ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NUMBER ANUHCV 2007/0277

BETWEEN: **ENGLISH HAVEN LIMITED** **Claimant/Respondent**

And

THE REGISTRAR OF LANDS

First Defendant

And

ANGLO SWEDISH DEVELOPMENTS LIMITED

Second Defendant/Applicant

And

ATTORNEY GENERAL OF ANTIGUA AND BARBUDA

Third Defendant

Appearances:

Mr. Dexter Wason for the applicant/second named defendant

Mr. Trevor Kendall for the Respondent/Claimant

Mr. Justin Simon Q.C. for the first and third named defendants

……

2008 March 21st

June 23rd

…..……..

DECISION

[1] **Chambers**

Blenman, J: These are applications to strike out the statement of case or portions of the statement of case together with an application for security of costs.

[2] Anglo Swedish Developments Limited (Anglo Swedish) seeks to have the court exercise its jurisdiction both under Part 26.3 of the **Civil Procedure Rules 2000** (CPR 2000) and/or its inherent jurisdiction to strike out English Haven Limited's claim (English Haven). English Haven strongly resists the applications and seeks to have them dismissed.

[3] Alternatively, Anglo Swedish seeks to have the Court strike out the claim on the grounds stated hereunder;

(a) that it is frivolous, vexations, and an abuse of the Court's process; or

(b) the claim will fail as it is based on a document which was obtained by means of fraud, forgery, dishonesty and various breaches of the law which English Haven knowingly and deliberately perpetuated with the assistance of other individuals.

[4] Anglo Swedish also applies to the court for security of costs. The grounds of the application are that English Haven is not ordinarily resident in Antigua and Barbuda and that neither Mr. English nor English Haven has assets within the jurisdiction. English Haven strenuously resists this application also.

[5] **Issues**

The issues that arise for the court's determination are as follows:

(a) Whether the Court should strike out English Haven's statement of claim on the ground that:

(i) it does not disclose any reasonable ground for bringing the claim or

(ii) That the claim is an abuse of the court's process.

(b) Alternatively, whether the Court should strike out all or portions of paragraphs 9, 10, 13, 16 and 17 of the claim on the basis that English Haven seeks to rely on the land certificate as evidence of its legal or equitable rights to the property which forms the subject matter of the substantive claim.

(c) Whether English Haven's claim should be struck out as an abuse of the court's process.

(d) Whether the court should order English Haven to provide security for costs.

[6] **Pleadings**

English Haven has instituted a fixed date claim in which it seeks a number of declarations against Anglo Swedish. It has also sued the Attorney General and the Registrar of Lands. For the present purpose what is important is the relief sought against Anglo Swedish namely:

(a) Declaration that English Haven holds good title to the parcel of land at Galleon Beach, English Harbour known as Registration Section: English Harbour Block 35 3479A, Parcel 97 (formerly Parcel 58).

(b) Alternatively a declaration that Anglo Swedish holds Parcel 97 referred to above, on trust for English Haven and should forthwith transfer the title therein to English Haven.

(c) An order for Anglo Swedish to deliver Parcel 97 to English Haven.

[7] Also, English Haven has filed a statement of claim against the parties mentioned above. Anglo Swedish has not filed a defence to the claim (but has applied for the claim to be struck out).

[8] **Statement of Claim**

I will only refer to excerpts of some of the paragraphs in the statement of claim for the purpose of addressing the applications before the court.

[9] English Haven alleges that it is incorporated under the laws of Antigua and Barbuda to take over the ownership of Parcel 58.

[10] Paragraph 3 of the statement of claim states that Anglo Swedish was incorporated under the Laws of Antigua and Barbuda. The initial business was to purchase and develop two parcels of land one of which was Parcel 58 and the other was a Parcel 56. Phillip English and Bjorn Magnusson were the initial directors and shareholders of the company.

[11] Paragraph 6 of the statement of claim alleges that the parties entered into an agreement through which Parcel 56 was to be retained by Anglo Swedish and Parcel 58 was to be transferred to a new company.

[12] Paragraph 7 of the statement of claim indicates that the agreement was partly oral and written.

[13] Paragraph 8 of the statement of claim states that Mr. English travelled to Antigua and Barbuda to verify the condition of the villa. They also caused the new company English Haven to be incorporated.

[14] Paragraphs 9 of the statement of claim avers that in order to obtain the replacement land certificate, Mr. English travelled to Antigua with the knowledge, approval and consent of Bjorn Magnusson and Inger Magnusson.

[15] Paragraph 10 of the statement of claim states that Mr. English returned to the United Kingdom with the replacement land certificate in respect of Parcel 56 and 58 and furnished Bjorn Magnusson and Inger Magnusson with the certificate for Parcel 56.

[16] Paragraph 13 of the statement of claim alleges that Bjorn and Inger Magnusson fraudulently procured from the Registrar of Lands a further land certificate for Parcel 58 which purported to show Anglo Swedish as the owner of Parcel 58. This they did knowingly and by using the old land certificate which they were aware had been replaced.

[17] Paragraph 14 of the statement of claim states that Bjorn and Inger Magnusson wrongfully took possession of Parcel 58 in January 2007.

[18] Paragraph 15 of the statement of claim alleges that in the events that happened, the agreement that title to Parcel 58 (now Parcel 97) should be

transferred to English Haven is enforceable, even in the absence of statutory formality, in that the conduct of the parties is consistent with execution and substantial performance of the agreement.

[19] Paragraph 16 of the statement of claim contends that the agreement that title to Parcel 58 should be transferred to English Haven is enforceable, based on the substantial performance of the agreement.

[20] Paragraph 17 of the statement of claim states that, in the alternative, the words and conduct of Bjorn Magnusson and Inger Magnusson on behalf of Anglo Swedish constitute unequivocal and unambiguous representation that English Haven is the Proprietor of Parcel 58; as a consequence English Haven has acted upon those representations to its detriment in undertaking the management of, and making payment for the out goings of the property. In the circumstances Anglo Swedish is estopped from denying English Haven's title.

[21] **Application to strike**

Mrs. Inger Magnusson deposed to an affidavit in support of Anglo Swedish's application to strike out the claim. She states that she and her husband Bjorn Magnusson are the secretary and director of Anglo Swedish and make the affidavit on its behalf.

[22] Mrs. Magnusson disputes several of the matters pleaded in the statement of claim and denies several of the allegations contained in paragraphs 9, 10, 13, 16 and 17 of the statement of claim. In relation to paragraphs 9 of the statement of claim Mrs. Magnusson, as pleaded by English Haven, disputes

that Mr. English obtained the land certificate for Parcel 58 on 16th October 1999, since there was a change in favour of the firm American Bank now Global Bank of Commerce.

[23] Mrs. Magnusson contends that Mr. English has perpetuated a fraud on herself and her husband. She disputes that at any time herself and her husband ever advised Mr. English to obtain a replacement land certificate for Parcel 58. She states that she and her husband consider the agreement dated 18th February 1997 to be null and void. Further, she contends that English Haven relies on the land certificate as evidence of title obtained by virtue of instrument 4073/1996 but asserts that the signature of the Registrar of Land was forged and only the Registrar of Land may issue a land certificate.

[24] Mrs. Magnusson argues that Anglo Swedish has no reasonable ground for bringing the claim against Anglo Swedish. She says that English Haven improperly seeks to rely on the land certificate for Parcel 58 as the basis for bringing its claim and it should not be allowed to do so since Mrs. Magnusson avers that English Haven improperly/unlawfully and fraudulently obtained the certificate.

[25] In answer to the application to strike out the statement of claim, Mr. English deposed to an affidavit. He states that he is the director of English Haven and has been closely concerned with setting up and managing both English Haven and Anglo Swedish.

[26] In relation to paragraph 2 of the affidavit of Magnusson, he contends that the loan secured by the charge had been repaid on 31st January 1996 and that the collection charged was not secured on the property. Further, Mr. English denies several of the contentions made by Mrs. Magnusson. He asserts that the agreement pleaded at paragraphs 6 and 16 of the statement of claim set out the active role played by the Magnussons in achieving agreement on the division of the assets then owned by Anglo Swedish. He asserts further, that the conduct of the Magnussons since November 1997 clearly shows that they recognized that Parcel 58 passed into ownership of English Haven. Mr. English further states that since 1997 he has administered Parcel 58 and incurred expenses in doing so.

[27] Significantly, Mr. English states that the claim is not based on the land certificate for Parcel 58 obtained by virtue of instrument number 4073/1996. He contends that the claim is based on the agreement pleaded in paragraph 6 and 16 of the statement of claim, namely an agreement that lacks statutory formality but has been executed and substantially performed. The agreement is based on the behaviour of the Magnussons which amount to "unequivocal and unambiguous representation" that English Haven is the proprietor of Parcel 58 so that Anglo Swedish are now prevented from denying the English Haven's title. This is based on the history of events which give rise to Anglo Swedish holding Parcel 58 on trust for English Haven in circumstances in which the legal title should be transferred to English Haven. In none of those bases of the claim is the land certificate founded on instrument number 4073/1996 relied on as evidence of title. He further asserts, that any irregularity or dishonesty that may have taken place in the Land Registry took

place without his knowledge since he was relying on the officials to carry out their function properly.

[28] He maintains that English Haven has good causes of action against Anglo Swedish and that its claim should not be struck out.

[29] **Application for security of costs**

Mrs. Inger Magnusson deposed to an affidavit in support of Anglo Swedish's application for security. She states that Mr. Phillip English is the director and sole shareholder of English Haven and that he is a citizen of and is resident in the United Kingdom. She asserts that neither English Haven nor Mr. English has any assets within Antigua; neither Mr. English nor English Haven conducts any revenue business within the state so she believes that Anglo Swedish will have great difficulty in recovering any costs which may be awarded.

[30] (a) Mr. English also opposes Anglo Swedish's application for security for costs against English Haven. He contends that he has been a resident of Antigua for over 27 years. He alleges several wrong doings by the Magnussons and makes a number of allegations against the Registrar of Lands.

(b) Mr. English says that he is connected to Antigua and Barbuda.

(c) Mr. English says that he is now with Mr. Douglas Gordon Nichols a director and shareholder of English Haven. English Haven is the registered

owner of villa and land previously known as Parcel 58 and now known as Parcel 97.

[31] **Mr. Dexter Wason's submissions**

Reasonable grounds

Learned counsel Mr. Dexter Wason posited that the following is a summary of facts as it relates to English Haven's claim. He states that in paragraph 23 of the affidavit in response, English Haven's representative states that in order to obtain the land certificate on which they assert their title to Parcel 97(58) "he spoke to a Government Minister, Guy Yearwood, he put me in touch with Alva Richardson and Ernest Gilead who I understood were officers in the Land Registry, I discussed the matter with them and was told the fees for issuing the two land certificates would be US$12,000.00"

[32] Mr. Wason submitted that in paragraph 24(a), 26(c), 28(b) of the affidavit in response, English Haven's representative outlines in detail his dealings with Ernest Gilead and the "alterations" made by Mr. Gilead and himself to the "signed drafts" of Instrument No. 4073/1996 relating to Parcel 97(58).

[33] Further, learned counsel Mr. Wason stated that in paragraph 26 of the affidavit in response English Haven's representative explains how he gave Mr. Gilead the "documents" which he then collected from "his home late one evening before I returned to the UK".

[34] Next, Mr. Wason, learned counsel stated that paragraph 9 of the statement of claim, English Haven's representative states inter-alia that "Phillip English travelled to Antigua with the knowledge, authority and consent of Bjorn

Magnusson and Inger Magnusson, for the express purpose of obtaining replacement land certificates for Parcel 56 and 58. Phillip English had with him the sum of US$15,000.00 provided to him by Bjorn Magnusson and Inger Magnusson, US$12,000.00 which was to be applied to the payment for the provision of the replacement land certificates".

[35] Next, Mr. Wason said that paragraph 10 of the statement of claim. English Haven states that "Phillip returned to the United Kingdom with replacement land certificate in respect of Parcels 56 and 58, this statement confirms that the land certificate for Parcel 58 is the one obtained with the assistance of Mr. Ernest Gilead'.

[36] Also, Mr. Wason referred to paragraph 13 statement of claim and states that English Haven says that the land certificate held by the second defendant was inaccurate and invalid in that it purported to show the third defendants to be the proprietors of Parcel 58 and was inconsistent with the prior entry in the register showing the claimant to be the proprietor.

[37] In support of the application to strike out the paragraphs of the statement of claim, learned counsel Mr. Dexter Wason then submitted that the circumstances in which the English Haven's managing director asserts that he obtained the land certificate raises the reasonable inference that it was obtained in an unlawful, fraudulent and dishonest manner. He further submitted that the claim must fail as it is based on a document which was obtained by means of fraud, dishonesty and breaches of the laws of Antigua and Barbuda. He further stated that Anglo Swedish maintains its allegations that Mr. English has committed a fraud on Mr. and Mrs. Magnusson as stated

in the affidavit in support of application to strike out the claim. He further argued that there is no legal or equitable ground on which the court could transfer title to Parcel 97 (58) to the English Haven. The court should not allow itself to be used for an illegal, fraudulent or improper purpose.

[38] **Abuse of Process**

Further, advocating in support of the application to strike out the claim, learned counsel Mr. Wason stated that English Haven's actions constituted an abuse of the process of the court as provided in Part 26.3(c) of CPR 2000 as the claim inter-alia contains assertions of the fact which are vexations, scurrilous and obviously ill-founded. A claim may be struck out as not being valid as a matter of law. In support of his contention, Mr. Wason referred the court to **Price Meats Ltd. v Barclays Bank P.L.C. The Times 19th January 2000 Ch.D** Lord Bingham stated that abuse of process is "using that process for a purpose or in any way significantly different from its ordinary and proper use". See also **Attorney General v Barker The Times 7th March 2000.**

[39] **Fraud**

Next, Mr. Wason argued that English Haven in paragraph 17 of their statement of claim seeks to rely on certain equitable principles in establishing their claim to Parcel 97(58) by claiming that "in the premises the second defendant is estopped from denying the claimants' title". Learned counsel stated that the court must strike out the English Haven's statement of claim and all other relevant pleadings as it is based on a document which was obtained by fraud, dishonesty and various breaches of the law which the claimant knowingly and deliberately perpetuated with the assistance of certain other individuals.

[40] Finally, he said that Anglo Swedish maintains that English Haven's claim must fail due to the fact that the director Mr. English knowingly engaged in breaches of the law with the assistance of a named individual.

[41] **Mr. Trevor Kendall submissions**

Reasonable grounds

Learned counsel Mr. Trevor Kendall in opposing the application to strike stated that Anglo Swedish's submission appears to be based on the false premise that the action depends on the contents of a Land Certificate held by the claimant in relation to Parcel 97. In fact, the claim is not based on the contents of the said Land Certificate, or on any document which said not to comply with the requirements of formality for the disposition of an interest in land, but rests instead on the doctrines of part performance, proprietary estoppel and constructive trust. Mr. Kendall learned counsel referred to the affidavit of Philip English filed on 09.0 .07**,** which at paragraph 47 states that "I am further advised that, regardless of any possible defect in the documentation and implementation of the agreement, I have a very strong case based on the doctrines of part performance, proprietary estoppel and constructive trust". See also the statement of claim which at paragraphs 16 to 18 contains the following:

> "(16) In the premises and in the events that have happened, the agreement that title to Parcel 58/97 should be transferred to the claimant is enforceable, even in the absence of statutory formality, in that the conduct of the parties is consistent only with execution and **substantial performance** of the said agreement.
>
> (17) Further or in the alternative, the words and conduct of Bjorn Magnusson & Inger Magnusson for and on behalf of the second

defendant constituted unequivocal and unambiguous representations that the claimant is the proprietor of Parcel 58/97 and the claimant has acted upon those representations to its detriment in undertaking the management of, and making payment for the outgoings of, the property. In the premises, the second defendant is **estopped** from denying the claimant's title.

(18) Further, or in the further alternative, in the events that has happened, the second defendant holds Parcel 58/97 **on trust** for the claimant in circumstances in which legal title should forthwith be transferred to the claimant".

[42] Mr. Kendall advocated that as appears from the foregoing, English Haven advances three separate but overlapping cause of actions. Counsel dealt with the main ingredients, and the leading authorities, of, firstly, the doctrine of part performance and secondly, the doctrines of proprietary estoppel and constructive trust.

[43] Mr. Kendall said that whilst the doctrine of part performance has been abolished in England and Wales in respect of all dispositions of interest in land occurring after 26th September 1989 (by section 2(8) of the Law of Property Act (Miscellaneous Provisions Act) 1989), it continues to apply to transactions which are subject to the laws of Antigua.

[44] The following are propositions derive from the authorities:

(a) An application to strike out should not be granted unless the court is certain that the claim is bound to fail: **Richards v Hughes [2004] P.N.L.R. 35**

(b) Where the applicable law is clearly settled against the claim advanced by the claimant and an investigation of the facts would provide no assistance, the courts will not be reluctant to dismiss

cases which have no real prospect of success: **Lord Woolf in Kent v Griffiths [2001] [2002] 2 WLR 1158**;

(c) Lord Woolf's comments in **Kent v Griffiths** were endorsed in **Outram v Academy Plastics Limited [2001] ICR 367**

(d) A Statement of Claim is not suitable for striking out if it raises a serious live issue of fact which can only properly be determined by hearing oral evidence: **Bridgeham v Mc Alpine-Brown CCRTI 99/0977/B3**

(e) A fortiori in an area of developing jurisprudence a Statement of Claim should not be struck out where it raises a serious issue of fact that can only be properly determined by hearing oral evidence: **Partco Group Lt. v Wragg [2002] 2 Lloyd's Rep. 343**;

(f) It is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact: **Farah v British Airways, The Times, January 26, 2000**, referring to **Barrett v Enfield BC [1999] 3 All ER 193**

(g) Although the term "abuse of the court's process" is not defined in the rules, it has been explained in another context as " using that process for a purpose or in a way significantly different from its ordinary and proper use": **Attorney General v Barker [2000] 1 F.L.R 759**

(h) The undoubted jurisdiction of the court to strike out material in a witness statement which was both scandalous and irrelevant should only be exercised sparingly: **Sandhurst Holding Ltd. v Grosvener Assets Ltd, Case No HC 00 02854**

[45] Mr. Kendall said that the facts relied upon by English Haven are best understood by reference to three distinct phases in the history of their venture:

(a) The first phase occurred between June 1996 and November 1997 and involved an agreement and common intention between the

parties to terminate their joint venture and to split the assets, the essence of which was that Bjorn Magnusson would take Parcel 56 (in the name of Anglo Swedish) and Phillip English would take Parcel 58 (in the name of a new company, English Haven Limited, the claimant herein);

(b) The second phase occurred between November 1997 and February 2007 and involved overt conduct of the parties pursuant to, consistent with and in reliance upon their agreement and common intention;

(c) The third phase occurred from January 2005 to date and involved attempts by Bjorn Magnusson and his wife, Inger Magnusson (initially secret, but latterly overt) to subvert the effect of the agreement by conduct amounting to equitable fraud.

[46] Elaborating on his contentions that the claim has three phases, Mr. Kendall said that the first phase is**:** agreement/ common intention**.**

[47] The agreement relied upon by English Haven is fully and clearly pleaded at paragraphs 6 and 7 of the Statement of Claim as follows:

"(6). Between 10.06.96 and 14.11.97 the parties entered into an agreement, the essential part of which was that the business of the second defendant should be re-organized so that Parcel 56 was retained by the second defendant and Parcel 58 Galleon Beach was to be transferred to a company to be incorporated for the purpose ("the new company"), following which the shareholdings in respectively the second defendant and the new company would be re-organized so that all shares in the second defendant would be held by Bjorn Magnusson and Inger Magnusson and all shares in the new company would be held by Phillip English and Gordon Nichols.

(7) The agreement referred to at paragraph 6 herein was partly oral and partly in writing:

(a) In so far as the said agreement was oral, it was contained in conversations too numerous to relate between on the one

part Phillip English and on the other part Bjorn Magnusson and Inger Magnusson.

(b) In so far as the said agreement was in writing, it was contained in and/or evinced by a number of documents"

[48] Learned counsel Mr. Kendall stated that the second phase of the agreement is the conduct of the parties pursuant to their agreement and common intention. The conduct of the parties pursuant to their agreement and common intention is pleaded at paragraphs 11, 12 & 15 of the statement of claim as follows:

"(11) At all material times thereafter, the business of the second defendants has been limited to holding the freehold title absolute of Parcel 56 and dealing with it accordingly. Such limitation was expressly reflected in the articles of the second defendant by amendment of the same in or about August 1998.

(12) In or about January 2004 Parcel 56 was sold by the second defendant to one William Frost. The replacement land certificate for Parcel 56, referred to in paragraph 10 herein, was referred to and relied upon by the second defendant in order to establish its ability and entitlement to transfer good title to Parcel 56.

(15) At all material times from about November 1997 until January 2007, and pursuant to the agreement referred to at paragraph 6 herein, the sole business of the claimant has been to hold the freehold title absolute of Parcel 58/97 and deal with it accordingly (including maintaining it, paying all outgoings and renting it out on short lets for visitors to Antigua). This business has been carried on without demur from Bjorn Magnusson & Inger Magnusson or any other person for or on behalf of the second defendant, whose actions and acquiescence have been entirely consistent with and confirmed the existence of the agreement referred to at paragraph 6 herein"

[49] Finally, Mr. Kendall submitted that the third phase is the Magnussons' attempts to subvert the agreement by conduct constitute equitable fraud. In this regard, he said that there were actions secretly taken by the Magnussons (and from January 2007 their overt conduct) in their attempts to subvert the agreement are pleaded at paragraph 13 & 14 of the Statement of Claim as follows:

> "(13) On or about 15.03.05 Bjorn Magnusson and Inger Magnusson fraudulently produced from the first defendant the issue of a further land certificate for Parcel 58 (by this time transmuted to Parcel 97). The said further land certificate was, as Bjorn Magnusson and Inger Magnusson well knew, inaccurate and invalid in that it purported to show the second defendant to be the proprietor of Parcel 58 and was inconsistent with the prior entry in the register showing the claimant to be the proprietor. In order to procure the issue of the said inaccurate and invalid certificate, and in a dishonest attempt to circumvent and defeat the terms and effect of the agreement referred to at paragraph 6 herein, Bjorn and Inger Magnusson had presented to the first defendant the old land certificate for Parcel 58 (obtained by them for the purpose from the Swiss American Bank of Antigua), well knowing that it had been superseded by the replacement land certificate referred to at paragraph 10 above, was inconsistent with that same and was neither accurate nor valid.
>
> (14) In or about January 2007 Bjorn Magnusson and Inger Magnusson gained unlawful entry to Parcel 58, wrongly took possession of the same, and thereafter sought to justify their unlawful acts by making a claim of right based on the old land certificate, which they well knew to be inaccurate and invalid".

[50] Mr. Kendall learned counsel then emphasized that the applicable principles to the case at bar are those of Part Performance, Proprietary Estoppel and Constructive Trust. Whilst the doctrine of part performance has been abolished in England and Wales in respect of all dispositions of interests in land occurring after 26th September 1989 (by section 2(8) of the Law of

Property Act Miscellaneous Provisions) Act 1989), it continues to apply to transactions which are subject to the laws of Antigua.

[51] **Part Performance**

The doctrine of part performance renders such a contract enforceable, even in the absence of a written memorandum, where the claimant has done acts which, on an balance of probability, can be shown to have been undertaken in reliance on a contract, where it would in effect constitute a fraud for the defendant to take advantage of the fact that the contract was not evidenced in writing. In this regard, see '**Gray & Gray: Elements Of Land Law'** (4ed, OUP,2005) at pages 1176-1178. The classic requirements of part performance were laid down in **Maddison v Alderson (1883) 8 App Cas 467,** although it is noteworthy that in the period before its abolition in England & Wales, the requirements for its operation were substantially relaxed in that jurisdiction; see for example, **Steadman v Steadman [1976] AC 536** and in particular, the opinion of **Lord Reid.**

[52] **Proprietary Estoppel & Constructive Trust**

Learned counsel Mr. Kendall said given that the doctrines have been characterized in certain reports as virtually indistinguishable, it is not surprising that many of the leading decisions deal with both. In **Yaxley v Gotts [2000] Ch 162,** a decision under the Law of Property (Miscellaneous Provisions) Act 1989, the court made plain that both doctrines are capable of negativing the apparently strict requirements of even that statute:

(a) Robert Walker LJ at page 174 said that "I have no hesitation in agreeing that the doctrine of estoppel may operate to modify (and sometimes perhaps even counteract) the effect of section 2 of the

Act of 1989. The circumstances in which section 2 has to be complied with are so various, and the scope of the doctrine of estoppel is so flexible, that any general assertion of section 2 as a "no-go area" for estoppel would be unsustainable".

(b) His Lordship, Mr. Justice Walker at page 180 addressed the imposition of a constructive trust in such circumstances:

> "the species of constructive trust based on 'common intention' is established by what Lord Bridge in **Lloyds Bank Plc v Rosset** [1991] 1 A.C. 107, 132, called an 'agreement, arrangement or understanding' actually reached between the parties, and relied on and acted on by the claimant. A constructive trust of that sort is closely akin to, if not indistinguishable from, proprietary estoppel. Equity enforces it because it would be unconscionable for the other party to disregard the claimant's rights [The 1989 Act] would allow a limited exception, expressly contemplated by Parliament, for those cases in which a supposed bargain has been so fully performed by one side, and the general circumstances of the matter are such, that it would be inequitable to disregard the claimant's expectations".

(c) Beldam LJ at page 190, having referred to the Law Commission Report which led to the passing of the 1989 Act, observed that "the Commission's report makes it clear that in proposing legislation to exclude the uncertainty and complexities introduced into unregistered conveyancing by the doctrine of part performance, it

did not intent to affect the availability of the equitable remedies to which it referred".

[53] In **McCausland v Duncan Lawrie Ltd [1997] 1 WLR 30**, the Court of Appeal declined to strike out an action, finding that the estoppel contended for was "plainly arguable" and finding that the issue could not be resolved without evidence (**Neil LJ at p.45H and see Morritt LJ at p.50B-C**).

[54] In **Ash Street Properties Pty v Pollnow (1987) 9 NSWLR 80,** Priestley JA considered at p.100G-101D the jurisprudential basis on which the remedy of specific performance may be granted in such cases:

> "given appropriate circumstances, equity will declare that A holds property subject to equities which require him to transfer it to B as on a performance of the agreement. In appropriate circumstances, it will achieve this by a decree for specific performance. In my opinion, equity so acts not in order to perform the contract as such but in order to give effect to an equity which has arisen extra the contract and as the result of what the parties have done. This view has been taken in relation to proceedings for specific performance where, against a statute of this kind, B seeks specific performance of a contract. It has been said that, in ordering specific performance, equity gives effect not to the agreement which, as the statute has said, is unenforceable, but to the equity which has arisen extra the contract as the result of what the parties have done. The reason why equity will see such interest to have arisen is, to adopt the conventional language, that otherwise the statute would be used to give effect to a fraud. Fraud in this sense

means, of course, not fraud at common law but that which is regarded in equity as warranting the description: see **Rochefoucauld v Bouchstead [1897] 1 Ch 196 at 206**".

[55] Mr. Kendall also referred the court to the judgment of **HH Judge John Hicks QC** in **Target Holdings Ltd. v Priestley (2000) 79 P & CR 305** at paragraphs 77 to 83, rejecting submissions, firstly, that estoppel could not be used to circumvent the requirements of the 1989 Act and, secondly, that estoppel could be used only ad a shield, not a sword.

[56] Mr. Kendall said that should English Haven succeed in establishing the facts alleged in his claim (and he emphasized the extent to which the factual assertions made by English Haven are based upon and corroborated by the contemporaneous record), it would plainly be unconscionable for his title to Parcel 58 to be denied.

[57] Mr. Kendall next said that on the evidence as it stands and the current state of law, English Haven has, at the very least, a strongly arguable claim and striking out the claim would be, on the authorities, quite unwarranted.

[58] **Abuse of process**

As regards the second limb of the application, Mr. Kendall said it is clear that the English Haven has not issued proceedings for any improper purpose or ulterior motive; on the contrary, English Haven is seeking to use the machinery of the Court to establish and vindicate what he contends is his

legal title to the real property which is the subject of the proceedings. Nor is there any question of English Haven having flouted the procedural rules applicable to these proceedings or having employed any device or otherwise manipulated the process of the court. Finally, whilst the statement of claim filed, and the related affidavits, certainly make serious allegations against the Magnussons, such allegations are neither "scandalous" (in that they are corroborated by a wealth of contemporaneous documentation), nor are they irrelevant; on the contrary, they are highly relevant to the causes of action relied upon by English Haven and, in particular, the element of 'equitable fraud'.

[59] **Security for costs**

Learned counsel Mr. Kendall advocated that in determining the application for security for cost herein, the court should apply the following principles.

[60] With respect to the application for security for costs, English Haven's primary submission is that Anglo Swedish needs not only to show that one of the 'grounds for security' exists, but, in addition, that "in all the circumstances of the case, it is just to make such an order"

[61] The court will take into account the strength of the claim. The overall result requires that the order should be just: **Fernhill Mining Ltd.v Kier Construction Ltd. QBENI 99/0857/A2.** Certainly, a claimant will not be required to provide security for costs where, at the time of the application, the claim appears highly likely to succeed: **Keary Devwlopments Ltd. v Tarmac Construction Ltd. [1995] 3 All ER 534**

[62] Other factors the court should take into account are whether English Haven's alleged of assets, within the jurisdiction, has been brought about by the conduct of the Registrar of Lands, whether the Registrar of Lands has assets to satisfy any costs order obtained if the claim is successful and the degree of connection between English Haven and the jurisdiction. It appears from **Leyvand v Barasch & Ors, The Times, March 23, 2000,** that the greater the connection the claimant has with the relevant jurisdiction, the less likely it is that the security will be ordered. For other circumstances which the court might take into account in deciding whether to order security for cost, Mr. Kendall referred the court to Lord Denning's pronouncements **in Sir Lindsay Parkinson & Co Triplan Ltd [1973] 1 QB 609.**

[63] Mr. Kendall finally submitted that, in the circumstances of this case, it would be wholly inappropriate to order English Haven to provide security for cost. English Haven has a case which appears to be overwhelmingly meritorious on the facts and strongly arguable as a matter of law. The central allegation in the case is that the guiding minds behind Anglo Swedish have perpetrated a fraud, which has deprived English Haven of a valuable realizable asset within the jurisdiction. Unless Anglo Swedish successfully defends the claim, its position is that it is itself a 'shell company' with no assets within the jurisdiction. The main guiding mind behind Anglo Swedish, Bjorn Magnusson, is a multiple bankrupt, who has massive unpaid debts and in the course of his actions in the instant dispute he appears to have defrauded his creditors. English Haven is a company incorporated in Antigua and its guiding mind, Mr. Philip English, whilst ordinarily resident in England, has had a long-standing, genuine and practical connection with Antigua, both through his ownership of

the property the subject matter of the dispute and through frequent extended visits in the course of which he has taken an active role in Antiguan life.

[64] **Court's analyses and findings**

Reasonable grounds

I have perused the pleadings in the matter and carefully examined the affidavits that have been deposed to in support of Anglo Swedish's application to strike out the claim or portions of the claim. I have equally given deliberate consideration to the very lucid submissions of both sides together with the authorities that have been so helpfully provided CPR 2000 Part 26.3 (1)(b) and 26.3 (1)(c) clothe the court with the power to strike out a statement of case or part of a statement of case if it fails to disclose a reasonable ground for bringing a claim; or if it is an abuse of the process of the court or is likely to obstruct the just disposal of the case. It is the law that the court should only strike out a claim where it is evident that the statement of claim in its present form is insufficient to entitle the plaintiff to what he asks. It is for the party who seeks to have the claim struck out to show that there is no reasonable cause of action, when this limb is relied upon in order to ground the application.

[65] Where on the pleadings it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out. Once the statement of claim discloses some cause of action, or raises some question fit to be decided by trial, the mere fact that a case is weak and not likely to succeed is no ground for striking it out. See **Morris v Lawson [1915] TLR 418; Wealock v Maloney [1965] 1WLR 1238.** It is the law that the court has power at any stage to strike out the whole or any part of the pleading. However a statement

of case in an area of developing jurisprudence should not be struck out where it raises serious issue of fact that can only be properly determined by hearing oral evidence. See **Partco Group Ltd. v Wragg [2002] 2 Lloyd's Rep 343**

[66] A statement of case is not suitable for striking out if it raises a serious live issue of fact which can only properly be determined by hearing oral evidence **Bridgeman v McAlpine – Brown (2000)** ibid.

[67] Applying the above principles to the case at bar, I am of the respectful view that there are serious issues to be tried in the matter, namely as is pleaded that there was an agreement between the parties to transfer Parcel 58 and whether English Haven has performed a substantial part of the alleged agreement. The issue of constructive trust clearly arises on the pleadings and the elements of a constructive trust are adequately pleaded.

[68] I digress to state that under the old rule it was well settled that the jurisdiction to strike out was to be used sparingly. The reason was, and this has not changed, that the exercise of the jurisdiction deprives a party of its right to a trial, and of its ability to strengthen its case through the process of disclosure and other court procedures such as requests for further information. Further, it has always been true that the examination and cross examination of witnesses often changes the complexion of the case. It was accordingly the accepted rule that striking out was limited to plain and obvious cases where there was no point in having a trial.

[69] Under the CPR it is part of the court's active case management role to identify the issues at an early stage and to decide which issues need full investigation

at trial, and to dispose summarily of the others. In **Swain v Hillman [2001] 1 All ER 91** (a summary judgment case), Lord Woolf MR said that part 24 applications had to be kept within their proper limits, and were not meant to be used to dispense with the need for a trial where there were issues which should be considered at trial. The same could be said in relation to striking out under **r.3.4** In the same vein, before using **r.3.4** to dispose of 'side issues', care should be taken to ensure that a party is not deprived of the right to trial on issues essential to its case. In **McPhilemy v Times Newspapers Ltd. [1999] 3 All ER 775,** one of the first cases decided under the CPR, the Master of the Rolls said that the powers of the court to restrain excess do not extent to preventing a party from putting forward allegations which are central to its case. That said, it is open to the court to attempt to control how those allegations are litigated with a view to limiting costs. The court should only strike out portions of a statement of claim on the basis that there is no reasonable ground for bringing the claim in plain and obvious cases.

[70] The leading case under the old rule was **Williams and Humbert Ltd v W and H Trade Marks (Jersey) Ltd [1986] AC 368.** The claimant's application to strike out the defence took seven days to argue before the judge, six days in the Court of Appeal, and four days in the House of Lords. The case reiterated the point that striking out was only appropriate in plain and obvious cases. Sometimes, a case would only become clear after protracted argument. Lord Templeman said that:

> "if an application to strike out involves a prolonged and serious argument the judge should, as a general rule decline to proceed with the argument unless he not only harbours doubts about the soundness of the pleading but, in addition, is satisfied that striking out will obviate

the necessity for a trial or will substantially reduce the burden of preparing for trial of the burden of the trial itself."

[71] A judge may therefore refuse to hear a striking out-application if: (a) the application is unlikely to succeed; or (b) the application will not be decisive or appreciably simplify the eventual trial. See **Morris v Bank of America National Trust [2000] 1 All ER 954).** It is generally improper to conduct what is in effect a mini-trial involving protracted examination of the documents and facts as disclosed in the written evidence on a striking- out application. See **Wenlock v Moloney [1965] 1 WLR 1238.**

[72] In order to determine whether the cause of actions as formulated by English Haven can be established at trial would necessitate the hearing or extensive evidence. Most of the allegations that are pleaded by English Haven are closely connected to its claim, so much so that I fail to see how I can properly strike out the paragraphs which provide useful and relevant history to the claim. English Haven has not made irrelevant allegations against Anglo Swedish in establishing its cause of action but has pleaded, in my respectful opinion, relevant facts.

[73] It seems to me that one of the main bases upon which Anglo Swedish grounds its application to strike out the statement of claim is the contention that English Haven cannot properly rely on the Land Certificate as evidence of their legal or equitable rights to Parcel 97 (formerly Parcel 58). The gravamen of Anglo Swedish's argument appears to be that the Land Certificate which it contends that English Haven relies to ground its case has been obtained fraudulently and dishonestly. With respect, I do not share the

view that English Haven relies on the Land Certificate to ground its claim. On this issue I accept the submissions of learned counsel Mr. Kendall.

[74] It is the law that when the court exercises its jurisdiction on the basis that the statement of claim discloses no reasonable ground for bringing the claim this includes statements of case which are unreasonably vague, unsustainable, incoherent, scurrilous or ill-founded and other cases which do not amount to a legally recognizable claim. This is so, also, when the court exercises its inherent jurisdiction. See **Spencer v The Attorney General of Antigua and Barbuda Civil Appeal No. 20A of 1997.**

[75] Having perused the statement of claim and the fixed date claim form filed by English Haven, I state with respect that I find the arguments advanced by English Haven to be more persuasive. I am satisfied that English Haven is contending that there was an agreement between itself and Anglo Swedish that Parcel 97 would have been transferred to English Haven. Mr. English who is the main actor in English Haven contends that acting pursuant to the agreement he has performed certain major obligations and as a consequence he is entitled to have the agreement enforced in relation to Parcel 97. It is in that context that English Haven claims to be entitled to have Parcel 97 transferred into its name. He also contends that in the circumstances where Anglo Swedish unlawfully caused the title to Parcel 97 to be transferred into its name, that the court should order that Parcel 97 be transferred. With respect, I cannot say that on the face of the pleadings that when the allegations contained therein are examined that English Haven's claim is bound to fail. See **Richards v Hughes** ibid.

[76] Alternatively, English Haven is clearly contending that the Magnussons acting on behalf of Anglo Swedish made certain representations to Mr. English and caused him to rely on them and act to his detriment in relation to Parcel 97. Accordingly, English Haven contends that Anglo Swedish holds Parcel 97 as a constructive trust for the benefit of English Haven. **Harris v Bolt Burdon [2000] LTL Feb 2, 2000** is authority for the proposition that statements of case which are suitable for striking out on the basis that there is no reasonable ground include those which raise an unwinnable case where continuance of the proceedings is without any possible benefit.

[77] I am afraid that I cannot state, without more, that English Haven's case is misconceived and/or unwinnable, to the contrary I am of the respectful view that it raises serious live issues of the fact which can only be determined after the hearing of evidence. See **Bridgeman v McAlpine Brown** ibid. It is also the law a claim may be struck out as not being a valid claim as a matter of law see **Price Meats Ltd. v Barclays Bank Plc, The Times January 19, 2000.** I however am not of the view that the case at bar fits into that category. In contradistinction, English Haven's claim discloses reasonable grounds for bringing the claim.

[78] Further, it is not appropriate to strike out a claim in an area of developing jurisprudence, since in such areas; decisions as to novel points of law should be bases on actual findings of fact see **Farah v British Airways Plc, The Times, January 26, 2001.**

[79] In relation to English Haven's reference to the land certificate, I respectfully disagree that on the face of the pleading a court can determine, in the

absence of oral evidence that it was obtained by fraud or dishonesty. There is no doubt in my mind that in order for Anglo Swedish to establish the contentions of fraud there would of necessity have to be a hearing of the matter during which Anglo Swedish would be required to adduce evidence in this regard and of necessity that Mr. English would have to be subjected to cross examination before a court can properly determine the matter one way or the other.

[80] However the bases on which English Haven relies to ground its claim are well known to law and require the hearing of evidence in order to determine whether there was an agreement, as pleaded, between the parties and whether there was part performance of the agreement by English Haven, as is pleaded.

[81] Also in relation to the constructive trust claim, the court will have to hear oral evidence in order to determine whether English Haven can prove the allegations in the statement of case. Let me hasten to state that on the hearing of an application to strike it is no part of my function to determine whether or not the allegations are true. It contradistinction, I am required to determine whether English Haven has established a cause of action on the face of the pleading. I am satisfied that English Haven has sufficiently pleaded relevant facts in order to ground its claim and accept Mr. Kendall's submissions in that regard.

[82] Due to the nature and pleadings in the matter, I am afraid that I do not hold the view that this is a case that is suitable for striking out of the statement of claim or any of the paragraphs (which in my view pleads relevant history) and

alleged facts that are germane to the claim. Neither am I of the view that the material pleaded by English Haven is irrelevant or scandalous. I am convinced that on the pleadings English Haven has established causes of action.

[83] Accordingly, I decline to strike out the claim or the paragraphs requested by Anglo Swedish on this ground.

[84] **Abuse of Process**

The court has power both under its inherent jurisdiction and Part 26.3 (1)(c) of CPR 2000 to strike out a claim on the ground that it is an abuse of process. This limb requires that the process of the court must be used properly and must not be abused. The court will not entertain frivolous and vexatious matters. An abuse of the court's process usually arises in circumstances in which two or more set of proceedings are brought in respect of the same subject matter which can amount to that harassment of the defendant.

[85] The court always prevents the improper use of its machinery and will not allow its processes to be used in an oppressive manner but the court, before exercising its jurisdiction to strike out must ensure that the statement of case is devoid of merit. See **Norman v Mathews [1916] 85 LJKB 857, 859** Lush J pronounced the test as follows:

> "In order to bring a case within the description it is not sufficient merely to say that the plaintiff has no cause of action. It must appear that his alleged cause of action is one which on the face of it is clearly one which no reasonable person could properly treat as bona fide, and

contend that he had a grievance which he was entitled to bring before the court".

[86] In view of the legal principles, I fail to see, therefore, on what basis that I can properly conclude that English Haven's claim is an abuse of process. Here again, I respectfully decline to exercise the jurisdiction to strike out its claim on the basis that it is an abuse of the court's process.

[87] **Security of costs**

The defendant may in certain cases ask for an order to compel the claimant to give security for the cost of the action. Part 24.2 (1) of CPR 2000 permits a defendant in any proceedings to apply for an order requiring the claimant to give security for costs. The court has the discretion as to whether to award security for costs but in order for the court to exercise its discretion in favour of the defendant, the application must be brought within the ambit of the conditions provided by Part 24.3 of CPR 2000.

[88] The main condition to be satisfied is that it is just and convenient to make the order see Part 24.3 CPR2000. Part 24.3 (a)-(b) of CPR 2000 list other factors that the court should take into consideration when determining whether to order security for costs including 24.3 (c) which states as a consideration the fact that the claimant has taken steps with a view to placing its assets beyond the jurisdiction of the court.

[89] I am not of the respectful view that I should order English Haven to provide security on the basis that the company does not have assets in the jurisdiction in Antigua and Barbuda. To do so can result in injustice and be

oppressive to English Haven who may otherwise have a meritorious claim being driven from the seat of justice.

[90] An order for security for costs seeks to protect the party in whose favour it is made against the risk of being unable to enforce any costs order he may later obtain. The order, if complied with, will provide the party in whose favour it is made with funds normally held in court available for the payment of any costs the court later awards him.

[91] As seen in **The Civil Court Practice 2007 Volume 1,** in exercising its discretion as to whether to order security the court will take into account all relevant circumstances. See **Sir Lindsay Parkinson & Co Ltd v Triplan Ltd [1973] QB 609, [1973] 2 All ER 273, CA),** especially:

> "(1) Whether it appears that the application is made in order to stifle a genuine claim;
>
> (2) Whether an order for security would have the result of stifling a genuine claim, even if that was not the defendant's motive for making the application;
>
> (3) Whether the application is made at a late stage, when the claimant has already incurred substantial costs which would be thrown away if security were ordered; and
>
> (4) Whether any impecuniosity on the part of the claimant has been caused by the defendant, in particular as a result of the subject matter of the claim".

[92] As stated earlier, in addition to the court being satisfied of the primary condition namely: having regard to all of the circumstances of the case that it

is just to make such an order, the court is empowered to make such an order if it is just to do so and it is satisfied that the claimant has taken steps with a view to placing the claimant's assets beyond the jurisdiction of the court. See Part 24.3(c) of CPR 2000.

[93] It is the law that the court can grant a security for costs even if the claimant is in the jurisdiction if he or she has taken steps to place his or her assets beyond the jurisdiction of the court.

[94] Further, the basic principle that must guide the court in its determination as to whether to order security for costs is whether it is just to do so having regard to all of the circumstances of the case.

[95] In the case at bar, apart from Anglo Swedish contending that Mr. English, who is the sole shareholder of English Haven, is a citizen and resident of United Kingdom and that neither he nor English Haven has any assets in Antigua to satisfy any costs which may be awarded, Anglo Swedish has not provided the court with any evidence that English Haven has taken steps to place its assets outside of the jurisdiction. In my respectful opinion, to simply assert that neither English Haven nor Mr. English has any revenue earning business in Antigua and therefore there is the belief that great difficulty will be experienced in recovering the costs is insufficient to bring the application within one of the stated limbs of Part 24.2 of CPR 2000.

[96] The onus is on Anglo Swedish to show some basis for concluding that enforcement would be impossible, or that it would face substantial obstacles in enforcing to warrant an order for security for costs.

[97] In view of the totality of circumstances, I am not of the respectful view that I should order English Haven to provide security for costs since Anglo Swedish has failed to bring its application within any of the established limbs of Part 24.2 of CPR 2000.

[98] In effect, Anglo Swedish has failed to adduce any evidence from which I can conclude that it is just to make the order for security for costs. Critically, it has failed to provide the court with any evidence in relation to the established bases upon which to exercise my decision. Accordingly, I am left with no alternative but to dismiss the application for security of costs.

[99] **Conclusion**

(a) In view of the foregoing I hereby dismiss Anglo Swedish Developments Limited's application to strike out English Haven Limited's statement of claim or portions of its statement of claim.

(b) I also hereby dismiss Anglo Swedish Developments Limited's application against English Haven Limited for security of costs.

(c) Further, I hereby grant leave to Anglo Swedish Developments Limited to file and serve its defence within 28 days of this order.

(d) The case is hereby adjourned for further directions to be given by a Judge of the High Court, to be held on a date to be determined by the Registrar.

(e) Costs of the applications shall be costs in the cause.

The court gratefully acknowledges the assistance of both learned counsels.

Louise Esther Blenman
High Court Judge

It is important that the court apologises for the delay in finalising this matter, which was occasioned by administrative difficulties with which all concerned are aware.