[2018] JMSC Civ 40

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014 HCV 04853

BETWEEN	**TYRONE SEAN LEWIS**	**1ST CLAIMANT**
AND	**ANNETTE JEAN BLOUNT**	**2ND CLAIMANT**
AND	**COURTNEY GEORGE LEWIS**	**3RD CLAIMANT**
AND	**NATIONAL COMMERCIAL BANK JAMAICA LIMITED**	**DEFENDANT**

IN CHAMBERS

Mr. Tyrone Sean Lewis & Mr. Courtney George Lewis, appear in person and on behalf of the 2nd claimant

Mrs. Sandra Minott–Phillips, QC. & Mr. Litrow Hickson, instructed by Myers, Fletcher & Gordon, for the defendant

HEARD: October 23, 2017, & March 23, 2018

APPLICATION FOR SUMMARY JUDGMENT – APPLICABLE LEGAL PRINCIPLES – BURDEN OF PROOF – MORTGAGOR AND MORTGAGEE – PRIVITY OF CONTRACT – NEGLIGENCE – BREACH OF FIDUCIARY DUTY – UNJUST ENRICHMENT

ANDERSON, K., J

The Background

[1] This claim was instituted by the claimants, who did so, unrepresented by counsel, against the defendant following a dispute regarding a home equity loan agreement between the 1st and 3rd claimants and the defendant. The 1st and 3rd

claimants engaged the defendant's services as mortgagee with a view to securing a loan, and, in 2009, the mortgage sum of $5,210,660.00 was disbursed to them. As security for the loan, the 1st and 3rd claimants proposed and offered property registered at Volume 1421 and Folio 425 of the register book of titles. At the time when they utilized that property as security for that loan, the 1st and 3rd claimants were registered owners of that property as joint tenants.

[2] The property is located at 67 Harwood Drive, Washington Gardens, in the parish of Saint Andrew, (hereafter referred to as 'the Harwood Drive property,') and later became central to the dispute between the parties. It became central to the dispute as the 1st and 3rd claimants were unable to make the monthly repayments and hence defaulted on the loan. That led to the defendant exercising their power of sale over the property which was offered as collateral for the loan. The claimants then initiated this claim on October 16, 2014, seeking the following:

i. Special damages against the Defendant in the sum of ($162, 630,850.00);

ii. Damages for particulars of negligence;

iii. Damages for breach of arrangement and understanding;

iv. Damages for breach of fiduciary duty;

v. Damages for conspiracy to cheat, defraud and injure the Claimants in their business;

vi. Damages for unjust enrichment;

vii. Damages for breach of trust and confidence during the Defendant period of banking service to the Claimant;

viii. Damages for malicious destruction of property;

ix. Interest at such a rate and for such a period as the Honourable Court thinks fit;

x. Costs; and

xi. Further or other relief.

[3] The defendant filed its further amended defence on September 11, 2015, denying the allegations made in the claimant's claim, with the only admission being that they, the defendants, were in a mortgage relationship with the 1st and 3rd claimants. Consequent on this, on December 8, 2015, the defendant filed an application for summary judgment, pursuant to **rule 15.2(a) of the Civil Procedure Rules** (CPR), and sought the following orders:

> *'1. Judgment issues for the Defendant on the Claimants' claim;*
>
> *2. Costs of the action are awarded to the Defendant to be taxed if not agreed.'*

[4] The defendant alleged, as its sole ground for those orders, that the claimants have no real prospect of being successful in their claim.

[5] The defendant's application was supported by the affidavit of Damion Fletcher, which was also filed on December 8, 2015. That was the only affidavit relied upon by the defendant in support of their application. That affiant deponed, at paragraph 1 of the said affidavit, that he was employed to the defendant as '*Team Lead, Debt Collection & Recovery Unit*.' Later in the affidavit, at paragraphs 8 and 9 the following was stated:

> *'8. Tyrone and Courtney Lewis did not satisfy* [the defendant]*'s demand for repayment and* [the defendant]*, as registered mortgagee, exercised its power of sale over the mortgage property.*
>
> *9. The proceeds of sale were insufficient to extinguish the entire debt owed to* [the defendant]*, and a balance exceeding $28M now remains owing and unpaid by Tyrone and Courtney Lewis.'*

[6] In response to that application, the claimants, on their own behalf, that is, without any legal representation, filed an application for summary judgment on January 25, 2016 and an amended application for summary judgment, on February 1, 2016, pursuant to **rule 15.2(a) of the CPR**. In that amended application, they alleged, *inter alia,* that, *'the defendant have no real prospect of successfully defending the claim*,' and sought the following orders:

'1. Judgment issues for the Claimants on the Defendant, issue;

2. *Recovery of property of 67b Harwood Drive, part of Washington Gardens, being the Lot numbered 463D on the plan of Washington Gardens at Volume 1421 Folio 425 of the register book of titles or award to the Claimant payment of it assessed value; and*

3. *General damages to be assessed by the court if not agreed to pay a sum equivalent to the damages by the Defendant, on the Claimants to be paid; and*

4. *The Court may, if it so think fit, adjudged to forfeit a sum equivalent to the amount of injury done since there is a presumption that the Claimants suffered some special damages.'*

[7] That application was supported by the affidavit of Courtney Lewis, also filed on February 1, 2016. At paragraph 5 of the affidavit of Courtney Lewis, it was stated that the defendant's exercise of their power of sale upon the Harwood Drive property was both 'improperly exercised' and 'unauthorized.' Further, at paragraph 22 of the said affidavit, it was stated that the claimants 'believe that the defendant has no real prospect of successfully defending the claim or the issue on its behalf...' Both applications for summary judgment came up before me on October 23, 2017. Also at that time, the claimants were unrepresented by any counsel, but nonetheless, reasonably competently, when considered in that context, made oral submissions to this court, on their own behalf. Throughout this claim, the defendant has been represented by the law firm: Myers, Fletcher and Gordon.

Issue for determination

[8] The issue for my determination is: Does the claimants' statement of case disclose any real prospect of being successful at trial?

A brief statement of the law

[9] Part 15 of the **C.P.R** empowers the court to determine a claim or a particular issue in a claim without a trial. Further, **Rule 15.2(a) of the C.P.R** permits the court to grant summary judgment on a claim or on a particular issue of the claim, where the court considers that the claimant has no real prospect of succeeding on the claim or the issue, or the defendant has no real prospect of successfully defending the claim or issue, as the case may be. **Rule 15.2 of the C.P.R** states as follows:

> *'15.2 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.'*

[10] Additionally, **rule 15.6(1) of the C.P.R** outlines the court's powers in granting summary judgment. That rule reads as follows:

> *'15.6 (1) 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.'*

[11] In **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."*

[12] Further, at paragraph 34, Harris JA, referred to the House of Lords judgment of **Three Rivers District Council v Governor and Company of the Bank of England** [2001] UKHL 16, where Lord Hutton, at paragraph 158, stated the approach a judge should adopt when dealing with the applicable test. Lord Hutton stated the following:

> *'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, ie 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.'*

[13] The party opposing an application for summary judgment, is not required to adduce compelling evidence, but instead, may successfully oppose same by putting forward enough evidence to raise a real prospect of a contrary case: See **Korea National Insurance Corporate v Allianz Global Corporate and Specialty AG -** [2007] EWCA Civ. 1066. Where a respondent puts forward a prima facie case in answer, then the matter should ordinarily be allowed to continue to trial. Further, where the court is called upon to decide upon an application for summary judgment, the court must consider same, taking into account very carefully, the overriding objective of dealing with the case justly.

Analysis

[14] As stated above, the defendant filed an application for summary judgment on December 8, 2015 pursuant to **rule 15.2(a) of the C.P.R**, and, subsequently, the claimants filed an amended application for summary judgment on February 1, 2016. The defendant's application will be dealt with first, and, depending on the outcome of the determination of that application, the claimants' application will be addressed next. In other words, if this court grants summary judgment on the defendant's application, then there would be no need to consider the claimant's application. Of course, since both applications for summary judgment cannot be successful, it follows that, in reality, it matters not, other than from the perspective of the overall length of these reasons, which application is considered first.

[15] It is noteworthy to state here, that, the burden of proof upon an application for summary judgment rests with the applicant, to adduce sufficient evidence, when considered on a balance of probabilities, that the opposing party's claim or defence (as the case may be), has no realistic prospect of success, if it were to proceed to trial. The defendant has averred, in their application, that the claimants' claim has no real prospect of being successful, if that claim was allowed to proceed to trial. The claimants, have, on the other hand, for the purposes of their amended application for summary judgment, averred that the defendant has no real prospect of successfully defending the claim.

The defendant's application against the case of the 1st and 3rd claimants

[16] It will be convenient, for present purposes, to address the case of the 1st and 3rd claimants and the defendant's application for summary judgment, in that context, first. I will now do so. The reason for same, will be stated, later on, in these reasons.

[17] It was the undisputed evidence that the defendant's mortgage facility was engaged by the 1st and 3rd claimants, in that, the parties to the mortgage agreement, were the 1st and 3rd claimants, as mortgagors, and the defendant as mortgagee. The undisputed evidence further revealed that the 1st and 3rd claimants offered the Harwood Drive property, which was at that time registered in their names as joint owners, as security for the loan. Moreover, it was not in issue that the 1st and 3rd claimants, being parties to the mortgage agreement, bore the responsibility of the repayment of that loan, and that they were unable to meet that obligation which saw them defaulting on the repayment. That default led to the defendant exercising its power of sale over the Harwood Drive property.

[18] The defendant's application, as said before, was supported by the affidavit of Damion Fletcher, filed on December 8, 2015, where the evidence outlined: (i) the 1st and 3rd claimants' engagement with the defendant's mortgage facility, (ii) a lay out of the sums loaned to the 1st and 3rd claimants, (iii) the fact that the Harwood Drive property was used as security for the loan, (iv) that the 1st and 3rd claimants failed to make the required monthly instalments, upon which the defendants made formal demands for those payments to be made, and (v) that the defendant exercised their power of sale, after the 1st and 3rd claimants failed to satisfy the defendant's demand for the repayment of the loan. That evidence, as outlined before, was uncontradicted by the claimants, and I accept that evidence. In my view, the defendant has met the evidentiary burden and has set out sufficient evidence, when considered on a balance of probabilities, disclosing that the 1st and 3rd claimants' claim, has no realistic prospect of success. To my mind, the 1st and 3rd claimants have not led any sufficient evidence, capable of enabling this court to reach a contrary conclusion. My reasons for having so stated, are set out below.

[19] The question, therefore, now being considered, is whether the claim, of the 1st and 3rd claimants, discloses any real prospect of success, if it is permitted to

proceed to trial. That is to say, whether there was material which demonstrated that there are issues which ought to be resolved, by means of a trial, or in other words, issues which ought to be investigated at trial, so that they can be resolved, at trial. I will again, set out the claimants' claim below, for convenience, and to facilitate with greater ease, the assessment of their claim as filed. In addition, this court will carefully consider the evidence adduced by the respective parties, both in support of, as well as in opposition to the defendant's application for summary judgment, for the purpose of considering what evidence will likely be adduced by the respective parties, at trial. On an application for summary judgment, this court should adopt that approach, as was succinctly stated out at paragraph 35 of the **Fiesta** case *(op. cit.)*: '*the important question is **whether there was material** which demonstrated that there are issues to be investigated at trial'* (my emphasis). The case of the 1st and 3rd claimants with respect of each of the several claims which they are pursuing, must, of necessity and will be, considered separately.

[20] The claimants filed this claim, seeking the following:

i. *Special damages against the Defendant in the sum of ($162, 630,850.00);*

ii. *Damages for particulars of negligence;*

iii. *Damages for breach of arrangement and understanding;*

iv. *Damages for breach of fiduciary duty;*

v. *Damages for conspiracy to cheat, defraud and injure the Claimants in their business;*

vi. *Damages for unjust enrichment;*

vii. *Damages for breach of trust and confidence during the Defendant period of banking service to the Claimant;*

viii. *Damages for malicious destruction of property;*

ix. *Interest at such a rate and for such a period as the Honourable Court thinks fit;*

x. Costs; and

xi. Further or other.

[21] It is clear from the undisputed evidence, which was earlier referred to, that any claim upon any issue arising from the mortgage agreement, may only be pursued as between the 1st and 3rd claimants, as mortgagors, and the defendant, as mortgagee. As a general rule of contract law, only the parties to the contract are entitled to sue and be sued pursuant to that agreement. Therefore, it is only the 1st and 3rd claimants or the defendant, who may sue upon any issue arising from the mortgage agreement entered into between them. That is what is known as 'privity of contract' see: **Tweddle v Atkinson** (1861) 1 B&S 393, especially at pages 397 to 398. I will now address each heading of the claimants' claim to consider whether, any of the averment was supported by evidence which would warrant those claims, all now subsumed within the ambit of a single claim, as is permissible, proceeding to trial.

[22] Secondly, the 1st and 3rd claimants have sought 'Damages for particulars of negligence.' In order for them to prove negligence, they must demonstrate, to the satisfaction of the court that: (i) there existed a duty of care owed by the defendant to the 1st and 3rd claimants, and that (ii) there was a breach of that duty of care by the defendant, and (iii) that they, the 1st and 3rd claimants, have suffered loss as a consequence of the defendant's breach of that duty of care, and that the said loss constitutes a reasonably foreseeable consequence of the breach of that duty of care. In that regard see: **Adele Shtern v Villa Mora Cottages Ltd. et al** [2012] JMCA Civ 20, especially at paragraph 49. By virtue of the mortgage agreement that existed between the 1st and 3rd claimants and the defendant, a duty to act in good faith was thus owed by the defendant towards the 1st and 3rd claimants, when exercising its power of sale. See: **Lord Waring v London and Manchester Assurance Co Ltd** [1935] Ch 310 page 318.

[23] The 1st and 3rd claimants, in my view, have not averred or given evidence of any breach of that duty which was owed to them by the defendant, and neither have

the 1st and 3rd claimants shown, by means of evidence, on a balance of probabilities, the losses that flowed as a result of any alleged breach of the defendant's duty to act in good faith in so exercising their power of sale. Their claim for damages for negligence, therefore, has no realistic prospect of success.

[24] Thirdly, the 1st and 3rd claimants have claimed 'Damages for breach of arrangement and understanding.' It is the view of this court that, there exists, no such cause or causes of action, whether in legislation or at common law, within this jurisdiction. Consequently, that claim has no realistic prospect of success.

[25] Fourthly, the 1st and 3rd claimants have further claimed 'Damages for breach of fiduciary duty.' The evidence showed, as outlined above, that the relationship that existed between the 1st and 3rd claimant, and the defendant, was one which arose from the mortgage relationship. The relevant question to be asked, then, is: Does a fiduciary relationship exist between a mortgagor and a mortgagee? Guidance may be gleaned from **JMMB Merchant Bank LTD v Winston Finzi & Ors** [2014] JMCCCD 10, paragraph 19, per Sykes J, (as he then was):

> *'It must be appreciated that a lender who holds security thereby becoming a secured lender holds the power of sale for his purposes. It is not held on trust in order to be exercised in a manner beneficial to the debtor. The mortgagee can exercise the power of sale even if the time at which the power is exercised may be disastrous to the debtor. The duty owed by the mortgagee to the mortgagor is that the power of sale must be exercised for the purpose for which it was inserted into the mortgage instrument, namely, to realise or convert the security into cash. All this shows why a banker/lender does not fall within the presumptively fiduciary relationships. It also shows why the case law insists that there must be something more before the banker/lender can be held to be a fiduciary to the debtor. Once the mortgagee properly describes the property and makes a good faith effort to get the best possible price, it is virtually impossible to hold him accountable.'*

[26] Following that guidance, in the present case, there was no evidence that the Harwood Drive property was being held by the defendant for the benefit on the 1st and 3rd claimants. The defendant was a secured lender that held the power of sale for the purposes of converting that property into cash to satisfy the total of

the mortgage loan if the 1st and 3rd claimants defaulted, which, as the evidence has shown, they have indeed defaulted. Since the 1st and 3rd claimants have failed to show that, there existed, anything beyond a mortgagee/mortgagor relationship between themselves and the defendant, I find that there was no fiduciary relationship between the 1st and 3rd claimants and the defendant. Accordingly, there was no breach of fiduciary relationship for which the 1st and 3rd claimants may claim damages. That head of claim, must fail.

[27] Fifthly, by means of their claim, the 1st and 3rd claimants sought 'Damages for conspiracy to cheat, defraud and injure the claimants in their business.' The 1st and 3rd claimant, again, did not substantiate this averment. There was no evidence, whether by way of affidavit or by documentation attached claimants' particulars of claim, to show on a balance of probabilities that the defendant conspired to cheat, defraud or to cause harm to the defendants in their business life. The evidence being relied on by the claimants at this time, did not go further as regards the legal relationship of the parties, than to demonstrate that what existed between the parties, was a mortgagor/mortgagee relationship, and there was nothing to suggest any element of conspiracy by the defendant to either cheat, defraud or otherwise injure the claimants in their business. Accordingly, this head of claim, has no realistic prospect of success.

[28] Sixthly, as part of their claim, the 1st and 3rd claimants also sought 'Damages for unjust enrichment.' For the 1st and 3rd claimants to be successful in that claim, they ought to show that: (i) the defendant must have been enriched by the receipt of a 'benefit,' (ii) that benefit must have been gained at the expense of the 1st and 3rd claimant, and (iii) it would be unjust to allow the defendant to retain that benefit. In that regard see: **Musson (Jamaica) Limited v Claude Clarke** [2016] JMCA Civ 44, paragraphs 29 and 30, per Brooks JA.

[29] In applying those three requirements to the circumstances of this case, the 1st and 3rd claimants' case fell at the first requirement as, they have not shown what benefit the defendants have gained based on the mortgage relationship. The

evidence, on the contrary, showed that the defendants suffered a loss resulting from the mortgage transaction with the 1st and 3rd claimants. At paragraph 9 of the affidavit of Damion Fletcher, the following was stated:

> '*The proceeds of sale were insufficient to extinguish the entire debt owed to NCB, and a balance exceeding $28M now remains and unpaid by Tyrone and Courtney Lewis.'*

[30] That evidence clearly showed that the defendant, notwithstanding the fact that they exercised their power of sale over the Harwood Drive property, are still owed sums by the 1st and 3rd claimants. It is impossible, in those circumstances, for one to say that a party such as the defendant here has derived a benefit, at the expense of the opposing party. The 1st and 3rd claimant, in my view, have failed to advance any evidence upon which the court may assess to determine what benefit, if any, the defendant has enjoyed to the claimants' detriment. Their failure to establish the first of the three elements of a claim for unjust enrichment, listed in **Musson (Jamaica) Limited v Claude Clarke** *(op. cit)*, is fatal to their claim for unjust enrichment and, consequentially, this head of their claim must accordingly fail.

[31] Seventhly, the 1st and 3rd claimants also claimed 'Damages for breach of trust and confidence' for the duration of their banking service relationship with the defendant. Again, here, the 1st and 3rd claimants have baldly asserted that they have suffered from a breach of trust and confidence relationship existing between themselves and the defendant. Additionally, in similar manner as the preceding grounds above, the 1st and 3rd claimants did not adduce any evidence to show what was the nature of that breach. As I have expressed earlier, the evidence before this court did not disclose matters beyond a mere mortgage transaction, in which the 1st and 3rd claimants as mortgagors, failed to honour their obligations, which led to the defendants exercising their power of sale, as mortgagee, over the property held as security. Accordingly, this head of the claim, in my view, must also fail.

[32] Also, the 1st and 3rd claimants claimed 'damages for malicious destruction of property.' Malicious destruction of, or 'injury to' property, is a criminal offence. See section 42 of the **Malicious Injuries to Property Act.** The malicious destruction of property though, even if proven, provides no legal basis for a civil claim, as between party and party in this jurisdiction, save and except to the extent that it is pursued as a claim for trespass to goods. It has been stated, in **Winfield and Jolowicz on Tort**, (14th ed.) [1994], pp. 487, that the tort of 'trespass to goods' is:

> *'Trespass to goods is a wrongful physical interference with them. It may take innumerable forms, such as scratching the panel of a coach, removing a tyre from a car or the car itself from a garage, or, in the case of animals, beating or killing them.'*

[33] The 1st and 3rd claimants have provided no legal basis to show that the defendant wrongfully interfered with goods belonging to them. It follows therefore, from the foregoing, that the 1st and 3rd claimants have failed to establish a *prima facie* case on all heads of their claim.

The defendant's application against the case of the 2nd claimant

[34] I have elected to address the defendant's application against the 2nd claimant separately, as the case of the 2nd claimant differs from that of the 1st and 3rd claimants. Firstly, a perusal of the Registered Title of the Harwood Drive Property indicates that the registered owners, at the time the property was offered as security for the Home Equity Loan, were the 1st and 3rd claimants. With that, it is unequivocally clear that the 2nd claimant had no legal interest in that property.

[35] Secondly, it was also undisputed that the mortgage agreement was between the 1st and 3rd claimants, as mortgagors, and the defendant, as mortgagee. Pursuant to that agreement, the home equity loan was disbursed to the 1st and 3rd claimants, who also bore the obligation of meeting the monthly repayments. The 2nd claimant was not a party to that agreement, and as such, bore no obligation

towards the defendant, and also, the defendant equally did not bear any obligation towards her in relation to the mortgage agreement.

[36] I find, therefore, from the foregoing, that the 2nd claimant had no *locus standi*, that is, no interest in any of the claims which she has made against the defendant, and is not a proper party to this claim. In this respect, I find that the defendant has proved, on a balance of probabilities, that the 2nd claimant has no real prospect of being successful at trial, and accordingly, judgment ought to be summarily entered against her.

The claimant' claim for special damages

[37] The claimants have claimed for special damages of over $162 million dollars. Such a claim cannot properly be awarded by this court, as a matter of course. Also, there is no presumption that the claimants, either collectively, or individually, are entitled to any such award. The same can only be awarded if it has, as a general rule, been specially proven, or even if not specifically proven, if it has been, at least, proven on a balance of probabilities, as likely having been the consequence, in terms of a loss suffered by the claimants, arising from the defendant having committed a legal wrong which has been specifically claimed for. The claimants have particularized alleged legal wrongs committed by the defendant, but have provided no sufficient evidentiary basis for this court to properly conclude that any of those alleged legal wrongs have any realistic prospect of being successfully proven by any of the claimants, against the defendant, at trial. In the circumstances, the claimants' claim for special damages and indeed, any damages whatsoever, has no realistic prospect of success.

The claimants' application for summary judgment

[38] The claimants, as stated before, filed an application for summary judgment on February 1, 2016. However, consequent upon my reasons above and conclusions herein, I do not find it necessary to consider that application.

Conclusion

[39] The cases of all the claimants have not been shown to be of any merit, that is to say, their claims have not disclosed any material upon which this court ought to allow those claims to proceed to trial. Accordingly, summary judgment ought to be ordered on their claim in favour of the defendant, for the reason that the claimants' claim, in terms of each and all of the respective heads of claim, has no real prospect of succeeding at trial.

Orders

1. The defendant's application for summary judgment is granted against all the claimants, and judgment is entered against them in favour of the defendant.

2. The claimants' application for summary judgment is refused.

3. The costs of the claimants' claim against the defendant are awarded to the defendant and the costs of the defendant's application for summary judgment are awarded to the defendant, with all such costs to be taxed, if not sooner agreed.

4. The defendant shall file and serve this order.

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Hon. K. Anderson, J.