**Claim No. BIOT SC 2021-1**

**IN THE SUPREME COURT OF THE BRITISH INDIAN OCEAN TERRITORY**

BETWEEN:

(1) BERNARD NOURRICE

(2) SOLOMON PROSPER

Claimants/Respondents

– and –

THE GENERAL COUNSEL OF THE BRITISH INDIAN OCEAN TERRITORY

Defendant/Applicant

---

**GROUNDS IN SUPPORT OF THE APPLICATIONS FOR THE SUMMARY DISMISSAL OF THE CLAIM AND SECURITY FOR COSTS**

---

1. The Defendant respectfully contends that the Particulars of Claim and/or the claim as a whole should be dismissed at a summary stage and before any substantive hearing since:
   1.1. They fail to disclose any reasonable cause of action;
   1.2. They constitute an abuse of process of the Court, the substance of the claim having previously been litigated in the High Court of England and Wales and before the European Court of Human Rights ('ECHR');
   1.3. They have no real prospect of success.

2. Pursuant to section 3 of the BIOT Courts Ordinance 1983, the law applied in the BIOT is the law of England, including the rules of equity, but subject to any:
   2.1. Specific laws made for the BIOT; and

   2.2. Such modifications, adaptations, qualifications and exceptions as local circumstances require.

3. Accordingly, in order to succeed in any civil claim in a BIOT Court a claimant must identify, plead and establish the elements of a substantive cause of action that is known to the law of England and Wales.

4. The same provisions mean that the English Civil Procedure Rules 1998 (SI 1998/3132) ("**the CPR**") apply to civil litigation before the BIOT courts. It is also relevant to consider the case law dealing with applications to strike out pleadings under CPR Part 3.4, on the one hand, and applications for summary judgment on a claim or defence under CPR Part 24, on the other.

5. The principles governing striking out a claim and/or entering summary judgment in favour of a Defendant are as follows. Claims suitable for strike out under CPR Part 3.4(2)(a) include claims raising an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides: Harris v. Bolt Burdon [2000] CP Rep 70, CA; and where the claim is not valid as a matter of law: Price Meats Ltd v. Barclays Bank Plc [2000] 2 All ER (Comm) 346, Ch D per Arden J. Strike out is appropriate where the court considers that the claim is bound to fail: Richards (t/a Colin Richards & Co) v. Hughes [2004] EWCA Civ 266; [2004] PNLR 35, CA per Peter Gibson LJ at [22].

6. A claim is liable to be struck out under CPR Part 3.4(b) where it is an abuse of the Court's process. It is against fundamental public policy for a party to litigation to seek to relitigate points which have already been conclusively determined against it. See Virgin Airways Ltd v. Zodiac Seats UK Ltd [2013] UKSC 46; [2014] AC 160, AC per Lord Sumption at [26]. In so far as any new points are deployed in the second claim, it will be an abuse of process of the second court where those are matters which could and should have been ventilated in the first set of proceedings. See the principles set by Lord Bingham in Johnson v. Gore Wood (No 1) [2002] AC 1, HL at p. 30

7. Summary judgment under CPR Part 24.2 may be granted where the claimant has no real prospect of succeeding on the whole of a claim or on a particular issue; and there is no other compelling reason why the case or issue should be disposed of at a trial. As summarised in Toshiba Carrier UK Ltd and Others v. KME Yorkshire Limited [2011] EWHC 2665 (Ch) per the Chancellor (Sir Andrew Morritt):

    7.1. 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, CA;

7.2. A "realistic" claim is one that carries some degree of conviction, i.e. is more than merely arguable: ED & F Man Liquid Products v. Patel [2003] EWCA Civ 472, CA at [8];

7.3. The Court must not conduct a "mini-trial": Swain v. Hillman;

7.4. This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements. 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];

7.5. 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, CA;

7.6. 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. 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;

7.7. A short point of law or construction may be decided on an application for summary judgment if the Court is satisfied it has before it all the evidence necessary for its proper determination.

8. The Defendant relies upon the witness statement of Kit Pyman dated 26 August 2021 which sets out the factual background and the relevant history of previous litigation involving members of the Chagossian community (including the Claimants) and either the Commissioner of the British Indian Ocean Territory ('BIOT') or his administration and/or the United Kingdom Government on behalf of the Crown in right of the BIOT.

9. The claim is liable to be struck out and/or summary judgment should be entered in favour of the Defendant in respect of the whole of the claim since:

9.1. None of the pleaded case reflects a cause of action recognised in English law and/or which will be entertained by the BIOT Courts;

9.2. The claim is an abuse of process of the Court, given the previous litigation conducted by the Chagossians in general and the Claimants in particular. Alternatively, any aspect of the present claim could and should have been raised in that earlier litigation, in particular in Chagos Islanders v. Attorney General [2003] EWHC 2222, QB and Application 35562/04 Chagos Islanders v. United Kingdom [2013] 56 EHRR SE15 p.173;

9.3. The claim has no real prospect of success. Any claim for damages is clearly time-barred.

10. Alternatively, the Defendant contends that judgment should be entered in his favour on the following issues or parts of the Claimants' claim as set out in the following paragraphs of the Claimants' Particulars of Claim:

| Para. | Reason |
|---|---|
| 4 | There was and is no "*indigenous*" population of the BIOT. |
| 5 | The Claimants have not sought any group litigation order and there is no other proper basis for the bringing of "*collective claims*" as "*class representatives*" |
| 7 | (i) It is nowhere said that the alleged "*intentional denial and confiscation*" was unlawful as a matter of BIOT law. If, and insofar as, such unlawfulness is contended for by the Claimants it would have to be pursued as a public law claim for judicial review and would be decades out of time.<br><br>(ii) There was and is no "*indigenous*" population of the BIOT and those Chagossians who lived in the BIOT had no arguable claim to property rights: see the judgment of Ousley J. in Chagos Islanders v. Attorney General [2003] EWHC 2222, QB ('Chagos Islanders Litigation') at §§219-225.<br><br>(iii) Neither the Claimants nor anyone else was 'forcibly excluded' from the BIOT by HM Armed Forces in 1973.<br><br>(iv) The grounds for any action arose in 1973 and any relevant Claim is now out of time. |
| 9 | No common law right to fish in tidal waters conferred on citizens of the Crown could have survived the statutory and other legislative arrangements that have been made for the BIOT. |
| 10 | (i) There was and is no "*indigenous*" population of the BIOT.<br><br>(ii) No legal source for this "*right*" is identified anywhere in the Claim and the paragraph is unreasonably vague. |
| 12 | (i) The "*rights*" described are unknown to public international law;<br><br>(ii) The "*rights*" described would not be justiciable in the BIOT Court; and |

| | |
|---|---|
| | (iii) The "*rights*" described could not, without more, confer any right to damages in the law of BIOT. |
| 14, 15, 17 | (i) The "*rights*" described would not be justiciable in the BIOT Court; and<br><br>(ii) The "*rights*" described could not, without more, confer any right to damages in the law of BIOT. |
| 19, 23 | (i) There was and is no "*indigenous*" population of the BIOT and those Chagossians who lived in the BIOT had no arguable claim to property rights. See the judgment of Ouseley J in Chagos Islanders Litigation at §§219-225.<br><br>(ii) Any property "*rights*" which the Claimants once had vested in the Crown when the territory of the BIOT was acquired in 1967. See again, the judgment in Chagos Islanders Litigation at §§398-430 concluding that there was no arguable claim for damages arising in relation to property rights given the legislative regime that had been put in place by which all property rights had been compulsorily acquired in accordance with domestic law.<br><br>(ii) The matters relied upon as giving rise to the Claim arose in 1973, some 48 years ago. Pursuant to sections 2 and/or 15 and/or 27A of that Act and section 3(1) of the BIOT Courts Ordinance 1983, any cause of action would be statute-barred.<br><br>(iii) Alternatively, the Claim is barred by the equitable doctrine of *laches*. |
| 19-20 | These paragraphs, and the Claim more broadly, are an abuse of process, insofar as it is an attempt to relitigate matters that have already been determined in the English Courts and the European Court of Human Rights. In particular:<br><br>(i) In the group litigation action Chagos Islanders v. Attorney General [2003] EWHC 2222, QB, the claimants sought compensation and restoration of their property rights, in respect of their unlawful removal or exclusion from the Chagos islands and declarations as to their property rights and restitution of property (judgment §98)<br><br>(ii) The European Court of Human Rights in Application 35562/04 Chagos Islanders v. United Kingdom [2013] 56 EHRR SE15 p.173 at §§77-83 held that the findings made by Ouseley J in Chagos Islanders Litigation were binding on all Chagossians including the Claimants.<br><br>(iii) The Claimants now seek the same or substantially similar relief to that sought in the Chagos Islanders Litigation claim.<br><br>(iv) The Second Claimant was a party to Chagos Islanders Litigation and to the application to the European Court of Human Rights.<br><br>(v) The First Claimant was also a party to Chagos Islanders Litigation or alternatively, it was open to the First Claimant to become a party |
| 27 | (i) There was and is no "*indigenous*" population of the BIOT and those Chagossians who lived in the BIOT had no arguable claim to property rights. See the judgment of Ouseley J in Chagos Islanders Litigation at §§219-225. |

| | |
|---|---|
| | (ii) Any property "*rights*" which the Claimants once had vested in the Crown when the territory of the BIOT was acquired in 1967. See again, the judgment in Chagos Islanders Litigation at §§398-430 concluding that there was no arguable claim for damages arising in relation to property rights given the legislative regime that had been put in place by which all property rights had been compulsorily acquired in accordance with domestic law. |
| 33(i) | To seek such relief in the present claim amounts to an abuse of the Court's process, in the light of the matters raised and determined in Chagos Islanders Litigation |

11. The Defendant also seeks an Order that the Claimants should pay his reasonable costs of the case. An assessment of the Claimants' ability to pay the said order for costs should be adjourned to a date to be fixed on application by the Defendant.

12. Alternatively, in the event that the claim is not struck out and/or summary judgment is not entered in favour of the Defendant, it is submitted that the Court should proceed to make an order for security for costs. Here, again, the CPR is applicable and CPR Part 25.12-13 and the caselaw arising from those provisions will assist the Court.
    12.1. The Court may exercise its discretion to order security for costs, where each of the requirements in CPR Part 25.13 is met. Those requirements are that: (i) the Court is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and (ii) one of the conditions or gateways in CPR Part 25.13(2) is applicable. The latter include, at CPR Part 25.13(2)(a), that the claimant is resident out of the jurisdiction but not resident in a State bound by the 2005 Hague Convention.
    12.2. Whether the application passes through one of the CPR Part 25.13(2) gateways is a question of fact. Other matters, including the "*overall*" question in Part 25.13(1), of whether it is just to make the order and the detailed form of the order, are matters of discretion: Infinity Distribution Ltd (in administration) v. The Khan Partnership LLP [2021] EWCA Civ 565 at [29]-[30] per Nugee LJ.

13. So far as justice in the circumstances of the case is concerned, the following principles can be drawn from the authorities:
    13.1. The purpose of security for costs is to protect a defendant, who is forced into litigation at the election of another, against adverse costs consequences of that litigation: Autoweld Systems Ltf v. Kito Entreprises LLC [2010] EWCA Civ 1469 at [59] per Black LJ.

13.2. An application for security does not demand an examination of the merits and should avoid it so far as possible, but the overall result requires that the order should be just: Fernhill Mining Ltd v. Kier Construction Ltd [2000] CP Rep at [52] per Evans LJ.

13.3. Where security is sought against a claimant, and there is a high probability that the defendant will succeed, that is nonetheless a matter that can be weighed by the court: Porzelack K.g. v. Porzelack (UK) Ltd 1987 1 WLR 420 at 423 per Sir Nicholas Browne-Wilkinson VC and Kufaan Publishing Ltd v. Al-Warrak Publishing Ltd, 1 March 2000, unrep, CA, at [33] per Potter LJ.

13.4. In England, the courts will often be concerned about the ability of the claimant to raise funds and whether this could infringe Article 6(1) of the European Convention on Human Rights ('ECHR'). The application of the ECHR has not been extended to the BIOT by the UK Government and the line of cases considering this issue is therefore not relevant to the present application.

13.5. Only in an "*extremely rare and exceptional*" case is the applicant's wealth likely to be considered and to operate as something more than a minor factor: (LIC Telecommunications Sarl v. VTB Capital Plc [2016] EWHC 1891 (Comm) at [17] per HHJ Waksman QC. An order should not be refused merely on the basis that the applicant is wealthy enough to survive without the protection of the order.

14. The amount of security awarded is in the discretion of the court, which will fix such sums as it thinks just, having regard to all the circumstances of the case (CPR Part 25.13(1)(a)), in a robust, broad-brush manner:

14.1. The court may take into account the "balance of prejudice" between the harm to the applicant and the respondent, which will usually favour the applicant;

14.2. The court should not normally make continuation of the claim dependent upon a condition which it is impossible for the claimant to fulfil. However, where a respondent opposes the making of an order for security or seeks to limit the amount of security by reason of their own impecuniosity, the onus is upon the respondent to put proper and sufficient evidence before the court, making full and frank disclosure (MV Yorke Motors (A Firm) v. Edwards [1982] 1 WLR 444, [1982] 1 All ER 1024, HL).

15. In the present case, there is no dispute that the Claimants are resident out of the jurisdiction (i.e. out of the BIOT), in a non-Hague Convention State (the Seychelles). Taking into

account the very serious flaws in the Claimants' case, as set out in the application to strike-out, there is a very high probability that the Defendant will succeed at trial. The Defendant therefore submits that an order for security, in the sum of £115,680 (i.e. £96,400+VAT), should be ordered to protect the public purse, against the risk of unrecoverable costs. The Defendant will provide an up-to-date breakdown of costs, in advance of the hearing of this application, to indicate both those costs that have already been incurred and those anticipated if the claim were to proceed to trial.

KIERON BEAL QC
*Blackstone Chambers*
JOHN BETHELL
*11 King's Bench Walk*
26 August 2021