Neutral Citation: [2025] CIGC (Civ) 12

G0249 OF 2024

IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

BETWEEN:

ANTHONY AKIWUMI

Plaintiff/First Counterclaim Defendant

AND:

PETRUS DORFLING BASSON

First Defendant/First Counterclaim Plaintiff

LIZE BASSON

Second Defendant/Second Counterclaim Plaintiff

AND:

DENNIS BRADY

Second Counterclaim Defendant

Hearing Room 2 (as Chambers)

Coram: Hon. Justice Walters (Act.)

Appearances: Mr Dennis Brady for the Plaintiff and in person
Mr Peter Sherwood, Ms. Kalyani Dixit and Mr. Andrew Chih of Carey Olsen for the First and Second Defendants

In attendance: Mr Anthony Akiwumi

Heard: 11 February 2025

Draft circulated: 21 March 2025

Judgment delivered: 4 April 2025

JUDGMENT

General Background

1. These proceedings relate to a transaction entered into between the Plaintiff (Mr Akiwumi) and the First and Second Defendants (for ease of reference, "Mr and Mrs Basson" or the "Bassons") in relation to a property at 69 Hinds Way, George Town (the "Property") of which Mr Akiwumi is the registered proprietor. The Property is also the subject of various orders in FAM102 of 2012 (the "Family Proceedings"). Mr Akiwumi is the Respondent in the Family Proceedings, but they do not involve Mr and Mrs Basson. I will explain the interconnection between the two sets of

proceedings in more detail below. I believe that some explanation of the details of the background is necessary in order to appreciate the context within which the current application is brought.

Background to the Family Proceedings

2. On the application of the Applicant in the Family Proceedings, two orders were made (coincidentally by me) on 14 September 2023 and 12 March 2024 (respectively the "September 2023 Order" and the "March 2024 Order"). Copies of both orders were included without objection in the hearing bundle for this present hearing.

3. Counsel for the Applicant in the Family Proceedings are Travers Thorpe Alberga ("TTA"). When the September 2023 Order was made, the Property was already listed for sale by Mr Akiwumi with realtors International Realty Group Ltd ("IRG") for CI$1,475,000 (US$1,798,780 at CI$0.82:US$1). A number of charges are registered against the title to the Property including those in favour of the bank with a mortgage over the property, the Applicant in the Family Proceedings in relation to a number of sums due from Mr Akiwumi to the Applicant in the Family Proceedings which, for ease of reference, can be best described as arrears of maintenance and child support.

4. At the time that the September 2023 Order was made, Mr Akiwumi accepted that the Property should be sold, but there was disagreement with the Applicant in the Family Proceedings as to the list price of the Property. The September 2023 Order ordered that the Property should be sold without further reference to the Court and for the Applicant in the Family Proceedings to recover possession of the Property and for a sale by private treaty. This essentially put the Applicant in the Family Proceedings in the same possession as a mortgagee exercising its power of sale. The September 2023 Order required that on the instruction of the Applicant in the Family Proceedings, two valuations of the Property should be obtained from specified valuation agents (the "Valuations"). A mechanism was provided for the adjustment of the list price of the Property depending on the Valuations. Provision was also made to set a reserve sale price for the Property. The September 2023 Order further provided that Mr Akiwumi was to have conduct of the sale of the Property at its, then current, list price until the Valuations were received.

5. The September 2023 Order additionally provided that if the Property still remained unsold four calendar months from the date of the Valuations, RE/MAX (Cayman) Limited (RE/MAX) would be instructed as the sales agent in place of IRG. It was further ordered that in the event that an unconditional offer to purchase the Property was received, within 30 days, Mr Akiwumi would deliver vacant possession of the Property to the Applicant in the Family Proceedings. TTA were appointed as the attorneys on record with conduct of the sale of the Property, and it was ordered that the proceeds of sale of the Property shall be paid to TTA to be held in escrow to discharge the various debts secured against the Property and other sums owed by Mr Akiwumi. Any remaining balance was to be paid to Mr Akiwumi.

6. The Valuations were obtained in October and November 2023. The March 2024 Order provided that Mr Akiwumi should instruct IRG to withdraw their sales listing for the Property. The March 2024 Order also set the sale price at the reduced figure of CI$1,136,000 (US$1,385,365 at CI$0.82:US$1). The Applicant in the Family Proceedings was ordered to appoint RE/MAX as the sales agent in place of IRG. Copies of the March 2024 Order were to be sent by TTA to Mr. Akiwumi, IRG, RE/MAX and the various secured and unsecured creditors.

Background to these proceedings and evidence of Mr Basson

7. Mr. Basson swore an affidavit dated 27 November 2024 which sets out his version of events.

8. Mr. Basson says that in or about January 2024, he and his wife came across an online listing of the Property and subsequently attended an open house viewing of the Property organised by a Mr. David Gordon of IRG. Mr Basson says that Mr. Gordon introduced Mr Akiwumi as the owner of the Property. After some negotiation, Mr Basson says that on 5 March 2024, he and his wife entered into an agreement (the "Purchase Agreement") with Mr Akiwumi for the purchase of the Property at a price of CI$1,115,000. The offer to purchase was on the standard terms of the Cayman Islands Real Estate Brokers Association ("CIREBA") and was subject to various conditions including approved financing by 25 April 2024 and satisfactory surveys and inspections. On 25 April 2024, it was agreed that the deadline in the Purchase Agreement for approved financing should be extended to 31 May 2024.

9. He goes on to say that on 15 May 2024, he had a call with Mr Gordon during which Mr Gordon mentioned that the Property was subject to the Family Proceedings and that TTA required certain documents from Mr and Mrs Basson for know your customer ("KYC") purposes. Mr Basson says that neither he nor his wife were aware of the Family Proceedings before that conversation and that neither Mr Gordon nor Mr Akiwumi informed them that TTA had been empowered to sell the Property and that Mr Akiwumi was not in a position to sell the Property. Mr Basson says that no further information about the Family Proceedings was shared with them.

10. Mr Basson says that on or about 31 May 2024, he and his wife were informed by their prospective mortgagee that it would not be able to lend them more than 50% of the value of the Property due to it being a wooden structure. As a result, the sale could not proceed and Mr and Mrs Basson entered into direct negotiations with Mr Akiwumi about the Property. The parties appear to have discussed various options about how Mr Akiwumi's interest in the Property might be transferred to Mr and Mrs Basson other than by way of an outright, immediate sale. Mr Basson says that on 24 June 2024, Mr Akiwumi circulated to them to draft documents, one described as a Tenancy Agreement and Lease Option and the other as an Owner Financing Purchase Deed. The general gist of the two agreements was to allow the Bassons to rent the Property with a provision for lump sum payments to be made on agreed dates towards an agreed purchase price of US$1,050,000. There would also be a partial credit toward the

purchase price from the monthly rent. Mr Basson says that the receipt of those draft documents caused him to obtain legal advice from Carey Olsen, who act for him in these proceedings. Whilst making clear that he was not waiving privilege in relation to the advice from Carey Olsen, it appears that they recommended that the transaction be structured as an option agreement. They prepared a draft of that which Mr Basson sent to Mr Akiwumi on 25 July 2024 (the "Option Agreement").

11. Mr Basson says that throughout the remainder of July 2024 and early August 2024, he and Mr. Akiwumi negotiated the terms of the Option Agreement with a final form being agreed on 8 August 2024. The Option Agreement was signed by Mr and Mrs Basson on 9 August 2024, but it was dated 23 August 2024, details that I will return to below. In summary, Mr Basson says that the option agreement provided that:

    i. He and his wife were granted an option to purchase the Property at any time during the period of six years from the date of the Option Agreement (the "Option Period") at the price of US$1,050,000;

    ii. During the Option Period, Mr and Mrs Basson were entitled to occupy the Property as licensees and during that period, Mr Akiwumi was not entitled to sell, lease, charge, share, part possession with, or in any way deal with the Property; and,

    iii. Mr and Mrs Basson were required to pay Mr Akiwumi US$250,000 (the "Option Fee") on execution of the Option Agreement, which Mr Basson said that they did on 23 August 2024 and further sums during the Option Period which, in total, would amount to US$1,050,000.

12. Of particular importance are the following terms and clauses of the Option Agreement:

    i. Although the parties signed the agreement on 9 August 2024, as mentioned, the Option Agreement was dated 23 August 2024. The Option Period is defined as being six years from the date of the Option Agreement.

    ii. Clause 2 provides as follows:

    "2. PURCHASER'S OPTION

    2.1 In consideration of the payment by the Purchaser to the Owner [Mr Akiwumi] of the Option Fee (the receipt of which is hereby acknowledged) the Owner grants the Purchaser the Purchaser's Option, during the Option Period, to purchase the Property at the Purchase Price.

    2.2 The Purchaser may exercise the Purchaser's Option at any time during the Option. By serving notice on the Owner.

    2.3 If the Purchaser's Option is exercised in accordance with the terms of this Agreement. The Owner will sell and the

Purchaser will purchase the Property at the Purchase Price, as varied in accordance with clause 3, and the Parties shall enter into the Option Purchase Agreement within ten (10) Working Days of the Purchaser serving notice on the Owner."

iii. Clause 3 provides for the payments due during the Option Period.

iv. Clause 4 provides as follows:

"4. NON-EXERCISE OF PURCHASER'S OPTION

4.1 Subject to clause 9.5, if the Option is not exercised in accordance with the terms of this Agreement:

(a) the Purchaser will remove any caution registered against the Property without delay;

(b) the obligation to respect of maintenance and access set out in clause 6 below shall cease; and

(c) the Owner shall, without delay, refund to the Purchaser the sum of One Hundred and Fifty Five Thousand Dollars ($155,000.00) , which represents fifty percent of the Option Fee and the additional payment made in accordance with clause 3.1 (a) together with any sums due under clause 6(b)."

v. Clause 5 provides that the "Purchaser" shall be entitled to lodge a caution on the land register to protect its interests under the Option Agreement. It further provides that Mr Akiwumi shall not permit any changes to the land register in respect of the Property without the prior written consent of the Purchaser.

vi. Clause 6 (a) provides that during the Option. Mr Akiwumi agrees not to sell, lease, charge, share, part with possession or in any way deal with the Property. Provision is made in clause 6 (b) for any alterations or improvements to the Property that the Bassons may have wished to carry out. Clause 6 (c) provides that Mr Akiwumi grants the Bassons a licence to occupy the Property as licensees on the basis that no relationship of landlord and tenant is created.

vii. Clause 11 reads as follows:

"OWNER WARRANTIES

As a further consideration for the Purchaser entering into this Agreement, the Owner warrants that he is not aware of anything material which would negatively impact the Purchaser's decision to enter into this Agreement or to purchase the Property."

viii. Clause 15 provides that:

> *"LEGAL CAPACITY/AUTHORITY*
>
> *Each Party hereto for its respective part represents and warrants to the other party hereto that it is fully authorised and legally capable of entering into and performing all of its duties and obligations under this Agreement."*

ix. Clause 18 is an entire agreement clause providing that the Option Agreement embodies the entire understanding of the parties and supersedes all prior negotiations, understandings and/or agreements between them (whether oral or written) with respect to the terms of the agreement.

13. Appended to the Option Agreement was a draft form of the Sale and Purchase Agreement.

14. On 7 August 2024, Mr Basson had sent an email to Mr Akiwumi noting that they had discussed two final updates to the Option Agreement; namely, clause 9.4 (dealing with apportionment of risk) and the addition of clause 11 as set out above. In reply, Mr Akiwumi agreed to both amendments.

15. On 22 August 2024, after the Option Agreement was signed but prior to its effective date, Mr Basson sent a further email to Mr Akiwumi asking him to confirm whether TTA's involvement with the Property would have any impact on the sale. Mr Basson says that he did this because he had not heard any more about TTA's involvement since his conversation in May with Mr Gordon and he wanted to make sure this was not something that would impact their plans. He asked:

> *"One final point, I wanted to confirm before payment tomorrow was around Travers Thorpe Alberga I know we were asked to perform the KYC with them a few months back as the property was potentially being handed over to them. We haven't had any further correspondence and just wanted to confirm this will have no impact on the sale."*

16. Mr Akiwumi responded to that email the same day by indicating that it would not. He said: *"As regards, TTA, there will be no impact on the sale."* Mr Basson says that relying on that response, on 23 August 2024, he and his wife transferred the Option Fee into a bank account controlled by Mr Dennis Brady (the Second Counterclaim Defendant), who Mr Akiwumi had stated was acting for him in private transactional matters.

17. Mr Basson goes on to say that between 25 and 28 August 2024. He tried to contact Mr Akiwumi to make arrangements to obtain the keys to the Property and for him and his wife to move in. But, he says, Mr Akiwumi was unresponsive. Mr Basson says that due to Mr. Akiwumi's failure to respond during this period, on 28 August 2024 he called Ms. Louise Desrosiers at TTA. He says that Ms Desrosiers advised him that the Property was the subject of the Family Proceedings and referred to the September 2023 Order and the March 2024 Order. Ms Desrosiers also explained their effect and

in particular that Mr Akiwumi was prevented by orders of the Grand Court from selling the Property to them as was contemplated by the Option Agreement. Furthermore, apparently, Ms Desrosiers told Mr Basson that Mr Akiwumi was not in a position to prevent the Property being sold to anyone else during the Option Period. Mr Basson emailed Ms Desrosiers on 28 August 2024 saying:

> *"Good morning Louise,*
>
> *Hope you are doing well. We regot your contact details form David Gordon, who was helping us with he purchase of 69 Hinds way.*
>
> *We performed KYC with TTA a few months ago as we had an offer to purchase in on 69 Hinds Way, which is owned by Anthony Akiwumi. The process was done via the real estate agent and wee didn't get any additional information accept that the property was assigned to TTA by the family court.*
>
> *We are not proceeding with the purchase of the property and wanted to check that there are no restrictions on it that we should be aware of. We have inquired with the seller and he ensured us we can proceed, however, we wanted to double check with you."* [sic]

Ms Desrosiers replied on 28 August 2024 saying:

> *"Dear Petri,*
>
> *Thank you for reaching out. It is not clear from your email below whether you intend to proceed with the purchase of the property. If you do, please note that we have been appointed by the court to act as lawyers with conduct of the sale of this property.*
>
> *The realtor appointed with conduct of the sale is Mr. Michael Binckes of RE/MAX (cc'd). We strongly recommend liaising with Mr Binckes to progress the sale. If you remain interested.*
>
> *There are charges registered against the property that will need to be discharged before a sale can be completed. This is unlikely to be problematic, so long as the paperwork is probably attended to by the realtor and/or lawyers appointed.*
>
> *As such, please feel free to keep us cc'd into any correspondence.*
>
> *Do you have lawyers acting on your behalf in respect of the conveyancing? If so, feel free to put them in touch with us."*

18. Mr Basson says that he immediately contacted his bank to stop the payment being made to Mr Brady's account but was unsuccessful. It appears that the same day, TTA wrote to Mr Brady and Carey Olsen, putting Mr Brady on notice that the money paid

into his escrow account should not be transferred to Mr Akiwumi or to any other third party.

19. TTA said:

> *"... Travers Thorpe Alberga were contacted today by Mr Basson (and on the half of his wife), who are both purported purchasers of the Property. Mr Basson has advised us that himself and his wife have paid $250,000 to your law firm to be held in your firm's escrow account in respect of a purported agreement to purchase this property...*
>
> ***You are on notice that any funds received by your firm in respect of a purported sale of the Property should not be transferred from your client account (or any other account) to Mr Akiwumi and/or any third party, pending instruction from Travers Thorpe Alberga and/or further order of the Court.***
>
> *Please be advised that the Property is subject to order(s) of the Grand Court allowing our clients to recover possession of the Property and sell the Property by private treaty, subject to certain provisions. Travers Thorpe Alberga were appointed as the attorney on record with conduct of the sale and the proceeds of sale of the Property shall be paid direct to Travers Thorpe, Alberga and held in Escrow and applied to discharge certain sums as set out by order(s). Amongst other debts secured by Court Order(s), Charges are registered against the Property which would prevent any purported purchaser from taking title without being properly discharged.*
>
> *It was further ordered that Mr Akiwumi instruct the then agent IRG to withdraw the property from CIREBA. Before withdrawing, we understand IRG were involved with Mr Basson and his wife, who were in contract. Our understanding is Mr Basson and his wife were given time to fulfil the terms of the contract, but were unable to do so. The contract then expired. We understand Mr Basson and his wife made a suggestion following expiry for a "lease to own" agreement, a proposition which was rejected. Following this, Mr Gordon cooperated in transferring the sale of the property to Mr Binckes of REMAX as the real estate agent with conduct of the sale of the Property appointed by the Grand Court.*
> ...
> *We are now informed by Mr Basson that he was informed by Mr Gordon to contact Mr Akiwumi directly and proceed with the sale. This is despite both Mr Gordon and Mr Akiwumi being fully aware of the terms of the orders of the Court and that Mr Akiwumi did not have standing to conduct of the sale. We were not a party to*

> *those discussions so cannot comment at this juncture. But Mr Basson also appears to be aware that there were family proceedings are ongoing in respect of the Property as he states the same in an email to us dated today and he specifically states that he was aware "...* that the property was assigned to TTA by the family court…".
>
> *It appears in breach of this and other orders of the Grand Court, Mr Akiwumi has purported to enter into a "lease to own agreement" (according to Mr Basson) or possibly a "option agreement" (according to Carey Olsen) with Mr Basson and his wife."*

20. Carey Olsen wrote separately to Mr Brady on 28 August 2024 putting him on notice that the position of the Bassons' was that they had transferred the Option Fee to Mr Brady as a result of misrepresentations made by Mr Akiwumi and asked for immediate confirmation that the Option Fee will be held by impending further communication.

21. Late on 28 August 2024 Mr Akiwumi sent an email to Mr Basson saying as follows:

> *"Hi Petri,*
>
> *Since my last email, it has come to my attention that your attorneys have been in contact with Travers Thorpe Alberga, Attorneys, who act for [the Applicant in the Family Proceedings].*
>
> *I am unclear as to why Carey Olsen would have taken this step as I regarded the Option Agreement as the best way forward to facilitate the lease and option agreement, achieve value and manage outstanding (albeit disputed) claims that I may have to [the Applicant in the Family Proceedings].*
>
> *Unfortunately, Carey Olsen's actions have thrown a wrench in a carefully thought through transaction and unless our interests remain aligned, I am concerned that this transaction will have to be reversed.*
>
> *I am available for a call at any time tonight or early tomorrow morning to see how best this matter can be managed to a collective benefit."*

22. A follow up letter was sent on 6 September 2025 in which Carey Olsen indicated that as a result of the alleged misrepresentations made by Mr Akiwumi the Bassons were electing to rescind the Option Agreement.

23. On 3 October 2024 Mr Brady sent a reply. In it he notes that the Option Agreement was drafted by Carey Olsen under the instructions of Mr and Mrs Basson. He states

that neither of the signatories contemplated the sale of the Property at the date of the execution of the Option Agreement, nor was their liability to pay stamp duty unless the Option was triggered by Mr and Mrs Basson. He says that it is denied that Mr Akiwumi held himself out as "selling" or having the right to "sell" the Property. He says that the parties contemplated an agreement that did not involve a sale on execution. He goes on to say that it is indisputable that Mr and Mrs Basson knew of the involvement of TTA prior to the execution of the Option Agreement and that Mr Basson should have contacted TTA prior to execution of the Option Agreement. He says that without question, prior to the drafting by Carey Olsen of the Option Agreement, Mr and Mrs Basson were aware of TTA's interest in the Property. He says that Mr and Mrs Basson and Carey Olsen were obliged to undertake their own due diligence with respect to the transaction and as well as home inspections and valuation surveys, a search of the property register at the Land Registry would have and/or to have led to Mr and Mrs Basson knowing that the Property was subject to charges, which in turn, ought to have put them, and Carey Olsen on enquiry, if there are any concerns. He states that *"your reliance on the Court Orders referenced in your correspondence is of no assistance; TTA having "conduct of sale" in no way precluded the legal capacity by the proprietor to "sell" the Property, if in fact a sale was contemplated."*

24. Mr Brady goes on to deny that Mr and Mrs Basson were entitled to rescind the Option Agreement and denies that any misrepresentations were made to them in the manner suggested or at all. He states that Mr and Mrs Basson are in repudiatory breach of the Option Agreement. Finally he raises a point about the communication between TTA and Carey Olsen and suggests that there is some "unlawful collusion" between the two firms and their respective clients to interfere "tortuously" [sic] with the contract.

25. Mr Basson says in conclusion that he and his wife would not have entered into this arrangement with Mr Akiwumi if at any time the Property could be sold to third party who would not be bound by their rights to have Property transferred to them in accordance with the Option Agreement and would require them to vacate the Property. He goes on to say that had he and his wife known that Mr Akiwumi was powerless to give effect to his obligations under the Option Agreement, and powerless to prevent the Property being sold by TTA, they would not have entered into the Option Agreement.

26. As a result of these events, on 29 August 2024, TTA, acting for the Applicant in the Family Proceedings applied within the Family Proceedings for a freezing injunction restraining the account operated by Mr Brady into which the Option Fee was paid, preventing Mr Akiwumi from giving any instructions to Mr Brady in connection with the funds and that account and also restraining Mr Akiwumi's own assets. For various reasons that matter came before me in the Family Proceedings on 24 January 2025 and I ordered that the funds in dispute (being the Option Fee) should be paid into court and upon that happening the freezing injunction be discharged.

27. Mr Akiwumi swore an affidavit dated 6 February 2025[1] in these proceedings and I will come to the contents of that in due course.

These Proceedings

Mr Akiwumi's claim

28. These proceedings were commenced by way of writ dated 3 October 2024. The claim in the writ is headed "Indorsement of Claim" and appears to have been intended to be the statement of claim and it is in relation to this that the defence and counterclaim was served. In summary, it is claim by Mr Akiwumi that the Bassons are in repudiatory breach of their obligations under the Option Agreement. As a result of which Mr Akiwumi claims that he is entitled to retain 50% of the Option Fee, namely US$250,000. He also makes a claim for the amount of US$540,000 being the cumulative amount of the monthly licence fee that the Bassons would have paid during the Option Period (US$7500 for 72 months).

Bassons' Defence and Counterclaim

29. By their Defence and Counterclaim dated 23 October 2024, the Bassons deny being liable to Mr Akiwumi. They claim that they were induced to enter into the Option Agreement by express and implied misrepresentations made to them by Mr Akiwumi to the effect that he had the capacity, authority, ability and intention to sell the Property to them under the terms of the Option Agreement and to permit the Bassons to inhabit the Property for the duration of the option period of 6 years. They say that this is because, *inter alia*:

i. By entering into the Option Agreement, Mr Akiwumi represented that he would be able to sell the Property to the Bassons in the event that they exercised the purchaser's option in accordance with the terms of the Option Agreement and that he would be able to procure that the Property would not be sold to any other buyer during the option period (what Carey Olsen describe as the "**Overarching Representation**");

ii. By clause 11 of the Option Agreement, Mr Akiwumi warranted that he "*is not aware of anything material which would negatively impact [the Counterclaim Plaintiffs'] decision to enter into [the Contract] or to purchase the Property*" (what Carey Olsen describe as the "**Clause 11 Representation**"); and

iii. On 22 August 2024, recalling that they had been asked to provide TTA with KYC information a few months earlier in relation to the Property, the Counterclaim Plaintiffs asked Mr Akiwumi by email to confirm whether TTA's involvement with the Property would have any impact on the sale, to which Mr Akiwumi responded by saying that *"As regards, TTA, there will be no impact on the sale*" (what Carey Olsen describe as the "**Email Representation**").

[1] Although it was served late and in breach of the pre hearing directions given on 24 January 2025, Carey Olsen did not object to it being relied on by Mr Akiwumi at the hearing.

30. It is pleaded in the Counterclaim that unbeknown to the Bassons, but as Mr Akiwumi was fully aware, the representations above were false:

    i. The Property was the subject of the Family Proceedings. By the September 2024 Order, the Court had appointed TTA, the attorneys for the applicant in the Family Proceedings, to conduct the sale of the Property and the proceeds of the sale of the Property were to be paid directly to TTA.

    ii. By the March 2024 Order, Mr Akiwumi was ordered to instruct IRG (his agents) to withdraw the listing for the sale of the Property with immediate effect, and for Mr Michael Binckes of RE/MAX to have conduct of the listing and sale of the Property forthwith.

31. Accordingly, it is claimed, from at least 14 September 2023, Mr Akiwumi was prevented by orders of the Grand Court from selling the Property to the Bassons as was contemplated by the Option Agreement.

32. Further they say, as a result of the orders made in the Family Proceeding, Mr Akiwumi was not in a position to prevent the sale of the Property by TTA to another buyer during the option period as set out in the Option Agreement.

33. As a result of the above, it is claimed that Mr Akiwumi was not in a position to sell the Property to the Bassons or prevent the Property from being sold to another buyer during the Option Period. Further, it is claimed that this fact should have been disclosed to the Bassons in accordance with Mr Akiwumi's obligation under clause 11 of the Option Agreement.

34. The position of the Bassons is that accordingly, the Overarching Representation, the Clause 11 Representation and the Email Representation were false.

35. The Counterclaim continues to claim that in reliance on the false representations set out above, the Bassons executed the Option Agreement and on 23 August 2024 transferred the Option Fee to Mr Brady, at Mr Akiwumi's instruction.

36. Finally, it is pleaded that on 6 September 2024, upon discovering that the representations made by Mr Akiwumi were false, the Bassons rescinded the Option Agreement and demanded the Option Fee be returned to them. In response, Mr Akiwumi commenced these proceedings against the Bassons for breach of the Option Agreement.

Mr Akiwumi's Reply

37. By way of summary, in his Reply, Mr Akiwumi denies the claims made in the Counterclaim. His pleaded position is that:

    i. He was not in any way inhibited from selling the Property and that the Bassons knew that the Option Agreement was, as he describes it a "derivative

option" and not a sale or transfer of title, or indeed any proprietary right in the Property, save and except if the Option in the Option Agreement was triggered during the Option Period.

ii. The Bassons were fully cognizant of the fact that the Option Agreement did not confer on them any ownership rights in the Property. In particular because under the terms of the Option Agreement, Mr Akiwumi bore all the risks in relation to the Property, a position inconsistent with a sale.

iii. The Bassons had to provide KYC documentation to TTA and were, therefore, aware that any sale or other transaction (including the Option Agreement) concerning the Property might be subject to superintendence by TTA. He goes on to claim that the Bassons were under an obligation to conduct their own due diligence concerning, initially the sale of the property and subsequent, when a sale was not possible, the Option Agreement. He says that the Bassons duty to conduct due diligence was independent of any obligation of disclosure that he may have had.

iv. Under the terms of the Option Agreement, the Option Fee was due upon execution of the Option Agreement; namely, 9 August 2024. Mr Akiwumi expressly denies making any of the express or implied representations alleged in the counterclaim and further denies that he was in any way inhibited from permitting the Bassons from inhabiting the Property, as bare licensees for the duration of the Option Period.

The current application

38. Pursuant to Grand Court Rules (2023 Revision) (GCR) O.14, r 5(1) and/or O.86, r.1(1) the Bassons' summons dated 27 November 2024 seeks judgment against Mr Akiwumi and Mr Brady on the Counterclaim, the relief sought being as follows:

i. that the Bassons have validly rescinded the Option Agreement;

ii. that the Option Fee and/or its traceable proceeds are held on trust for the Bassons by Mr Brady;

iii. that Mr Brady return the Option Fee to the Bassons;

iv. that if all or part of the Option Fee is no longer held by Mr Brady:

- all necessary accounts and enquiries be undertaken into what has become of the Option Fee;
- to the extent that any part of the Option Fee was transferred by Mr Brady after he became aware of the Basson's claim money, a declaration that Mr Brady has breached his duties as a trustee; and,

v. an order that payment of such sums be made as equitable compensation for breach of trust; and,

vi. that the Bassons are entitled to damages, interest and costs.

39. Finally, the Bassons seek an order pursuant to O.18, r.19 (1) GCR that the Plaintiff's Statement of Claim dated 3 October 2024 be struck out on the basis that it discloses no reasonable cause of action, is scandalous, frivolous or vexatious and/or is otherwise an abuse of the process of the court.

Mr Akiwumi's affidavit

40. The evidence relied on by the Bassons was that set out in the affidavit of Mr Basson referred to above. Mr Akiwumi filed the affidavit in reply to which I referred earlier. In his affidavit, Mr Akiwumi spent some time dealing with the background leading up to the various charges being entered against the Property along with some of the background leading up to the abortive sale of the Property to the Bassons. He does note in paragraph 3(xx) that on 18 April 2024 Mr Gordon of IRG was served with the March 2024 Order. He says that regardless of Mr Gordon's knowledge, the Applicant in the Family Proceedings knew that the Property was on the market for sale and that although TTA had conduct of the sale, no issue had been taken by TTA at that point in connection with his right to sell the Property. Mr Akiwumi suggests that once served with the March 2024 Order. Mr Gordon entered into negotiations with TTA to permit him to remain as the listing agent for the Property until the expiry of that their listing agreement on 31 May 2024. However, Mr Akiwumi does not state the source of that knowledge.

41. Mr Akiwumi summarises in his affidavit the events leading up to the preparation of the draft Option Agreement and suggests in paragraph 11 that it was clearly understood by both parties that the effect of the Option Agreement was not a sale of the property. Mr Akiwumi continues in paragraph 13 of his affidavit to note that the Option Agreement was signed by him electronically on 9 August 2024 and says that the Bassons were required to pay the first part of the Option Fee upon execution of the Option Agreement. He says that they did not do so because of a misunderstanding about the time it would take to register a caution over the Property to protect their interests pursuant to the Option Agreement. Mr Akiwumi said he was prepared to accommodate the Bassons in that regard, but that when it became clear that registering a caution would take longer than anticipated, he requested payment of the Option Fee, which was not effected until 23 August 2024.

42. In relation to his statement made on 22 August 2024 that the involvement of TTA would have no impact on the sale of the Property. Mr Akiwumi says in paragraph 19 of his affidavit that as far as he was concerned with the Option Agreement having been executed, the response he provided on 22 August 2024 was correct and truthful. He goes on to say that such a statement having been made after the execution of the Option Agreement with a pre-existing obligation on the Bassons to pay the Option Fee, it cannot be contended that the Bassons were induced by his response to enter into the Option Agreement.

43. Mr Akiwumi goes on to deal with the suggestion by Mr Basson that Mr Basson was unable to contact him between 25 August 2024 and 28 August 2024. He states that

there was no effort by Mr Basson to make any contact other than Mr Basson's email of 28 August 2024 enquiring with Mr Akiwumi as to whether payment of the Option Fee had been received.[2]

44. From paragraphs 24 onwards in his affidavit, Mr Akiwumi suggests that Mr Basson is not being honest with the court although it appears that this was in part a misunderstanding by Mr Akiwumi about who had been privy to the correspondence between him and Mr Basson during the relevant period, with the suggestion being that Carey Olsen had been copied in contemporaneously. Mr Akiwumi accepted that this was not correct. He does, however, go on to take issue with what it was that TTA said in their email of 20 August 2024, the contents of which I have set out above. He suggests that in fact, TTA does not assert a lack of authority on his part to sell and attempts to draw a distinction between having conduct of the sale as distinct from having an ability to sell. He seems to suggest that TTA's involvement in the conduct of the sale and, specifically, the distribution/dispersal of the proceeds of the sale was entirely dependent on the existence of a sale, which did not arise in this case. He concludes this point by suggesting that if he is wrong about that, in the sense that TTA's power was engaged by the Option Agreement, TTA could have discharged its duty to its client by claiming the funds paid by the Bassons and utilising them to discharge the debts "purportedly" owed to their client.

45. Mr Akiwumi continues to refer to what he suggests is unlawful conduct and manipulation of the court process by TTA and Carey Olsen the relevance of which is connected with the application for the freezing injunction in the Family Proceedings as opposed to the current application. Although not having made any application in this regard, in his affidavit, Mr Akiwumi concludes with an invitation to the court to enter summary judgment in his favour and reverse summary judgement in his favour on the counterclaim. He also asks for an order striking out the defence and counterclaim on the grounds of abuse of process and indemnity costs.

Summary judgment and GCR O.14 and O.86, relevant law and submissions on behalf of the Bassons

46. There was no dispute between the parties as to the relevant rules of procedure and little, if any, disagreement as to the legal principles that relate to the Bassons' application. Carey Olsen filed a skeleton argument which I have made use of in setting out those rules and legal principles. Mr Akiwumi did not file a skeleton argument.

47. GCR O.86 specifically applies to summary judgment applications relating to claims for specific performance, rescission or the return of any deposit in relation to "*an agreement (whether in writing or not) for the sale, purchase or exchange of any property*" on the basis that the Defendant has no defence to the action (O.86, rule

[2] During the course of the hearing Mr Sherwood on the half of the Bassons accepted that there had been no other effort to contact Mr Akiwumi during that period.

1(1)). O.14 of GCR, which contains the procedural rules for summary judgment applications generally, does not apply to a claim to which O. 86 applies (O. 14, rule 1(2)(c)) **[Authorities Bundle (AB) AB/1]**.

48. On the basis that the Option Agreement is an agreement for the sale of the Property (by way of an option to purchase arrangement), and the Bassons seek a declaration that their rescission of the Option Agreement is valid, the Bassons submit that this application for summary judgment falls squarely into O.86.

49. However, unlike O.14, rule 5, O.86 is silent as to whether it is equally applicable to summary judgment of counterclaims. Mr Sherwood on behalf of the Bassons' submitted that nothing turns on this and that the Court has the power to grant summary judgment on counterclaim under O.86.[3]

50. Alternatively, he argues, if the Bassons are wrong and the Court does not consider it is able to grant summary judgment of counterclaims pursuant to O.86, such that this application is not caught by the limitation in O.14, rule 1(2)(c), then the Bassons submit that the present summary judgment application should be determined pursuant to O.14, rule 5 of the GCR.

51. In any event, he argues whether the summary judgment application is determined pursuant to O.14 or O.86, it is sufficiently clear that the governing principles for an application for summary judgment are the same[4].

52. Mr Sherwood argues that the test for summary judgment is straightforward and requires the plaintiff to demonstrate that "*the defendant has no defence to the action*" (O.86, rule 1(1), and O.14, rule 1(1)). The words "*has no defence*" have been interpreted as requiring the claimant to demonstrate that the defendant has no defence with a real prospect of success, as confirmed by the Cayman Islands Court of Appeal in *Walkers v Arnage Holdings Ltd* [2021] 1 CILR 347 at [12] **[AB/6]**.

53. In *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) **[AB/11]**, Lewison J summarised the correct approach to an application for summary judgment at paragraph 15:[5]

> i. *"The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91;*
>
> ii. *A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely*

[3] The 1999 RSC specifically included a rule equivalent to O.14, rule 5 in O.86, but this was not included in the Cayman Islands Grand Court Rules **[AB/Tab 4]**.

[4] *Chester Waide Watler v Omelin Campbell* [2021] CIGC J0401-1 per Ramsay-Hale J (as her Ladyship was then) at [33] **[AB/5]**.

[5] Applied by Parker J in *In the Matter of Neoma Manager (Mauritius) Limited et al* [2023] KY 2023 GC 23, at [46] **[AB/7]**.

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;*

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."

54. By way of further illustration Mr Sherwood refers to Sanderson J in *Zuiderent v Christiansen* 2004-05 CILR Note 23 who described the test in two stages:

i) is what the defendant says credible; and

ii) has he shown that there is a fair and reasonable probability that he has a real *bona fide* defence? [6]

55. He goes on to say that, as set out in Walkers v Arnage Holdings,[7] 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. On this point, the Bassons submit that Mr Akiwumi was served with the Summons and the affidavit of Basson on 27 November 2024 and accordingly has had sufficient opportunity to consider the contents of Bassoon's affidavit and present any evidence contrary to the evidence of the Counterclaim Plaintiffs and/or evidence in defence of the allegations of dishonesty and fraudulent misrepresentation, which he has not done. In those circumstances, the Bassons submit the Court is able to grant summary judgment.

FRAUDULENT MISREPRESENTATION – RELEVANT PRINCIPLES AND SUBMISSIONS ON BEHALF OF THE BASSONS

56. Mr Sherwood explained that the Basson's underlying claim is that they have validly rescinded the Option Agreement as it was procured by Mr Akiwumi's fraudulent misrepresentations, and the balance of the Option Fee (being CI$195,165.40) should be returned to them.

57. He argues that where a party has been induced by fraudulent misrepresentation to enter into a contract or other binding transaction with the representor, the party may rescind the contract and claim damages in relation to any loss incurred[8]. Accordingly, he says that the requirements are that:

i) there must have been a representation (whether express or implied) which is false;

ii) the misrepresentation must have been made fraudulently; and

[6] **[AB/8]**.

[7] *Walkers v Arnage Holdings Ltd* [2021] 1 CILR 347 at [13] **[AB/6].**

[8] Paragraph 780 of Vol. 76 (2024) of Halsbury's Laws of England **[AB/26]**. and paragraph 14.01 of Spencer Bower and Handley: Actionable Misrepresentation (LexisNexis, 2014, 5th ed) ("**Spencer**") **[AB/30]**.

iii) the fraudulent misrepresentation must have induced the entry into the relevant contract.

Representation

58. A representation may be made expressly or impliedly. An express representation includes written and spoken statements. Whether any and, if so, what representation was made has to be "*judged objectively according to the impact that whatever is said [or done] may be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee*".[9]

59. In relation to an implied representation, Mr Sherwood argues that the Court has to consider what a reasonable person would understand was being conveyed by the words and conduct in question or would infer from them.

The representations were made fraudulently

60. Mr Sherwood goes on to argue that a misrepresentation is fraudulent when the representor[10]:

(a) knew it to be false;

(b) believed it to be false;

(c) did not know or believe it to be true; or

(d) made it with reckless indifference as to its truth or falsity.

61. Lord Herschell expressed in *Derry v Peek* (1889) 14 App Cas 337 at page 374 that "*to prevent a false statement being fraudulent there must, I think, always be an honest belief in its truth*".[11]

Inducement

62. It is argued on behalf of the Bassons that reliance by a party on a misrepresentation is a question of fact,[12] and the claimant must establish that the misrepresentation operated in the claimant's mind and caused him to act as he did.[13] Although it is argued that the representation must be an inducing cause, it need not be the only one. In that regard, Lord Hoffman said:[14]

> "*...if a fraudulent representation is relied upon, in the sense that the claimant would not have parted with his money if he had*

[9] *MCI Worldcom International Inc v Primus Telecommunications plc* [2004] 2 All ER (Comm) 833, 844 CA per Mance LJ **[AB/12]**.

[10] Paragraph 5.03 of Spencer **[AB/27]**.

[11] **[AB/13]**.

[12] *Smith v Chadwick* (1884) 9 App Cas 187, 195–6 **[AB/14]**; *Pan Atlantic* [1995] 1 AC 501 at 542 per Lord Mustill **[AB/15]**.

[13] Paragraph 6.01 of Spencer **[AB/28]**.

[14] *Standard Chartered* [2003] 1 AC 951 at 967 **[AB/16]**.

> *known it was false, it does not matter that he also had some negligent or irrational belief about another matter, and but for that belief, would not have parted with his money either. The law simply ignores the other reasons why he paid....in this field the law does not allow an examination into the relative importance of contributing causes.*"

63. It is further argued that in establishing whether a misrepresentation is material enough to cause inducement, it is enough if knowledge of the material facts might have made the victim pause.[15] Mr Sherwood says that this test has also been described in another way in *Pan Atlantic*[16] where Lord Goff said that inducement was established if the misrepresentation had "*an impact on the mind*" or an "*influence on the judgment*". In the same case,[17] Lord Lloyd said that the test was whether the misrepresentation "*might well have influenced*" the representee. The English Court of Appeal characterised "material" as meaning "*relevant*" to the decision of the representee to enter into the contract.[18]

64. Mr Sherwood goes on to argue that the onus is on the representee to prove inducement but he does not have to show that the misrepresentation was a sufficient or even a necessary cause, but must simply show that the false statement was *"actively present in his mind"* at the time.[19] Then, to rebut a prima facie inference of inducement, the representor must establish that the misrepresentation *"had absolutely nothing to do with the result"*, which "*can rarely be established*".[20]

65. It is argued that another relevant factor to make out actionable misrepresentation is that the representor must intend to induce the particular representee to act on the representation in the way he did. However, where intention is in issue it may be inferred and in *Coaks v Boswell* (1886) 11 App Cas 232, Lord Selborne at page 236,[21] speaking of "*a communication which would be necessarily, or naturally and probably, misleading*", said:

> "*...if it is a fair conclusion that he did this intentionally, and with a view to mislead in any material point, that is fraud. A man is presumed to intend the necessary or natural consequences of his*

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[15] *Reynell v Spyre* (1852) 1 De GM & G 660, 708 **[AB/17]**.
[16] *Pan Atlantic* [1995] 1 AC 501 at 517 per Lord Goff **[AB/15]**.
[17] *Pan Atlantic* [1995] 1 AC 501 at 573 per Lord Lloyd **[AB/15]**.
[18] *Morris v Jones* [2002] EWCA Civ 1790 at [11] **[AB/18]**.
[19] *In re London & Leeds Bank Ltd* (1887) 56 LJ Ch 321, 324 **[AB/19]**; Paragraph 6.09 of Spencer **[AB/28]**.
[20] Paragraph 6.09 of Spencer, referring to *Corben* [1974] 2 NSWLR 202 **[AB/28]**.
[21] **[AB/20].**

words and acts, and the evidentia rei would therefore be sufficient without other proof of intention".[22]

66. The mere fact, it is argued, that the representee has the opportunity to discover the truth does not prevent the statement from being a misrepresentation.[23] The appropriate test is whether there is actual and reasonable reliance on the misrepresentation. Accordingly, it is said that if a representee does not know that a representation is false, it is no defence to an action, either for damages or rescission, that the representee might have discovered the falsity of the representation by the exercise of reasonable care.

67. Mr Sherwood refers to *Walker v Boyle* [1982] 1 WLR 495 in which at page 505 Dillon J said: "*An express representation by a vendor in regard to his title… relieves the purchaser from an investigation of the facts of the case, and he is entitled to rely on such statement, and it is no defence to say that he [the purchaser] had the means of discovery and might with reasonable care have discovered that the statement was untrue.*"[24]

Relief for fraudulent misrepresentation

68. It is argued on behalf of the Bassons that upon the discovery of the fraud, the representee may at his election:

(a) do nothing;

(b) rescind it; or

(c) affirm it and if the fraud caused loss, sue for damages.

69. Their position is that where a contract is rescinded for fraud, the relevant effect is that "*fraud unravels everything*",[25] that is the representee, on discovery of the fraud, is entitled to rescind the transaction ab initio unless restitution has become impossible.[26]

70. An action to enforce rescission is the usual proceeding for enforcing annulment of a contract induced by misrepresentation. Contracts which may be the subject of such proceedings include those relating to sales, mortgages or leases of land.[27]

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[22] *Smith v Chadwick* (1884) 9 App Cas 187, 190 per Lord Selborne **[AB/14]**.
[23] *Redgrave v Hurd* (1881) 20 Ch D 1 at 13 **[AB/21]**.
[24] **[AB/22]**.
[25] Paragraph 14.01 of Spencer **[AB/30]**; *May v Platt* [1900] 1 Ch 616, 623 per Farwell J **[AB/23]**.
[26] *Lindsay Petroleum* (1874) LR 5 PC 221 **[AB/24]**.
[27] *Cooper v Phibbs* (1867) LR 2 HL 149 **[AB/25]**.

Strike Out – Relevant Principles

71. Mr Sherwood went through the principles relating to strike out. O.18, rule 19 of the GCR **[AB/3]** gives the Court the power to strike out the whole, or a part, of a party's pleading and to grant judgment to the opponent accordingly on the grounds that it:

(a) it discloses no reasonable cause of action;

(b) it is scandalous, frivolous or vexatious;

(c) it may prejudice, embarrass or delay the fair trial of the action; and/or

(d) it is otherwise an abuse of the process of the Court.

72. Mr Sherwood referred to *TCB Creditor Recoveries Ltd v Arthur Andersen Ltd* [2008] CILR 486,[28] in which McIntosh Ag. J held that in striking out applications, the Court had to assume that the facts pleaded in the statement of claim were true and consider those facts in ascertaining whether the claim had a reasonable prospect of success. If upon undertaking this exercise, it is determined that the claim has no realistic prospect of succeeding, then it must be struck out as it is not a reasonable cause of action.

73. It is argued that there is an overlap between a pleading which is frivolous or vexatious and one which amounts to an abuse of process of the court. This, it is said, was recognised by Smellie CJ in *Kalley v Manus* [1999] CILR 566 where he held that to be frivolous or vexatious, a pleading had to be "*so clearly frivolous that to put it forward would be an abuse of the process of the court*".[29]

74. O.18, rule 19(1)(d) is set out as a "*catch all*" provision encompassing a whole range of circumstances where it is just for the Court to strike out the claim or where the Court is not used in a bona fide or proper manner. The categories of conduct that could render a claim of abuse of process are not closed and can encompass a wide range of circumstances.

Summary of Submissions on behalf of the Bassons

75. The Bassons' claim against Mr Akiwumi is put on the basis that it is a direct application of the various principles on fraudulent misrepresentation set out above and, in their

[28] **[AB/9]**.
[29] **[AB/10]**.

submission, is capable of being summarily determined. From the outset, Mr Sherwood made it clear that the Bassons were not arguing that the Option Agreement itself amounted to a sale of the Property. The focus of their application is on the representations that it is argued that Mr Akiwumi made in connection with the Option Agreement. Mr Sherwood also emphasised that as far as his clients are concerned, there is little material factual dispute between the parties other than in relation to the alleged representations made by Mr Akiwumi and their effect. By way of example, he contends that there is no dispute about the fact that the Bassoons did not know the details of the September 2023 Order and March 2024 Order. He also argues that the discrepancy between the date that the Option Agreement was signed and the date on the face of the agreement is immaterial for the purposes of this application because it is the representations in the Option Agreement itself that the Bassoons rely on.

76. It is argued that Mr Akiwumi made both express (the Clause 11 Representation and the Email Representation) and implied representations (the Overarching Representation) to the Bassons, knowing them to be false. Mr Sherwood says that Mr Akiwumi denies making the representations in his Defence to the Counterclaim or (incorrectly) alleges that he was not inhibited from selling the Property nor allowing the Bassons to occupy the Property in the manner contemplated by the Option Agreement, but, he says, these denials are plainly without foundation.

77. Mr Sherwood argues that it could readily be inferred that Mr Akiwumi intended to induce the Bassons into entering the Option Agreement as that is the natural consequence of the misrepresentations made before the sale of the Property.

78. He goes on to argue that the representations were clearly material and were intended to, and did, influence the mind of the Bassons so as to affect their conduct as neither the Bassons nor any reasonable person would enter into the Option Agreement if it was made clear at the outset that:

(a) at any time the Property could be sold to a third party who would not be bound by the Bassons' right to have the Property transferred to them in accordance with the Option Agreement, and would require the Bassons to vacate the Property; and

(b) Mr Akiwumi was powerless to give effect to his obligations under the Option Agreement, and powerless to prevent the Property being sold by TTA during the Option Period.

79. Mr Sherwood explains that upon the discovery of the fraud by Mr Akiwumi, the Bassons immediately elected to and did rescind the Option Agreement on 6 September 2024, thereby making the Option Agreement void ab initio.

80. In light of the above, it is submitted that having made out the various elements for rescission of the Option Agreement for fraudulent misrepresentation, neither Mr Akiwumi nor Mr Brady have any defence to the Counterclaim and the Bassons respectfully request that the Court grant summary judgment to them for the relief sought pursuant to O.86, rule 1(1) of the GCR.

81. Mr Sherwood says that a natural extension of the grant of summary judgment as sought by the Counterclaim Plaintiffs is that Mr Akiwumi's Statement of Claim is no longer capable of being determined by the Court: he says that if the Bassons have validly rescinded the Option Agreement, they cannot be liable to Mr Akiwumi for breach of that Option Agreement. Therefore, the Bassons respectfully request that the Statement of Claim be struck out pursuant to O.18, rule 19(1) of the GCR.

Orders sought by the Bassons

82. On the basis that the money paid by the Bassons into Mr Brady's account is intended to be held in Court pending further order of the Court and final determination of these proceedings, the Bassons seek a further consequential order from the Court, that the money held in Court, being CI$195,165.40, is forthwith paid to the Bassons upon the summary judgment order being issued by the Court.

83. As has been confirmed in the evidence, CI$10,000 of the Option Fee was removed from Mr Brady's account on 28 August 2024. The Bassons seek an order for this amount by way of damages from Mr Akiwumi.

84. The Bassons also seek their costs against both Mr Akiwumi and Mr Brady on an indemnity basis, if not agreed.

Mr Akiwumi's Submissions

85. As indicated earlier, Mr Akiwumi did not produce a skeleton argument for the purposes of this hearing. Although Mr Brady is on the record for Mr Akiwumi, Mr

Akiwumi requested that he make oral submissions on his own behalf. Mr Akiwumi has substantial experience as a senior litigation attorney so I agreed with his request.

86. Mr Akiwumi argues that the Option Agreement itself does not amount to an agreement to sell the Property. Rather it provided for a sale of the Property to the Bassons if they choose to exercise the Option during the Option Period. He says that in no way did the parties to the Option Agreement contemplate a sale of the Property.

87. Mr Akiwumi rehearsed some of the history of the aborted direct sale of the Property to the Bassons as an explanation for the resulting "derivative" Option Agreement. Mr Akiwumi says that the fact that the Bassoons were unable to complete the initial outright purchase of the Property cuts across their argument that he had held himself out as having the capacity to sell the Property. At one point he suggested that the knowledge of IRG might be imputed to the Bassons. He also claimed that TTA were aware in December 2023 that IRG was still the sales agent for the Property and took no steps at that point to intervene. Indeed, he says that on 24 December 2023, TTA put IRG on notice of the terms of the September 2023 Order.

88. Mr Akiwumi argues that in or around 15 May 2024, TTA requested KYC from the Bassons in connection with what was then the intended sale of the Property. He argues that TTA knew of the existence of the potential sale but that no objection was taken by TTA to the continuation of that transaction or the continued involvement of IRG as the sales agent. Mr Akiwumi argues that it is not, therefore, correct to say that he was deprived of the ability to sell the Property. He goes on to argue that nothing in either the September 2023 Order or the March 2024 Order specifically prohibits him from selling the Property.

89. Mr Akiwumi spent some time going over the different dates upon which the Option Agreement was signed and dated and also the reasons for the delay on the payment of the Option Fee.

90. After the short adjournment, Mr Akiwumi started making submissions about the question of reliance by the Bassons on any misrepresentations and the extent to which there had been any inducement to enter into the Option Agreement which their attorneys had drafted. At that point I asked him to consider a hypothetical scenario; namely, what did he think would have happened if the Option Agreement had been signed, the Bassons got into a position in which they could afford to exercise the

Option sooner rather than later but that TTA approached them and Mr Akiwumi with a prospective third party purchaser for the Property.

91. Mr Akiwumi's response was that if a third-party purchaser was found then the Option Agreement would not be capable of completion and clause 4 of the Option Agreement would apply. That clause is set out above and provides for the situation in which the Option is not in fact exercised and essentially provides for Mr Akiwumi to refund 50% of the Option Fee and any additional monies that might have been paid toward the Option.

92. He went on to say that this is the reason why he wanted the Option Fee paid into an escrow account. Indeed, he said that the reason for using Mr Brady's escrow account was primarily in order to allow him to come up with what he described as a *"scheme of arrangement"* in relation to his debts. He said that would enable him to go from bank to bank and to his primary charge holders to come up with an arrangement to discharge his debts.

93. I asked him why he would not have simply involved TTA as part of that process as envisaged by the September 2023 Order and the March 2024 Order. His reply was that he has continuing concerns about the costs incurred in the Family Proceedings and the risk that the proceeds of sale of the Property would be swallowed up by further legal costs.

94. Mr Akwiumi referred to the fact that his mortgage is in arrears and that a *"scheme of arrangement"* would enable him to approach his mortgagee and make some contribution to the arrears. In relation to monies owed to a Dr James, again, the scheme would enable him to approach him to settle the debt.

95. In relation to the Applicant in the Family Proceedings, he suggested that he would pay any residual balance of monies into court pending the outcome of the remainder of the disputes that he has with that party.

96. He said that the scheme of arrangement would be carried out in phases using the sums paid by the Bassons by way of the Option Fee. He described this as a pragmatic, creative solution to the "impasse" in relation to the sale of the Property which had been for sale since 2022.

97. Mr Akiwumi said that the idea of an informal scheme of arrangement did not come into play until the suggestion of an alternative type of agreement in relation to the Property materialised. He accepted that TTA were aware of the prospective sale of the Property to the Bassons but were not aware of the Option Agreement.

98. Mr Akiwumi said that the hypothetical scenario that I had presented was very unlikely to have occurred. He questions whether TTA could have found an outright buyer for a sum in excess of the purchase price in the Option Agreement so in his opinion there was no issue with which to be concerned.

99. Mr Akiwumi denies that the components of fraud exist to enable the Bassons to succeed with their application. In particular, he denies that there has been any inducement. He went on to argue that the court could only properly decide the question of inducement after cross-examination at trial.

100. The question was raised by Mr Akiwumi of the opportunity cost of not engaging in an alternative structure to sell the Property. He said that all efforts had to be made to explore options in relation to the Property and when the alternatives to an outright sale to the Bassons arose, it made complete sense to consider them.

101. Mr Akiwumi spent some time going through the case of *Pan Atlantic Insurance Ltd v Pine Top Ltd* specifically in relation to the question of causation in connection with an inducement to enter into a contract. His suggestion is that the case is of general application. I did make the point to him at the time that the *Pan Atlantic* case seems to be limited in application to contracts of insurance and, in particular marine insurance.

102. Referring to clause 18 of the Option Agreement, the entire agreement clause, Mr Akiwumi argues that any representations made after the date that the Option Agreement was signed were excluded. In particular, the communications between him and Mr Basson on 22 August 2025 and between the Bassons and TTA, on 28 August 2024, could not be relevant to the question of misrepresentation.

103. Mr Akiwumi went to some lengths, suggesting that there was collusion between TTA and Carey Olsen that had somehow led to the manipulation of the process of the court. He argued that the court must take this into account as parties seeking equitable relief could not come before a court without clean hands.

104. Mr Akwiumi also spent some time referring to the case of *Walkers v. Arnage* and, in particular, numbered paragraph 1 of the headnote and paragraph 13 of the judgment itself, where the Court of Appeal dealt with circumstances in which it is inappropriate to conduct a mini-trial of a case at the summary judgment stage. Mr Akiwumi said that he has been requesting disclosure in relation to the allegations of collusion but has been ignored. In the circumstances, he argued that it is inappropriate to deal with this matter on a summary basis without that additional discovery.

Analysis and Decision

105. I believe that an appropriate starting point is to review what it was in my view that the September 2023 Order, and the March 2024 Order intended and provided for. In the context of these proceedings, I am in no doubt that once the Valuations were obtained the cumulative effect of both orders was to put the process or conduct of the sale of the Property in the hands of the Applicant in the Family Proceedings, TTA and Re/Max. Paragraph 15 of the September 2023 Order was quite clear about this and provided for the proceeds of sale of the Property to be paid directly to TTA and then disbursed by TTA to discharge a series of specifically identified debts secured against the Property, including the monies owed to the Applicant in the Family Proceedings. The Orders made as part of the process of enforcing the charging order dated 6 October 2022 were made in favour of the Applicant in the Family Proceedings and registered against the Property. This was necessary because Mr Akiwumi had neither satisfied the various financial orders made against him in favour of the Applicant in the Family Proceedings nor made any progress with the sale of the Property. As I mentioned earlier, the position is similar to that of a mortgagee enforcing its security.

106. Mr Akiwumi suggests that nothing in either order explicitly prevents him from having conduct of the sale of the Property and seeks to distinguish that from the ability to sell. In my view, the effect of the September 2023 Order and the March 2024 Order hands both the conduct of the sale of the Property and the ability to sell the Property to the Applicant in the Family Proceedings and TTA. In practice, as was almost the case with the Bassons, the Applicant in the Family Proceedings and TTA might have agreed to allow Mr Akiwumi to proceed with a sale whilst IRG were still the listing agent but TTA's position in relation to this was set out clearly in its letter of 28 August 2023 which I have set out in full above.

107. It is not disputed that Mr Akiwumi was fully aware at all material times of the terms of the September 2023 Order and the March 2024 Orders. It is also not disputed that at all material times, the Bassons had limited knowledge of the terms and effect of both orders.

108. The question then is whether with that knowledge, Mr Akiwumi acted in a way that amounts to fraudulent misrepresentation when entering into the Option Agreement with the Bassons. I do not think that anything turns on the fact that the Option Agreement itself did not effect a sale of the Property. The Option Agreement clearly, in my view, provided a legal mechanism for the Bassons to purchase the Property if they wished to exercise the Option. Those were the reciprocal rights and obligations provided for in the Option Agreement.

109. When discussing my hypothetical scenario during the course of the hearing, Mr Akiwumi accepted that there was a possibility that after the Option Agreement was entered into and the Option exercised, TTA could advise that they had a purchaser of the Property equal to or in excess of what the Bassons had agreed to pay. The likelihood of this possibility arising is, in my view, irrelevant. The fact is that it clearly was a possibility and would have prevented Mr Akiwumi from conveying title to the Property to the Bassons pursuant to the terms of the Option Agreement. As I have mentioned above when explaining the consequences of the hypothetical scenario, Mr Akiwumi referred to clause 4 of the Option Agreement as providing the mechanism for terminating the Option Agreement in such circumstances. Clause 4 is clearly not drafted with this scenario in mind and as I noted above, it only provides for a fixed percentage of the monies paid by the Bassons to be returned to them.

110. As I noted in paragraph 25 above, in his affidavit Mr Basson says that he and his wife would not have entered into this arrangement with Mr Akiwumi if at any time the Property could be sold to third party who would not be bound by their rights to have Property transferred to them in accordance with the Option Agreement and would require them to vacate the Property. He goes on to say that had he and his wife known that Mr Akiwumi was powerless to give effect to his obligations under the option agreement, and powerless to prevent the Property being sold by TTA, they would not have entered into the Option Agreement.

111. There are two other aspects of this case that I will mention again because I am of the view that they have some relevance to Mr Akiwumi's knowledge and/or intention.

The first is the email from Mr Akiwumi on 28 August 2023 in which he comments that the disclosure of the Option Agreement to TTA had "*thrown a wrench*" in what he describes as a "*carefully thought through transaction*". This suggests to me that he knew that TTA were unaware of the Option Agreement and once they were (as they did in their letter of 28 August 2024) would treat the terms of such an agreement as a breach of the terms of the September 2023 Order and March 2024 Order, and wished to avoid the terms of the Option Agreement from coming to their attention. The second are the comments that Mr Akiwumi made to me during the hearing about his "*scheme of arrangement*". These suggest to me that Mr Akiwumi intended that the funds generated by the Option Agreement would be dealt with by him personally to the exclusion and arguably in breach of the process set out in the September 2023 Order and March 2024 Order.

112. Having considered the evidence and submission from Mr Akiwumi, I am satisfied that the Overarching Representation, Clause 11 Representation and the Email Representation were made. The latter may well be excluded by virtue of the entire agreement clause (18) in the Option Agreement. Regardless, I am of the view that Mr Akiwumi did represent to the Bassons that he would be able to sell the Property to them if they exercised the Option and that he also warranted that he was not aware of anything material would negatively impact the decision of the Bassons to enter into the Option Agreements. These are express representations. Based on what I have set out above, in the case of the Overarching Representation, I am of the view that Mr Akiwumi made it with reckless indifference as to its truth or falsity. In the case of the Clause 11 Representation, I am of the view that he made it knowing it to be false. In the case of the Email Representation, I am of the view that he made it knowing it to be false but place no weight on that of the purposes of this application.

113. Having considered the evidence from Mr Basson and the submissions made by Mr Sherwood, I am satisfied that the Bassons relied on (and that it was reasonable for them to do so) the Overarching Representation and Clause 11 Representation when entering into the Option Agreement and that if they had been apprised of the detail, effect and implication of the September 2023 Order and March 2024 Order, they would not have entered into it. Mr Akiwumi argues that there was a duty on the Bassons to make an enquiry in relation to the September 2023 Order and March 2024 Order and that they failed to do so. I have set out above Mr Sherwood's submissions on this point; namely, that the mere fact it is argued that the representee has the

opportunity to discover the truth does not prevent the statement from being a misrepresentation. As Mr Sherwood submitted, the appropriate test is whether there is actual and reasonable reliance on the misrepresentation and that if a representee does not know that a representation is false, it is no defence to an action, either for damages or rescission, that the representee might have discovered the falsity of the representation by the exercise of reasonable care. Those submissions are not challenged by Mr Akiwumi, and I am satisfied that based on my finding that there was actual and reasonable reliance on the representations made by Mr Akiwumi such that it is no defence to suggest that if they had made further enquiry of TTA, they might have discovered the falsity of what Mr Akiwumi has represented.

114. I am not satisfied that, as Mr Akiwumi argues, there is any basis for this matter to proceed to trial. The material evidence is before the Court. Mr Akiwumi has alluded to the need for discovery, but as I mentioned earlier, this appears to relate to the basis of the application for the Freezing Injunction in the Family Proceedings. I can see no further evidence that might be relevant to the question of the representations made by Mr Akiwumi in connection with the Option Agreement.

115. Having reached the above conclusions I am satisfied that and order as follows:

i. the Bassons were entitled to rescind the Option Agreement and have validly done so;

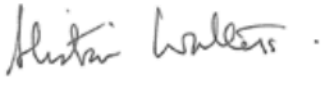
ii. that the Option Fee and/or its traceable proceeds are held on trust for the Bassons by Mr Brady;

iii. that Option Fee be paid out of Court to the Bassons;

the CI$10,000 paid by Mr Brady to Mr Akiwumi from the Option Fee is to be paid to the Bassons by Mr Akiwumi by way of damages such sum be paid as equitable compensation for breach of trust; and, that the Bassons are entitled to interest on such sum.

iv. In light of the above, Mr Akiwumi's Statement of Claim is struck out and dismissed as disclosing no reasonable cause of action.

The parties are to make brief written submissions on the question of costs to be filed by 16.00 on 3 April 2025.



Hon. Justice Alistair Walters
Acting Judge of the Grand Court