the same conclusion - that the Proceedings now should be struck out. The case as pleaded in respect of the Consent Order as regards Miss Booth's state of mind and the Court's process for dealing with Consent Orders has no legal foundation and is unsustainable.
24. As regards the pleaded case that there is a duty on an attorney for the Mortgagee to aid the unrepresented Mortgagor, I cannot agree. The allegation in the pleading is that the attorneys knew she was a litigant in person and that they had promised that the construction that she was carrying out on the property would be completed in three months. Leaving aside the fact that the duty on an attorney who is on the opposite side to a lay litigant is the same as if that litigant was represented by an attorney, these were matters which could and should have been raised in the previous hearing before the Chief Justice if they had merit to support the attack on the First Consent Order. Further, the attorneys had no duty to ensure she had obtained independent legal advice, even though they had in correspondence suggested that to her. There appears to be confusion on the part of the Plaintiff as to the legal position of

an individual who is a mortgagor or guarantor with the long line of English cases involving Banks and married couples which the court was referred to. In those cases, a spouse could raise the issue that she/he didn't know the consequences of signing for a mortgage or guarantee or that the spouse was acting under undue influence of the other spouse. It has been held in those cases that the Bank should have ensured that the spouse was independently advised.

25. In **National Westminster Bank Plc v. Morgan** [1985] 1 AC 686 Lord Scarman, in the context of undue influence (which to be clear was not pleaded by the Plaintiff in this case), set out that if the relationship is an ordinary one of banker and client, the bank is under no duty to ensure that the client has independent legal advice. I hold that this applies to the attorneys for the bank in this case: that they had no duty to ensure that she had independent legal advice. Lord Scarman doubted that the law had any general principle of relief against inequality of bargaining power. The fact that the Mortgagor had no legal representation is not to be confused with any other principle which exists where the person is under a legal disability, such as being a minor or suffering from a mental disorder.

SUMMARY

26. Each of the Defendants' strike-out Applications succeeds. I have already dealt with the costs of the Third Defendant. In respect of the First, Second and Fourth Defendants, I see no reason why they should not get their costs, to be taxed in default of agreement. If any party wishes to present argument that the usual order for costs should not be made, they may apply to the Registrar within 7 days of the date of this Judgment for a hearing. If no application is made, the costs of each of their respective Applications are awarded to them, to be taxed in default in agreement.

DATED this 29th day of **September** 2025



THE HON. MR. JEFFERY ELKINSON
ASSISTANT JUSTICE OF THE SUPREME COURT