In The Supreme Court of Bermuda

CIVIL JURISDICTION

2022: No. 25

B E T W E E N:

RANAE PATRICE CANN

Plaintiff

and

(1) MUHSIN NASIR

(2) BERMUDA ELITE ATHLETIC STRENGTH TRAINING LIMITED

Defendants

RULING

Before:	**Hon. Alexandra Wheatley, Registrar**
Appearances:	**Mr Jonathan White and Mr Dante Williams of Marshall Diel & Myers Limited, for the First and Second Defendants** **Ms Ranae Cann, In Person with McKenzie Friend, Mr Eron Hill**
Dates of Hearing:	16 February 2023
Date Draft Circulated:	22 March 2023
Date of Ruling:	24 March 2023

Capacity of MacKenzie Friend; Strike Out Application; Reasonable Cause of Action; Unjust Enrichment

RULING of Registrar, Alexandra Wheatley

INTRODUCTORY

1. On 4 February 2022, the Plaintiff filed a Specially Endorsed Writ of Summons (**Claim**) claiming in summary:

    (a) The First Defendant and the Plaintiff entered into a loan agreement where the Plaintiff loaned the First Defendant BD$127,000.00 with interest accruing annually at 6.5%. The loan is evidenced in the form a Promissory Note dated 11 September 2017. The Plaintiff disclosed the Promissory Note in her First Affidavit sworn on 24 June 2022 (**Plaintiff's Affidavit**) and the relevant clauses are as follows:

        i. Principal Amount: One Hundred and Twenty-Seven Thousand dollars;
        ii. Loan adjusted from August 2017 to add $7,000 in additional business expenses;
        iii. Interest at the rate of 6.5 % p.a.;
        iv. Loan Term: 5 years (60 Months);
        v. Monthly payments of principal and interest total $2,485 due on the first day of each calendar month;
        vi. Loan is due 60 months from the date of first payment: 1 September 2022 (date of final payment);
        vii. Terms of Loan: Unsecured.

    (b) The Plaintiffs sought in its prayer, the sum of $144,130.00 and interest.

2. On 12 May 2022, the Second Defendant filed an application to strike out the Plaintiff's case ~~as~~ against them (**Strike Out Application**). The Second Defendant's Strike Out Application was supported by the First Affidavit of Muhsin Nasir (**Mr Nasir's Affidavit**). The relief sought in the Strike Out Application is as follows:

> "*(a) the Plaintiff's Specially Endorsed Writ of Summons dated 4 February 2022 (**Writ**) in this action be struck out and this action be dismissed as against the Second Defendant pursuant to Rules of the Supreme Court (**RSC**) Order 18, Rule 19 and/or under the inherent jurisdiction of the Court on the ground that the Writ does not disclose a reasonable cause of action against the Second Defendant (**Strike Out Application**);*
>
> *(b) such further or other relief the Court considers just.*"

3. The Plaintiff's Affidavit filed on 24 June 2022 was in response to Mr Nasir's Affidavit. An Amended Statement of Claim was subsequently filed on 29 June 2022 (**Amended Claim**).

4. The Amended Claim included new causes of action, which materially differ from the Claim in that the Plaintiff now sought to introduce concepts of unjust enrichment. The Plaintiff's prayer however, requests repayment of the sum of $144,130.00 and is based on the various promissory notes entered into by the First Defendant.

5. On 31 January 2023, the First Defendant filed a Notice to Admit Judgment in the full sum being sought in the Amended Claim of $144,130.00.

6. This is my decision of the Second Defendant's Strike Out Application heard on 16 February 2023.

PRELIMINARY ISSUE

7. This application was originally listed on 7 February 2023 at which time the Plaintiff made an application for an adjournment on the basis the Second Defendant had filed its Skeleton Argument two days out of time in accordance with the Consent Order for Directions dated 22 June 2022. The Plaintiff requested further time to file her Skeleton Argument in order to be properly prepared for the hearing of the Strike Out Application.

8. It should be noted that on 14 December 2022 the Plaintiff's filed a Notice of Change of Attorney which appointed 95 Law Ltd as her attorneys. On 7 February 2023 the hearing was scheduled to commence at 9:30 a.m.; however, neither the Plaintiff nor her attorneys attended this time. This caused me to direct the Court Associate to contact 95 Law Ltd to ascertain if they were attending the hearing. The Court Associate was told that 95 Law Ltd would not be attending, but was advised the Plaintiff would be attending. It transpired that the Plaintiff appeared in Court at approximately 9:41 a.m. with Mr Eron Hill who was being requested to appear as a McKenzie Friend for the Plaintiff.

9. I confirmed that I had no difficulty in authorizing Mr Hill to appear as a McKenzie Friend for the Plaintiff; however, Mr White for the Second Defendant objected to Mr Hill being given a right of audience which would enable him to advocate for the Plaintiff. Mr White relied on the recent case of *Robert Moulder v Commission of Enquiry into the Historic Land Losses of Land in Bermuda* [2022] SC (Bda) 59 Civ (5 August) to support this position. In Robert *Moulder v Commission of Enquiry into the Historic Land Losses of Land in Bermuda*, Assistant Justice Hugh Southey specifically addressed the principles which should be applied in the Court exercising its discretion as to whether a McKenzie Friend should be authorized to act for one of the parties. The capacity in which a McKenzie Friend can assist a party was also addressed. At paragraph 6, Southey AJ stated as follows:

"6. *The Bench Book notes that the English Court of Appeal summarised the principles to be applied when deciding whether to authorise a McKenzie Friend in Paragon Finance plc v Noueiri [2001] 1 WLR 2357, as follows:*

a. *A McKenzie Friend has no right to act as such: the only right was that of the litigant to have reasonable assistance.*

b. *A McKenzie Friend was not entitled to address the court: if he did so, he would become an advocate and require the grant of a right of audience.*

c. *As a general rule, a litigant in person who wished to have a McKenzie Friend should be allowed to do so unless the judge was satisfied that fairness and the interests of justice did not so require. However, the court could prevent a McKenzie friend from continuing to act in that capacity where the assistance he gave impeded the efficient administration of justice.*" [Emphasis added]

10. I allowed Mr Hill to respond to this objection and queried whether he could provide case law which supported the position that he should be granted a right of audience as a McKenzie Friend rather than in the capacity to assist the Plaintiff. Mr Hill brought my attention to the recent Court of Appeal case of *Green v Mahraoui* [2022] CA (Bda) 19 Civ wherein he stated he was granted rights of audience by the Court of Appeal as a McKenzie Friend. Upon reading *Green v Mahraoui* it was evident that this case did not address the legal principles surrounding the capacity in which a McKenzie Friend can assist a party before the Courts. Mr Hill attempted to use this case as a precedent that he should be granted a right of audience simply on the basis he was granted this in *Green v Mahraoui.* I stressed to Mr Hill that this was not a precedent which was binding on this Court in relation to the rights of audience of a McKenzie Friend as this issue was not raised or determined by the Court of Appeal. I urged Mr Hill that should the Second Defendant still object on the relisting date regarding him being granted a right of audience, he should obtain legal precedents to present to the Court at that time.

11. Both parties having confirmed their respective availability to appear on 16 February 2023, I adjourned the Strike Out Application to 16 February 2023. I further ordered that the Plaintiff file her Skeleton Argument and any authorities by close of business on 13 February 2023 which both the Plaintiff and Mr Hill confirmed would not be an issue.

12. At the start of the hearing, Mr White confirmed he still objected to Mr Hill being granted a right of audience as submitted at the last appearance. Despite my guidance to Mr Hill that he should be prepared to present any case law or otherwise on this issue, he did not do so.

13. I confirmed my position that I accepted the principles set out in *Robert Moulder v Commission of Enquiry into the Historic Land Losses of Land in Bermuda* and would not grant Mr Hill a right of audience. These are my reasons:

    a) I took into consideration that the Plaintiff had been represented by attorneys throughout this matter up until the day of the hearing, 16 February 2023, which was when she filed a Notice to Act In Person, albeit she was ordered to file the Notice to Act In Person "*forthwith*". The Plaintiff should note that although she may have indicated this in her Notice, it is the discretion of the Court to appoint a McKenzie Friend. Therefore, 95 Law Ltd remained attorneys of record until 16 February 2023.

    b) At the appearance before me on 7 February 2023, Mr Hill (as the Plaintiff's McKenzie Friend) had requested that the Plaintiff be granted extra time to file her Skeleton Argument as the Second Defendant's Skeleton had been filed two days late. This was the basis for which the Plaintiff sought an adjournment. When asked about the availability of the Plaintiff for the hearing on 16 February 2023, Mr Hill's response was that if he was granted a right of audience there was no objection to the matter proceeding on this date; however, if I did not grant him a right of audience, the Plaintiff would want several weeks to obtain new attorneys. Notably, the Plaintiff was still represented by 95 Law Ltd at this appearance, but they failed to appear. I voiced my concern as this position

appeared to me to be effectively holding the Court hostage to disposing of this matter based on whether Mr Hill would be granted a right of audience.

c) I also raised the Overriding Objective set out in Order 1A of the RSC, noting the Strike Out Application had been made some time ago with directions being set out in the Consent Order for Directions dated 22 June 2022 as well as observing this is not a complex application. Believing that Mr Hill would provide the Plaintiff with "*reasonable assistance*" as a McKenzie Friend in order that she could comply with the Order of 7 February 2023, I granted leave for an extension to file these by 13 February 2023 the Plaintiff failed to file any Skeleton Argument or authorities. When asked why she had not filed a Skeleton Argument in accordance with the Order of 7 February 2023, the Plaintiff stated that she had not understood that she was required to do this. I rejected this position, as this was the basis for which she had sought the adjournment the week prior in order that she could have more time to file her Skeleton Argument.

14. It must be noted that I have grave concerns regarding the request to be appointed as a MacKenzie Friend in the manner which unfolded in this case. Of particular concern, when I asked the Plaintiff why she had not filed any Skeleton Arguments as was ordered on 7 February 2023, her response was that she did not understand that she had to do so. I was quite shocked by this given that the justification the Plaintiff put forward for the hearing to be adjourned on 7 February 2023 was in order to have more time to file her Skeleton Argument.

15. I voiced my concern to Mr Hill as it was evident that Mr Hill had not assisted the Plaintiff in any way since the last appearance on 7 February 2023. The purpose of a MacKenzie Friend appointment is to aid the party and the Court. It was clear to me given Mr Hill's comments on 7 February 2023 that he would not "assist" the Plaintiff unless he was granted a right of audience. This is quite frankly both unacceptable given the role of a MacKenzie Friend. There is a clear legal position as it relates to the appearance of MacKenzie Friends. As such, there should be no expectation whatsoever that when a

party attends Court requesting leave to have a MacKenzie Friend assist that not only will that application be granted, but also that the MacKenzie Friend will be granted a right of audience.

THE LAW

16. The power to make an order striking out a pleading under Rules of the Supreme Court 1985 (**RSC**), Order 18, Rule 19 is discretionary and provides as follows:

> "***18/19 Striking out pleading and indorsements***
>
> *19(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-*
>
> *(a) it discloses no reasonable cause of action or defence, as the case may be; or*
> *(b) ...*
> *(c) ...*
> *(d) it is otherwise an abuse of the process of the court;*
>
> *and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.*
>
> *(2) No evidence shall be admissible on an application under paragraph (1)(a).*
>
> *(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.*"

17. The summary procedure under this provision will only be applied to cases which are plain and obvious where the case is clear beyond doubt, where the cause of action is on the face of it obviously unsustainable, or where the case is unarguable.

No reasonable cause of action and inherent jurisdiction of the Court

18. The White Book, The Supreme Court Practice 1999 provides at page 349 under Order 18, Rule 19:

> ***"No reasonable cause of action or defence (18/19/10)***
> *(1) Principles - A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered (per Lord Pearson in Drummond-Jackson v British Medical Association [1970] 1 WLR 688; [1970] 1 All ER 1096, CA). So long as the statement of claim or the particulars (Davey v Bentinck [1893] 1 QB 185) disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak and not likely to succeed is no ground for striking it out (Moore v Lawson (1915) 31 TLR 418, CA; Wenlock v Maloney [1965] 1 WLR 1238; [1965] 2 All E.R. 871, CA):*
> ..." [Emphasis added]

19. Therefore, a reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered.

20. In *Lonrho PLC v Fayed and Others (No. 2)* [1992] 1WLR 1, Millett J, as he then was, set out the approach of the Court on an application to strike out under our equivalent rules of the Supreme Court, Order 18, Rule 19 (1)(a). At 5B he said thus:

> *"The approach of the court on an application to strike out a statement of claim under R.S.C., Ord. 18, r. 19(1)(a), on the ground that it discloses no reasonable cause of action, is to assume the truth of the allegations contained in the statement of claim; and evidence to the contrary is inadmissible. This is because the court is being invited to strike out the claim in limine on the ground that it is bound to fail even if all such*

allegations are proved. In such a case the court's function is limited to a scrutiny of the statement of claim. It tests the particulars which have been given of each averment to see whether they support it, and it examines the averments to see whether they are sufficient to establish the cause of action. It is not the court's function to examine the evidence to see whether the plaintiff can prove his case, or to assess its prospects of success." [Emphasis added]

21. The principles of law applicable to strike out applications were also set by Subair Williams J in the case of *Fidelity National Title Insurance Company v Trott & Duncan Limited* [2019] SC (Bda) 10 Civ (5 February 2019). Subair Williams J made the following comments at paragraph 50:

"***General Approach and the Court's Case Management Powers***

50. In David Lee Tucker v Hamilton Properties Limited [2017] SC (Bda) 110 Civ I outlined the general approach and relevant legal principles applicable to strike out applications. As a starting point, at paragraph 11, I stated:

"The principles of law applicable to the strike-out of a claim were no source of contention between the parties. This area of the law has been well recited in previous decisions of this Court. In general synopsis, strike out applications ought not to be misused as an alternative mode of trial. It is not a witness credibility or fact finding venture and for good reason. The evidence before the Court at this stage is not oral and has not yet been tested through cross examination. A strike out application, in reality, is a component of good case management. Where the pleadings are so bad on its face and so obviously bound for failure, the Court should strike it out."" [Emphasis added]

22. Subair Williams J gave further guidance of the principles when considering if there is reasonable cause of action at paragraphs 54 and 55:

"54. The rule against the admission of evidence in support of the ground that no reasonable cause of action is disclosed is contained at RSC Order 18/19(2).

55. At paragraphs 18- 20 in David Lee Tucker v Hamilton Properties Limited I referred to the following authorities in support of the rule at RSC Order 18/19(2):

> *18. This rule was recognized in Broadsino Finance Co Ltd v Brilliance China Automative Holdings Ltd [2005] Bda LR 12: "Where the application to strike-out (is) on the basis that the Statement of Claim discloses no reasonable cause of action (Order 18 Rule 19(a)), it is permissible only to look at the pleading.*
>
> *19. In E (a minor) v Dorset CC [1994] 4 All ER 640 at 649, [1995] 2 AC 633 at 693-694, Sir Thomas Bingham MR stated: 'It is clear that a statement of claim should not be struck out under RSC Ord 18, r 19 as disclosing no reasonable cause of action save in clear and obvious cases, where the legal basis of the claim is unarguable or almost incontestably bad...I share the unease many judges have expressed at deciding questions of legal principle without knowing the full facts. But applications of this kind are fought on ground of a plaintiff's choosing, since he may generally be assumed to plead his best case, and there should be no risk of injustice to plaintiffs if orders to strike out are indeed made only in plain and obvious cases. This must mean that where the legal viability of a cause of action is unclear (perhaps because the law is in a state of transition) or in any way sensitive to the facts, an order to strike out should not be made. But if, after argument, the court can be properly persuaded that no matter what (within the reasonable bounds of the pleading) the actual*

facts the claim is bound to fail for want of a cause of action. I can see no reason why the parties should be required to prolong the proceedings before that decision is reached." [Emphasis added]

23. In the matter of *David Lee Tucker v Hamilton Properties Limited* [2017] SC (Bda) 110 Civ, Registrar Subair Williams (as she then was) set out the following at paragraphs 11 to 13:

> "*11. The principled of law applicable to the strike-out of a claim were no source of contention between the parties. This area of law has been well recited in previous decisions of this Court. In general synopsis, strike out applications ought not to be misused as an alternative mode of trial. It is not a witness credibility or fact finding venture and for good reason. The evidence before the Court at this stage is not oral and has not yet been tested through cross-examination. A strike out application, in reality, is a component of good case management. Where the pleadings are so bad on its face and so obviously bound for failure, the Court should strike it out.*
>
> *12. That is not to say that a strike-out order should stand as the remedy for a badly pleaded statement of claim which can be cured by an amendment (see Dow Hager Lawrence v Lord Norreys and Others HL 1980 [Vol XV] 210) On the other hand, the inference to be drawn from facts unsupported by the affidavit evidence may be either the evidence was not deemed sufficient or important enough to be put forward or it was known that the asserted facts were incapable of being proved.*
>
> *13. In Electra Private Equity Partners (a limited partnership) v KPMG Peat Marwick [1999] EWCA Civ 1247p.613 Auld LJ said, "It is trite law that the power to strike-out a claim under RSC Order 18 Rule 19, or in the inherent jurisdiction of the court, should only be*

exercised in plain and obvious cases. That is particularly so where there are issues as to material, primary facts and the inferences to be drawn from them, and where there has been no discovery or oral evidence. In such cases...to succeed in an application to strike-out, a defendant must show that there is no realistic possibility of the plaintiff establishing a cause of action consistent with his pleading and the possible facts of the matter when they are known. Certainly, a judge, on a strike-out application where the central issue is one of determination of a legal outcome by reference to as yet undetermined facts, should not attempt to try the case on the affidavits...There may be more scope for an early summary judicial dismissal of a claim where the evidence relied upon by the Plaintiff can properly be characterised as shadowy, or where the story told in the pleadings is a myth and has no substantial foundation...

However, the court should proceed with great caution in exercising its power of strike-out on such a factual basis when all the facts are not known to it, when they and the legal principle(s) turning on them are complex and the law, as here, is in a state of development. It should only strike out a claim in a clear and obvious case. Thus, in McDonald's Corp v Steel [1995] 3 ALL ER 615 at 623, Neill LJ...said that the power to strike out was a Draconian remedy which should be employed only in clear and obvious cases where it was possible to say at the interlocutory stage and before full discovery that a particular allegation was incapable of proof." [Emphasis added]

Unjust enrichment

24. In the case of *Mary Charlene Butterfield v Charles Eugene Brangman et al* [2015] SC Bda 66 Civ, Stephen Hellman J, relying on Lord Clarke in *Benedetti v Sawris* [2014] AC 938, that the principles of unjust enrichment are summarized as follows at paragraph 42:

"...(2) *A court must ask itself four questions when faced with a claim for unjust enrichment. (i) Has the defendant been enriched? (ii) Was the enrichment at the claimant's expense? (iii) Was the enrichment unjust? (iv) Are there any defences available to the defendant? Per Lord Clarke at para 10.*

(3) A claim for unjust enrichment is not a claim for compensation for loss, but for recovery of a benefit unjustly gained by a defendant at the expense of the claimant. Per Lord Clarke at para 13..."

25. Most recently, the test for unjust enrichment was reaffirmed in the Privy Council case of *Samssondar v Capital Insurance Co Ltd* [2020] UKPC 33:

> "*18. It has now become conventional to recognise ... that a claim in the law of unjust enrichment has three central elements which the claimant must prove: that the defendant has been enriched, that the enrichment was at the claimant's expense, and that the enrichment at the claimant's expense was unjust. If those three elements are established by the claimant, it is then for the defendant to prove that there is a defence.*"

26. Mr White for the Second Defendant, also relied on the leading commentary of Goff & Jones, The Law of Unjust Enrichment, at paragraph 3-29 which states as follows:

> "*3-29 If the parties to a contract have made express or implied provision for the return of payments where the basis for those payments has failed, the contractual remedy excludes a remedy in unjust enrichment. In Pan Ocean Shipping Co Ltd v Creditcorp Ltd (The Trident Beauty) the time charterer of a vessel had paid an instalment of hire in advance (as required by the charterparty) to the defendants, to whom the right to receive the hire had been assigned by the disponent owners as part of a financing arrangement. The vessel was off-hire for the entire period, and the claimants sought to recover*

their payment from the defendants. The charter provided for the disponent owners to repay any overpaid hire immediately, and Lord Goff (with whom Lord Lowry agreed) commented that, since there was a contractual regime which legislated for the overpaid hire:

> *"[T]he law of restitution has no part to play in the matter; the existence of the agreed regime renders the imposition by the law of a remedy in restitution both unnecessary and inappropriate."*..." [Emphasis added]

27. The commentary then goes further to consider what Lord Goff meant by "*unnecessary and inappropriate*":

> "*...The most likely interpretation is that he was referring to the potential for a remedy in unjust enrichment to undermine the parties' contractual allocation of risk. Hence, if the contract expressly or impliedly provides that benefits are not to be returned, a remedy in unjust enrichment in respect of those benefits would clearly be "inappropriate"...It can be tentatively suggested that the parties should be assumed to have contracted with full knowledge of their underlying legal rights, and it is therefore only if, as a matter of interpretation, the parties intended that their contractual provision should act as a definitive "regime" that claims in unjust enrichment should be displaced. It would follow that a contractual provision for the return of benefits in certain circumstances would, in itself, be insufficient to displace remedies in unjust enrichment in respect of benefits conferred in other circumstances.*" [Emphasis added]

APPLICATION OF PRINCIPLES TO FACTS

28. As a starting point, I must consider the Amended Claim as pleaded and assume the truth of all the allegations set out therein. I cannot consider any evidence presented by the Defendant disputing the allegations of the Amended Claim.

29. The Second Defendant submitted that the Plaintiff's Amended Claim appears to apply the following logic:

(a) The Plaintiff provided the First Defendant an unsecured loan;

(b) The First Defendant did not tell the Plaintiff that funds loaned were to be used to purchase equipment for the Second Defendant;

(c) Consequently, the First Defendant misrepresented the purpose of the loan agreement;

(d) The Second Defendant is now legally responsible to the Plaintiff for the loan because it was unjustly enriched.

30. I do not believe this is an accurate representation of the Amended Claim. The Plaintiff's position in the Amended Claim is that she believed the First Defendant was operating as a sole proprietor rather than the Second Defendant being an incorporated company. She is alleging that the First Defendant at no time disclosed to her the Second Defendant was an incorporated company; had he done so, she would have included the Second Defendant as a party to the three promissory notes in addition to the First Defendant. This is her allegation in relation to the misrepresentation made by the First Defendant.

31. The First Defendant does not accept that any misrepresentations by him to the Plaintiff and avers the loans were used to make an investment for return that has not yet been realized. As such, Mr White submitted that the Amended Claim does not contain a reasonable cause of action against the Second Defendant. This is clearly a disputed matter of fact that must be tested at a trial of this matter. If I assume, as I must, that there was a misrepresentation then it can only follow that there is a cause of action.

32. Mr White further submitted that the legal concept of unjust enrichment is not made out on the Plaintiff's pleaded case for the following reasons:

(a) Firstly, the Second Defendant was never enriched through any expense of the

Plaintiff.

(b) Secondly, the funds loaned to the First Defendant were by way of unsecured contractual agreement which provided the parties with clear express terms, including instances of default.

(c) On the Plaintiff's affidavit evidence, the Plaintiff was aware that the First Defendant had a business and wanted to invest further with the First Defendant even after the alleged "revelation";

(d) The First Defendant has admitted the amount owed and has acknowledged that judgment should be entered against him.

33. I also do not accept the summary provided above. The Amended Claim clearly sets out that the Second Defendant is receiving "enrichment" of the equipment which was purchased by the First Defendant as the Second Defendant is using the equipment to generate an income. Whilst I accept that the general legal principle is that when there is a contract in place between parties, the remedy of unjust enrichment is excluded, there are always exceptions. The commentary in Goff & Jones at paragraph 27 above specifically confirms the assumption that all parties are fully aware of their respective legal positions at the time of entering into the contract. In this case, the Plaintiff is claiming misrepresentation which in my view is implicit in challenging the assumption that she was fully aware of all her legal rights at the time of signing the promissory notes. For the avoidance of doubt, I am not making this finding, but rather merely pointing out that there is a cause of action and these issues are ones which should be argued and considered at a trial.

34. Furthermore, whilst the legal concept of unjust enrichment has not been fully laid out in the Amended Claim as it should be, such an error should not result in the entire action being struck out. Rather, the Plaintiff should be given an opportunity to amend the Amended Claim (see *David Lee Tucker v Hamilton Properties Limited*). For example, I recognize that the relief being sought against the Second Defendant is stated as being only in

accordance with the promissory notes, this will have to be amended.

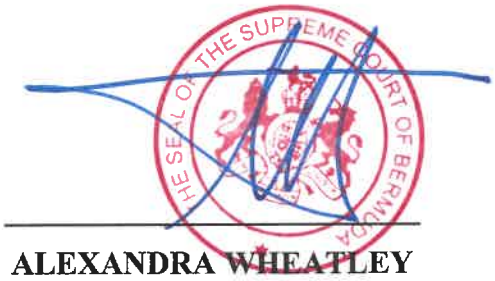
35. Furthermore, the fact that the First Defendant has filed a Notice to Admit Judgment, does not usurp the Plaintiff's ability to proceed in her action against the Second Defendant.

CONCLUSION

36. In light of the above findings, I will therefore dismiss the Second Defendant's Strike Out Application. Further, I give leave for the Plaintiff to amend her Amended Claim in order to reflect the appropriate claim for unjust enrichment.

37. As to costs, I see no reason why costs should not follow the event and as such award costs to the Plaintiff on a standard basis, to be taxed if not agreed.

24 March 2023



ALEXANDRA WHEATLEY

REGISTRAR OF THE SUPREME COURT