[2015] JMSC Civ. 213

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014 HCV 00854

BETWEEN	**MELODY CAMMOCK-GAYLE**	**CLAIMANT**
AND	**HEATHER URQUHART**	**1ST DEFENDANT**
AND	**GLENDON B. SPENCE**	**2ND DEFENDANT**

IN CHAMBERS

Cavelle Johnston, instructed by Townsend, Whyte and Porter, for the Claimant

Douglas Leys, Q.C and Kimmone Tennant, instructed by Douglas Leys and Co. for the Defendant

Heard: March 17 and September 18, 2015

APPLICATION FOR SUMMARY JUDGMENT – REGISTRATION (STRATA TITLES) ACT – WHETHER CLAIM SHOULD HAVE BEEN INSTITUTED AGAINST STRATA CORPORATION RATHER THAN THE 1ST DEFENDANT – LEGAL APPROACH TO BE ADOPTED BY COURT IN RESPECT OF SUMMARY JUDGMENT APPLICATIONS – WHETHER STRATA PLAN WAS A DULY REGISTERED STRATA CORPORATION

ANDERSON, K.J

BACKGROUND

[1] This application first came before this court, upon a hearing in Chambers, which was held on March 17, 2015. At that hearing, the 1st defendant's application for summary judgment, which had been filed by the 1st defendant on June 17, 2014, was

heard and ruling thereon, was reserved. Embodied herein, is the ruling and consequential orders, following upon the hearing of that application and the reasons underlying same.

[2] The 1st defendant's application for summary judgment is supported by the affidavit of the 1st defendant which was filed on June 17, 2014 and by her supplemental affidavit, which was also filed on the said date. The claimant has not filed and thus, has not sought to rely on any affidavit in response.

[3] The claimant filed her claim against the defendants, on February 21, 2014 and her particulars of claim was filed on said date. The claimant had, by means of her claim form, sought court orders, declaratory relief and damages for trespass, personal injuries and consequential loss, arising out of an incident that occurred on or about August 34, 2013.

[4] There has not yet been held, in respect of the claimant's claim, any case management conference. As such, in keeping with **rule 20.1 of the Civil Procedure Rules (CPR)**, the claimant has made subsequent amendments to her claim form and particulars of claim and has done so, without seeking this court's permission prior thereto. As is her right also, the 1st defendant has filed, without this court's permission, an amended defence. Accordingly, for the purposes of this written reasons for ruling, reference will be made by this court, to the claimant's further amended particulars of claim and the 1st defendant's amended defence. There has been filed by the 1st defendant, an ancillary claim, which was subsequently amended by the 1st defendant, and an amended defence to said ancillary claim, which was filed by the claimant. For present purposes however, it is to be noted that the allegations made by the pertinent parties, in respect of the ancillary claim, bear no relevance whatsoever and shed no light whatsoever, on any matters pertinent to the 1st defendant's application for summary judgment. As such, even if the 1st defendant's application for summary judgment is successful, court proceedings in respect of the ancillary claim, will nonetheless, remain extant, as also will, the claimant's claim against the 2nd defendant.

[5] From the aforementioned, it is apparent that the claimant's claim is being vigorously pursued, against the 1st defendant, thus far and is also, being vigorously disputed by that defendant. Accordingly, it should come as no surprise to anyone, that the 1st defendant's application for summary judgment, is also being vigorously disputed.

[6] The 1st defendant has, in her application for summary judgment, filed seven (7) grounds, in support thereof. Upon the hearing of that application by this court, on March 17, 2015, counsel for the applicant/1st defendant – Mr. Douglas Leys, Q.C made it clear that he will now only be relying on the first three (3) of those grounds. For present purposes therefore, this court will pay no regard to any of the other grounds. Those first three (3) grounds are as follows:

> *'i) The respondent/claimant has no real prospect of success in respect of the issues reused in the particulars of claim for the reasons stated hereunder.*
>
> *ii) The respondent/claimant does not have the necessary capacity or locus standi to institute and maintain the claim.*
>
> *iii) The respondent/claimant does not have any registered interest reflected on the certificate of title registered at volume 1260 folio 253 of the register book of titles recognizing her ownership or entitlement to the common property, as the said certificate of title refers to the area claimed by the claimant as common property belonging to the proprietors' Strata Plan No. 528.'*

SUMMARY OF THE PARTIES' LEGAL SUBMISSION AND THE PARTIES' RESPECTIVE STATEMENTS OF CASE

[7] In order to not only effectively summarize the parties' respective legal submissions, but also, to make the same readily understable by all, it is essential to contextualize those submissions, by making reference to the parties' respective statements of case. It is only after having done same, that anyone will be able to readily recognize and understand what are the issues in dispute between the parties. After having carefully considered the nature of the claim and the issues surrounding same

which are in dispute between the parties, along with the nature of the 1st defendant's application for summary judgment, this particularly as regards the precise grounds being relied upon, in support of that application and the law concerning how an application such as that, is to be approached by this court and finally, after having also considered the undisputed evidence which has been led by the 1st defendant, in support of her said application, this court will then properly be able to make the appropriate judicial determination of that application.

[8] How then can the claimant's and the 1st defendant's respective statements of case, be summarized? By this claim, the claimant is seeking to obtain, as against the 1st defendant, declaratory relief and orders for certain things to be done. Additionally, the claimant is seeking, as against both defendants, damages for trespass to property. It will be useful to set out, in exact terms, all of those reliefs being claimed. Same is now done:

> *i) A declaration that the claimant is the holder of possessory title to the entirety of the additional parcel of land comprising approximately 140 square feet formerly enclosed immediately adjoining the rear of the ground floor apartment, the property of the claimant and more particularly described in certificate of titles registered at volume 1260 folio 252 and volume 1260 folio 253 of the register book of titles as 'common property.'*
>
> *ii) An order that there be a survey of said additional parcel of land immediately adjoining the rear of the ground floor apartment, the property of the claimant, and more particularly described in certificate of title registered at volume 1260 folio 252 and volume 1260 folio 253 of the registered book of titles as 'common property,' such cost to be borne by the claimant.*
>
> *iii) An order that the certificate of title registered at volume 1260 folio 252 of the register book of titles be cancelled and a new certificate of title issued to include the said additional parcel of the land as the property of the claimant.*

iv) An order that the certificate of title registered at volume 1260 folio 253 of the register book of titles be cancelled and a new certificate of title issued to exclude the said additional parcel of land as common property.'

'2 i) A declaration that the actions of the defendants on or about August 24, 2013 were ulra vires and amount to trespass for that there was no valid order from any competent authority authorising the entry of the defendants and or their authorised servants or agents unto the said 'common property' and or to engage in the destruction/demolition and removal of the enclosed construction, inclusive of walls, windows, steel and tile floor.

ii) Damages in the sum of $1,271,690.00.

iii) Damages for personal injuries, such damages to be assessed.

iv) Damages ...'

[9] The reliefs set out above are all contained in the claimant's further amended claim form, which was filed on July 11, 2014. The claimant filed, 'further amended particulars of claim,' on July 14, 2014. Essentially, this claim pertains to two (2) parcels of land, which adjoin each other, these being: Title registered at volume 1260, folio 252 on which land parcel presently resides the claimant in an apartment. This in commonly known as Apt. No. 1, or in more correct legal terms, as, 'Strata Lot 1 and' is part and parcel of Strata Plan No. 528. That apartment is located on the ground floor of the apartment complex which is known as, 'Timbers of Worthington.' The claimant has allegedly been in possession of the said land parcel since as of 1991, when she purchased same, prior to her marriage, in her maiden name. She was residing at that apartment, on or about August 24, 2013.

[10] The claimant has allegedly also, for in excess of twelve (12) years, enjoyed exclusive possession of an additional land parcel containing approximately 140 square feet and which directly adjoins the rear of the claimant's land parcel, as aforementioned.

That 140 square feet of land space has been described in the certificate of title which is registered at volume 1260, folio 252, as 'common property' and this court understands this to mean that in the usual course of things, that 140 square feet of land space belongs to both of the land parcel owners on whose title, that land parcel has been described as common property – that being, the claimant and the 1st defendant. The same is commonly owned by them and should, ordinarily, be left accessible to both of them. Accordingly, said 140 square feet of land space, is also described on the land title registered at volume 1260 folio 253 of the registered book of titles, 'common property.' Since April 2, 2007, the 1st defendant has been the registered proprietor of Strata Lot 2, which is located on the upper floor of the said, 'Timbers of Worthington' apartment complex and which is registered at volume 1260 folio 253 of the register book of titles said land parcel; is also, part and parcel of Strata Plan No. 528.

[11] The dispute in this claim, centers, around the said, 'common property.' On their respective property titles, that 'common property' has been described as property to which the claimant and the 1st defendant respectively, each have a half, undivided share. The claimant has alleged that, at the time when she acquired the relevant land title and took possession of apartment 1, the 'common property' was covered with an overhead grill and used by her to enter and exit her Strata Lot 1. She has further alleged that, on the other hand, when the 1st defendant became the registered proprietor of Strata Lot 2 in 2007 and at all material times, the 1st defendant has accessed her upstairs Strata Lot 2, via an external staircase that is to the right of both Strata Lots, but which forms a part of Strata Lot 2.

[12] The claimant has also alleged that in or about 1992, she enclosed the said 140 square feet of land space, described on the disputing parties' land titles, as 'common property,' by erecting concrete walls and outfitting same with a door and windows and constructing a concrete roof over the said area. As same was 'common property' though, it is of importance to recognize that legally, the claimant would not then have had any legal right to have so built on, or enclosed that 'common property,' acting unilaterally, in having so done.

[13] What then, if anything, subsequently occurred, with respect to that, 'common property?' From the claimant's viewpoint, no doubt, what occurred with respect to same, on or about August 24, 2013, can best be described as a cataclysmic event, since, according to her, the 2nd defendant, having been engaged by the 1st defendant, to so do and while doing so, in the capacity of the 1st defendant's servant (employee) or agent and having done so in accordance with the terms of his work engagement by the 1st defendant, entered upon, or caused entry to be made upon the said, 'common property,' and destroyed the said enclosed construction, inclusive of walls, windows, steel and tile flooring and thus, exposed the property's interior to, 'the elements' (i.e. rain etc.).

[14] The claimant has contended, in this claim, that the said demolition of that construction which had been carried out by the defendants the 'common property' constitutes trespass, since she (the claimant) had, at no time, authorized either of the defendants to either carry out that demolition work, or to, 'take any actions whatsoever that affected the claimant's exclusive possession and occupation of the said area of land.' Furthermore, it is the claimant's allegation that there is no valid demolition order or notice issued by any competent authority, that authorized the defendants to carry out the said demolition work, or to take any actions whatsoever, that affected the claimant's alleged exclusive possession and occupation of the said areas.

[15] In the circumstances, the claimant has, by means of this claim, claimed against the defendants for damages (monetary compensation) for alleged 'personal injuries,' as well as loss of earnings for five (5) months, between August, 2013 and January, 2014 and also, for the cost to reconstruct the demolished structure.

[16] In her defence, the 1st defendant has firstly, contended that this claim has not disclosed a reasonable cause of action against her, since at all times, her actions which form the subject of this claim, were carried out by her, in her capacity as an executive member of the Strata Corporation, which is, she has alleged, what Strata Plan No. 528 is, pursuant to **section 4 of the Registration (Strata Titles) Act**.

[17] Secondly, it is the 1st defendant further contention, that the claimant never enjoyed exclusive and undisturbed possession of the said, 'common property,' since, as of the date when the 1st defendant acquired her land parcel, the claimant's said exclusive possession of her land parcel, was 'disturbed' and was no longer 'exclusively possessed' by the claimant. Furthermore, the 1st defendant alleges that the said 'common property' was never enclosed in 1992, as the claimant has alleged. Somewhat surprisingly though, the 1st defendant has not specifically alleged when it was that the claimant enclosed the said, 'common property.' Her failure to have specifically so alleged, is perhaps in breach of **rule 10.5 of the CPR**, which requires that the defendant specifically state, not only the reason for her denial of the claimant's allegation that she (the claimant), had enclosed the said 'common property' as of 1992, but also, if she (the 1st defendant) intends to put forward a contrary version of events in that respect, she is required to specifically state that contrary version in her defence. At this stage though and for present purposes, this court perhaps need not address said defensive *lacuna*, any further.

[18] The 1st defendant has alleged that she never engaged the 2nd defendant to effect the demolition, as the claimant has alleged. To the contrary, the 2nd defendant was, she alleges, never engaged, contractually or otherwise, in this said demolition, but instead, had only provided service pursuant to a contractual agreement between the defendants, to remove the debris which had remained after the said demolition exercise had been conducted. Once again though, there is perhaps yet another defensive *lacuna*, in that, whilst the 1st defendant has specifically denied that the 2nd defendant conducted the demolition exercise, or that he was engaged by her to do so, she has made no assertion whatsoever, as to exactly who it was, that conducted the said exercise. She (the 1st defendant) has, in that respect, only addressed this *lacuna* in her defence, in general terms. It is my view though that our rules of court require her to do so with specificity, or at least, to specifically state why it is that she is unable to do so.

[19] This then brings us now, to the very essence of why it is that the 1st defendant has contended that this claim has no realistic or 'real' prospect of success. This is so,

she contends, because, this claim cannot properly succeed and indeed, should not even have been brought against her, personally. She contends that it was the Strata Corporation which had caused, 'its servants and/or agents' (the precise identities of whom, are not disclosed in the 1st defendant's defence) to enter the enclosed land parcel ('common property') and to remove, in a professional way, the material used to enclose the said land parcel. The 1st defendant has also alleged that the actions of hers which are being impugned in this claim, were carried out by her, in her capacity as an executive member of the Strata Corporation, by virtue of which, she was fully authorized to protect the, 'common property' of that corporation. The disputed 'common property' is she alleges, in law, 'common property' of and belonging to and owned by the Strata Corporation – Strata Plan No. 528. Further, the 1st defendant has contended that, she was fortified in her actions by the order of the Strata Commission dated November 23, 2012, that the encroachment, was to be demolished' – this referring no doubt, to the claimant's alleged encroachment on the 'common property.'

[20] The claimant has filed no reply, in response to the defence, but the 1st defendant has filed an ancillary claim which is not relevant, for present purposes. That being an outline of the respective parties' statement of case, the next matter to be addressed by this court, is the law as regards summary judgment applications. This court will address same briefly, as it considers that the law on that subject – matter is now quite well settled.

[21] **Rule 15.2 (a) of the CPR** provides that:

> *'The court may give summary judgment on the claim or on a particular issue if it considers that the claimant has no real prospect of succeeding on the claim or the issue.'*

As such, this court is now obliged to determine whether the claimant's case against the 1st defendant, has a realistic as opposed to a fanciful, prospect of success. See: **Swain v Hillman** – [2001] 1 ALL ER 91 and **ASE Metals NV and Exclusive Holiday of Elegance Ltd.** – [2013] JMCA Civ. 37. A claim may be fanciful, where it is *entirely without substance*, or where it is clear beyond question, that the *claimant's statement of*

case is contradicted by all of the documents or other material on which it is based. See: **Three Rivers District Council v Bank of England (No. 3)** – [2003] 2 AC 1. On the other hand though, where the claimant's statement of case has some realistic prospect of success, summary judgment in favour of the defendant, should not be granted by the court and the court should restrain itself from conducting a mini-trial into disputed questions of fact. In other words, it would not be proper for this court, at this stage, to consider the respective statements of case of the disputing parties and on that basis, decide at this times, on which of those statements of case is more credible than the other and thus, award summary judgment in favour of the party whose statement of case, appears to that judge, to be more credible. See: **E.D. and F Man Liquid Products Ltd. v Patel** – [2003] EWCA Civ. 472. This is equally true wherein there exists disputed issues of fact surrounding a particular claim, set out in affidavit evidence led in support of and in opposition to the said application. See in that regard: **Cotton v Rickard Metals Inc.** – [2008] EWHC 824 (QB). It is though, worthy of reiteration, that if a statement of case is contradicted by the very documents or other material, on which it is itself based, then, that is different.

[22] In the present case, the claimant has not responded to the 1st defendant's application for summary judgment and the affidavit evidence adduced by her and indeed, also deponed to by her, in support thereof, with any affidavit evidence whatsoever. This though, has not been taken by this court as rendering the 1st defendant's factual allegations made in opposition to this claim, as being undisputed by the claimant. This court can and ought to take judicial notice of the respective parties' statements of case, which have respectively, been certified as true. Whilst it is true that the claimant's statement of case was not certificate by her personally, but instead, as is duly permitted by our rules of court, certified on her instructions by her current attorney-at-law Ms. Johnston, the same was so certified in accordance with attorney Ms. Johnston's instructions. As such, the claimant's statement of case, can be and is being relied on in opposition to the 1st defendant's application as a whole and in opposition to her averments of fact, as made in her affidavit evidence.

[23] This court agrees with the submission which was made by the learned queen's counsel – Mr. D. Leys, on the 1st defendant/application's behalf, upon the hearing of the 1st defendant's application for summary judgment, that being that the burden of proof in respect of an application such as this, rests on the applicant's shoulders, to satisfy this court, that the claimant's case has no realistic prospect of success.

[24] As stated in the test – **Blackstone's Civil Practice 2014**, at paragraph 34.10 (p. 537) –

> *'The question of whether there is a real prospect of success is not approached by applying the usual balance of probabilities standard of proof. Many cases will succeed at trial, but will be unsuitable for summary judgment because there are complexities, disputes of fact or further inquires that need to be resolved through case management and trial before it can be said that the applicant should win on the balance of probabilities. Rather, summary judgment should only be entered where, on the untested written evidence and whatever further evidence, may be found in the future, there is no real prospect of success.*'

Placing before the court, a case which is merely arguable, ought to be distinguished from placing before the court, a case which carries with it, a realistic prospect of success. See: **E.D. and F. Man Liquid Products Ltd. v Patel** (*op. cit*.). A merely arguable case is one upon which and against which, summary judgment can properly be entered by the court, whereas, a case which carries with it, a realistic prospect of success, is not one upon which and/or against which, summary judgment can properly be entered by the court.

[25] In the case – **Director of Assets Recovery Agency v Woodstock** – [2006] EWCA Civ. 741, Tucker L.J. said that where the applicant establishes a *prima facie* case against the respondent, there is an evidential burden on the respondent to show a case answering that advanced by the applicant. A respondent who shows a *prima facie* case in answer should ordinarily be allowed to take the matter to trial. This court adopted that same legal approach, in the case – [2014] JMSC Civ. 218 – **Stanley Gabriel Marzo Michel and Bonnetta Banton and Desroy Reid**, esp. at paragraph 35,

per K. Anderson, J. Thus, the respondent to an application for summary judgment, is not required, at that stage, to place before this court, compelling evidence, in an effort to satisfy this court that his claim or defence (as the case may be) will likely succeed at trial. All that the respondent need to do, is satisfy this court, that his, her or its statement of case, constitutes a real, as distinct from a fanciful prospect, of a contrary case. See: **Korea National Insurance Corpn. v Allianz Global Corporate and Specialty AG** – [2007] EWCA Civ. 1066. This is no doubt why, in court cases, judges have described what must be done by each of the opposing parties to a claim, in their respective statements of case, which are to be considered contextually, in light of any material which can possibly be realistically relied upon, in support thereof, is to raise a, '*prima facie case*.' That quoted term is used to mean what it would mean if considered in the context of a claim which was being pursued upon a trial, that being, a case – whether for the claimant, or the defendant, which, taken at face value and without as yet having determined who is telling the truth and who is not, is a case which realistically, may succeed at trial and is thus, a case which is more than merely arguable. The disputing parties to any claim before this court, have a duty to place before this court, such a case, which I believe, can properly be described as, '*a prima facie case*.' Failure to do that, can properly result in summary judgment being entered against the party who has so failed to do so.

Application of the law as regards summary judgment applications, to the 1st defendant's applications for summary judgment to be entered against the claimant

[26] The 1st defendant, having, through her counsel, limited the grounds upon which her application for summary judgment is being pursued, has thus obliged this court, in turn, to limit its consideration of that application, to those grounds.

[27] Those grounds which were provided to me by counsel for the application in support, essentially are and the helpful written submission contending three (3) main points, being:

i) That the 1st defendant cannot properly be sued and the claim against her, has no realistic prospect of success, since the actions carried out in

respect of the demolition of the structure which had been built by the claimant on the, 'common property,' were carried out by Proprietors Strata Plan No. 528 and not by the 1st defendant personally, or for that matter, by any servant or agent of hers. As such, it is Proprietors Strata Plan No. 528 which ought to have been sued and the law allows for them to be so sued as 'Proprietors Strata Plan No. 528.'

ii) The claimant's claim for declaratory reliefs based on adverse possession and her claim that she is entitled to be declared as the title holder to the 'common property' based upon the law of adverse possession, is wholly misconceived and without merit, since the evidence coupled with the claimant's own statement of case, clearly disclose that the 1st defendant acquired that relevant property in 2007 and that when she did so, she also acquired a share of the 'common property.' As such, time could only have begun to run against the 1st defendant, for the purposes of the law of adverse possession, as at the date when the 1st defendant acquired a share of that 'common property,' That having been in 2007 and the current year now being 2015, it is apparent that the claimant cannot overcome the hurdle of establishing to this court's satisfaction, if this claim were to proceed to trial, that she has enjoyed exclusive and uninterrupted possession of the 'common property,' as against the claimant, for a period of twelve (12) years – that being the period of time required by law, if adverse possession is to be successfully relied on, in respect of private property. As such, the 1st defendant has simply termed this as the claimant having no *locus standi* to pursue this claim, since the foundation of the claimant's claim, is based on the law of adverse possession.

iii) That yet another reason why the 1st defendant cannot properly be sued and the claim against her, has no realistic prospect of success, is because, the title documents which are before this court as evidence and the contents of which, are not disputed in any respect, clearly show, that the 'common property' which forms the subject – matter of this court dispute, is owned by the disputing parties as tenants-in-common, proportional to the unit entitlement of their respective Strata Lots. As such, that 'common property' is owned by the disputing parties, in equal share. According to **section 10(3) of the Registration (Strata Titles) Act**, the 'common property' of a Strata Corporation can only be transferred by unanimous resolution of the proprietors. There has been no such resolution and the Strata Corporation, which is the body that, in law, is vested with the lawful responsibility for the management and control of the 'common property,' has not been even so much as joined as a party to this claim. In the circumstances, according to the submissions made by the 1st defendant's counsel, the claimant's case against the 1st defendant has also, for this reason, no realistic prospect of success.

[28] This court will not address each of these submissions and contentions because it is this court's considered opinion, that to do so, would be unnecessary. The first of these submission will be sufficient to dispose of this application. In addressing same, this court will refer to the oral submissions which were made to it, during the hearing of the 1st defendant's application for summary judgment. Before doing so though, it should be noted that neither party was required to provide written submissions to this court, in respect of the relevant application. Accordingly, the claimant's counsel did not provide same to this court. Her failure to have so done though, has not placed her client at any disadvantage, since this court has carefully considered her oral submissions which were clearly and in as equally a potentially convincing manner, made before this court, as were the written and oral submissions which were made by the 1st defendant's counsel. If this court fails to make reference to any particular submission of counsel therefore, in these written reasons, this does not mean that this court has failed to take same into account, but rather, simply that constraints of time and writing space, did not require, or even permit, otherwise.

The demolition of the claimant's structure on the common property was not carried out by the 1st defendant or by any servant or agent of hers.

[29] It is the claimant's simple response to this contention, that the relevant demolition was in fact carried out by the 1st defendant, through one of her servants or agent, that being the person named as the 2nd defendant in this claim. Whilst that response may be simply stated, it is nonetheless, a profound one, for the purposes of the claimant's response to the 1st defendant's application for summary judgment. It is profound, when considered in that context, because it is a response which cannot simply be either disregarded by this court, nor discounted, for that matter. This court has noted that whilst it may be true that the relevant demolition was carried out by the 1st defendant's servant or agent and thus, the 1st defendant would be liable for same, if it was done unlawfully, it may also be true that the said demolition was carried out by Strata Plan No. 528 – that being a body corporate, which by law, is entitled to sue and be sued, in the name – 'Strata Plan No. 528.' See: **Section 4 (2) of the Registration (Strata Titles) Act**.

[30] It would not and could not be legally proper for this court, at this stage, to resolve the factual dispute as to who it was, that actually carried out the relevant demolition. That dispute is one which needs to be resolved by a judge of this court, following upon a trial of this claim. It is not permissible for the judge, on a summary judgment application, to simply disbelieve the respondent's account of the facts. See: **Mentmore International Ltd. v Abbey Healthcare (Festival) Ltd.** – [2010] EWCA Civ. 761 and **Blackstone's Civil Practice** (*op. cit.),* at paragraph 34.15.

[31] Separate and apart from that factual dispute though, there is an important legal issue surrounding this said contention, which also has arisen. It is this: The 1st defendant has contended, in her statement of case, that Strata Plan No. 528 is a Strata Corporation, pursuant to **section 4 of the Registration (Strata Titles) Act** and that it was that Strata Corporation which had ordered the claimant to demolish that which they have alleged, was the claimant's unlawful encroachment on the Strata Corporation's "common property,' by the building of a structure enclosing same, which thereby reserved same, for the claimant's sole use and benefit. Following upon the failure of the claimant to demolish same, the 1st defendant alleges that it was then the Strata Corporation – of which, she was then an executive member, which demolished that structure

[32] In her oral submissions made upon the hearing of the 1st defendant's application for summary judgment, the claimant's counsel submitted that there is a live issue in this case, as to whether Strata Plan No. 528 was duly registered with the Commission of Strata Corporations and whether or not any executive committee could have been, or was, lawfully formed on behalf of that Strata Corporation.

[33] Further, claimant's counsel had orally submitted, that the notice of demolition which was issued by the Executive Committee is *ultra vires* and amounts to trespass, since there was no valid order of any competent authority, authorizing entry onto the said common property and the destruction/demolition of any structure situated on same.

[34] Whilst this court does accept that, as a matter of law, said demolition notice may or may not be *ultra vires* – and this is addressed in greater detail, below, this court does not at all accept that the issuance of a demolition notice can possibly constitute trespass. In fairness to the learned claimant's counsel however, this court should state that this court understood her to have meant something which is not quite in accord with that which she submitted, in that particular, limited respect. This court understood the claimant's counsel as instead, submitting, that the entry onto and destruction/demolition of the claimant's structure, which she erected on the, 'common property,' was trespass. Indeed, that is precisely what the claimant has alleged, in her statement of case. The issuance of the demolition notice though, could not, as a matter of law, under any circumstances, constitute trespass.

[35] There are two (2) exhibits attached to the first of the 1st defendant's two (2) affidavits, which she filed for the purposes of evidentially supporting her summary judgment application. Those exhibits are respectively marked as Exhibit 'HU9B' and 'HU10' respectively. Both of those exhibits are of great significance, bearing in mind that the claimant has specifically alleged, in paragraph 13 of her further amended particulars of claim, that –

> *'... the claimant says that there is no valid demolition order or notice issued by any competent authority that authorized the 1st defendant and/or 2nd defendant to carry out the destruction and removal of the said walls, windows, door, and roof enclosing the additional parcel of land, or to take any actions whatsoever that affected the claimant's exclusive possession and occupation of the said area.'*

[36] Whilst it is undoubtedly correct to state that there was no valid demolition order or notice issued by any competent authority, that authorized the *1st and/or the 2nd defendant* to carry out the relevant demolition, there undoubtedly did exist a demolition notice and a demolition order, each issued by separate authorities, authorizing Strata Plan No. 528, to carry out the relevant demolition. Whether the said demolition notice and demolition order were validly issued though, as also, whether same (the demolition) was carried out by a 'competent authority,' is what is in dispute.

[37] Exhibit 'HU8' which has been attached to the first affidavit of the applicant/1st defendant, when considered along with certain undisputed affidavit evidence of the 1st defendant make it clear that the 1st defendant had reported to the Commission of Strata Corporations (hereinafter referred to as 'the commission'), about the alleged encroachment by the claimant on the, 'common property,' that in terms of the enclosed structure which she (the claimant) had constructed on same. Following on her having reported same, the commission held a hearing in an effort to resolve the strata property – related dispute, which then existed between the claimant and the 1st defendant. The commission was duly authorized, by **section 3B (1) (c) and/or (e) of the Registration (Strata Titles) Act**, to facilitate the resolution of disputes arising from any matter to which the Registration (Strata Titles) Act relates and in particular, the disputes of that nature, which exist, as between a Strata Corporation and a Proprietor.

[38] The particular categories of such disputes which the Commission of Strata Corporations can properly seek to facilitate the resolution of, is not to be understood as being limited to only those that exist, in relation to a matter which falls within the ambit of the Registration (Strata Titles) Act, as between a Strata Corporation and a proprietor. The general words of section 3B (1) (c) are wider then the particular words within that section and sub-section of that Act. As such, the general words are not to be taken as being limited by the special words. The maxim – '*generalia specialibus non derogant'* would be applicable. Thus, even though the dispute may in fact, only have existed as between the claimant and the 1st defendant, this as distinct from the claimant and a duly registered Strata Corporation, the commission was nonetheless empowered by law, to facilitate the resolution of that dispute.

[39] It is the 1st defendant's undisputed evidence, as set out in paragraph 10 of her first affidavit, that the claimant did not attend the meeting which was scheduled by the commission, to facilitate the resolution of the relevant dispute. What is unknown to this court though, is what happened at that particular meeting. There is no affidavit evidence from the 1st defendant, deponing to same, other than to the extent of having stated that such meeting was scheduled and exhibiting the letter which proves same

and it is of importance to note also, that the said meeting was scheduled for October 10, 2012, at 10 a.m. The said affidavit evidence only went on to state, as regards that meeting, that the claimant did not attend same.

[40] What is known though, is that following on that meeting, a demolition notice was issued by the commission, to Strata Corporation No. 528. Exhibit 'HU9B' as earlier referred to, proves that.

[41] The 1st defendant's failure though, to lead any evidence, or to have made any specific averments in her statement of case, as to whether or not an actual hearing of any nature whatsoever, which at least, had permitted the input of the disputing parties and in particular, if it was a hearing at which oral presentations were to be made by those disputing parties, whether any such oral presentation was ever made by the 1st defendant upon a date and time when the claimant was also given the opportunity to be present and make her presentation, is a serious evidentiary lacuna in the 1st defendant's present application. It is such because this court cannot, even on the undisputed evidence of the 1st defendant, conclude that a valid demolition order was made by the commission. This court cannot properly so conclude, because, this court is unable to conclude, one way or the other, that the requirements of natural justice ('fair hearing') were duly complied with by the commission, prior to it having issued the demolition order, which it did.

[42] The claimant has alleged, in her statement of case, that no valid demolition order was issued. The claimant though, should have stated what it is about the demolition order which was issued, which made it lack validity. **Rule 10.5 of the CPR** requires that the defendant put forward a positive case and not merely deny that there was no valid demolition order issued. Having so generally denied same though and the 1st defendant having not applied to strike out that portion of the claimant's statement of case, this court would not at all, be inclined to strike out same, even though, it would, of course, be permissible for this court to do so, of its own motion. See **rule 26.3 (1) (a)** read along with **rule 26.2 of the CPR**.

[43] Considered in that context, the said lacuna is all the more significant because, it may very well be that the claimant is contending that the demolition order is invalid, because it was obtained without there having been a fair hearing. Of course though, this would still be a tenuous legal argument, because, having not challenged the commission, by means of judicial review proceedings, upon its issuance of the demolition order, it may very well be, as a matter of law, that said demolition order having been issued from as long ago, as November 23, 2012, the same must now be deemed by a court, as valid. That determination though, is by no means a legally automatic one and may also be a determination which can only be made, once certain issues of fact have also been made known to and determined, by the court. See **rule 56.6 of the CPR.**

[44] Even if the proposed evidence expected to be adduced on behalf of the claimant at trial, and/or the points of law expected to be relied on by the claimant at trial, are tenuous though that is not enough to enable this court to properly conclude, in advance of any trial being held, that the claimant's statement of case is one which has no realistic prospect of success.

[45] This is so because, whilst this court does accept that it is the law, as was clearly enunciated by the Privy Council, in **National Commercial Bank Jamaica Ltd. v Olint Corporation Ltd.** [2009] 1 WLR 1405, at [7], that a misconceived 'legal' point does not amount to a triable issue, it is, as was stated by Ld. Donaldson of Lymington MR in **R.G Carter Ltd. v Clarke** – [1990] 1 WLR 578, quite a different matter '*if the issue of law is not decisive of all the issues between the parties or, if decisive of part of the [claimant's] claim or of some of those issues, is of such character as would not justify its being determined as a preliminary point, because little or no savings in costs would ensue. It is an a fortiori case if the answer to the question of law is any way dependent upon undecided issues of fact.*' In the case – **Director of Assets Recovery Agency v Woodstock** *(op.cit)* although the respondent's case had obvious weaknesses, it was not bound to be disbelieved. As such, a summary judgment application which was

made in that case, was refused. See: **Blackstone's Civil Practice** *(op.cit),* at paragraph 34.10 (page 537).

[46] In her oral submissions before me, the claimant's counsel made the point that there existed no evidence that Strata Plan No. 528 is a duly registered Strata Corporation. Indeed, she is correct, in that respect. The evidence in fact, discloses that half of the registration fees for the said intended corporation, were due to have been paid by the claimant, in order to have the said intended corporation registered, but apparently, the same was never so paid. Exhibit 'HU6' attached to the first of the 1st defendant's affidavits and which is comprised of various documents, make it clear that there are two (2) Strata Lots comprising Strata Plan No. 528, but Strata Plan No. 528 was never duly registered as a Strata Corporation, since the owner of Strata Lot No. 1 – being the claimant, never paid over to the Real Estate Board, her half of the required registration fees. Paragraph 8 of the 1st defendant's said affidavit evidence, also makes this point quite clear.

[47] That being so, the claimant's claim that no valid demolition order could have been directed by the Commission of Strata corporations to Strata Corporation No. 528 and that the demolition notice, as well as the actual demolition itself, were all invalid in law, does indeed have a realistic prospect of success. Equally, her claim that Strata Corporation No. 528 had no lawful right to demolish the structure which she had erected on the 'common property,' also has a realistic prospect of success.

[48] This is so because, by law, only a duly registered Strata Corporation could have been directed by the Commission of Strata Corporations, to carry out the relevant demolition work and further, only a duly registered Strata Corporation could have lawfully carried out any such demolition work, or given any valid notice of an intended demolition. See: **Sections 3B (2) (a) and (3) of the Registration (Strata Titles) Act**, in that respect.

[49] As it was when the relevant demolition work took place, the only member of the supposed 'Strata Corporation' No. 528 was the 1st defendant and also, the only 'executive committee' member of the said 'Strata Corporation,' was the 1st defendant. A careful consideration of the documents which have been exhibited to the 1st defendant's first affidavit, as the collective exhibit, 'HU6', evidence which has been deponed to by the 1st defendant in the first sentence of paragraph 6 and also, the first sentence of paragraph 8 of her first affidavit, make this clear.

[50] When considered carefully, this may also be the legal reason underlying the claimant's pursuit of this claim, against the 1st defendant; personally, since surely, since it is the claimant's contention that proprietor's Strata Plan No. 528 was not a duly registered corporation under the **Registration (Strata Titles) Act**, it could not be proper, in that context, for the claimant to make claim against that said 'corporation'. In the circumstances, with the only member of that 'corporation' being the 1st defendant, the claimant has pursued the claim against her, personally.

[51] Solely for the sake of completeness on this particular aspect, it should be stated, particularly for the benefit of those that may hereafter read this written ruling, but not at that time, be familiar with the intimate details of this case, that, as evidenced by one of the letters comprised in the collective exhibit, 'HU6' that being a letter addressed to the claimant by the 1st defendant and which is dated, February 15, 2011, it was an entity called '*Timbers of Worthington Association'* which had filed a registration for Strata Plan No. 528 in September of 2010. Ms. Urquhart stated in that very letter, that the action of that entity was illegitimate and invalid, since that entity was an unrelated party, not duly authorized to act for and on behalf of Strata Plan No. 528.

[52] That same letter makes it clear that 'Strata Corporation No. 528' consists of only two (2) Strata Lots, these being the ones owned by the claimant and the 1st defendant respectively. Paragraph 3 of the first affidavit of the 1st defendant, also makes it clear that Strata Plan No. 528 was registered on May 14, 1993 and thus, was so registered, well in advance of the significant amendments which were made to the **Registration**

(Strata Titles) Act on December 30, 2009, by means of Act No. 17 of 2009. Strata Plan No. 528 is part of the, '*Timbers of Worthington Development*' which consists of a hybrid of 25 housing units, consisting of nineteen (19) townhouses and six (6) apartments. Those six (6) apartments are the subject of three (3) separate Strata Plans – those being, Strata Plan No. 528, No. 531and No. 532.

[53] There being no evidence existing, showing that Strata Plan No. 528 was registered as a Strata Corporation under the **Registration (Strata Titles) Act** as amended, strengthens the submission made by the claimant's counsel that her client's claim is one which has a realistic prospect of success.

[54] There is one other point to be made, which also impacts on the first of the three (3) submissions - set out above. It is that there are by – laws which, subject to the provisions of the Act, regulate the control, management, administration, use and enjoyment of the Strata Lots and the common property contained in any registered Strata Plan. Those by – laws are set out in the first and second schedules to that Act and it is those by – laws which will so apply and operate unless and/or until duly amended or varied, in accordance with that Act. See: **section 9 (1), (2) and (3) of that Act**, in that respect.

[55] This one other point becomes all the more significant for present purposes, in view of the provisions of **section 9A of the Act**, which provides that – '*No action, suit, prosecution or other proceedings shall be brought or instituted personally against any proprietor who is a member of the executive committee in respect of any act done bona fide in pursuance or execution or intended execution of this Act*.' By – Law No. 13 in the first schedule requires that there shall be an executive committee of the corporation which shall, subject to any restriction imposed or direction given at a general meeting, exercise the powers and perform the duties of the corporation.

[56] As such, the corporation, even if validity in existence, could only lawfully perform its functions under the Act, through a lawfully appointed executive committee. Indeed,

this is no doubt why the Act has provided that the Commission of Strata Corporations may order, by notice in writing to a corporation, that an annual general meeting shall be held for the purpose of the election of an executive committee within the period stated in that notice and for the commission to be notified within fourteen (14) days of that meeting, of the names of the members of that executive committee. Indeed, the Act goes on to provide that in situations where the corporation fails to comply with such an order, the Commission shall convene the annual general meeting for the purpose of the election of the executive committee and that any decisions thereof, '*shall be building on the corporation and be effective as if made at a meeting called by the corporation*.' See: **section 3 B (2) (b) (ii) and 3 (B) (4) of the Act**, in that respect. In respect of this matter though, no such action as that, was apparently ever taken by the Commission of Strata Corporations, this even though, Strata Corporation No. 528 clearly, only had one executive committee member, that being, the 1st defendant.

[57] Regulation 14 of the first schedule provides for a matter, which it seems to be, will be of significant importance for the purpose of determining what the final outcome of this claim should be. Regulation 14 provides: '*The executive committee shall consist of not less than three (3) or more than nine (9) proprietors and shall be elected at the first general meeting. Provided that where there are no more than three (3) proprietors the executive committee shall consist of all the proprietors.'*

[58] What this may very well mean therefore, is that since there were only two (2) proprietors within Strata Plan No. 528, both of those proprietors would have had to have been members of that executive committee. That though, is an issue which will have to be determined by this court, as part and parcel of its judgment on this claim. It is not an appropriate legal issue to be determined at this interlocutory stage, especially since it has also been provided in by – law 23 of the first schedule, that – '*the validity of the proceedings of the executive committee shall not be affected by any vacancy amongst the members thereof or by any defect in the appointment of a member thereof*.'

The other two (2) submissions made in support of the 1st defendant's application for summary judgment.

[59] The third submission made, which had already been set out in these written reasons, is clearly not one worthy of merit. It is not worthy of merit, because, there has been no transfer, nor is the claimant seeking, by means of this claim, a transfer of, the 'common property' to her. What she is instead seeking, *inter alia*, is that the Certificates of Title Registered at volume 1260 folios 252 and 253 respectively, be cancelled and a new Certificate of Title be issued, excluding the 'common property' and declaring the additional land and parcel which is presently designated as 'common property' as instead, the property of the claimant.

[60] Clearly, no unanimous resolution of the proprietors is required, in order for this court to grant any of the declaratory reliefs or court orders, as sought by the claimant herein.

[61] The second submission made - also earlier set out, ought not properly to be determined by this court, at this stage. It ought not to be determined at this stage, because, it concerns a fairly complex legal issue which has within its ambit, a factual substratum.

[62] That factual substratum is in fact a disputed one, this, insofar as there is dispute between the claimant and the 1st defendant as to when it was that the claimant took exclusive possession of the 'common property', by having enclosed same. The exact boundaries of that particular factual dispute are however, unknown to this court at this time, since, as earlier stated the 1st defendant has not specifically stated when it was that the claimant took exclusive possession of same.

[63] Additionally, where the legal issue is not a straightforward one and thus, is not easily resolved by a court, it is always best for that legal issue to be resolved in a judgment following from a trial. The time and costs that may be saved in seeking to resolve that issue, upon an application for summary judgment, may in the final analysis

be minimal and may leave the party who is not in favour of the resolution reached by the court, feeling more aggrieved then he or she would be, if that matter had been resolved, following on a trial. In any event though, full arguments on that particular legal issue, were never presented before me by either party, upon this court's hearing of the 1st defendants summary judgment application. In the circumstances, it seems to me that this situation is exactly that which was referred to by Ld. Donaldson of Lymington MR in **R.G. Carter Ltd. v Clarke** *(op.cit*), as being an issue of law which is unsuitable for resolution by this court, upon a summary judgment application.

[64] This court therefore orders as follows:

i) The 1st defendant's application for summary judgment, which was filed on June 17, 2014, is denied.

ii) The costs of that application are awarded to the claimant in any event, with such costs to be taxed, if not sooner agreed.

iii) This claim shall proceed to mediation.

iv) Leave to appeal is granted.

v) The claimant shall file and serve this order.

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Hon. K. Anderson, J.