[2021] JMCC COMM. 31

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2020CD00242

BETWEEN	**EVEROY CHIN**	**CLAIMANT**
AND	**SILVER STAR MOTORS LIMITED**	**DEFENDANT**

IN CHAMBERS

Lord Anthony Gifford QC instructed by Gifford, Thompson & Shields for the Claimant

Mr. Christopher Dunkley and Ms. Kayola Muirhead instructed by Phillipson Partners for the Defendant

Heard: 10 & 18 February, 20 May, 2021

Civil practice and procedure–Application for summary judgment–Whether defendant has any real prospect of successfully defending the claim–Civil Procedure Rules, 2002 as amended, rule 26.3–Application to strike out claim–Whether claimant's statement of case is an abuse of process or discloses no reasonable grounds for bringing the claim–Civil Procedure Rules, 2002 as amended, rule 15.2

PALMER HAMILTON, J

BACKGROUND

[1] In this matter, the court heard two competing applications. On the one hand, the claimant filed a notice of application for summary judgment seeking that summary judgment be entered for the claimant on the claim. On the other hand, the

defendant countered with a notice of application seeking, inter alia, that the claimant's statements of case and claim as a whole be struck out.

[2] These applications emanate from a dispute that arose between the claimant and the defendant concerning a Black 2012 Mercedes Benz S350 motor vehicle bearing VIN: WDDNG2CBCA436916 (the motor vehicle). The claimant is a businessman and the defendant is the authorized dealer of Mercedes Benz in Jamaica. The claimant purchased the motor vehicle from the defendant in 2012. The dispute concerned the replacement of an engine by the defendant in the motor vehicle which culminated in the institution of claim no. 2015CD00125. That claim was settled on terms endorsed on counsel's brief (settlement agreement). The terms were as follows: -

> *"1. There is to be a valuation of 2012 Mercedes Benz S350 motor vehicle bearing VIN: WDDNG2CB6CA436916, to be carried out by Advanced Insurance Adjusters Limited of 18 South Avenue, Kingston 6 and by MSC McKay Jamaica Limited of 27 Lady Musgrave Road, Kingston 5.*
>
> *2. If the average of the market value and forced sale valuations made by these two valuators is at least $4.5 Million, the Defendant will purchase the car for the price established by the average of the two (2) valuations.*
>
> *3. If the value established by the formula at paragraph 2 above is less than $4.5 Million, the Claimant is at liberty to retain the vehicle and in such an event, the Defendant will facilitate the stencilling of a visible engine number, if no number is already visible.*
>
> *4. If the Claimant so requests, the Defendant will service the Mercedes Benz motor vehicle purchased and imported by the Claimant, provided that Karl Salmon and Peta-Kaye Chin are to be the sole designated customers of the Defendant during the first six (6) months from the first service.*
>
> *5. If the Defendant purchases the 2012 Mercedes Benz S350 motor vehicle bearing VIN: WDDNG2CB6CA436916, payment of the purchase price and collection of the motor vehicle shall be done by the Defendant within ten (10) days from the date of the last completed valuation."*

[3] The claimant caused two (2) valuations to be done by the valuators stipulated in the settlement agreement which he averred to be consistent with the settlement agreement. The defendant company opposed these valuations on the following grounds: -

1. A diagnostic test was necessary in order to arrive at a true valuation;

2. The claimant engaged the agreed valuators thereby denying the defendant of a valuation on which it could rely;

3. The valuation prepared by MSC McKay contained a disclaimer that it was not the Engineer's Report;

4. The valuators were not aware that the valuation was pursuant to a court order.

[4] The defendant subsequently withdrew their offer to repurchase the claimant's vehicle and this led the claimant to institute a second claim against the defendant for damages for breach of contract and settlement agreement order. The defence to this claim declared the defendant's oppositions mentioned above and it particularized the claimant's lack of bona fides.

THE APPLICATIONS

[5] The claimant is seeking that summary judgment be entered on the claim on the following grounds: -

> *"1. That pursuant to CPR 15.2 the Court may grant summary judgment to the Claimant if it considers that the Defendant has no real prospect of defending the claim or issue;*
>
> *2. That the claimant is seeking to enforce the terms of a consent order made in this Honourable Court;*
>
> *3. That the Defendant seeks to be excused from its obligations in the Consent order on the basis of terms it wishes to imply in the Settlement Agreement;*
>
> *4. That the Claimant states that the terms which the Defendant seeks to imply into the agreement are not necessary to give business efficacy to the Settlement Agreement;*
>
> *5. On a true construction of the Settlement Agreement, the parties both agreed to two valuations being done and they were done.*

[6] The defendant in addition to seeking that the claimant's claim be struck, seeks in the alternative, that the claim be stayed unless and until the claimant's motor vehicle is made available for diagnostic testing by a certified automotive mechanic/technician commissioned by both parties to complete the valuation per the settlement terms endorsed on counsel's brief within such a time as this honourable court shall deem appropriate. The defendant predicated this application on twenty-one (21) grounds. I find that the bulk of these grounds are a repetition of the circumstances surrounding the institution of the claim and I do not intend to reproduce them in their entirety. Without any intended disrespect to the defendant, the following are what I discern to be the core grounds of the application: -

> *"1. Pursuant to Civil Procedure Rule 26.3(1)(b), the Court may strike out a statement if it appears to the Court that the statement of case is an abuse of the process of the Court, or is likely to obstruct the just disposal of the proceedings.*
>
> *2. Pursuant to Civil Procedure Rule 26.3(1)(c), the Court may strike out a statement of case if it appears to the Court that the statement of case discloses no reasonable grounds for bringing the claim.*
>
> *…*
>
> *11. By independently instructing both name valuators, the Claimant thereby and deliberately denied the Defendant the opportunity to participate in their commissioning, and to fully inform them of the parties' need to ascertain the true condition and so purchase value of the vehicle (Particular 1 of Refusal).*
>
> *…*
>
> *18. The Claimant's naked resistance to full information about the vehicle undermined the bona fides underpinning the parties' intention to create legal relations, the lack of which was a fundamental breach, which went to the substratum of the settlement agreement, and the Claimant's subsequent rejection of all efforts to mitigate amounted to a frustration of the Agreement.*
>
> *19. The Claimant deliberately and unilaterally engaged valuators without joint or full instructions and having refused to submit the vehicle to diagnostic testing, has since urged this Honourable Court to accept valuations based solely on visual inspections over diagnostic tests and actual mechanical assessments necessary to ascertain the vehicle's true state, and so value.*
>
> *20. The prejudice of forcing the Defendant to complete the purchase of a vehicle that was parked for several years, having been deprived of full*

> *information, must outweigh the Claimant's own stated reasons for completion.*
>
> *21. This Claim and the Claimant's recent application for summary judgment are both attempts to use the Court's process to sanction unreasonable conduct and to seek a result which would be both unjust and unfair because it is this Claim which has no real prospect of success."*

THE ISSUES

[7] The seminal issue to be determined by this court is whether the parties are entitled to the reliefs sought, in particular, is it appropriate for summary judgment to be entered on behalf of the claimant and whether his statement of case should be struck out for abuse of process.

[8] I also want to thank counsel for their succinct submissions which guided the court in its deliberation of the issues emerging on each application.

THE CLAIMANT'S POSITION AND SUBMISSIONS

[9] The claimant's application is supported by his affidavit. His core contention is there is no substantive dispute about the express terms of the agreement between the parties and that the defendant is seeking to enforce new terms to the settlement agreement.

[10] The claimant maintains that an Engineer's Report is an entirely different report from a valuation report and is not necessary to give the settlement agreement business efficacy. Further, the defendant was represented by competent attorneys-at-law who were free to ask for any terms they wished when they drafted the settlement agreement and as a dealer in motor vehicles and the entity which serviced the motor vehicle, the defendant would be in a good position to know what it wanted in the settlement agreement.

[11] The claimant proffered that he did not consider that by unilaterally engaging the valuators that he had affected the value, voided the settlement agreement or acted in bad faith as both valuators are reputable and were agreed by the parties. The claimant further added that the defendant does not say how the value of a motor

vehicle is affected by the fact that it was requested in the context of court proceedings.

[12] Learned Queen's Counsel, Lord Gifford, on the claimant's behalf commenced his submissions by outlining the grounds for summary judgment to be granted. Lord Gifford submitted that it is not sufficient for the defendant to state that as an authorized dealer of motor vehicles they had certain expectations of the valuation. They must go onto state that the reasonable person having all background information must also come to the same conclusion. It must not be their specialized knowledge of the industry which was not communicated to the claimant.

[13] It was submitted that there was no dispute that the express terms of the settlement agreement have not been breached by the claimant. The case therefore turns on whether the defendant can imply the terms outlined in its defence into the settlement agreement.

[14] The claimant submitted that the test is objective. It is not enough for the defendant to say that the value would have been different if certain steps were taken. They must go on to say through evidence, that the clear meaning of the settlement agreement was that an enhanced valuation containing diagnostic tests and an engineer's report was an obvious condition of the settlement agreement.

[15] The claimant relied on the following facts and matters: -

> *"(a)s The word "valuation" is a simple one. It means an assessment of the value of a thing, usually made by a person with experience in the market for the category of things of that kind. "The act or process of valuing" Merriam Webster Dictionary.*
>
> *(b) A valuation is a different concept from a test. If the parties had wanted any particular test to be carried out, they could have said so.*
>
> *(c) The agreement was made in a settlement of a claim and involved the participation of counsel on each side. If any terms as to a particular test was considered desirable, it could have been proposed and (if agreed) included.*
>
> *(d) The agreement provided for a "market value" and a "forced sale" value to be provided by the two valuators. These are well known terms. Thus the*

> *purpose of the valuation was not relevant. Two hypothetical purposes were considered.*
>
> *(e) Thus the terms of the agreement were simple and obvious. Two valuators were to carry out a valuation of the vehicle. They did so. There is no dispute as to the average of the two. But the defendant has failed to carry out its obligation to pay the price arrived at."*

[16] In concluding, Lord Gifford proffered that the claimant has performed his aspect of the settlement agreement and the only outstanding obligation is for the defendant to perform. In all the circumstances the defendant cannot escape liability to pay the claimant.

[17] In advancing his submissions, the following cases were relied on by Lord Gifford:-

1. **Three Rivers District Council v Governor and Company of the Bank of England (No.3)** [2001] 2 All ER 513;
2. **Sagicor Bank Jamaica Limited v Taylor Wright** [2018] UKPC 12;
3. **Dwight Clacken v Michael Causewell et al** (unreported) Supreme Court, Jamaica, Claim No. 2008 HCV 01834, judgment delivered on 12 November 2010;
4. **Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1 WLR 896; and
5. **Attorney General of Belize v Belize Telecom Ltd** [2009] UKPC 10.

THE DEFENDANTS POSITION AND SUBMISSIONS

[18] The defendant's application is supported by the affidavit of Mr. Duncan Stewart, the director of the defendant company. He disclosed in his affidavit that the defendant company is fully aware that to determine the true value of an after-market vehicle, such as the one owned by the claimant, the valuator should be aware of the purpose of the valuation exercise which should comprise a diagnostic

test or an engineer's report in order to be considered fulsome and therefore reliable.

[19] Mr. Duncan stated that it was always the defendant's understanding that both parties would jointly engage the two (2) valuators selected and as the paying party, the defendant company would repurchase only after its true condition and purchase value was determined. He further indicated that had the defendant been a part of engaging the designated valuators, it would have informed both of the purpose of the exercise and the necessity of putting the motor vehicle through a diagnostic test and obtaining an engineer's report to ascertain its true condition and value and complete its evaluation.

[20] The defendant highlighted that the valuation from MSC McKay contained the following disclaimer: -

> *"While we have visually inspected the vehicle to the best of our capabilities, the possibility exists that there may be hidden faults. This is not an Engineer's Report nor is it a recommendation to purchase the vehicle."*

[21] Mr. Duncan stated that the claimant refused three (3) invitations to utilize the defendant's diagnostic facilities and after his last refusal, the claimant was notified that the defendant was withdrawing its offer to repurchase the motor vehicle. Mr. Duncan also deposed that he verily believes that the claimant's unilateral engagement of the valuators without apprising either of the circumstances behind or the purposes for their valuations, his subsequent refusal to a full mechanical assessment which went entirely against the good faith in which the defendant entered into the settlement agreement and his rejection of the defendant's efforts to mitigate, in totality, comprised the efficacy and frustrated the parties settlement agreement.

[22] The written submissions on behalf of the defendant was prepared by Mr. Christopher Dunkley in consultation with Ms. Kayola Muirhead. It was submitted that the settlement agreement had no warranties as to the vehicle's condition, so having voluntarily accepted the obligation of entering into an agreement to

purchase, the defendant was well within its rights to insist on knowing exactly the state of the motor vehicle. A diagnostic test was therefore an essential tool to the valuators to discern and take any specific faults and the expense of any necessary repairs into account in coming to a reliable value for the sole purpose of the defendant's repurchase of the motor vehicle.

[23] The defendant averred that had its legitimate expectation been to jointly engage the valuators' services at the time when the claimant did so unilaterally, it would have indicated the purpose of the valuation and request that the valuations needed to be comprehensive.

[24] The defendant submitted that good faith is essential to any settlement agreement and although settlement did not come from mandatory mediation, it is submitted that the same obligations of confidentiality and good faith that apply to mediation would still apply to party and party settlements. The defendant further submitted that the claimant consistently acted unilaterally in his own interests and thereafter against the express wishes of the defendant. The claimant's arbitrary conduct in the purported fulfilment of the terms agreed between the parties brings into question his good faith.

[25] The remainder of the defendant's submissions are summarized as follows: -

1. The defendant does not dispute the language of the settlement agreement in its use of the word "valuation" however the dispute between the parties arose with the claimant's unilateral engagement and commissioning the valuators.

2. The defendant's legitimate expectation of a diagnostic test could not be construed as an additional term in circumstances in which the owner of an electronic based vehicle brought multiple issues to the attention of the prospective purchaser.

3. A comprehensive inspection as part of the valuation, not as an independent report would facilitate a more thorough and conclusive appraisal of the motor vehicle's state and therefore value, therefore giving business efficacy to the parties' sale and purchase intentions.

4. The claimant is asking this honourable court to grant him damages for breach of contract whilst still retaining the benefit of the motor vehicle. This is sufficient grounds to strike out the claimant's statement of case on the grounds that it is an abuse of the process of the court, it obstructs the just disposal of the claim and ultimately discloses no reasonable grounds for bringing the claim against the defendant.

[26] The defendant relied on the cases of **Cordell Green v Kingsley Stewart** [2014] JMSC Civ. 26, **Investors Compensation Scheme Limited v West Bromsich Building Society** [1998] 1 WLR 896, **Roger James Weston v Sara Elizabeth Dayman** [2006] EWCA Civ. 1165, **Attorney General of Belize v Belize Telecom Ltd** (supra), **Three Rivers District Council v Governor and Company of the Bank of England (No.3)** (supra) and **Swain v Hillman** [2001] All ER 91 in support of its submissions.

LAW AND ANALYSIS

[27] In considering whether or not to grant an application for summary judgment, I must have regard to the provision of rule 15.2 of the Civil Procedure Rule 2002, as amended (CPR) which states: -

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

> *b) the defendant has no real prospect of successfully defending the claim or the issue.', in an effort to ensure justice is served between the parties."*

[28] I must also consider rule 15.6 of the CPR which outlines the court's powers in granting summary judgment. Rule 15.6(1) states: -

> *"On hearing an application for summary judgment the court may–*
>
> *(a) Give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end.*
>
> *(b) Strike out or dismiss the claim in whole or in part;*
>
> *(c) Dismiss the application;*
>
> *(d) Make a conditional order; or*
>
> *(e) Make such other order as may seem fit."*

[29] The test for summary judgment has been sufficiently established in our jurisprudence. In order to succeed on his application, the claimant must demonstrate that the defendant has no real prospect of successfully defending the claim. In the oft-cited case of **Fiesta Jamaica Ltd. v National Water Commission** [2010] JMCA Civ. 4, Harris JA, at paragraph 31 stated: -

> *'A court, in the exercise of its discretionary powers must pay due regard to the phrase "no real prospect of succeeding" as specified in Rule 15.2. These words are critical. They lay down the criterion which influences a decision as to whether a party has shown that his claim or defence, as the case may be, has a realistic possibility of success, should the case proceed to trial. The applicable test is that it must be demonstrated that the relevant party's prospect of success is realistic and not fanciful. In **Swain v Hillman** [2001] All ER 91, 92 at paragraph [10] Lord Woolf recognized the test in the following context:*
>
> > *"The words 'no real prospect of being successful or succeeding' do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospect of success or, as, Mr. Bidder QC submits, they direct the court to the need to see whether there is a realistic as opposed to a fanciful prospect of success."*

[30] At paragraph 34 Harris JA, referred to the decision of **Three Rivers District Council v Governor and Company of the Bank of England (No.3)** (supra), where at paragraph 158, Lord Hutton stated the approach a judge should adopt when dealing with the applicable test as follows: -

> *"The important words are "no real prospect of succeeding." It requires the judge to undertake an exercise of judgment. He must decide whether to exercise the power to decide the case without a trial and give summary judgment. It is a 'discretionary' power, i.e. one where the choice whether to exercise the power lies within the jurisdiction of the judge. Secondly, he must carry out the necessary exercise of assessing the prospects of success of the relevant party. If he concludes that there is "no real prospect," he may decide the case accordingly."*

[31] The court has recognized and appreciated that there may be some difficulty in making a determination as to whether there is a real as opposed to a fanciful prospect of success. In the case of **Bolton Pharmaceutical Co 100 Ltd v Doncaster Pharmaceuticals Group Ltd and others** [2006] EWCA Civ 661 the Court of Appeal held: -

> *"The decision whether or not an action should go to trial was more a matter of general procedural law than of knowledge and experience of a specialised area of substantive law…. In handling all applications for summary judgment, the court's duty was to keep considerations of procedural justice in proper perspective. Appropriate procedures had to be used for the disposal of cases, otherwise there was a serious risk of injustice. The court should exercise caution in granting summary judgment in certain kinds of cases, particularly where there were conflicts of facts on relevant issues which had to be resolved before a judgment could be given. A mini-trial on the facts conducted under CPR 24 without having gone through the normal pre-trial procedures had to be avoided, as it ran a real risk of producing summary injustice. The court should also hesitate about making a final decision without a trial where, even though there was no obvious conflict of fact at the time of the application, reasonable grounds existed for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case".*

[32] The seminal issue then to be determined on this application is whether summary judgment may be properly entered against the defendant on the basis that the defendant has no real prospect of successfully defending the claimant's claim. The answer to this is in the negative. The defendant has maintained that the claimant's good faith intentions must be called into question in seeking to enforce the settlement agreement and I agree with this proposition.

[33] The settlement agreement in this case was not the product of the mandatory mediation tool engrained in our courts, rather, the parties, of their own volition arrived at a comprehensive settlement of the issues raised in the intial claim and counterclaim. It was recorded in writing and signed by the attorneys-at-law

representing each party. The order was subsequently endorsed by an order of the court which reads as follows: -

> *"1. The Claimant's claim and the Defendant's counterclaim are discontinued on terms endorsed on Counsel's brief.*
>
> *2. Each party to bear its own costs."*

[34] It is important to note that settlement agreements are by their very nature, contracts between the parties. Edwards J, at paragraph 20 of the case of **Cordell Green v Kingsley Stewart** [2014] stated: -

> *"I also accept that in arriving at an agreement it may mean that "each party freely agreed to do certain things in return for defined benefits in which event it may be considered to be a contract between the parties and enforceable as such." (See Justice Lawrence-Beswick in **Gayle v Miletic** [unreported, Supreme Court, Jamaica, Claim No. 2009HCV03497, judgment delivered 29 March 2011] (sic) at para 13)."*

[35] The settlement agreement in the instant case, in my view, is one which depicted and embodied the conciliation between the parties and is therefore a true binding contract between the parties. As such, the necessary ingredients and requirements of a contract must be present and the court cannot interfere with it except on the same ground as any other contract. Implicit in the consent order is that the parties will act in good faith in its performance and enforcement.

[36] What does good faith mean? Essentially good faith, otherwise called "fair dealing", could be described as acting honestly in the performance of contractual obligations and being loyal to the bargain. It means acting as much within the spirit of an agreement and in accordance with a justified expectation rather than the letter of the contract, and being faithful to an agreed common purpose. It includes an obligation to 'refrain from conduct which in the relevant context, would be regarded as commercially unacceptable by reasonable and honest people' (***Bates v Post Office Ltd*** *(No. 3)* [2019] EWHC 606 (QB)).

[37] Where good faith is implied into a contract, the court is of the view that it: -

> *"does no more than require a party to refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people".*

[38] It is trite that when parties are negotiating, the spirit and objectives of their venture may not be capable of being expressed exhaustively in a written contract. As such, in every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing. The duty of good faith in performance regulates advantage taking within the contract relation. Good faith forbids parties from hiding behind indefinite contract terms, by construing them in an excessively self-serving light, inter alia.

[39] By unilaterally approachng the agreed valuators without disclosing the purpose of the valuation or the fact that it was subject to a court order, given the circumstances on which the settlement agreement was founded, it can be construed that the claimant acted solely in his own commercial self-interests while technically not breaching the express terms of the contract. I disagree with the claimant's contention that the purpose of the valuation is immaterial. The court takes judicial notice that valaution reports contain the assisgnment identification. It is important to identify the intended purpose of the report as this will dictate the standard of value.

[40] I am in no way indicating that the claimant vested with a right is obligated to exercise that right to his own detriment for the purpose of benefiting the defendant. Mere self-interest is not bad faith, however, the court has to look at things in the round and in my view, this action did not effectuate the intentions of the parties, it was not predictable performance based on mutual trust and confidence at the time of the settlement agreement and it breached the defendant's reasonable legitimate expectation that both parties would jointly approach the valuators. Like the court in **Bristol Groundschool Limited v Intelligent Data Capture Limited** [2014] EWHC 2145 (Ch), I considered this breach of the implied good faith term in the

circumstances as a ‘strike at the heart of the trust which is vital to any long-term commercial relationship’.

[41] Harrison JA, at page 94 of the case of **Gordon Stewart et al v Merrick Samuels** SCCA no. 2/2005 stated: -

> *“The prime test being “no real prospect of success” requires that the learned trial judge do an assessment of the party’s case to determine its probable ultimate success or failure. Hence it must be a real prospect not a “fanciful one”. The judge’s focus is therefore in effect directed to the ultimate result of the action as distinct from the initial contention of each party. “Real prospect of success” is a straightforward term that needs no refinement of meaning”*

[42] Mummery LJ, in the case of **Bolton Pharmaceutical Co 100 Ltd v. Doncaster Pharmaceuticals Group Ltd and others** (supra) the court should hesitate to grant an application for summary judgment if: -

> *“…reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case”.*

[43] It is also trite that where a respondent puts forward a prima facie case in answer, then the matter should ordinarily be allowed to continue to trial. Mantell LJ, in **Munn v. North West Water Ltd**. [2001] C.P. Rep. 48 stated that the provisions in the CPR relating to summary judgment were: -

> *“…never intended to drive a claimant from the judgment seat where there were issues of fact which, if determined in the claimant’s favour, might result in a successful outcome”*

[44] Further, where the court is called upon to decide upon an application for summary judgment, the court must consider, taking into account very carefully, the over-riding objective of dealing with the case justly. I am also of the view that it cannot be said at this stage, that it is inevitable that the issue of transparency of the valuation process and breach of the implied duty of good faith be determined in favour of the defendant. These are matters which ought to be determined by a tribunal of fact.

[45] Turning to the defendant's application, an application for striking out of a pary's statement of case involves somewhat different considerations than one for summary judgment. Rule 26.3 (1) of the CPR sets out the circumstances in which the court may strike out a litigant's statement of case. The court also has an inherent jurisdiction to strike out pleadings which are shown to be an abuse of its process.

[46] McDonald-Bishop J, (as she then was) in **Dotting v Clifford & The Spanish Town Funeral Home Ltd**, (unreported) Supreme Court, Jamaica, Claim No. 2006HCV0338, judgment delivered 19 March 2007 stated as follows: -

> *"In considering this application to strike out, I am mindful that such a course is only appropriate in plain and obvious cases. The authorities have established that a claim may be struck out where it is fanciful, that is, entirely without substance or where it is clear that the statement of case is contradicted by all the documents or other material on which it is based (**Three Rivers District Council v Bank of England (No. 3) [2003] 2 A.C., 1)**. It may also be said, on the guidance of the relevant authorities, that in determining the issue as to whether the claim should be struck out one may seek to ascertain, among other things, whether the claimant's pleadings have given sufficient notice to the defendant of the case she wishes to present and whether the facts pleaded are capable of satisfying the requirements of the tort alleged. The ultimate question that should be considered in determining whether to strike out the statement of case on the basis that it discloses no reasonable cause for bringing the claim seems to be essentially, the same as that in granting summary judgment, that is: the claim against the defendant is one that is not fit for trial at all?"*

[47] I am also guided by the authority of **Wilton Williams v Ajas Limited** [2020] JMSC Civ 104. Simmons J, at paragragphs 25 and 26 stated: -

> *"The court's power to strike out a party's statement of case assists the court in its mandate to effectively manage cases by allowing for the summary disposal of issues which do not require full investigation at trial. However, unlike applications for summary judgment, the court in its consideration of such applications is mainly concerned with the adequacy of the statements of case, with whether they disclose reasonable grounds for bringing or defending the action. Consideration may however be given to the factual allegations.*
>
> *The power to strike out a party's statement of case is a discretionary one which has serious consequences for the party whose case has been excluded by such an order. It is therefore, only to be exercised in exceptional circumstances."*

[48] In approaching the application, I bear in mind the admonition given by Harris JA, at page 29 of **S. & T Distributors Limited and S & T Limited v CIBC Jamaica Limited and Royal and Sun Alliance**, SCCA 112/2004: -

> *'The striking out of a claim is a severe measure. The discretionary power to strike must be exercised with extreme caution. A court when considering an application to strike out, is obliged to take into consideration the probable implication of striking out and balance them carefully as against the principle as prescribed by the particular cause of action which is sought to be struck out. Judicial authorities have shown that the striking out of action should only be done in plain and obvious cases.'*

[49] The critical question arising on this application is whether the claimant's statement of case discloses no reasonable grounds for bringing the claim and whether it amounts to an abuse of process. I must therefore consider this question in the light of the nature of the settlement agreement made, that is, the settlement agreement is by its very nature, a consent order. Regarding consent orders and in particular, the varying of such an order it was established in **Kinch v. Walcott and Others** [1929] A.C. 482, that:-

> *"An order by consent is binding unless and until it has been set aside in proceedings constituted for that purpose."*

[50] It is well established in our jurisdiction that the court will not interfere with an order made by consent at a time after the order had been perfected (see **Marsden v. Marsden [1972] 3 W.L.R 136**). In the case of **Stockhausen v. Willis** (unreported) Supreme Court, Jamaica, Claim No. HCV 2920 of 2004, judgment delivered on 16 July 2008, R. Anderson J, (as he then was) stated: -

> *"It is settled that, as a general rule, an order arrived at by and with the consent of the parties to an action, where in effect, it embodies the conclusion of negotiations between the parties, the court will give effect to it and will not vary it."*

[51] I agree with the claimant's postion that the defendant is essentially asking the court to imply into the settlement agreement a term instructing that a diagnostic report be done as apart of the valuation report. The law is clear on this. In the case of **Pentium Holdings Limited v Bryan Morris, Islandwide Construction Ltd. and Plexus Limited** [2019] JMSC Civ. 160, K. Anderson J, comphrehensively outlinied the position at paragarghs 135 to 138 as follows: -

In the case: ***Attorney General of Belize and others v Belize Telecom Ltd****. and another [2009] 1 WLR 1988, the Privy Council definitively set out the circumstances in which a court, which is subject to the common law as regards implied terms in contract law, can properly imply a term into a contract. I will not quote from same, in these written reasons, for the sake of brevity. Suffice it to state that I have adopted and applied to the case at hand, same as set out in paragraphs 16 to 27 of that court's judgment, in that case, as per Ld. Hoffman, who announced/delivered, same.*

In applying the law as set out in that case, to the circumstances of the case at hand, it must always be recognized that this court is not to imply a term into a contract, in order to make the contract appear fairer, or more reasonable. The court must be astute, in seeking to determine what the parties to the contract had intended, based on the actual wording that was agreed to by the parties, as set out in the parties' written contract*.*

As was stated by Ld. Pearson, in ***Trollope and Colls Ltd. v North West Metropolitan Regional Hospital Board*** *[1973] 1 WLR 601, at 609 –*

> *'… the court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however, desirable, the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings. The clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that time to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves.'*

I think that it is worthwhile also, to quote from paragraphs 26 and 27 of the Board's judgment in the ***Attorney General of Belize v Belize Telecom case*** *(op. cit). That quotation is now set out:*

> *26. 'In* ***BP Refinery (Westernport) Pty Ltd v Shire of Hastings*** *(1977) 180 CLR 266, 282-283, Lord Simon of Glaisdale, giving the advice of the majority of the Board, said that it was "not necessary to review exhaustively the authorities on the implication of a term in a contract" but that the following conditions ("which may overlap") must be satisfied:*
>
> *1. it must be reasonable and equitable;*
>
> *2. it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;*
>
> *3. it must be so obvious that 'it' goes without saying;*
>
> *4. it must be capable of clear expression;*

> *5. it must not contradict any express term of the contract."*
>
> *27. The Board considers that this list is best regarded, not as a series of independent tests which must each be surmounted, but rather as a collective of different ways in which judges have tried to express the central idea that the proposed implied term must spell out what the contract actually means, or in which they have explained why they did not think that it did so. The Board has already discussed the significance of "necessary to give business efficacy" and "goes without saying". As for the other formulations, the fact that the proposed implied term would be inequitable or unreasonable, or contradict what the parties have expressly said, or is incapable of clear expression, are all good reasons for saying that a reasonable man would not have understood that to be what the instrument meant.' [my emphasis]*

[52] I garner from the authorities that the court's function is to interpret and apply the contract which the parties have made for themselves. As indicated previously, the settlement agreement in the instant case is one which depicted and embodied the conciliation between the parties. In my judgment, it is clear what the parties had agreed on and an enhanced valuation containing diagnostic tests and an engineer's report was not apart of that agreement.

[53] I also adopt the claimant's proposition that the agreement was made in settlement of a claim and involved the participation of legally competent counsel on each side. Further, the defendant company indicated that it was fully aware that to determine the true value of an 'after-market' vehicle, such as the one owned by the claimant, a diagnostic test or an engineer's report would be necessary. It therefore leads me to conclude that at the time of the making of the settlement agreement, this was a term desired by the defendant and should have been expressly proposed by the defendant if it required same to be included in the agreement.

[54] I must also venture to consider if this term might be necessary to give business efficiacy to the contract and whether it would be reasonable and equitable in the circumstances. The defendant's contention is not that it required the report separately but instead, that it formed part of the valuation report. Had the defendant been given the opportunity to approach the valuators jointly with the claimant, would this be incorporated into the reports? This cannot be answered definitively at this juncture.

[55] The position indicated by Bowen LJ, at page 68 of **The Moorcock** [1889] 14 P.D 64 is: -

> *"The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side…the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have.*
>
> *In business transactions…the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances."*

[56] I find that such a term was not an obvious condition of the settlement agreement in the circumstances. It is not patently clear from the context of the settlement agreement that this term should be implied into the agreement.

[57] Having arrived at this position, the question left to be determined is what route should the claimant employ to obtain relief? The authors at page 5 of the text **Atkins Court Forms/Compromise and Settlemet Volume 12 (1)) Practice/D ENFORCEMENT/32** stated: -

> *"In some cases, the terms of the agreement are contained in the body of the consent order or judgment rather than in a schedule, and in such a case it may be possible to obtain enforcement of them in the existing claim. Usually, however, it is necessary to begin a fresh claim alleging breach of compromise or contract…*
>
> *In deciding how to seek enforcement, the innocent party should have regard to the requirement of the overriding objective to save expense."*

[58] The settlement agreement disposed of the substantive dispute and it made no mention of what was to become of the original claim. The claimant's remedy therefore lies in fresh proceedings to seek to enforce the terms embodied in the settlement agreement as he could not do so by restoring the original action. Having considered all the circumstances, I have concluded that the institution of this claim was not an abuse of process. I am strengthened in this view by the admonition of Lord Bingham and Lord Millett in **Johnson v Gore Wood & Co (a firm)** [2002] AC

1. The law lords urged that a court must be very heedful before concluding that there is an abuse of process because the reason for the existence of the courts is to resolve disputes between the parties that they are not able to resolve themselves.

[59] In the case of **S v. S (Ancillary Relief: Consent Order)** [2002] 3 WLR 1372 Bracewell J stated at page 1376 paragraphs 4-5: -

> *'The authorities cited before me demonstrate that the grounds for setting aside a consent order fall into two categories. (1) cases in which it is alleged there was at the date of the order an erroneous basis of fact eg misrepresentations or misunderstanding as to the position or assets. (2) cases in which there has been a material or unforeseen change in circumstances after the order so as to undermine or invalidate the basis of the consent order, as in* ***Barder v Barder [1988] AC 20****, and known as a supervening event.*

[60] The court's power to set aside or vary consent orders is circumcised. However, the court has the jurisdiction to ensure that what is agreed between the parties is carried into effect. Both parties in the case at bar acted contrary to the terms of the settlement agreement. It is important to note that the defendant withdrew its offer to purchase the motor vehicle which further invalidated the basis on which the settlement agreement was made. In any event, they have not departed entirely from what the court is being asked to enforce, therefore the court's summary jurisdiction remains intact and the court is not bereft of the jurisdiction to intervene.

[61] This principle was applied in Huddersfield Banking Co. Ltd v Henry Lister & Son, Ltd [1895-99] All ER Rep 868, where Lindley LJ said:-

> *"A consent order I agree is an order, and so long as it stands it must be treated as such, and so long as it stands I think it is as good an estoppel as nay other order. I have not the slightest doubt on that point. But that a consent order can be impeached not only on the ground of fraud but upon any grounds which invalidates the agreement it expresses in a more formal way than usual, I also have not the slightest doubt. If authority for that be wanted, it will be found in two cases which were referred to in the course of the argument, and which I do not propose to examine at any length, I mean* ***Davenport v Stafford (1) and A-G v Tomline (2)****".*

[62] In seeking to carry out the terms of the settlement agreement, the court must consider the justice of the case and the conduct of the parties. The basis on which the settlement agreement was founded was to facilitate the defendant company

repurchasing the motor vehicle. The valuation reports were required to determine the average forced sale and market sale value of the motor vehicle to inform the decision of the parties. The settelement agreement also indicated what steps should be taken based upon these values. In light of the declaration of one report that it was not intended to be used for a recommendation to purchase the motor vehicle, the defendant tried to mitigate this blunder by offering to soley finance a diagnostic testing of the vehicle. The claimant refused to do so and has not provided the court with a reason for this refusal.

[63] The court's primary concern is to create justice. In giving effect to the overriding objective in dealing with cases efficiently and saving expense, the parties are expected to cooperate with each other in an attempt to save expenses and time and unjustifiably refusing to corporate to facilitate carrying the agreement into effect the parties would have failed to abide by the overriding objective.

ORDERS

[64] In my judgment, it is appropriate to make the following orders: -

1. Notice of Application for Summary Judgment dated and filed 22 December 2020 is refused and dismissed.
2. Notice of Application for Court Orders dated 26 January, 2021 and filed 27 January 27, 2021 is refused and dismissed.
3. Two (2) valuations of the 2012 Mercedes Benz S350 motor vehicle bearing VIN: WDDNG2CB6CA436916, are to be redone and to be carried out by Advanced Insurance Adjusters Limited of 18 South Avenue, Kingston 6 and by MSC McKay Jamaica Limited of 27 Lady Musgrave Road, Kingston 5. Costs of these two (2) valuations to be borne equally by the Claimant and Defendant.
4. A diagnostic testing by a certified automotive mechanic/technician is to be done on the 2012 Mercedes Benz S350 motor vehicle bearing VIN: WDDNG2CB6CA436916. The Claimant is to surrender the 2012 Mercedes Benz S350 motor vehicle bearing VIN: WDDNG2CB6CA436916 for this sole ,purpose

and once this diagnostic test is completed , the said vehicle is to be returned to the Claimant forthwith. Costs of this diagnostic testing is to be borne solely by the Defendant.

5. The Claim and Counterclaim are stayed until all reports are prepared, filed and exchanged.
6. Costs of Notice of Application for Summary Judgment filed on December 22, 2020 and Notice of Application for Court Orders filed on January 27, 2021 to be costs in the Claim.
7. Claimant's Attorneys-at-Law to prepare, file and serve Orders made herein. This Order is to be served on Advanced Insurance Adjusters Limited of 18 South Avenue, Kingston 6 and by MSC McKay Jamaica Limited of 27 Lady Musgrave Road, Kingston 5.
8. Leave to Appeal is granted.