**IN THE GRAND COURT OF THE CAYMAN ISLANDS**
**CIVIL DIVISION**

**CAUSE G85 OF 2022**

**BETWEEN:**

**(1) CHRISTOPHER CARROLL**
**(2) MALLORY CARROLL**

**PLAINTIFFS**

**AND**

**(1) RODERICK HARBECK**
**(2) CAYMAN ISLANDS SOTHEBY'S INTERNATIONAL REALTY**

**DEFENDANTS**

**AND BETWEEN:**

**RODERICK HARBECK**

**PLAINTIFF TO COUNTERCLAIM**

**AND**

**(1) CHRISTOPHER CARROLL**
**(2) MALLORY CARROLL**

**DEFENDANTS TO COUNTERCLAIM**

**IN CHAMBERS**

**CORAM:** **Walters J. (Acting)**

**Appearances:** **Mr & Mrs Carroll in person**
**Ms Kate McClymont of Nelsons for the First Defendant**

**Mr Kyle Broadhurst and Mr Richard Parrish of Broadhurst LLC for the Second Defendant**

**Heard:** **29 and 30 May 2023**

**Draft judgment circulated:** **20 June 2023**

**Judgment Delivered:** **17 July 2023**

**HEADNOTE**

**Application to strike out statement of claim for lack of particularization of allegation of fraud and lack of reasonable prospects of success. GCR O. 18, r. 19 (1) (a) (b), (c), (d) and inherent jurisdiction of the court. G.C.R. O. 14 - principles to apply.**

**JUDGMENT**

**Background**

1. These proceedings relate to a claim by the Plaintiffs (husband and wife) arising from their occupation of an apartment in the Cayman Islands (the "Property") that they rented from the First Defendant (a retired architect and building contractor) between 29 April 2019 and 26 January 2022. The Second Defendant is the employer of the rental agent (the "Agent" or "Ms Harris") [1] who was acting for the First Defendant. The principal of the Second Defendant is Ms Sheena Conolly.

2. In essence, the claim relates to alleged fraudulent misrepresentations made by and alleged deceit of the First Defendant and the Second Defendant as the employer of the Agent in relation to the nature, functionality and maintenance of the air conditioning system ("AC System") in the Property which, in turn, it is alleged induced the Plaintiffs to enter into a series of leases of the Property. The first two leases were for a term of 1 year each ("Lease 1" and "Lease 2" respectively), the third lease was for 2 years ("Lease 3") (collectively the "Leases"). The monthly rent under the leases varied from US$4,817.17 to US$5,100.00. The Plaintiffs say that during the term of Lease 3 they became aware that, as they put it, the Property was "*not safe or fit for human habitation due to toxic mould caused by malfunctioning and unmaintained air conditioning appliances*"[2]. There is no dispute that the AC System was not maintained properly during the course of the Leases. The First Defendant says that the Plaintiff had a contractual liability under the terms of the Leases to maintain it. The Plaintiffs claim that it was the responsibility of the First Defendant or that he prevented them from maintaining it properly through his alleged fraudulent conduct.

[1] Ms Barbara "Basia" Harris.
[2] Statement of Claim dated 13 April 2022, paragraph 5.


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3. The Plaintiffs say that when they found out about the state of the AC System during the term of Lease 3 they immediately moved out. They claim rescission of all the Leases and damages. The basis for the claim of damages and quantum is set out in the Plaintiff's letter before action dated 4 March 2022 (the "Letter Before Action")[3].

They are as follows:

| | | |
|---|---|---|
| 3.1 | return of rent paid under the Leases | US$172,321.91 |
| 3.2 | financial damage (approximate) | US$5,000 |
| 3.3 | non-financial damage (pain and suffering and loss of amenity, physical inconvenience and discomfort and aggravated damages) | US$350,000 |
| | Total | US$527,321.91 |

4. The Statement of Claim also contains an unparticularized claim for exemplary damages to be assessed by the Court on the purported basis that "*…the Defendants showed dangerously dishonest conduct motivated by the pursuit of profit that must be deterred in the future"*[4].

5. The First Defendant served a Defence and Counterclaim dated 10 May 2022. He denies the allegation of fraud and deceit and specifically avers that under the terms of the Leases, it was the Plaintiffs' responsibility to maintain the AC System by keeping all filters free and clean from dirt and replacing them on a monthly basis. He relies on the fact that the Plaintiffs entered into Leases 2 and 3 without being induced to do so. He counterclaimed for:
   5.1 the rent due under Lease 3[5];
   5.2 for the cost of repairs to damage to the AC System that he alleges are the result of the failure by the Plaintiff to maintain it;
   5.3 cleaning, painting, repair or replacement of fixtures and fittings[6]; and
   5.4 damages for libel resulting from the Plaintiff publishing videos on YouTube alleging that the First Defendant had threatened legal action against one of his contactors because they had not covered up the problems with the AC System. The First Defendant says that this could only mean that he had intimidated his contractor with an improper and possibly illegal threat of legal

[3] On the first page of the Letter Before Action the Plaintiffs stated: *"We confirm that we have legal skills and experience by virtue of our professional lives and intend to act for ourselves for the time-being in the interests of reducing our legal costs. We recommend that you obtain legal advice on the contents of this letter and the consequences of ignoring it."* The First Plaintiff is admitted to practice as a Cayman Islands attorney at law. Indeed in an email to the First Defendant at page 17 of Exhibit "CC 3" to the Second Affidavit of Mr Carroll dated 30 November 2022, in the context of being threatened with litigation by the First Defendant if they left the Property, Mrs Carroll states: *"In terms of any legal battle you threaten, we are unmoved by this. We are both lawyers of high pedigree and extremely confident in our situation."*

[4] Statement of Claim, paragraph 45.

[5] Although during the course of the hearing, by email dated 29 May 2023, his attorney accepted that Lease 3 was implied surrendered as a result of him retaking possession and occupation of the Property on 19 February 2022, thus extinguishing the quantum of this part of his counterclaim and crediting to the Plaintiffs US$1,278.32 for overpaid rent.

[6] First Defendant's Defence and Counterclaim, paragraph 92 in the original counterclaim amounting to CI$96,105.23.

proceedings to cover up his own wrongdoing. The First Defendant claims that the words and the publication were seriously defamatory of him and were false[7].

6. In its Defence dated 31 October 2022, the Second Defendant denies that, via the Agent, any representations were made to the Plaintiffs about the AC System. To the extent that the AC System was discussed prior to Lease 1, it is averred that the Agent's statements were to the effect that the AC System was functional and that any questions about it would need to be directed to the First Defendant. It is further contended that if it is found that the Agent did make any representations to the Plaintiffs that the AC System was functional and/or maintained at the time in question, that representation was true. It is further contended that if it is found that the Agent did make a representation and it was false (which is denied) then such representation was made innocently by the Agent without any belief or reason to believe that it was false.

**The Leases**

7. The Leases were all in the same form. Much of the contents are what can be described as "boiler plate" clauses. In particular:

7.1 Clause 5 – *"CONVEYANCE AND CONDITION OF PREMISES. … Lessor will supply photos and/or inspection report, and inventories taken beforehand, all of which will require Lessee's signed approval…. Lessee stipulates, represents and warrants that Lessee has examined the Premises, and that they are at the time of this Lease in good order, repair, and in a safe, clean and tenantable condition. Any problems with the condition of the premises unable to have been established at take-over will require notification. Lessee shall agree to submit a written report to the Lessor within Five (5) days of taking possession of the premises. Lessee agree [sic] that failure to file any written notice of defects will be legally binding proof that the premises are in good condition at the time of occupancy.*

7.2 Clause 11 – "*MAINTENANCE AND REPAIR; RULES. Lessee will, at its sole expense, keep and maintain the Premises and appurtenances in good and sanitary condition and repair during the term of this Agreement and any renewal thereof. Without limiting the generality of the foregoing, Lessee shall:*

*(a) be responsible for all required repairs to the furniture, plumbing, appliances, air conditioning, and electrical apparatus whenever damage thereto shall have*

[7] In their Amended Reply and Defence to Counterclaim dated 11 November 2022 the Plaintiffs accept that they posted the videos on YouTube but argue, amongst other things, that publication was limited to a small audience. In the same email referred to above, it was also accepted on behalf of the First Defendant that the alleged libel was unlikely to meet the "real and substantial" test (see *Cammish v Hughes* [2012] EWCA Civ 1655) and proposed that the claim should be dismissed on the basis that first there should be a finding vindicating their client's claim that it was defamatory and on the basis that the First Defendant should receive his relevant costs to the date of the Amended Reply and Defence to Counterclaim.

*resulted from the tenant's misuse, waste, or neglect or that of his family or a visitor. Major maintenance and repairs to the leased Premises, not accountable to the Lessee shall be the responsibility of the Lessor;*

...

*(c) keep all fixtures, chattels, windows, glass, window coverings, doors, locks and hardware in good, clean order and repair;*

...

*(g) keep all air conditioning filters clean and free from dirt – replace on a monthly basis;*

*...*"

7.3 Clause 22 – *"INDEMNIFICATION. Lessor shall not be liable for any damage or injury of or to the Lessee, Lessee's family, guests, invitees, agents or employees or to any person entering the Premises or the building of which the Premises are apart or to goods or equipment, or in the structure or equipment of the structure of which the Premises are part, including any damage or loss to the Lessee's property. Lessee hereby agrees to indemnify, defend and hold Lessor harmless from any and all claims or assertions of every kind and nature."*

7.4 Clause 27 – *"AGENTS. Lessee agrees to irrevocably release Cayman Islands – Sotheby's International Realty, agent for the Lessor, from any claim in respect to the performance and terms of this agreement.*

7.5 Clause 38 – *"MODIFICATION. The parties hereby agree that this document contains the entire Agreement between the parties and this Agreement shall not be modified, changed, altered or amended in any way except through a written amendment signed by all of the parties hereto.*

8. In the Letter Before Action the Plaintiffs state:

*"For the avoidance of doubt, this claim is tortious rather than contractual in nature. We are aware that relevant lease contracts contained limitation of liability clauses for both the Landlord and Landlord's Agent, but please note that pursuant to common law and public policy a party cannot limit liability for its own fraud (i.e. dishonesty)."*[8]

As they say, the reason that this action is based on the alleged fraud and deceit of the Defendants is to circumvent the contractual limitations on their ability to bring any proceedings against the Defendants as a matter of contract. In doing so, they have themselves set a high bar in terms of pleading and standard of proof.

[8] Page 1.



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**The current summonses**

9. There are 4 summonses currently outstanding:

   9.1 The Plaintiffs' summons dated 30 November 2022 which seeks orders dismissing the First Defendant's counterclaim and entering summary judgment in their favour pursuant to GCR O. 14, r. 12 along with an order striking out various paragraphs of the First Defendant's Defence.

   9.2 The Second Defendant's summons dated 25 January 2023 seeks orders under GCR O. 18, r. 19 (1) (a) (b), (c) and/or (d) striking out the Statement of Claim in its entirety in so far as it references the Second Defendant and under the inherent jurisdiction of the Court on the grounds that it discloses no reasonable cause of action or defence, is scandalous, frivolous or vexations, it may prejudice, embarrass or delay the fair trial of the action, or it otherwise is an abuse of the process of the Court. Alternatively an order striking out specific paragraphs of the Statement of Claim. Further or alternatively, an order pursuant to GCR O. 14 and/or 14A dismissing the Plaintiffs claim against the Second Defendant on the grounds that the whole of part of the Plaintiffs' claim has no prospect of success or that the Plaintiffs have no prospect of recovering more than nominal damages (the "Summons").[9]

   9.3 A summons dated 9 February 2023 issued by the First Defendant in similar form to that issued by the Second Defendant.

   9.4 Finally, a summons dated 23 March 2023 issued by the Plaintiffs seeking, amongst other things, orders under GCR O.14 and/or 14A for summary judgment against the First and Second Defendants on the grounds that they have no defence to the Plaintiffs' claims other than in relation to the amount of damages claimed and an order pursuant to GCR O.18, r. 19 striking out particular paragraphs of the Second Defendant's defence.

10. As far as pleadings are concerned, on 2 October 2022 the Plaintiffs provided replies to a request for further and better particulars served by the Second Defendant (the "Responses to the Request for F&BPs"). The Plaintiffs served an Amended Reply and Defence to Counterclaim and a Reply to the Second Defendant's Defence both dated 11 November 2022.

**Evidence**

[9] It was agreed between counsel and the Plaintiffs that this is the summons that would be argued and in relation to which this judgment is being given. All other summonses have been adjourned pending the handing down of this judgment.



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11. Before the Court at the hearing were 12 affidavits filed on behalf of the Plaintiffs totaling approximately 150 pages. Of those, Mr Carroll has sworn four and Mrs Carroll has sworn three. Between them, there are approximately 400 pages of exhibits. Also filed were an affidavit dated 9 March 2023 sworn by Ms Sheena Conolly, the CEO and owner of the Second Defendant. Affidavits have also been sworn by Ms Harris, Mr. Robert McNabb, and the First Defendant. Some of that evidence was not directly relevant to the Second Defendant's summons.

**Summary of Ms. Conolly's evidence**

12. Ms Conolly states that:

    12.1 The primary business of the Second Defendant is real estate sales. Ms Conolly founded her original business, Sheena Conolly Real Estate in 2002 and in 2007 took on the Cayman Islands master franchise for Sotheby's International Realty. The Second Defendant does assist some clients with rentals but that is a very small part of their business. It does not provide any property management services.

    12.2 The reputation of her business and her agents is of utmost importance to her and she takes serious issue with what she says are the unfounded allegations and insinuations made by the Plaintiffs in relation to the reputation of her business and that of the Agent.

    12.3 She is familiar with the First Defendant and assisted him with the purchase of the Property.

    12.4 The Second Defendant assisted the First Defendant with the rental of the Property on a number of occasions over the years. In 2015, Ms Conolly asked the Agent to assist with its continued rental.

    12.5 The Agent assisted with the rental of the Property to a tenant prior to the Plaintiffs but her role was limited to showing the Property to interested tenants and assisting the First Defendant with completing all necessary paperwork. Ms Conolly confirms that because the Second Defendant has no role in the maintenance of the Property, it would have been highly unusual for the Second Defendant or the Agent to have been aware of or checked the maintenance of the AC System.

**Summary of the evidence of the Agent and the Plaintiffs[10]**

13. The evidence of the Agent and Plaintiffs is intertwined chronologically so it has been easiest to set it out together noting the different perspectives/disagreements as to facts as and where they arise.

14. Ms Harris says:

[10] The affidavits sworn by the Plaintiffs are numerous and somewhat repetitive, often covering the same facts. I have therefore summarized most of their relevant evidence and quoted some.

14.1 She has been employed by the Second Defendant for approximately 12 years. Prior to that she worked with a real estate company in Florida for 3 years. She says that whilst she does on occasion assist clients of the Second Defendant with rentals, she does so infrequently.

14.2 In 2015, Ms Harris assisted the First Defendant with the rental of the Property to a tenant for a period of 6 months and says that they were happy with the Property. On the expiry of that lease, she was asked to assist with renting the Property again and a new tenant (the "Previous Tenant") was secured who rented the Property for 3 years from 1 June 2016 to 28 February 2019.

14.3 Ms Harris says that at the beginning of that lease, the Previous Tenant completed and signed a pre-lease inspection list[11] (the "Pre-Inspection Checklist") which comprises an inventory (the "Inventory") and checklist (the "Checklist"). This form identifies different items within the Property and asks for confirmation of the condition of certain of those items. This is used as the basis for the return of a tenant's security deposit at the end of the tenancy. It covers various items in relation to the Property ranging from the condition of storage closets to the condition of paintings and mirrors and the operation of items ranging from plumbing fixtures to utility main shut off values and includes the operation of kitchen appliances and central air conditioners. In relation to each item there is a column for the entry of a tick or a cross at the pre and post stages of the relevant lease.

14.4 In relation to the position pre-lease the form provides as follows:

> *"This inventory list and inspection report are for your protection as well as ours. All items are hereby presumed to be in an "Excellent" condition unless noted otherwise. Be sure to note any discrepancies and indicate the condition of each item. Note the number of items where applicable and location and nature of all soil and damage, et cetera. Be specific and check carefully. Additional comments may be attached if necessary. This assessment becomes a basis for refunding your security deposit."*

14.5 In relation to the post-lease position the form provides as follows:

> *"This assessment should be compared to the Pre-Lease assessment above at the expiration or termination of the Lease. Each item in the Pre-Lease assessment should be noted below, and it's present, Post-Lease condition noted. If any Post-Lease conditions differ from the Pre-Lease conditions for reasons other than depreciation by reasonable use and wear, these should be noted as damages. Additional comments may be attached if necessary."*

[11] Exhibit "BH 1" pp 1-4.

14.6 The Pre-Inspection Checklist was completed at the beginning and end of the Previous Tenant's occupation. At the pre-lease stage all items in the checklist received a tick next to them. There is a handwritten notation next to central air conditioners which says, "*who knows*". There are a number of other handwritten notes which are not relevant to the current matters at hand. The form was signed by Ms Harris and the Previous Tenant.

14.7 At the post-lease stage, the original form was completed and, again, all items on the checklist received a tick next to them. Next to the item for central air conditioners a further handwritten note was made saying "*filters changed 1 week ago*". The form was signed again by Ms Harris and the Previous Tenant. In the "*comments*" section Ms Harris says that she wrote "*Everything was in good condition*". She also added the comment that "*Dents on the carpet in the master bedroom should be considered as reasonable wear.*" Ms Harris says that at that point she was not aware of any significant issues with the Property.

14.8 Although not covered in her evidence, for chronological completeness, exhibited at "CC 24" to the fourth affidavit of Mr Carroll dated 30 January 2023 is a letter dated 22 February 2022 from Ancel's Air Conditioning & Appliance Repairs to the First Defendant stating that in relation to the Property:

> *"Assessment of air conditioning system was carried out by our certified air condition technician on December 7 2018. The air conditioning systems were thoroughly inspected by our certified technicians, at the request of the owner prior to the marketing of the condo.*
> *At the completion of our service works, which included air balancing, both interior air handler units were fully operational with no issues that required correction."*

14.9 Ms Harris says that after the Previous Tenant vacated the Property, the First Defendant then had the Property re-painted and professionally cleaned and she began showing it to new tenants in March 2019.

14.10 Turning to the second affidavit of Mrs Carroll, she says that the Plaintiffs had moved to the Cayman Islands on 20 April 2019. Mr Carroll's employers put them up temporarily in the Comfort Suites. This was said to be cramped (1 bed for the Plaintiffs and their daughter) and was available for a limited time and she says that they were highly incentivized to find somewhere to live.

14.11 On 23 April 2019 Mrs Carroll says that the Plaintiffs viewed the Property with Ms Harris. Mr Carroll says[12] that when they arrived at the Property it smelled musty. He says that Ms

[12] His fourth affidavit paragraph 11.

Harris was "*nonchalant*" on the point and said the Property had been empty a while and the AC had not been set low enough but that she had changed the setting and was blowing air through so it should improve. Mr Carroll said that the appliances (including the AC unit that they were shown) were old and the Property as a whole was well-lived in. However, he says he liked the location and thought that it was nice to be on the ocean. They were under pressure to find somewhere to move to and this was one of the better options that they had seen so far. He goes on to say[13] that the Property had enough drawbacks for them to ask some pre-contractual questions, especially because Mrs Carroll was worried about the appliances being so old.

14.12 Ms Harris says[14] that she does not recall the Plaintiffs raising the question of the musty smell in the Property. However, she says as the Property had recently been painted, deep cleaned and was not being lived in, it would not be surprising therefore for there to have been a smell. She says that if there had been something that she thought was wrong, she would have contacted the First Defendant.

14.13 That evening Mr Carroll sent an email to Ms Harris which read as follows:

> *"We are very serious about this property – we think that it's lovely – and are minded to make an offer. Please can you answer a few questions we have:*
>
> 1. *Is there an internet connection there? If not currently, would connecting be challenging or straightforward?*
> 2. *Has there ever been storm surge or flooding?*
> 3. *Are there hurricane shutters?*
> 4. *The appliances are quite old. Are they insured? Any plans to update?*
> 5. *How many parking spots would we have allocated?"*[15]

14.14 Ms Harris says that the same evening she sent the email on to the First Defendant. Early the next morning Ms Harris replied to Mr Carroll by email saying:

> *"Good morning Chris,*
> *Please see below from the owner of Coccoloba.*
> *If you are happy with all answers and interested to lease this property he also would like you to complete pre-lease application form for his consideration.*

[13] His fourth affidavit paragraph 12.
[14] Paragraph 16 of her affidavit.
[15] Exhibit "CC 13".

*I am looking forward hearing from you.*
*…*
*Evening [Ms Harris]*
*Regarding an offer; price is firm as it was just dropped three days ago to less than previous tenant was paying.*
*Regarding internet; recommended provider is FLOW, router is located on bottom shelf of the master bedside table next to outlet.*
*Regarding TV; provider is flow if cable TV is desired, or alternatively an IPTV (streaming) box is provided should service be preferred through Island TV.*
*Regarding Security provided; it transmits over tenant's Wi-Fi internet and is fully monitored with the emergency services.*
*After Hurricane Ivan, the Strata installed all PGT hurricane windows to the development; shutters are therefore unnecessary.*
*Additionally, I chose to upgrade to the top of the line WinDoor hurricane sliding doors; rated up to 4-foot of water pressure.*
*Fortunately, Coccoloba sits on the elevated southwest point and is 12-foot above sea level.*
*No plans to update appliances as they are fully functional.*
*Each unit has two allocated parking spaces with visitor parking next door at community centre.*
*Finally, if prospective tenants are serious, please have them complete the attached rental application for my consideration."*[16]

14.15 The Plaintiffs say that they were reassured by the responses from the First Defendant and approximately 2 hours later the Plaintiff sent the completed rental application form back to Ms Harris[17]. The covering email makes it clear that the Plaintiffs wished to move quickly with arrangements to move into the Property and requested a second and final viewing at which they could also review/agree a contract and discuss money transfers[18]. The covering email from the Plaintiffs is in part directed to the First Defendant and sets out the Plaintiffs' background and raises the question of how best to make funds available to pay rent. The rental application form is structured as an application by Mr Carroll to rent the Property. It requests personal information, recent residential history, credit history, employment information and references. It continues with some standard language which reads as follows:

*"I hereby apply to lease the above described premises for the term and upon the set conditions above set forth and agree that the rental is to be*

[16] Exhibit "CC 14".
[17]Exhibit "CC 16".
[18] Exhibit "BH-1" page 15.

> *payable the first day of each month in advance. As an inducement to the owner of the property and to the agent to accept this application. I warrant that all statements above set forth are true; however, should any statement made above be a misrepresentation on a true statement of facts, all of the deposit will be retained to offset the agents cost, time, and effort in processing my application."*

The final paragraph provided for the payment of a deposit although the amount was left blank.

14.16 The same day, the First Defendant sent Ms Harris the lease for execution as well as utility application forms and said that he would send the inventory/inspection report for Saturday. Ms Harris forwarded that email to Mr Carroll the same day[19]. Later that day, Ms Harris sent an email to the First Defendant confirming that Mr Carroll wanted to transfer funds for the deposit to the First Defendant and the first month's rent to the Second Defendant but needed more detailed bank account information, which the First Defendant provided. Mr Carroll replied saying that he was pleasantly surprised by how quickly things had moved and asked whether, if they transfer the deposit that day (24 April), an earlier move will be possible?[20] Ms Harris confirmed that they could make changes to dates in the lease when they meet.

14.17 Mrs Carroll confirmed[21] that the Plaintiffs gave instructions to their bank in England to transfer funds for the deposit and the first month's rent and that Mr Carroll had requested that they meet with Ms Harris to sign anything needed so that they could move in as quickly as possible should the funds arrive. She says that they were "*trying to appear as keen as possible to get that [rental] option in the bag in what was a difficult rental market*." She goes on to say:

> *"I was not there as I was looking after our daughter, however, I understand that Chris did meet [Ms Harris] to sign a copy of the lease document in the hope that funds would arrive for 25th April move in. In the event, the funds did not arrive, so what he signed never became a contract. While we continued to wait for funds to transfer, and until the deal was done, we kept looking for alternatives as we were not totally sold on the Property due to its drawbacks … I remember I kept nagging Chris about how unappealing I found the drop down ceilings in the bathroom in particular. I also didn't love that, for instance, the countertops in the kitchen and bathrooms weren't real stone, they were plastic, and the cabinets weren't real wood, there were laminate. I was continuing to keep an eye on any*

[19] First Affidavit of Ms Harris para 28.
[20] Exhibit "BH 1" page 17-19
[21] Paragraph 14 of her second affidavit.


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*other property that might fit our needs, but there really were pretty slim pickings in our budget at the time."*

14.18 On 24 April 2019, prior to a second viewing, Mr Carroll signed the lease[22] and the lease was dated accordingly. The dates for the term of the lease were originally typed as April 27, 2019 ending on April 26, 2020. They had been changed manually to April 24, 2019 and April 25, 2020 respectively. Mr Carroll appears to have transferred the deposit and first month's rent via "Revolut". On 26 April 2019 Mr Carroll sent an email to Ms. Harris[23] saying:

> *"...I have spoken with Revolut and they have confirmed that I followed the correct process. The transfers were executed by it yesterday-so everything is done on its end-but settlement can still take up to 3 business days after execution (i.e. no cause for concern until 30 April). It is what it is-it's on its way but we are at the mercy of the banks now. There is still hope it will turn up today, so please keep an eye out. I really don't want to be in Comfort Suites over the weekend! As you said before though, we will need to change dates on lease contract again when the money arrives."*

14.19 The Second Defendant received the first month's rent on 26 April 2019 and in his email of 28 April 2019, the First Defendant acknowledged receipt of the deposit. Due to the delay in payment of the deposit and first month's rent, the dates of the term of the lease were retyped as April 29, 2019 and April 28, 2020 but the date of the lease itself remained 24 April 2019. The First Defendant signed the lease with the new dates on 28 April 2019 and returned it to Ms Harris the same day. Ms Harris forwarded the executed lease to Mr Carroll by email on 29 April 2019 and asked him what time he would like to meet[24]. Mr Carroll re-signed the lease with the amended dates for its term on 29 April 2019[25].

14.20 What Mr Carroll says about the 29 April meeting is best reflected by reference to his own evidence[26], albeit somewhat lengthy:

> *"16 We did not find anywhere significantly better, so within a day or so we became pretty sure (but not totally certain) that we would move to the Property if the money came through. However, it did not come through until 29 April [2019][27],so the original lease document I signed did not work any more. We needed to start afresh. On 29 April [2019], Mallory and I met Basia at the Property to sign a lease.*

[22] Exhibit "BH 1" pages 34 – 40.
[23] Exhibit "BH 1" page 33.
[24] Exhibit "BH 1" p 41.
[25] Exhibit "RH 1" to the first affidavit of Roderick Harbeck dated 22 April 2022.
[26] Mr Carroll's fourth affidavit paragraphs 16 -22.
[27] This is incorrect, the evidence is that both payments had already been received prior to 29 April 2019.


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***Dishonesty by the Agent***

*17 When we arrived at the Property on 29 April 2019– still as free agents – Basia had a document we had never seen before called the Pre-Lease Inspection Checklist and Report, along with an Inventory. As the name suggested, the Pre-Lease Inspection Checklist and Report was apparently something I needed to sign pre-lease, although this had not been the case on 24 April 2019 when I had asked to be taken through all the documents necessary, so it seemed unfair. I read it and I was really angry. I thought it was unreasonable that I had to sign that everything was in excellent condition unless I could identify issues on the spot. With the flooring and walls, fair enough may be that is not impossible to do, but for the air-conditioning especially I thought it was insane and I felt like I was being cornered into something dodgy. I told Basia something along the lines of "Look, this is ridiculous. How do I know if the air-conditioning is maintained or not? That's not even possible for us to say. I mean what even is the "air-conditioning system"? Show me it-I'm not signing this unless you tell me it is maintained." Or words to that effect … Probably not as polite as that to be honest, as I was under a lot of stress with the move and this was such a disturbing moment. The situation was heated because Mallory and I were ready to walk away from the deal on this, as we had already been nervous about the appliances. I had a bad feeling about it. We exchanged concerned glances and a quick chat about the need to return to the Comfort Suites if this fell through-already contingency planning.*

*18 Basia could see we were suspicious but reassured us explicitly that the AC was maintained. She was unequivocal on that and never corrected that statement. She walked us over to the vertical air-handler unit in the utility closet to show us the AC. She went to show us where the filter in the wall should be but it was not there, so there was a slightly awkward moment, but she recovered quickly from that like a pro and said that probably it was not there just because there is a filter on the machine itself. Then she looked under the machine, and when she came back up to me her eyes were really wide open like she had just seen something surprising, and she did not recover so quickly this time-I could see something was up. To the best of my recollection, I looked for myself but was not sure what I was supposed to be seeing. I had never looked at any AC equipment before. I think she was*

*expecting to see a removable filter, but there was not one there. She said she was not sure if the filter was missing or not (I am not sure which filter she is talking about), but not to worry because the technician must have just forgotten it, and then tried to see if any of the loose spare filters in the Property fitted. I remember at that point Mallory and I both relaxed completely. I remember being given the impression that a technician had recently been, so the air-conditioning was maintained but missing a filter, which I thought was understandable human error and something that could be straightened out.*

19 *On the basis of Basia's reassurance, we signed the Pre-Lease Inspection Checklist and Report with just an annotation that a filter was missing (which she framed as a question with a "?" Because of the confusion regarding what should be on the air -handler itself). The part about the AC being "Maintained" was not struck out because she explicitly told us it was maintained and we relied on that. I believed her, or at least assumed good faith, so was under the impression we were starting the lease with a strong foundation of a fully functional and recently maintained AC system. I asked Basia what I needed to do personally to maintain the AC in future (but also other things like the pool and garden), because the Lease contract was so vague on those responsibilities. She told me that the garden and pool were definitely not my problem, but to check regarding division of responsibilities for AC, so I did via email later that day. The Landlord told me to change the changeable filters monthly and wash the washable filter 1-2 times a year, and those were the only things I was asked (or allowed) to do until we moved out. Then, and throughout the tenancy, we were led to believe by him that was all AC maintenance entailed and anything further was just overselling by AC tradesmen, which is why he wanted control over all tradesmen coming into the Property (to protect against that). In hindsight obviously he just did not want to pay to replace the air-handlers and no responsible technician would do anything other than recommend the replacement, but I was not alive to that trick at the time.*

20 *Weirdly, the Landlord said in his first email to us that Basia Harris had told him the filters were dirty (see **CC20** – email from Rod Harbeck on 29 April 2019 at 5:07pm). That was news to me. In hindsight too, if Basia saw the filters were dirty, she would have known maintenance was overdue, and it is clear she lied to us about the AC*

*being maintained to close that deal. I know she was anxious to close because it had been empty for quite a while-we think for a few months and was recently relisted at a lower price-and it had been a long wait for our funds to arrive, so it would have been really inconvenient for her if we walked away and she had to do viewings again to earn her commission, so it seems to us she fibbed to close the deal.*

*21 I was also under the impression that the vertical air-handler was the only air-handler, and did not realise there was another one above a lowered ceiling. This is despite the most ridiculously complete check-in inventory I have ever seen. Basia said she hated renting the flat out because the Landlord was stingy and made her count all the spoons. I thought she was joking at first, but we literally did… The inventory is remarkable for two reasons: (1) its completeness and level of detail; and (2) the fact it does not mention the two-air handlers anywhere. It is in hindsight a very strange document, but certainly after check-in I really thought we had seen encountered everything in the flat, so it is still a notable omission to me. The fact we were never told about the whereabouts of the 2nd air-handler precluded us from ever inspecting it and realising it was not functioning properly and mouldy, and that is a shame because it was much easier to see the mould on that appliance because of the way it was designed."*

14.21 In her second affidavit Mrs Carroll says the following:

*"15 On 29 April 2019 we met Basia Harris at the Property to go through the final formalities and checks. Strangely, given that Chris had previously thought he had signed everything needed, Basia asked him to sign a previously unseen Pre-Lease Inspection and Report. It certainly wasn't produced when he had met her on the 24th and she never mentioned it as an important part of the lease signing procedure. It was very detailed and it asked us to verify that the AC was maintained. It was unreasonable and alarming at the time because obviously there was no way we could say one way or another whether or not the AC was maintained without being told that it was maintained (or not).*

*16 I distinctly remember this entire episode because when she produced document it was if the air was sucked out of the room. We finally thought we had found a home, after much discussion and compromise, and we were excited to move in only for this deal-breaker document to*


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*be thrust in front of us at the last minute. Chris and I were openly discussing what we were going to do, that we would have to walk away from the deal and go back to the Comfort Suites. There is no way we could possibly have confirmed whether or not the AC was maintained, and it felt underhanded and cowboy to be put in that situation, so it was a red flag in itself. Chris got particularly animated and agitated when asked to sign this and we proceeded to have an in-depth conversation with Basia about the AC and whether or not it was maintained. We said it would be impossible for us to sign unless she could tell us that it was maintained, which she did. At that point she took us over to the AC closet which housed what I now know is called a vertical air handler.*

*17 It was old but Basia reassured us that it was maintained. She showed us where there should be filters, though when she opened the filter grate in the wall, there was no filter and Basia, in a confident and reassuring tone, said that it must just have been an oversight by the maintenance guy and there will be one on the machine itself. She then also looked under the air handler. She seemed less confident that time at reassured us that everything was in order, that she was just expecting to see something more on the underside of the appliance. At no point did she ever raise any doubt that the system might not be maintained. She told us it was important to check ongoing maintenance with the Landlord but exactly clear to us that the starting point was that it was maintained."*

14.22 Mr Carroll summarizes and concludes in his fourth affidavit as follows[28]:

*"32 To be clear on the actual act of dishonesty by Basia: on 29 April 2019, she orally deceived us about the air-conditioning in the Property being maintained whilst trying to get us to sign a document agreeing it was maintained and in excellent condition. She was clear as day on that point, having elicited conversation herself on the point by insisting on the unreasonable Pre-Inspection Checklist being signed before the lease.*

*33 As is clear from the Landlord's Defence and evidence, the maintenance history of the AC was chequered and at the time we viewed the Property it was nearly 5 months since any technician had been near it (this is even according to the Landlord, whose statements as to fact we do not trust and whose reports we will submit are fabricated, who states as much-*

[28] Paragraphs 32 – 43.

*see Ancel report in* ***CC24 …).*** *The AC was old and overdue maintenance at the moment we were being told it was maintained and being asked to sign a document that we agreed it was maintained and in excellent condition. According to the Landlord's own technician from Andro, whilst being recorded on video, air handlers need their drain lines/pans maintained every 3-4 months to stop the dehumidification functionality from failing, otherwise that happens every time.*

*34 Basia knew the AC was overdue maintenance because she saw the filters were dirty. However, she did not tell us that fact and not record on the Pre-Inspection Checklist. The discrepancy between those two contemporaneous documents showed her inconsistency. Instead, she told the Landlord only, so we found out via email from him after already entering into the lease.*

*35 Basia also saw a filter was missing and smelled the musty smell. Her attention to detail and experience in tropical climates make it totally implausible that she thought the AC was maintained having seen dirty and/or missing filters, especially in combination with a musty smell and a condo that had been empty with the AC running warm for an extended period. We also infer that the Property had been vacant and in the Agent's possession for an extended period of time, so they would have known what maintenance had happened in that timeframe.*

*36 Despite knowledge of the above facts, Basia did not call, text or email the Landlord to confirm whether the AC was maintained. This is despite the fact that he was easily contactable to her (although that time, Mallory and I could not reach out to him direct - our point of contact was solely Basia until after the lease had started). This is also despite the fact that every other detail of the flat had been inspected and documented - down to the number of spoons. As such, I infer she was being reckless and/or turning a blind eye. There is no way that Basia and the Landlord had overlooked such a massive detail as the state of the AC, given the incredible level of detail to every item in the Property, and it is telling that they tried to get us to sign a document agreeing it was maintained and in excellent condition. We were set up. The timing of the production of the Pre-Inspection Checklist was coordinated to make it as difficult as possible for us to walk away and was in itself a shyster thing to do.*

…


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> 41 *In conclusion, we infer from the above facts that the Agent lied to us and knew it was being reckless or turning a blind eye to the truth regarding the AC in the Property.*
>
> ***Summary – Specifics particulars relating to inducement***
>
> 42 *We were not totally enamoured by the Property and its appliances were an issue we had in mind. On 29 April 2019, when we met Basia at the Property, we still had the ability to walk away, and the appliances were still a nagging doubt. When Basia tried to make us sign the unreasonable Pre-Inspection Checklist, we nearly did walk away and openly aired that option, so angry was I at the document. In that context, she told us the AC was maintained, and that a technician had forgotten the filter. That induced us into Lease 1. The statement was never corrected and carried forward into Leases 2 and 3 (i.e. we did not realise the strong foundation of a fully-in functional and maintained AC system on 29 April 2019 was a fiction until discovering for ourselves in late January 2022).*

14.23 Ms Harris says that she met with the Plaintiffs on the 29 April 2019 and they went through the Pre-Inspection Checklist[29]. The Inventory is seven pages long and it details a number of items in relation to which there are handwritten annotations and comments or question marks. Some are deleted and some are not ticked. It is signed and dated 29 April 2019. The Checklist was also completed by the parties on the same date. Again, it has numerous handwritten annotations and comments. In relation to "Kitchen Appliances", confirmation on the form is sought as to whether they are "All Cleaned & Filters Maintained". The handwritten note next to this item reads *"? Not sure?" "No filters"*. In relation to "Central Air Conditioners", confirmation is sought that *"Filters-Replaced & Maintained. Thermostat –prog. 88º"*. The words *"Filters-Replaced"* have been circled and a note made saying *"no filter ??"*. In the comments section on the second page under the heading *"Article"* it appears to read *"A/C filter?" "please see photos"*.[30]

14.24 Ms Harris says that she believes that Mr or Mrs Carroll made the annotations on the Inventory and that she made the annotations on the Checklist. Ms Harris says that she has read the various affidavits sworn by the Plaintiffs and in particular their comments about the Inventory and Checklist she says that she is surprised by what they say because the fact that there was to be an inventory and inspection was stated in the email sent by the First

[29] Exhibited at "CC 19".
[30] The handwriting is unclear but Ms Harris confirms that this is what it says – paragraph 32 of her affidavit.


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Defendant on 24 April 2019; an email that she had forwarded to Mr Carroll[31]. She says she therefore believes that Mr Carroll was aware well before the meeting on the 29 April 2019 that an inventory and inspection report would have to be prepared. She also makes the point that it is a process that is commonly undertaken in relation to premises that are rented.

14.25 Ms Harris continues by saying that her recollection is that she went through the Pre-Inspection Checklist with Mr and Mrs Carroll and that she took photos of certain items as they went along. In relation to the item on the checklist for "*Central Air Conditioning*", Ms Harris says that she understood the Checklist to be asking whether the filters have been replaced and maintained and that the thermostat was programmed. In order to complete that item, she says that they went to where she thought the filters would be located. She says that she was not certain what she should look at as she is not an expert in air conditioning and she did not recall ever discussing the filters with the First Defendant (and says that when the Previous Tenant moved in she did not check them and when he moved out he said that he had changed them). Ms Harris also says that they came across some filters on the floor which did not look like they would fit anywhere. She says that she remembers taking a picture of them and one of the other filters whilst talking to the Plaintiffs. Ms Harris says that these are the photos that she referenced on the Checklist. Ms Harris says that the Checklist was not completed by Mr Carroll in a contentious atmosphere. She does not remember the discussion being animated in any way. She says that they walked around and she made notes as them discussed various items:

> *"35 There was nothing heated or animated about the process. There was no reason for there to be as I would have written, or Chris could have written, anything he wanted on the form. I do not try to force or compel anyone to agree to anything. While I was happy to have the Plaintiffs rent the Property as they very much wanted the place and it seemed like a good fit, had the Plaintiffs not wanted to sign the document for any reason I would have informed Rod. Alternatively, if they needed confirmation of anything in connection with the Property prior to executing the document I would have asked Rod. As the Checklist says at the top of it that it must be completed within 3 days of occupation and is intended to address the release of the security deposit I don't think the deal would have fallen apart if the Plaintiffs did not sign the document that day. However, even if for some reason the deal did not proceed this was not a significant issue for myself or Rod as the Property was desirable and would likely have rented to someone else within a few weeks."*

[31] Indeed, as I noted earlier, paragraph 5 of the lease states: "*Lessor will supply photos and/or inspection report, and inventories taken beforehand, all of which will require Lessee's signed approval.*

14.26 Ms Harris sent an email to the First Defendant later that day saying:

> *"Hi Rod,*
> 1. *Inventory list*
> 2. *Inspection report – I would like to bring a few issues to your attention:*
>     - *Master bedroom and living room fans are noisy*
>     - *A/C filter – I was told by previous tenant that new A/C filter was replaced however when looked there not sure. I will send you the photo so you will easy figure out. There is a couple of filters in the closet but they don't look like fitting to your unit. Please advise.*
>     - *Bedding and towels are heavily used. I think it will be nice to offer tenant a new sets.*
>       *I asked Chris to add to next month rent amount of USD37.20*[32]
>       *Please give me a call if you have any questions. Thank you."*

She says that later that day she sent the photos that she had taken to the First Defendant.

14.27 The First Defendant then started correspondence by email direct with Mr Carroll. On 29 April 2019 he sent a message to Mr Carroll saying:

> *"… Basia mentioned the ceiling fans were out of balance and that filters appeared dirty. Consequently, I will contact my handyman Oliver and will orchestrate access with you to correct same. Regarding air filters; for monthly replacement, they are available at C.A.C. …"*

Ms Harris states in her affidavit that she did not say to the First Defendant that the filters were dirty and assumes that he made that comment after viewing the photos that she had taken. She emphasises that she did not make any representations about the AC System and also points out that her commission from the rental was CI$1,757.75, a sum that she says would not be a motivation to do anything other than act professionally (not, she says, that she would act fraudulently whatever the amount).

14.28 Summarizing her position she says[33]:

> *"While I do not accept that I made any representations, given the attack on my character I wish to make it clear that when I met with the Plaintiffs I thought*

[32] Being the amount that the first month's rent, sent the previous week, was short due to bank charges.
[33] Paragraph 53 of her affidavit.

*that the Property to be in good condition including the air conditioning. I would not have tried to place the Plaintiffs into a Property that I had any reason to think had anything wrong with it. I know that when I met with the Plaintiffs I believed the air conditioning to be fine as:*

*a. everything I knew about the air-conditioning pointed to it being maintained as it was functioning correctly every time I went to the Property;*

*b. I was familiar with the prior tenants and they never raised any issue to me;*

*c. I was aware that the immediate past tenant… told me he had just replace the filters; and*

*d. I was aware that the landlord, Rod, paid attention to the need for filters to be replaced and maintained as evidenced by his Checklist."*

14.29 The Second Defendant and Plaintiffs had little if any further contact that is material to the current issues.

15. In the Plaintiffs' Responses to the Request for F&BPs the Plaintiffs assert[34]:

> *"… The Second Defendant, acting through Ms Basia Harris, orally represented that the air-conditioning was maintained and that representation was false because it was overdue maintenance.*
>
> *To be clear on what overdue means in this context, the Plaintiffs understand from experts that reasonable intervals of maintenance in a tropical climate are once every 3-months/90 days, but reasonable intervals might be shorter where appliances are near or beyond the recommended lifetimes.*
>
> *…*
>
> *The representation from Ms Harris regarding air-conditioning maintenance was a huge source of reassurance and relief to the Plaintiffs, who at that moment were new arrivals to the islands staying in a 1-bedroom in the Comfort Suites with their young daughter and 9 suitcases, and had already internationally wire transferred monies (taking nearly a week to arrive) for the move-in. The Plaintiffs were present with their daughter who is inspecting with excitement her new home, which was the only viable property the Plaintiffs could find at that time that was affordable whilst in a reasonable commutable distance to both their daughter's school … and the First Plaintiff's office in George Town. … The presentation of a deal-breaking snag at that moment was extremely memorable because it was unusual, unprofessional, dramatic and stressful. The conversation between the*

[34] The response to request 2 in relation to paragraph 5 of the Statement of Claim.

*Plaintiffs and Ms Harris were highly animated and the First Plaintiff explicitly refused to sign the Pre/Post- Lease Inspection Checklist & Report without Ms Harris representing the air-conditioning was maintained, which she did. The Plaintiffs are both lawyers and knew they were signing extremely favourable- albeit non-negotiable (according to Ms Harris) - terms to the Defendants, granting them both immunity from negligence (as is the norm in the Cayman Islands), so they were careful to extract representations as protection knowing that dishonesty was the only thing the Defendants could not contractually limit their liability for in the Cayman Islands. The Plaintiffs explicitly discussed that point with each other, as they thought it was a remarkable point of difference from the UK, and were careful to take that tactic as the only protection they could get for lack of bargaining power on non-negotiable terms."*

**Relevant law and procedure**

16. The law and procedure is not in dispute in this case.

**Fraud and deceit**

17. In the well-known case of *Derry v Peek*[35] Lord Herschell set out what are now the well-established principles[36] required to maintain an action for fraud or deceit:

> *"Having now drawn attention, I believe, to all the cases having a material bearing upon the question under consideration, I proceed to state briefly the conclusions to which I have been led. I think the authorities establish the following propositions: First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.*
>
> *…*

[35] [1875] 14 App Cas 337.
[36] See e.g. *Bodden v Ferryman Invs Ltd and O'Brien* (1992-93) CILR Note 8.

*In my opinion making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds. Indeed Cotton L.J. himself indicated, in the words I have already quoted, that he should not call it fraud. But the whole current of authorities, with which I have so long detained your Lordships, shews to my mind conclusively that fraud is essential to found an action of deceit, and that it cannot be maintained where the acts proved cannot properly be so termed."*

18. In their written submissions prepared for their own application for summary judgment, the Plaintiffs analyse in more detail the concept of fraudulent misrepresentation or the tort of deceit and refer to numerous authorities which cover the main principles as set out in *Derry v Peek* as well as considering the liability a party may have for representations made by a third party[37]. The Plaintiffs focus on circumstances in which a representation might be actionable and refer to *Vald. Nielson Hodlings A/S v Baldorino*[38]*:*

> *"144. The representation must be false. A representation may be true without being entirely correct, provided that it is substantially correct and the difference between what is represented and what is actually correct would not have been likely to induce a reasonable person in the position of the claimants to enter into the contracts: Avon Insurance v Swire Fraser [2000] Lloyd's Rep IR 535 at [17] per Rix J.*
>
> ...
>
> *146. As to recklessness, even if the party making the representation may have had no knowledge of its falsehood, he will still be responsible if he had no belief in its truth and made it, 'not caring whether it was true or false': see Clerk & Lindsell, at [18-21]. As Lord Herschell put it Derry v Peek, supra, at 368 (and 361):*
>
> *"Any person making such a statement must always be aware that the person to whom it is made will understand, if not that he who makes it knows, yet at least that he believes it to be true. And if he has no such belief he is as much guilty of fraud as if he had made any other representation which he knew to be false, or did not believe to be true."*

[37] See e.g. *Ivy Technology Ltd v Martin & Anor* [2022] EWHC 1218. Although it was accepted by the Plaintiffs in their Responses to F&BPs that the alleged untrue representation in the email from the First Defendant that the appliances were fully functional should only be attributed to the First Defendant. Response to request in relation to paragraph 13 of the Statement of Claim.

[38] [2019] EWHC 1926.

*147. It is not necessary that the maker of the statement was 'dishonest' as that word is used in the criminal law: Standard Chartered Bank v Pakistan National Shipping Corp (No. 2) [2000] CLC 133. Nor is the defendant's motive in making the representation relevant. "If fraud be established it is immaterial that there was no intention to cheat or injure the person to whom the false statement was made": Clerk & Lindsell, para. 18-20, quoting Bradford Third Benefit Building Society v Borders [1941] 2 All ER 205, 211 per Viscount Maugham. What is required is dishonest knowledge, in the sense of an absence of belief in truth: The Kriti Palm, [257] (Rix LJ). It is in that sense that I use the word "dishonest" in this judgment.*

*148. The ingredient of dishonesty (in the above sense) must not be watered down into something akin to negligence, however gross: The Kriti Palm, [256]. However, the unreasonableness of the grounds of the belief, though not of itself supporting an action for deceit, will be evidence from which fraud may be inferred. As Lord Herschell pointed out in Derry v Peek at 376, there must be many cases:*

> *"where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the court that it was not really entertained, and that the representation was a fraudulent one."*

19. In *Petromec Inc v Petroleo Brasiliero SA*[39] Gloster J said as follows:

*"94 As to the requirement that the party making the statement knew it to be false, the classic statement of the law on this point is the well-known speech of Lord Herschell in Derry v Peek [1889] 14 App. Cas. 337, at 374. That case makes it clear that negligence, or a want of reasonable care in the making of the statement, is not sufficient to ground the tort of deceit, and that the party making the representation must have addressed his mind to the falsity, or possible falsity, of the statement which is being made. Thus there must be knowledge on the part of the maker of the statement that the statement is untrue, but knowledge in this regard includes "blind eye knowledge", i.e. knowledge that the statement may not be true and a deliberate decision to fail to inform oneself; see Manifest Shipping Co Ltd v. Uni-Polaris Insurance Co Ltd ("The Star Sea") [2003] 1 AC 469."*

[39] [2006] EWHC 1443 (Comm).

20. In *Twinsectra Limited v Yardley & Ors*[40] the House of Lords considered the accessory liability principle and the question of relevant knowledge and commented:

> *"112 There was a gloss on this. It is dishonest for a man deliberately to shut his eyes to facts which he would prefer not to know. If he does so, he is taken to have actual knowledge of the facts to which he shut his eyes. Such knowledge has been described as "Nelsonian knowledge", meaning knowledge which is attributed to a person as a consequence of his "wilful blindness" or (as American lawyers describe it) "contrived ignorance". But a person's failure through negligence to make inquiry is insufficient to enable knowledge to be attributed to him: see Agip (Africa) Ltd v Jackson [1990] Ch 265, 293."*

21. In their submissions, this is how they explain their case against the Second Defendant; namely, that in relation to the AC System, Ms Harris refrained from making enquiries about the AC System /appliances (and was therefore guilty of blind eye knowledge) despite knowing[41]:
    19.1 the nature of the Property, Island, First Defendant and their role;
    19.2 the need to sign the Pre-Lease Inspection Checklist and discuss AC maintenance with tenants;
    19.3 The fact of missing or dirty filters regarding AC maintenance;
    19.4 The location and age of the Property and occurrence of Hurricane Ivan and concerns of tenants; and,
    19.5 The approximate age of appliances and "parsimonious" nature of the First Defendant.

**Pleading fraud and deceit**

22. If, and when, an allegation of fraud can and should be pleaded is a separate question. In his written submissions, Mr Broadhurst, counsel for the Second Defendant says that allegations of fraud are among the most serious cases that come before the civil courts. He rightly points out that the impact of allegations of fraud and deceit, even if subsequently established to be false, can be devastating. He says it is for this reason that there are very specific requirements upon any party who wishes to put forward a claim in fraud. This is encapsulated in the Code of Conduct for Cayman Islands attorneys at law[42]:

> ***"Rule 8.04 An attorney must not attack a person's reputation without good cause nor make any allegation of fraud or dishonesty unless he has clear instructions***

[40] [2002] UKHL 12.
[41] Paragraph 4.3 of the Plaintiffs' submissions relating to their application for summary judgment.
[42] Published by the Cayman Islands Legal Practitioners Association.

***to do so and has satisfied himself that there is reasonably credible material supporting a prima facie case.***

*Commentary*

*(1) This rule applies equally both in court during the course of proceedings and out of court by inclusion of statements in documents which are to be filed in the court.*

*(2) An attorney should not be a party to the filing of a pleading or other court document containing an allegation of fraud, dishonesty, undue influence, duress unless the attorney has first satisfied himself or herself that it is necessary relevant and material and that there is reasonably credible material to support the allegation. For an attorney to allow such an allegation to be made, without the fullest investigation, could be an abuse of the protection which the law affords to the attorney in the drawing and filing of pleadings and other court documents.*

*…"*

23. In *Sagicor General Insurance (Cayman) Limited v Crawford Adjusters (Cayman) Limited*[43] Henderson J said:

> *"2 It goes without saying that such allegations [fraud and conspiracy] have a detrimental effect on the reputations of those involved and that such allegations should never be made lightly. Every attorney in the Cayman Islands has a positive obligation to refrain from making allegations of fraud and dishonest conduct unless there is a case of substance which gives rise to a reasonable expectation that the allegations can be proved. From the failure of these plaintiffs to prosecute their case, I infer that they have never been in possession of a body of evidence capable of establishing fraud or conspiracy. These few comments, without more, provide ample justification for an award of indemnity costs. I award such costs to each defendant now."*

24. In *Three Rivers District Council v Governor and Company of The Bank of England*[44] Lord Millett said:

> *"184. It is well established that fraud or dishonesty (and the same must go for the present tort) must be distinctly alleged and as distinctly proved; that it must be sufficiently particularised; and that it is not sufficiently particularised if the facts pleaded are consistent with innocence: see Kerr on Fraud and Mistake 7th ed (1952), p 644; Davy v Garrett (1878) 7 Ch D 473, 489; Bullivant v Attorney Genera; for Victoria [1901] AC 196; Armitage v Nurse [1998] Ch 241, 256. This means that a plaintiff who alleges dishonesty*

[43] [2008 CILR 482].

[44] [2001] UKHL 16; [2001] 2 All ER 513.

*must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and that facts, matters and circumstances which are consistent with negligence do not do so.*

*185. It is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him. If the pleader means "dishonestly" or "fraudulently", it may not be enough to say "wilfully" or "recklessly". Such language is equivocal. A similar requirement applies, in my opinion, in a case like the present, but the requirement is satisfied by the present pleadings. It is perfectly clear that the depositors are alleging an intentional tort."*

*186. The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved.*

*187. In Davy v Garrett 7 Ch D 473, 489 Thesiger LJ in a well-known and frequently cited passage stated:*

> *"In the present case facts are alleged from which fraud might be inferred, but they are consistent with innocence. They were innocent acts in themselves, and it is not to be presumed that they were done with a fraudulent intent."*

25. In the same case, commenting on the principle in *Davy v Garrett,* Lord Hope said:

> *"55 … The principle to which those remarks were directed is a rule of pleading. As the Earl of Halsbury LC said in Bullivant v Attorney General for Victoria [1901] AC 196, 202, where it is intended that there be an allegation that a fraud has been committed, you must allege it and you must prove it. We are concerned at this stage with what must be alleged. A party is not entitled to a finding of fraud if the pleader does not allege fraud directly and the facts on which he relies are equivocal. So too with dishonesty. If there is no specific*

*allegation of dishonesty, it is not open to the court to make a finding to that effect if the facts pleaded are consistent with conduct which is not dishonest such as negligence. As Millett LJ said in Armitage v Nurse [1998] Ch 241, 256G , it is not necessary to use the word "fraud" or "dishonesty" if the facts which make the conduct fraudulent are pleaded. But this will not do if language used is equivocal: Belmont Finance Corporation Ltd v Williams Furniture Ltd [1979] Ch 250, 268 per Buckley LJ. In that case it was unclear from the pleadings whether dishonesty was being alleged. As the facts referred to might have inferred dishonesty but were consistent with innocence, it was not to be presumed that the defendant had been dishonest. Of course, the allegation of fraud, dishonesty or bad faith must be supported by particulars. The other party is entitled to notice of the particulars on which the allegation is based. If they are not capable of supporting the allegation, the allegation itself may be struck out. But it is not a proper ground for striking out the allegation that the particulars may be found, after trial, to amount not to fraud, dishonesty or bad faith but to negligence."*

26. The Plaintiffs referred to a number of similar authorities including *Barrowfen Properties Limited and Patel & Ors*[45] in which it was said:

> *"5 The principles applicable to considering the strike out application were not in dispute and are familiar. The case was argued on the basis of the Amended Particulars of Claim. To the extent that there is a difference between considering the striking out of an existing allegation as distinct from deciding whether to give permission to make an amendment, that distinction does not matter in the present case. Put briefly, the relevant principles are that the court will strike out a statement of case if it discloses no reasonable grounds for bringing the claim, if it is an abuse of process, or if it has no real prospect of success. I will refer to the order I am asked to make as a strike out, rather than always adding that it would also include refusal of amendments.*
>
> *6. Furthermore, all three grounds which are in issue involve allegations of fraud and/or dishonesty. These are treated with particular care by the court and fraud is one of the matters which must be specifically pleaded (CPR Part 16, PD para 8.2).*
>
> *7. In **JSC Bank of Moscow v Kekhman** [2015] EWHC 3073 (Comm) at [12]–[23], Flaux J summarised the principles that apply to a plea of fraud/dishonesty as set out by the House of Lords in **Three Rivers DC v Bank of England** [2003] 2 AC 1. I take the following from Flaux J's judgment:*

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[45] [2020] EWHC 1145.

> *i) The use of the word "fraud" or "dishonesty" is not necessary in a pleading if the facts which make the conduct fraudulent are pleaded.*
> *ii) The function of pleadings is to give the party opposite sufficient notice of the case which is being made against them. An allegation of fraud/dishonesty must be sufficiently particularised by pleading the primary facts relied on.*
> *iii) At an interlocutory stage, the court is not concerned with whether the evidence at trial would establish fraud, but only whether the facts pleaded disclose a reasonable prima facie case which the other party will have to answer at trial. If the plea is justified the case must go forward to trial and the assessment of whether the evidence justified the inference is a matter for the trial judge.*
> *iv) For a valid plea of fraud/dishonesty the claimant does not have to plead primary facts which are consistent only with dishonesty. The correct test is whether, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. There must be some fact or facts which tilts the balance and justifies an inference of dishonesty.*
>
> *…*
>
> *9. For deceit, based on* ***Derry v Peek*** *[1889] UKHL 1 the claimant has to plead:*
>
> *i) the factual representation alleged;*
> *ii) that it was made knowing it was false or reckless as to its truth;*
> *iii) that the defendant intended the claimant to rely upon it;*
> *iv) that the claimant did rely upon it to its own detriment."*

27. In *Three Rivers,* Lord Millett also said as follows:

> *"161. The judge's assessment has to start with the relevant party's pleaded case but the enquiry does not end there. The allegations may be legally adequate but may have no realistic chance of being proved. On the other hand, the limitations in the allegations pleaded and any lack of particularisation may show that the party's case is hopeless. The tort of misfeasance in public office is a tort which involves bad faith and in that sense dishonesty. It follows that to substantiate his claim in this tort, first in his pleading and then at the trial, a plaintiff must be able to allege and then prove this subjectively dishonest state of mind. The law quite rightly requires that questions of dishonesty be approached more rigorously than other questions of fault. The burden of proof remains the civil burden - the balance of probabilities - but the assessment of the evidence has to take account of the seriousness of the*

*allegations and, if that be the case, any unlikelihood that the person accused of dishonesty would have acted in that way. Dishonesty is not to be inferred from evidence which is equally consistent with mere negligence. At the pleading stage the party making the allegation of dishonesty has to be prepared to particularise it and, if he is unable to do so, his allegation will be struck out. The allegation must be made upon the basis of evidence which will be admissible at the trial. This common sense proposition has recently been re-emphasised by the Court of Appeal in Medcalf v Mardell (A3/2000/6456) 24 November 2000, in which Peter Gibson LJ said (§40): "The material evidence must be evidence which can be put before the court to make good the allegation." Evidence which cannot be used in court cannot be relied upon to justify the making of the allegation of dishonesty. I mention this because it shows the principle to be applied and not because there is any suggestion in the present case that there is any inadmissible material which would support allegations of dishonesty in the present case. It is normally to be assumed that a party's pleaded case is the best case he can make (or wishes to make). Therefore, in the present case, the particulars given provide a true guide to the nature of the case being made by the plaintiffs (claimants).*

28. The Plaintiffs also refer to a number of passages from *Jinxin Inc v Aser Media Pte Ltd and Ors*[46]:

*"36 It might have been thought from reading Lord Millett's judgment [in Three Rivers] that the pleading of primary facts which are consistent with honest or non-fraudulent conduct is not sufficient for the purposes of a plea of fraud to be inferred from those primary facts. However, para. 189 of Lord Millett's judgment indicates that a plea of fraud can be justified by way of an inference based on primary facts, which taken together demonstrate that fraud may be inferred, even if the primary facts are consistent with honesty as well as dishonesty. That said, if the primary facts which are pleaded taken together are consistent only with honest or non-fraudulent conduct, the plea may not be justified; but if an inference of fraud may be drawn from the primary facts pleaded, the plea should not be regarded as demurrable.*

…

*38 This would suggest that, in order to justify a plea of fraud, the inference of dishonesty or fraud must be more likely than not having regard to the primary facts pleaded (see also Raja v McMillan [2020] EWHC 951 (Ch), para. 21-22).*

[46] [2022] EWHC 2988 (Comm).

> *39 That all said, there remains some flexibility in allowing an element of freedom to a claimant alleging fraud to plead its case with the evidence and information then available, given that there might be concerns that the evidence against the defendant will not be readily available, at least possibly until disclosure and the exchange of evidence."*

**Striking out pleadings**

29. The rules relation to striking out pleadings are set out in GCR O.18, r.19[47]:

> *"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[48]; or*
> *(b) it is scandalous, frivolous or vexatious; or*
> *(c) it may prejudice, embarrass or delay the fair trial of the action; or*
> *(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 subparagraph (1)(a).[49]"*

30. In addition to GCR. 19, r. (1) (d), the Court also has a discretionary inherent jurisdiction to stay or dismiss proceedings which may be hopeless, oppressive or spurious. This provides the court with the power where there appears to be an abuse of the process of the court. The process of the court has to be used bona fide and properly and must not be abused.[50]

**Summary judgment**

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[47] See also e.g. *Murphy & Anor v Hacet & Anor* [2020 (1) CILR 47].
[48] *"A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered… So long as the statement of claim or the particulars disclose some cause of action, or raise some question fit to be decided by a Judge or jury, the mere fact that the case is weak, and not likely to succeed, is no ground for striking out."* RSC O.18/19/10.
[49] RSC O. 18/19/18.
[50] RSC O.18/19/27.


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31. In relation to the question of summary judgment, again, the principles are not disputed but I think that it is helpful to set them out in some detail. GCR O. 14, r. 12 provides that:

> ***"Application by defendant for summary judgment (O.14, r.12)***
> *12. (1) Where in an action to which this rule applies a defence has been served by any defendant, that defendant may, on the ground that the plaintiff's claim has no prospect of success or that the plaintiff has no prospect of recovering more than nominal damages, apply to the Court for the plaintiff's claim to be dismissed and judgment entered for that defendant."*

32. The Second Defendant has referred to a number of authorities that helpfully set out the approach to be taken by the court. In *Easyair Ltd v Opal Telecom Ltd*[51] the following was noted by the judge:

> *"15. As Ms Anderson QC rightly reminded me, the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:*
>
> *i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 1 All ER 91 ;*
>
> *ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]*
>
> *iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman*
>
> *iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]*
>
> *v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;*

[51] [2009] EWHC 339.

*vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;*

*vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."*

33. Similarly in *Walkers (a firm) v Arnage Holdings Limited & Ors*[52] the Cayman Islands Court of Appeal commented as follows:

*"12 Summary judgment should not be entered under O.14 of the Cayman Islands Grand Court Rules unless there is no real prospect of success (see,* e.g., *the citation of* Swain v. Hillman *(17) ([2001] 1 All E.R. at 95) in* Southdown Regency Dev. Ltd. *v.* Cayman National Bank Ltd. *(15)). Nor should a judge*

[52] [2021 (1) CILR 347].

*"usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination" (see* Wenlock *v.* Moloney *(20) ([1965] 1 W.L.R. at 1244B–C)). In* Swain *([2001] 1 All E.R. at 95), Lord Woolf, M.R. referred to the need to avoid what he called a "mini-trial." To conduct "an inappropriate mini-trial on disputed facts … is an error of principle" said Etherton, C. in* Allied Fort Ins. Servs. Ltd. *v.* Creation Consumer Fin. Ltd. *(1) ([2015] EWCA Civ 841, at para. 103).*

*13 Of the many authorities cited, at least in written argument,* Allied Fort Servs. Ltd. *is of particular assistance because in that case the essence of the complaint was that the defendant insurance brokers had acted dishonestly (see* ibid.*, at para. 83). Moreover, Etherton, C. said this (*ibid.*, at paras. 81–82):*

> *"81. Further, although summary judgment is not precluded in a case in which the honesty of one or more of the parties is in issue, particular caution should be exercised before depriving a party of the opportunity of rebutting allegations of dishonest conduct: comp.* ED&F Man Liquid Products Ltd v Patel *[2003] EWCA Civ 472, [2003] CP Rep 51, at [55], and* Wrexham Association Football Club Ltd v Crucialmove Ltd *[2006] EWCA Civ 237, [2008] 1 BCLC 508, at [51], [57] and [58]."*

34. When approaching the question of whether a claim has no prospect of success, the judge is exercising a discretion after having made an assessment of the prospects of success rather than embarking on a fact finding exercise or mini trial[53]. As mentioned above, in the *Three Rivers* case, the House of Lords considered the process of assessment that the judge has to go through.

35. In his conclusion in *Three Rivers* Lord Millett said:

> *"192. I agree with my noble and learned friend Lord Hope of Craighead that, while cases should in principle be disposed of as expeditiously and cheaply as the circumstances permit, the most important principle of all is that justice should be done. But this does not mean justice to the plaintiff alone. It is not just to a plaintiff to strike out his claim without a trial unless it has no real prospect of success. It is not just to defendants to subject them to a lengthy and expensive trial to defend their integrity when there is no foundation in the evidence for the attack upon it."*

**The Second Defendant's applications**

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[53] *Three Rivers District Council v Governor and Company of The Bank of England* [2001] UKHL 16 at para 158.

36. This is a case where it is the Second Defendant/Applicant's application to strike out in circumstances in which the allegation of dishonesty is made against it (and Ms Harris). It is not a case therefore of potentially depriving a party of the opportunity at trial to rebut those allegations. The Second Defendant's position is quite simply that the Plaintiffs have failed to plead a case with sufficient particularity to allow it to go to trial. Separately, it argues that the Plaintiffs' claim against it has no reasonable prospect of success and judgment should therefore be entered in its favour and the action against it dismissed.

**Striking out the whole or parts of the Statement of Claim**

37. The Second Defendant challenges the particularity of various paragraphs of the Statement of Claim each of which is dealt with below. As Lord Millett said in *Three Rivers: "…a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and that facts, matters and circumstances which are consistent with negligence do not do so.* The requirements for a plea of fraud are clear and demanding. Below, each relevant paragraph of the Statement of Claim is considered.

37.19 Paragraph 5:

> *"Specifically, the Plaintiffs assert fraudulent misrepresentation and deceit by the Defendants regarding the nature, functionality and maintenance of the air-conditioning system of the Property. The Plaintiffs assert that fraudulent misrepresentations and deceit by the Defendants were inducements that the Plaintiffs relied upon when entering into a series of rental leases for the Property. The Plaintiffs would later learn the Property was not safe for human habitation due to toxic mould caused by malfunctioning and unmaintained air-conditioning appliances."*

37.20 The Second Defendant says that this is liable to be struck out for failing to provide proper particulars of either party's alleged fraudulent misrepresentations or deceit and also commingles the two defendants, against whom separate allegations have been made by the Plaintiffs. The Plaintiffs argue that this is just an introductory paragraph and is not intended to be more specific.

37.21 Paragraph 7:

> *"The Plaintiffs entered into the above Leases in reliance on, and inducement by, fraudulent misrepresentations made by the Defendants. Accordingly, the Plaintiffs seek rescission and damages as remedies."*



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Again, the Second Defendant says that this fails to provide any particulars and is unsupported by the remainder of the pleading.

37.22 Paragraph 10:

*"Evident to the Plaintiffs when viewing the Property was a vertical air-handler appliance in a utility closet situated in the middle of the Property. It was clearly old, as were all the other visible appliances, such as the washing machine, tumble dryer, fridge, dishwasher and oven. The Plaintiffs were led to believe by the Landlord's Agent that the vertical air-handler was the only air-handler appliance in the Property and was installed post-Hurricane Ivan in 2004.*

The Second Defendant says that this again lacks sufficient particularity and also has no relevance to the claim actually being advanced by the Plaintiffs.

37.23 Paragraphs 13 and 14:

*"13 It would later become evident that the Defendants gave the above representation knowing it to be false and without any genuine belief that it was true, or recklessly not caring if it was true or false, with the intention of inducing the plaintiffs into Lease 1.*

*14. In actual fact:*

*(a) there were two air-handler appliances in the Property and not just the one shown to the Plaintiffs;*

*(b) the air-handler appliances were not fully functional;*

*(c) both air-handler appliances were old and beyond their reasonable lifetimes for safe usage in a tropically hot and highly humid climate;*

*(d) the Defendants had no reasonable basis on which to make such a representation; and*

*(e) the Defendants (especially the Landlord) would later take extraordinary steps to prevent the discovery by the Plaintiffs of the true state of the appliances."*

This refers back to the response by the First Defendant in his email of 24 April 2019 indicating that he had no plans to update the appliances as they are fully functional. The Second Defendant says that this is liable to be struck out because not only does it again fail to refer to the defendants separately but also fails to clarify that the alleged representation was made in an email from the First Defendant which was forwarded to them by Ms Harris. It was not a representation by the Second Defendant, a position which has now been



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accepted by the Plaintiffs. It is also contended that these paragraphs again fail to particularize sufficiently the alleged falsity.

37.24 Paragraph 15:

> *"The Plaintiffs had no prior experience or knowledge of air-conditioning appliances and the Defendants were able to exploit this information advantage to deceive. As such, in reliance on and induced by the above fraudulent misrepresentation, which would be followed by many more fraudulent misrepresentations and acts of deceit, the Plaintiffs (acting through Christopher Carroll) would decide on 29 April 2019 to:*
> *(a) enter into Lease 1 for the use of the Property as the Plaintiffs' primary dwelling; and*
> *(b) sign the related "Pre-Lease Inspection Checklist and Report", which required the Plaintiffs to agree the "Central Air Conditioners" were "Maintained".*

The Second Defendant once again points out that this is a reference to defendants, plural. No particulars are given of alleged deceit by the Second Defendant. The reference to "above fraudulent misrepresentation" is also unclear because, as has already been seen, there is no particularized allegation of fraudulent misrepresentation by the Second Defendant made in the pleading up to that point. It should also be noted that the Pre-Lease Inspection Checklist did not require the Plaintiffs to agree that the AC System was maintained. As mentioned earlier, the Checklist stated:

*"This inventory list and inspection report are for your protection as well as ours. All items are hereby presumed to be in an "Excellent" condition unless noted otherwise. Be sure to note any discrepancies and indicate the condition of each item. Note the number of items where applicable and location and nature of all soil and damage, et cetera. Be specific and check carefully. Additional comments may be attached if necessary. This assessment becomes a basis for refunding your security deposit."*

As Ms Harris said, they could have annotated the form as they wished, in the same way that they did for other items.

37.25 Paragraphs 16 – 19:

*"16 The Landlord's Agent's deceit was also in relation to its conduct and statements during a physical inspection of the Property immediately before Lease 1 and the Pre-Lease Inspection Checklist and Report was signed.*

*During this inspection, the Landlord's Agent overstated the maintenance of the air-conditioning and omitted key information regarding the air-conditioning appliances, specifically the existence of a horizontal air-handler appliance concealed above a ceiling in the bathroom. This omission would prevent both an initial inspection of the appliance and also the Plaintiffs from subsequently being able to request it being inspected and maintained.*

*17 Additionally, despite questions by the Plaintiffs regarding whether the air-conditioning was maintained and the Plaintiffs expressing reluctance to sign the "Pre-Lease Inspection Checklist and Report" on the basis that they did not know and could not verify if the air-conditioning was "Maintained", the Landlord's Agent would represent that there is no cause for concern. In the context of deciding whether to sign the Pre-Lease Inspection Checklist and Report, the Plaintiffs specifically questioned the Landlord's Agent on the maintenance of the air-conditioning and the musty smell of the Property, and also queried why a filter was not fitted for the vertical air-handler. In response to the Plaintiffs' concerns, the Landlord's Agent represented that the air-conditioning was "Maintained" and, as the Landlord had expressed, fully functional.*

*18 The Plaintiffs took reassurance from the Landlord's Agent's representations, which they relied upon, and which induced them into signing the Pre-Lease Inspection Checklist and Report and Lease 1.*

*19 Despite subsequent written requests by the Plaintiffs to the Landlord's Agent for confirmation of the basis for its representations leading to Lease 1, no such information has been provided. Accordingly, the Plaintiffs assert that the relevant representations were made by the Landlord's Agent at least recklessly not caring if true or false."*

The Second Defendant refers to the Response to the Request for F&BPs in relation to paragraph 5 of the Statement of Claim. The request is for the nature and extent of each and every fraudulent misrepresentation and/or act of deceit alleged to have been made. In a lengthy and somewhat longwinded reply made up of mainly opinion and repetitive factual narrative, the Plaintiffs state that "*The Second Defendant, acting through Ms Basia Harris, orally represented that the air-conditioning was maintained and that representation was false because it was overdue maintenance*." In response to a similar request in relation to paragraph 13 of the Statement of Claim the Plaintiffs state:

> *"As above on the nature of the representation: Ms Harris made an oral representation to both Plaintiffs that the air-conditioning was maintained. It is clear at this time that the air-conditioning was overdue maintenance (the Landlord's Defence makes no mention of maintenance during 2019).*



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*Even prior to the pleading, though, the Plaintiffs were confident of that fact at the time of making their claim based on the extent of the disrepair at the time Otis Air inspected the system on 26 January 2022 (Paul Darling at Otis suspected a lack of maintenance for at least 2.5 years prior).*

*…*

*Facts indicating to Ms Harris that it was unmaintained work: (i) musty smell; the (ii) missing filter (and potentially sight of dirty filters, according to the Landlord); and (iii) presumably Sotheby's had not granted access to any technician with their key to the Property for air-conditioning maintenance during February, March or April 2019."*

As the Second Defendant points out, to allege that the false representation related to overdue or overstated maintenance is inconsistent with the claim that the false representation just related to "maintenance". Indeed, if the statement attributed to Mr. Darling by the Plaintiffs was correct, that maintenance had not occurred 2.5 years prior to January 2022, then maintenance ceased at a time subsequent to the Plaintiff taking occupation in April 2019.. As has been mentioned previously, maintenance after April 2019 was the responsibility of either or both of the Plaintiffs and First Defendant. It is clear in my view that the pleaded position of the Plaintiffs as set out in the above paragraphs of the Statement of Claim and Responses to the Request for F&BPs is inconsistent, confused and lacking in factual basis.

37.26 Paragraph 22 of the Statement of Claim is noted by the Second Defendants because it alleges that it was the First Defendant's fraudulent misrepresentations and deceitful statements after the start of the tenancy upon which the Plaintiffs relied and induced them to enter into Leases 2 and 3. The Plaintiffs also accept in paragraph 29 that no person with relevant experience could reasonably have expected that the AC System would be or would remain fully functional without care and maintenance and that a failure to maintain the AC System would result in a mould infestation.

37.27 Paragraph 31:

*"In summary, the words and conduct of both Defendants in relation to Lease 1 and the Landlord in relation to Leases 2 and 3 were acts of fraudulent misrepresentation and deceit made with the intent of inducing the Plaintiffs to enter into such contracts and then to prevent the discovery of such deceit after the fact. The Plaintiffs assert that the Defendants made the above representations knowing them to be false, without a genuine belief that they were true, or recklessly not caring if they were true or false."*

Once again the Defendants are referred to jointly without distinction and, once again, there are no or insufficient particulars of the allegations being made.

37.28 The Plaintiffs suggest in their submissions that the chronology in paragraph 32 of the Statement of Claim sets out the required particulars of the allegations against the Second Defendant. Once again, however, not only are both defendants referred to jointly but the only relevant reference to the Second Defendant does no more than refer to its alleged representations and deceit in relation to functionality and maintenance of air-conditioning appliances. No further detail of the basis upon which the claim is actually brought is provided.

37.29 Paragraph 36:

> *"In summary, the Plaintiffs claim that the totality of the Defendants conduct particularised over the total relevant period shows knowledge (actual or blind-eye) that the air-conditioning appliances were not at any material time fully functional nor adequately maintained nor free from high levels of mould, and that there was never any intention to carry out appropriate maintenance on the air-handlers during the tenancy."*

37.30 It is not entirely clear from paragraphs 39 to 47 of the Statement of Claim precisely what damages are sought against the Second Defendant. In paragraph 45 there is an unparticularized claim for exemplary damages on the basis that the "… *Defendants showed dangerously dishonest conduct motivated by the pursuit of profit that must be deterred in future*." The extent which this relates to the Second Defendant is not obvious based on the facts of the case and what little has been pleaded against the Second Defendant. In paragraph 47 the Plaintiffs raise the question of the apportionment of damages between the Defendants and acknowledge what they allege is the "wide-ranging" conduct of the First Defendant. They add:

> *"However, but for the veneer of respectability provided by the Landlord's Agent's brand to the Landlord… and its initial role in the deceit and fraudulent misrepresentations, the Defendants would never have become involved in the Property nor suffered their related damages. For this reason, the Plaintiffs contend that the Defendants should have joint and several liability subject to assessment by the Court."*

38. The relevant paragraphs require consideration against the backdrop of:

38.19 The requirements for a plea of fraud and deceit:

38.19.1.1 the factual representation alleged;



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38.19.1.2 that it was made knowing it was false or reckless as to its truth;
38.19.1.3 that the defendant intended the claimant to rely upon it; and,
38.19.1.4 that the claimant did rely upon it to its own detriment.

38.20 The fact that the Plaintiffs have had ample opportunity to apply to amend their Statement of Claim but have failed to do so.

38.21 The fact that the Responses to the Request for F&BPs do not advance the Plaintiffs' pleaded case against the Second Defendant.

38.22 The Plaintiffs, self-professed attorneys with a high pedigree, demonstrating that they have a clear understanding of the relevant law and procedure having prepared two sets of lengthy written submissions that cover the issues in detail with copious reference to rules and authority. The Plaintiffs contend generally that the specific facts from which they infer fraud are sufficiently pleaded. This position has to be viewed in light of the proposition that a claimant does not have to plead facts that are consistent only with dishonesty but if it is claimed that an inference is to be drawn from pleaded facts, the basis for that inference must still be pleaded. In turn, that inference had to be assessed as to whether it is more likely one of innocence or negligence. There has to be some fact or facts that tilts the balance and justifies the inference of dishonesty[54].

38.23 The Plaintiffs also suggest in their submissions that they should be granted some flexibility in their pleading based on authorities such as *Jinxin* on the basis that relevant evidence is not readily available and that they are operating at an informational disadvantage. Although discovery has not yet taken place is seems to me that from what seems to be fairly comprehensive evidence that is already available to the Plaintiffs there is unlikely to be any further relevant evidence which would assist them with the quality of their pleading.

39. Having taken all of the above into account, I am of the view that the paragraphs of the Statement of Claim that make the allegations of fraud and deceit against the Second Defendants are singularly lacking in particularity and do not come close to meeting the requirements for such a claim. The Plaintiffs have not articulated in their Statement of Claim what, if any, inferences they are in fact seeking to draw or the precise facts from which any inferences might be drawn. Furthermore, assuming a representation of some kind was made by the Second Defendant about the AC System I am of the view that the Plaintiffs have not set out any particulars of the conduct or intention of the Second Defendant that would elevate that representation beyond innocent. Nothing, therefore, in my view, tilts the balance in favour of the Plaintiffs and justifies the inference of dishonesty.

40. On that basis, in my opinion, the relevant paragraphs of the Statement of Claim should be struck out. Moreover, as the paragraphs referenced above are the only basis for the claim against the Second Defendant, that means that the entirety of the claim against the Second Defendant is also liable to be struck out pursuant to GCR O. 18, r. 19 (d) and pursuant to the inherent jurisdiction of the court for failing to disclose a reasonable cause of action against the Second Defendant.

[54] See e.g. *Barrowfen.*



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**Does that action against the Second Defendant have a reasonable prospect of success?**

41. Regardless of the lack of pleaded particularity of the claim against the Second Defendant, there still needs to be consideration of whether the claim itself has a reasonable (as opposed to fanciful) prospect of success. Does it carry some degree of conviction? As was said in the *Three Rivers* case, "…*The burden of proof remains the civil burden - the balance of probabilities - but the assessment of the evidence has to take account of the seriousness of the allegations and, if that be the case, any unlikelihood that the person accused of dishonesty would have acted in that way. Dishonesty is not to be inferred from evidence which is equally consistent with mere negligence."* The same four elements must be borne in mind: (i) the factual representation alleged; (ii) that it was made knowing it was false or reckless as to its truth; (iii) that the defendant intended the claimant to rely upon it; and, (iv) that the claimant did rely upon it to its own detriment.

42. I have followed that approach and assessed the Plaintiffs' pleaded case as well as the evidence before the court at the hearing. Of particular relevance are the following:

42.19 The fact that the Plaintiffs have on a number of occasions made it expressly clear that they are bringing these claims of fraud and deceit to circumvent limitation of liability clauses in the Leases that would otherwise have provided a defence to claims for breach of contract.

42.20 The Agent's previous dealings with the Property and the Previous Tenant and her understanding that the Previous Tenant had changed the filters for the AC System when he moved out of the Property.

42.21 Confirmation from Ancel Air Conditioning & Appliance Repairs that they did service the AC System in December 2018.

42.22 After viewing the Property on 23 April 2019, Mr Carroll raised various questions about the Property including about the appliances (which may or may not have been intended to include the AC System) and was told by the First Defendant that they were fully functional. On 24 April 2019 Mr Carroll then competed a rental application form which was sent to the First Defendant. On the same day Ms Harris forwarded to Mr Carroll an email from the First Defendant making reference to an inventory/inspection report for the following Saturday. Mr Carroll was also sent the draft lease, clause 5 of which makes express reference to an inspection report and inventories which will require the lessee's approval. Mr Carroll gave instructions for the transfer of the deposit and first month's rent and signed the lease which was dated 24 April 2019. Thereafter, the Plaintiffs indicated their wish to move into the Property as soon as they could, the exact date being dependent on the arrival of the rent and deposit. The Plaintiffs have also confirmed in their evidence that there were few of any viable alternatives to the Property and their desire to move out of Comfort Suites as soon as possible.

42.23 Whilst the Plaintiffs' account of the meeting with Ms Harris is at odds with her recollection, what is most striking is the increasingly dramatic way that they refer in their evidence to the Pre-Inspection Checklist and the pejorative way in which the describe and refer to Ms

Harris. This was a document that had previously been referred to by the First Defendant in an email and was also clearly referred to in the lease as a requirement. As mentioned above, Mr Carroll had already paid the first month's rent and deposit and signed the original lease on 25 April 2019. To the extent that he did so in reliance on any representations, it seems to me that they seem likely to only have been the answers by the First Defendant to the questions posed by email on 23 April 2019. Indeed Mr Carroll says that that they were reassured by those responses.

42.24 The Plaintiffs were not required to certify that the AC System was maintained. As with the Previous Tenant, they could have annotated that item with a question or qualification. They chose not to do that despite apparently being "*careful to extract representations as protection knowing that dishonesty was the only thing the Defendants could not contractually limit their liability for in the Cayman Islands".* They claim instead that they were "*set up*".

42.25 Ms Harris explains in her evidence the steps that she went through with the Plaintiffs on 29 April 2019 and followed up with the First Defendant in relation to questions that arose and sent him photographs taken by her at the time. The correspondence between the parties after the 29 April 2019 is consistent with her evidence. In my view, it is unlikely that Ms Harris acted in a way that could amount to any form of dishonesty and there is no evidence, other than the Plaintiffs' own, to suggest otherwise. Indeed, their evidence of what happened prior to 29 April 2019 suggests that they were already committed to moving into the Property before then and that nothing that may have happened on 29 April 2019 made any difference to that.

42.26 The Plaintiffs themselves allege that it was the false representations of the First Defendant that induced them to enter into Leases 2 and 3. It was during the period of the Leases that the AC System was not maintained properly leading to what all agree is the inevitable contamination of mould. It is difficult to see what liability the Second Defendant can have in such circumstances.

43. Taking into account the above, I do not believe that the Plaintiffs' claim however pleaded demonstrates any reliable evidence to support their contention that: any untrue representation was made by Ms Harris on 29 April 2019 in relation to the AC System; any representation which may have been made by Ms Harris was made by her knowing that it was false or recklessly or with blind-eye knowledge; Ms Harris intended the Plaintiffs to rely on any such representation or that they in fact did rely on anything that was said on 29 April 2019 as an inducement to enter into the Lease. Having read their evidence and heard their submissions at the hearing I am left with the impression that the Plaintiffs' claim against the Second Defendant is contrived. As such, I am of the view that the Plaintiffs' claim against the Second Defendant has no reasonable prospects of success and should also be dismissed on that ground.



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**Costs**

44. I will leave the parties to make brief written submissions on costs within 21 days of this judgment being handed down.

**Hon. Justice Alistair Walters**
**Acting Judge of the Grand Court**