[2021] JMCA Civ 36

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

SUPREME COURT CIVIL APPEAL NO COA2019CV00066

BETWEEN	**SAGICOR BANK JAMAICA LIMITED**	**APPELLANT**
AND	**HARLEY CORPORATION GUARANTEE TRUST COMPANY LIMITED**	**RESPONDENT**

Christopher Kelman and Litrow Hickson instructed by Myers, Fletcher & Gordon for the appellant

Lijyasu M Kandekore for the respondent

19, 20 May 2020 and 23 July 2021

MCDONALD-BISHOP JA

[1] I have had the privilege of reading, in draft, the reasons for judgment of my sister, Foster-Pusey JA. It is for the reasons she gave that I agreed with the decision and orders of the court made on 20 May 2020.

P WILLIAMS JA

[2] I too have read the draft judgment of my sister Foster-Pusey JA and I agree with the reasons which she gave for the decision we arrived at on 20 May 2020.

FOSTER-PUSEY JA

[3] Sagicor Bank Jamaica Limited ('the bank') is a banking institution which is the successor in title to Citizens Bank Limited. By successive name changes, Citizens Bank Limited's name was changed to Union Bank of Jamaica Limited, then to Royal Bank of

Trinidad and Tobago Bank Jamaica Limited (RBTT), then to RBC Royal Bank (Jamaica) Limited. Sagicor Group Jamaica acquired RBC Royal Bank (Jamaica) Limited in June 2014, and eventually merged it with its existing banking operations, Sagicor Bank Jamaica Limited. In light of the successive name changes involved, reference to "the bank" will be taken to include reference to its predecessor institutions. From time to time, if it will assist in better understanding of the facts, reference may be made to a predecessor institution.

[4] Harley Corporation Guarantee Trust Company Limited ('the respondent') is a company incorporated in Jamaica and has its registered office at 1-C Braemar Avenue, Unit A, Kingston 10 in the parish of Saint Andrew.

[5] On 24 June 2019, Wolfe-Reece J ('the judge'), refused to grant the Bank's application for summary judgment in a claim for breach of contract, brought against it by the respondent, and also refused to strike out the respondent's claim.

Background

[6] By agreement for sale dated 25 February 1995, the bank's predecessor institution, Citizens Bank Limited, in its capacity as mortgagee, sold to the respondent property registered at Volume 1022 Folio 570 in the Register book of Titles, ('the property'). A copy of the registered title was not included in the record of appeal, however, in its pleadings in the court below, the respondent stated that it was endorsed on the title as sole registered proprietor, on 6 March 1995.

[7] The property was not vacant. Mr Etal Walters was occupying it. In an effort to obtain possession, the respondent, on 30 April 1995 served a notice to quit on Mr Walters, requesting him to vacate the property, however he refused to do so.

[8] Mr Walters was not the previous registered owner of the property at the time when it had been sold by the bank by virtue of its powers as mortgagee. He and his wife had entered into an agreement with the previous registered owner, Mr Rudolph Daley, to purchase the property. Mr Daley, in Suit No CL D 162 of 1995 on 13 September 1995,

sued the bank for damages for negligence and/or breach of contract and/or breach of fiduciary duty and/or breach of statutory duty. Mr Daley claimed that the bank sold his property at a gross under-value at a time when it knew, or ought to have known, that he had already sold the property, and at a time when he was servicing his mortgage. He sought, among other things, a declaration that he was entitled to an indemnity and/or contribution from the bank with respect to any or any alleged claim by Mr and Mrs Walters concerning their purchase of the property.

[9] On 22 February 1996, Mr Walters, in Suit No CL W 55 of 1996 sued Mr Daley, the bank and the respondent seeking a declaration that he was the beneficial owner of the property.

[10] The respondent, on 15 May 1996, filed a writ of summons against Mr Walters, and later filed its statement of case on 23 December 1996 in Suit No CL H 094 of 1996, seeking possession of the property.

[11] On 17 October 1996, Mr Walters, in Suit No CL W 369 of 1997 brought a claim in terms similar to Suit No CL W 55 of 1996, against Mr Daley and the bank, seeking a declaration that he was the beneficial owner of the property.

[12] In March 1998, the respondent, in its reply to Mr Walters' defence in Suit No CL H 094 of 1996, asserted that when the respondent's agent enquired of the bank whether the premises would be sold with vacant possession, the bank's agent stated that the property was being sold subject to tenancies. The respondent also pleaded that the bank put it in possession of the property.

[13] The suits were consolidated and were heard by Sykes J (as he then was). On 30 January 2007, Sykes J made several orders, which included setting aside the bank's sale of the property to the respondent, and ordering the registrar of titles to remove the respondent's name from the title as registered proprietor.

[14] Sykes J declared Mr Walters as the beneficial owner of the property, on condition that he paid to the estate of Mr Daley the balance of $35,000.00 which was due and owing. The estate of Mr Daley was indemnified in respect of any damage or loss suffered by Mr Walters. Additionally, the claim brought by the respondent for possession of property and mesne profit was dismissed.

[15] The respondent appealed the decision, and the bank, Mr Daley's estate and Mr Walters were among the respondents to that appeal. The bank also appealed the decision, and Mr Walters, Mr Daley's estate and the respondent were also respondents to that appeal. The appeals were heard on 9, 10, 11 June and 25 September 2009. On 20 December 2010, this court, in allowing the appeal, set aside Sykes J's orders, declared that the respondent was the legal and beneficial owner of the property, and ruled that Mr Walters did not have any right to the property. The matter was remitted to the Supreme Court for assessment of the mesne profits that Mr Walters was to pay to the respondent, and costs of the appeal and in the court below were awarded to the respondent. Mr Daley's claim against the bank, was remitted to the Supreme Court for assessment of damages (see amended certificate of result of appeal dated 23 March 2011 and the case of **Harley Corporation Investment Guarantee Company Limited v Estate Rudolph Daley and Others; RBTT Bank Jamaica Limited v Estate Rudolph Daley and Others** [2010] JMCA Civ 46).

[16] On 27 May 2014, the Privy Council refused Mr Walters' application for permission to appeal, on the basis that his application did not raise an arguable point of law.

Proceedings in the court below

[17] By a claim form and particulars of claim filed on 16 May 2018, the respondent sued the bank for damages for breach of contract in respect of the 25 February 1995 agreement for sale of the property. The respondent pleaded that it had complied with the terms of the agreement for sale, as it paid all the sums that were due and owing, however, the bank failed to comply with the terms of the agreement for sale which required it to give vacant possession of the property. The respondent pleaded that this

resulted in it having to engage in extensive litigation in the Supreme Court, the Court of Appeal, and the Privy Council in order to acquire vacant possession of the property, which eventually occurred by way of a writ of possession dated 10 February 2017 which was issued by the Supreme Court.

[18] In response, the bank filed a defence on 28 August 2018 in which it asserted that the claim was brought outside of the relevant limitation period, and was, therefore, statute barred, as the cause of action had arisen more than six years prior to the commencement of the claim. It also pleaded, in the alternative, that the statements of case did not disclose any reasonable ground for bringing the claim against the bank, and constituted an abuse of the process of the court. The bank stated that the agreement for sale did not include a clause, either express or implied, providing that it would give vacant possession to the respondent, and the respondent was aware that it was selling the property in its capacity as mortgagee under the power of sale contained in a mortgage. Therefore, the loss, damage and expense claimed by the respondent was not caused by any breach by the bank of the agreement between the parties.

[19] On 28 August 2018, the bank filed a notice of application for court orders seeking an order for summary judgment or, in the alternative, an order that the respondent's claim be struck out, with costs of the claim and the application. The application was supported by an affidavit of Andrew Foreman, attorney-at-law and the bank's manager of Legal Services, Group Legal, Trust & Corporate Services.

[20] The grounds on which the bank sought those orders were that the respondent had no real prospect of succeeding in the claim, as it had brought the action outside of the relevant limitation period, and the respondent's statement of case did not disclose any reasonable grounds for bringing the claim. The claim therefore constituted an abuse of the court's process.

[21] On 3 May 2019, counsel for the respondent, Mr Lijyasu M Kandekore, in responding to the affidavit of Andrew Foreman, swore to an affidavit which, before us, the parties could not agree on whether it had been admitted into evidence by the judge.

[22] Both counsel indicated that the judge gave oral reasons, but they were unable to agree on them.

The judge's orders

[23] The notice of application was heard on 10 May 2019. The judge reserved her decision until 24 June 2019 when she ordered that:

> "1. [The bank's] Notice of Application for Court Orders, filed on August 18, 2018, is refused;
>
> 2. [The bank] is granted leave to appeal; and
>
> 3. Costs of the application to [the respondent], to be taxed if not agreed."

The appeal

[24] Displeased with the orders of the judge, the bank filed a notice of appeal on 8 July 2019. The bank has challenged both findings of fact and law.

Grounds of appeal

[25] The bank has based its challenge on the following grounds:

> "a) The learned judge erred in making findings of fact for which there was insufficient evidence. The court, having excluded the Affidavit of Lijyasu Kandekore filed on May 3, 2019, had no evidential basis for a finding that the Respondent was hindered from commencing its claim against the [bank] for breach of contract or of adding it to any of the previously subsisting claims.
>
> b) Having correctly accepted that the cause of action arose in February 1995, the learned judge erred in law in failing to appreciate that there are very limited

circumstances in which the limitation period is deemed to be postponed or extended. None of those exceptions arise on the facts of this case.

c) In finding that this was a case requiring full investigation at trial, the learned judge failed to appropriately apply the summary judgment test whether the Respondent has a real prospect of succeeding on its claim for breach of contract, the sole legal issues being whether the [bank] had a commercial obligation to give vacant possession to the Respondent and, if so whether there was a breach.

d) The learned judge erred by disregarding the evidence that there was no obligation on the [bank] to deliver vacant possession of the property to the Respondent.

e) In considering the [bank's] application to strike out, the learned judge erred in applying a test of "unjust harassment" as opposed to the **Henderson v Henderson** rule of whether the issue confronting the court on this new claim ought properly to have been raised in the previous proceedings."

[26] The orders being sought are:

"(1) The appeal is allowed.

(2) The Order of the Hon. Mrs. Justice Wolfe-Reece made on June 24, 2019 is set aside.

(3) Summary judgment is granted in favour of the [bank].

(4) Costs of the appeal and in the Court below are awarded to the [bank] and are to be taxed, if not agreed.

(5) Such further and other relief as may be just."

Application for a stay of execution of costs order

[27] The bank, pursuant to section 10 of the Judicature (Appellate Jurisdiction) Act and rule 2.11(1)(b) of the Court of Appeal Rules, applied to this court for a stay of execution of the costs order made by the judge in the court below, pending the determination of

this appeal. Simmons JA (Ag) (as she was then) heard the application and granted the order (see **Sagicor Bank Jamaica Limited v Harley Corporation Guarantee Trust Company Limited** [2019] JMCA App 25).

The court's decision on the appeal

[28] On 19 and 20 May 2020, this court heard the appeal, and at the end of the hearing we made the following orders:

> "1. The appeal is allowed.
>
> 2. The order of Wolfe-Reece J made on 24 June 2019 is set aside.
>
> 3. Summary judgment is granted in favour of the [bank] in claim 2018HCV01918 Harley Corporation Guarantee Trust Company Limited v Sagicor Bank Jamaica Limited.
>
> 4. Costs of the appeal and costs in the court below to the [bank] to be taxed if not agreed."

We had also indicated that the written reasons for our decision would follow. In fulfilment of our promise we now do so and apologize for the delay.

Submissions

Ground (a)

[29] Both counsel made submissions which touched on whether the judge had struck out Mr Kandekore's affidavit. I read the affidavit in which Mr Kandekore restated a number of matters covered by the pleadings and other affidavit evidence. It was not necessary for this ground to be considered in any detail, as the content of the affidavit did not take the matter any further.

[30] The real issues of controversy in the appeal are reflected in grounds (b) to (e).

Appellant's submissions-Grounds (b)-(e)

[31] Mr Kelman, counsel for the bank, submitted that the respondent's claim for breach of a simple contract, an agreement for sale of land, was statute barred, as the appropriate limitation period is six years from the date the cause of action arose. He argued that while the respondent was claiming that it was precluded from bringing a claim due to intervening proceedings which terminated at the Privy Council in May 2014, it had not provided any case law indicating that the limitation period could be extended in such circumstances. Counsel emphasized that there are very limited circumstances in which a court will declare that the running of the limitation period is postponed, for example, in certain cases where claimants suffer a disability or there are issues of estoppel. Counsel submitted that no such circumstances arose in the case at bar, and so the judge erred when she found that this was a peculiar case requiring investigation at trial.

[32] Counsel noted that the judge found that the cause of action arose from the date of the alleged breach of contract in or around February 1995. This meant that the latest time by which the respondent ought to have brought the claim was February 2001, and even if the claim related to a specialty contract, giving rise to a 20-year limitation period, which it was not, the claim would have been statute barred by February 2015. The claim was however filed in 2018. He submitted that a claim that is statute barred has no real prospect of success, and amounts to an abuse of the process of the court. Counsel relied on the Limitation Act and **International Asset Services Limited v Edgar Watson** [2014] JMCA Civ 42 per Dukharan JA.

[33] Counsel then turned to the question as to whether the judge correctly applied the law relating to summary judgment applications, and he referred to the principles guiding this court in its review of the exercise of a judge's discretion (see **Hadmor Productions Limited and Others v Hamilton and Another** [1982] 1 All ER 1042 and **The Attorney General of Jamaica v John McKay** [2012] JMCA App 1), as well as the applicable principles when a judge is considering whether to grant an application for summary judgment (see **Winsome Brown v Cleveland Scarlett** [2019] JMCA Civ 41, **Barbican Heights Limited v Seafood and Ting International Limited** [2019] JMCA Civ 1, **ICI**

Chemicals and Polymers Limited v TTE Training Limited [2007] EWCA Civ 725 and **Sagicor Bank Jamaica Limited v Marvalyn Taylor-Wright** [2018] UKPC 12; [2018] 3 All ER 1039 at paragraph [16]).

[34] Counsel submitted that all the substantial undisputed facts were before the court, with no real prospect of oral evidence contradicting them. The issues in the case were purely matters of law in light of the undisputed evidence, the respondent's case was bad in law, and so the judge ought to have granted summary judgment. Furthermore, it was clear from the agreement for sale that the bank had neither an express nor implied obligation to give vacant possession of the property on completion of the sale.

[35] Touching on the bank's application to strike out the respondent's claim on the basis of the doctrine of *res judicata*, counsel submitted that the judge erred in applying a test of unjust harassment instead of the rule laid down in **Henderson v Henderson** (1843) 3 Hare 100. He submitted that the respondent ought to have pursued the issue of the alleged breach of contract at the time when the various issues relating to the property were being litigated among the various parties. He highlighted the principle that this rule applies even if it would have been necessary for the respondent to add the bank to one of the claims being pursued at the time, and there was nothing that prevented the respondent from suing the bank for breach of contract at the time when it was seeking recovery of possession from Mr Walters. Counsel referred to and relied on **Yat Tung Investment Company Limited v Dao Heng Bank Limited and Another** [1975] AC 581 and **Greenhalgh v Mallard** [1947] 2 All ER 255.

Respondent's submissions - grounds (b)-(e)

[36] Counsel for the respondent, Mr Kandekore, urged that, since Sykes J had declared the respondent's title as fraudulent and had ordered it cancelled, while that position remained, the respondent could not have brought an action for possession as it did not have a title. He relied on **J A Pye (Oxford) Ltd and Another v Graham and Another** [2003] 1 AC 419 at 432-433 and **Myra Wills v Elma Roselina Wills** [2003] UKPC 84 at 22. He submitted that it was only after this court had set aside Sykes J's order, and

had declared the respondent the true owner of the property, that it could have brought an action for possession. Counsel stated that Mr Walters pursued a further appeal to the Privy Council which was refused in 2014, and it was only at that time, when all the proceedings had ended, that the respondent could have pursued its breach of contract claim.

[37] In oral submissions, counsel also urged that the appropriate limitation period for the claim the respondent brought was 12 years, since the agreement for sale is a contract by deed, and, furthermore, time would have begun to run as of 2014.

[38] Turning to the question as to whether all the relevant facts were before the court so as to facilitate summary judgment, counsel stated that the facts were intensely contested, there were more facts to be investigated, and this evidence could come from discovery, interrogatories or "many places" at the trial, including cross-examination. He relied on **Harley Corporation Guarantee Investment Company Limited v Estate Rudolph Daley and Others** [2010] JMCA Civ 46, the decision of this court, to demonstrate the complexity of facts. He referred to **McDonald's Corp and Another v Steel and Another** [1995] 3 All ER 615, **Three Rivers District Council v Governor and Company of The Bank of England** [2001] UKHL 16 at 136 and **Wenlock v Moloney and Others** [1965] 1 WLR 1238, at 1244.

[39] On the question as to whether the judge should have struck out the respondent's claim as an abuse of the process of the court, counsel submitted that it would have been foolhardy for the judge to do so, since she had refused the bank's application for summary judgment.

Issues

[40] The issues for determination are as follows:

i. Whether the respondent's claim was statute barred (Ground b);

ii. Whether the bank, under the agreement for the sale of the property was bound by an express or implied term to provide vacant possession to the respondent (Grounds c and d);

iii. In light of the outcome of the issues in (i) and (ii), whether the judge ought to have granted the application for summary judgment (Ground c);

iv. Whether the respondent's claim was barred by the doctrine of res judicata. (Ground e); and

v. In light of the outcome of issues (i) and (iv) whether, in the alternative, the respondent's claim should have been struck out as an abuse of the process of the court (Ground e).

Analysis

Scope of review

[41] A judge at first instance, when determining an application for summary judgment, or to strike out a claim, is vested with discretionary powers to grant or refuse the application. Therefore, an appellate court, in reviewing the exercise of the judge's discretion, ought to be cautious. This court has provided repeated guidance in this regard. In **Winsome Brown v Cleveland Scarlett**, my learned sister, Straw JA, in succinctly outlining the relevant principles, said at paragraph [13]:

> "The grant or refusal of an application for summary judgment is discretionary, as such, this court must not interfere with the exercise of a judge's discretion merely on the ground that the members of this court would have exercised the discretion differently. It is settled that this court will only set aside the exercise of a judge's discretion where it was **(i) based on a misunderstanding of the law or evidence; or (ii) based**

> **on an inference which can be shown to be demonstrably wrong; or (iii) so aberrant that no judge regardful of his duty to act judicially, could have reached it (see Hadmor Productions Ltd and others v Hamilton and another** [1982] 1 All ER 1042, 1046) and **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1 at paras [19] and [20]).” (Emphasis supplied)

Relevant principles

[42] The bank, in its notice of application for court orders at first instance, sought orders for summary judgment..

[43] In determining whether to grant or refuse an application for summary judgment, the test to be applied is whether the claimant or defendant has a realistic prospect of succeeding on the claim or the issues. Part 15.2 of the Civil Procedure Rules (‘CPR’) is applicable. It states:

> “**Grounds for summary judgment**
>
> 15.2 The court may give summary judgment on the claim or on a particular issue if it considers that –
>
> (a) the claimant has no real prospect of succeeding on the claim or the issue; or
>
> (b) the defendant has no real prospect of successfully defending the claim or the issue.
>
> (Rule 26.3 gives the court power to strike out the whole or part of statement of case if it discloses no reasonable ground for bringing or defending the claim.)”

[44] In **Sagicor Bank Jamaica Limited v Taylor-Wright**, a Privy Council decision in an appeal from this court’s judgment, Lord Briggs, addressing the relevant law in relation to summary judgment, said:

> “*Summary Judgment*
>
> 16. Part 15 of the CPR provides, in Jamaica as in England and Wales, a valuable opportunity (if invoked by one or other of

the parties) for the court to decide whether the determination of the question whether the claimant is entitled to the relief sought requires a trial. Those parts of the overriding objective (set out in Part 1) which encourage the saving of expense, the dealing with a case in a proportionate manner, expeditiously and fairly, and allotting to it an appropriate share of the court's resources, all militate in favour of summary determination if a trial is unnecessary.

17. There will in almost all cases be disputes about the underlying facts, some of which may only be capable of resolution at trial, by the forensic processes of the examination and cross-examination of witnesses, and oral argument thereon. But a trial of those issues is only necessary if their outcome affects the claimant's entitlement to the relief sought. If it does not, then a trial of those issues will generally be nothing more than an unnecessary waste of time and expense."

[45] Brooks JA (as he then was) in **ASE Metals NV v Exclusive Holiday of Elegance Limited** [2013] JMCA Civ 37 underscored that:

"[14] The overall burden of proving that it is entitled to summary judgment lies on the applicant for that grant (in this case ASE). The applicant must assert that he believes that the respondent's case has no real prospect of success. In **ED & F Man Liquid Products Ltd v Patel and Another** [2003] EWCA Civ 472, Potter LJ, in addressing the relevant procedural rule, said at paragraph 9 of his judgment:

> '... the overall burden of proof rests upon the claimant to establish that there are grounds for his belief that the respondent has no real prospect of success...'

[15] Once an applicant/claimant asserts that belief, on credible grounds, a defendant seeking to resist an application for summary judgment is required to show that he has a case 'which is better than merely arguable' (see paragraph 8 of **ED & F Man**). The defendant must show that he has 'a 'realistic' as opposed to a 'fanciful' prospect of success'.

…

[18] In carrying out its task, a court considering an application for summary judgment, so far as factual issues are concerned, should not seek to conduct a 'mini trial'. Lord Woolf MR, stated at page 95 of **Swain v Hillman**:

> '...the proper disposal of an issue under Pt 24 does not involve the judge conducting a mini-trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily.'

[19] The court does not, however, have to accept everything which a party places before it. The court in **ED & F Man** established this at paragraph 10 of that judgment:

> 'However, that does not mean that the court has to accept without analysis everything said by a party 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 contemporary documents.** If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable...' (Emphasis supplied)

[20] The rationale for the power given in part 15 is conveniently set out by Lord Woolf MR at page 94 of **Swain v Hillman** where he stated, in part:

> 'It is important that a judge in appropriate cases should make use of the powers contained in Pt 24. **In doing so he or she gives effect to the overriding objectives contained in Pt 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice**. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, **if a claim is bound to succeed, a claimant should know that**

> **as soon as possible.**'" (Emphasis as in the original)

[46] In **Barbican Heights Limited v Seafood and Ting International Limited** which was referred to and relied on by both counsel, Sinclair-Haynes JA noted at paragraph [78]:

> "At page 64 of the Commonwealth Caribbean Civil Procedure, third edition, the learned authors pointed out that:
>
> > '[On] an application for summary judgment the claimant must satisfy the court of the following:
> >
> > > '(a) All substantial facts relevant to the claimant's case, which are reasonably capable of being before the court, must be before the court.
> > >
> > > (b) Those facts must be undisputed or there must be no reasonable prospect of successfully disputing them.
> > >
> > > (c) There must be no real prospect of oral evidence affecting the court's assessment of the facts.'"

[47] The bank had also applied, in the alternative, for the respondent's claim to be struck out. Rule 26.3(1)(b) and (c) of the CPR states:

> "(1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court-
>
> ...
>
> (b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;

(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim;..."

[48] In **International Asset Services Limited v Edgar Watson**, Dukharan JA stated at paragraphs [14] and [15]:

> "[14] It is clear from the judgment of Brooks J, that the main issue he had to determine was whether the limitation period had expired by the time of the institution of the proceedings, and particularly what was the applicable limitation period for the contract in question. It seems also that the appellant argued in defence of its right to bring an action within six years of its demand on the respondent, but in the alternative, the contract ought to have been treated as a "writing obligatory", to which the period being argued by the respondent was not applicable to the contract at issue.
>
> [15] If Brooks J was correct that the six year limitation period was applicable, rule 26.3(b) and/or (c) of the Civil Procedure Rules (CPR) 2002, provides that the court can strike out a claim or statement of case which is an abuse of process or where it discloses no reasonable grounds for bringing, or, defending a claim. **Under the Act, a matter that is statute barred will have no prospect of success at trial and is therefore an abuse of process**." (Emphasis supplied)

[49] The bank also argued that the respondent's claim was barred by the doctrine of *res judicata* and so was also an abuse of the process of the court on this basis.

[50] In **Hon Gordon Stewart OJ and Others v Independent Radio Company Limited and Another** [2012] JMCA Civ 2, Hibbert JA (Ag) stated:

> "[26] The **Henderson v Henderson** form of abuse of process was pronounced by Wigram, V C in **Henderson v Henderson** [1843-60] All ER Rep 378 at 381-382 as follows:

> 'In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of the adjudication by, a court of competent jurisdiction, **the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case.** The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.'" (Emphasis supplied)

He continued to state, highlighting aspects of the Privy Council case of **Yat Tung Investment Company Limited v Dao Heng Bank Limited and Another**, that:

> "[30] In delivering the judgment of their Lordships, Lord Kilbrandon at page 590 stated:
>
> > 'The shutting out of a 'subject of litigation' - a power which no court should exercise but after a scrupulous examination of all the circumstances–is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless 'special circumstances' are reserved in case justice should be found to require the non-application of the rule.'
>
> At page 588 Lord Kilbrandon also stated:

> 'The tendency, today, in all jurisdictions, is so far as possible to simplify the technical rules of pleading. Rules have to exist for the orderly conduct of litigation and especially for the prevention of surprise, which is injustice. But pleading and the rules of pleading are servants, not masters.'"

[51] The question to be considered was whether the respondent ought to have brought its breach of contract claim at the time when the other matters involving the property were being pursued.

[52] In order to make a determination whether the judge erred in refusing to grant summary judgment, I will proceed to examine the bank's contentions as it related firstly, to the limitation defence, and secondly, the question as to whether the bank was contractually bound to give the respondent vacant possession of the property.

Limitation defence

[53] The bank contended in its defence to the respondent's claim, and in its notice of application, that the claim was statute barred. The learned author in the book entitled A Practical Approach to Civil Procedure, 14th edition at paragraphs 7.01 and 7.02 provides useful guidance on the matter of limitation defences. He states:

> "**Expiry of a limitation period provides a defendant with a complete defence to a claim.** Lord Griffiths in **Donovan v Gwentoys** [1990] 1 WLR 472 said, 'the primary purpose of the limitation period is to protect a defendant from the injustice of having to face a stale claim, that is a claim with which he never expected to have to deal'. If a claim is brought a long time after the events in question, the likelihood is that evidence which may have been available earlier may have been lost, and the memories of witnesses who may still be available will inevitably have faded or become confused. Further, it is contrary to general policy to keep people perpetually at risk.
>
> **Limitation is a procedural defence. It will not be taken by the court of its own motion, but must be specifically set out in the defence**...Time barred cases rarely go to trial.

> If the claimant is unwilling to discontinue the claim, it is usually possible for the defendant to apply successfully for the claim to be struck out ... as an abuse of the court's process." (Emphasis supplied)

[54] In **Attorney General of Jamaica v Arlene Martin** [2017] JMCA Civ 24, P Williams JA at paragraph [36] pointed out that:

> "Although the defence that a limitation period has expired is a procedural defence, it is one that usually has to be raised as such and be resolved at trial. However, it is permissible for the defendant to apply to have the claim, or the relevant parts of it struck out as being an abuse of process. **This however will only be allowed in a case where the expiry of the limitation period is clearly established and unanswerable.**"

She continued at paragraph [39]:

> "The correct approach to be taken when calculating the limitation period was usefully discussed in **Blackstone's Civil Practice 2012** at paragraph 10.13:
>
> > 'The rules on accrual fix the date from which time begins to run for limitation purposes. Lindley LJ in **Reeves v Butcher** [1891] 2 QB 509 said: 'it has always been held that the statute runs from the earliest time at which an action would be brought.' In **Read v Brown** (1888) 22 QBD 128 Lord Esher MR defined 'cause of action as encompassing every fact which it would be necessary for the [claimant] to prove, if traversed, in order to support his right to the judgment of the court. **In other words, time runs from the point when facts exist establishing all the essential elements of the cause of action**.'" (Emphasis supplied)

[55] Further in **Medical and Immunodiagnostic Laboratory Limited v Dorett O'Meally Johnson** [2010] JMCA Civ 42, K Harrison JA underscored at the following paragraphs:

> "[4] Now, the law makes it abundantly clear that an action shall not be commenced after the expiration of six years from the date on which the cause of action accrued: see the Limitation of Actions Act. A 'cause of action' has been defined as 'every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court': **Read v Brown** [1888] 22 QBD 128, 131.
>
> [5] The general rule in contract is that the cause of action accrues not when the damage is suffered but **when the breach occurred. Consequently, the limitation period runs from the time the contract is broken** and not from the time that the resulting damage is sustained by the plaintiff." (Emphasis supplied)

[56] The cause of action in this case arose some time in March 1995. However, it was not until 16 May 2018 that the respondent initiated its claim for breach of contract against the bank. I agreed with the submissions of counsel for the bank that the respondent's claim was statute barred.

[57] Counsel for the bank, was also correct that even if the agreement for sale could be considered a specialty contract, (which it is not), pursuant to section 52 of the Limitation of Actions Act, which provides a limitation period of 20 years, that period had long elapsed. In **Citrus Development Company Limited v Development Bank of Jamaica Limited** [2018] JMCA App 41, Straw JA (Ag) (as she was then) gave useful insight as to the meaning of speciality contracts. She noted:

> "[38] 'Speciality' and 'bond' are also given in the following definitions:
>
> Speciality – 'A somewhat archaic term used to refer to a contract made by deed (q.v.). A specialty debt is one due under a deed …'
>
> [39] The Halsbury's Laws of England, volume 68 (2016), provides a list of examples of specialities at page 976. These include: a bond, a deed, a covenant, a statute and also a foreign contract under seal. It also states that 'speciality' is often used in the sense of meaning a speciality debt, that is

> an obligation under a deed securing a debt or a debt due from the Crown or under statute."

[58] The agreement for sale of the property was certainly not a specialty contract, and even if it was, more than 20 years had passed before the respondent brought the claim for breach of contract in 2018.

[59] I did not accept the submissions of counsel, Mr Kandekore, that the appropriate limitation period was 12 years and that time began running from 2014. I accepted the submissions of counsel for the bank that the appropriate limitation period in this case was six years. This is because the cause of action is for breach of contract.

[60] The limitation period for bringing a claim for breach of contract was also usefully set out by Brooks JA (as he was then) in **Sherrie Grant v Charles McLaughlin and Collin Smith** [2019] JMCA Civ 4. He said:

> "[30] It is well established in this jurisdiction that actions grounded in tort **and in contract are time barred after the expiry of six years.** The authority usually cited for that principle, in the case of tort, is **Melbourne v Wan** (at page 135 F). This court also discussed the principle in **Bartholomew Brown and Another v Jamaica National Building Society** [2010] JMCA Civ 7, and explained that **the limitation period for both contract and tort is six years.** K Harrison JA, in delivering the judgment of the court stated, in part at paragraph [40] that:
>
> > '… actions based on contract and tort (the latter falling within the category of 'actions on the case') are barred by section III, subsections (1) and (2) respectively of the [English Limitation of Actions Act 1623 (21 Jac I Cap XVI), which has been received into Jamaican law] after six years (see **Muir v Morris** (1979) 16 JLR 398, 399, per Rowe JA).'" (Emphasis supplied)

He continued:

"[31] Section 3 of the Limitation Act of 1623 is important for this analysis. It states:

> 'And be it further enacted, That all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, action for trover, and replevin for taking away of goods and cattle, all actions of account, and upon the case, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty; all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding and imprisonment, or any of them which shall be sued or brought at any time after the end of this present session of parliament, shall be commenced and sued within the time and limitation hereafter expressed, and not after (that is to say) (2) **the said actions upon the case (other than for slander) and the said actions for account, and the said actions for trespass, debt, detinue and replevin for goods or cattle, and the said action of trespass, *quare clausum fregit*, within three years next after the end of this present session of parliament, or within six years next after the cause of such actions or suit, and not after**;…'" (Emphasis as in the original)

[61] Was this a peculiar case? Counsel for the respondent has argued that the respondent's delay in bringing the claim was due to the extensive litigation in which it was forced to engage due to the bank's failure to provide vacant possession upon completion of the agreement. However, as the bank has submitted, there is no case law or statute allowing for an extension of the limitation period in such circumstances. In any event, the extensive litigation did not prevent the respondent from bringing the claim for breach of contract.

[62] In all the circumstances, the expiry of the limitation period was clearly established and unanswerable. The respondent had no real prospect of succeeding on the claim as it was statute barred.

Vacant possession

[63] On the question concerning vacant possession, the respondent contended that the bank was obliged to provide vacant possession of the property upon completion of the agreement for sale. The bank, on the other hand, argued that there were no express or implied terms in the agreement for sale which required it to provide vacant possession.

[64] The first points of reference on this issue are the provisions of the agreement for sale which state in part:

> "COMPLETION: On or before the expiration of thirty (30) days from the signing hereof on payment of the balance purchase price in exchange for the registrable instrument of Transfer and Duplicate Certificate of Title.
>
> **POSSESSION: Upon payment of the full purchase price**
>
> ...
>
> SPECIAL CONDITIONS
>
> 6. The Vendor is selling as mortgagee and will give no covenants for Title other than those implied by its conveying as such.
>
> 7. The only covenant the Vendor will enter into is a covenant that it has not encumbered the said property and the Vendor is not liable hereunder to rectify, amend, modify or correct any restrictive covenant (if any) endorsed on the Duplicate Certificate of Title.
>
> 8. The property shall be sold as the same shall stand at the time of signing hereof without reference to extent or condition respectively and the Purchasers shall take

> the property in the state and condition in which the same may be actually found." (Emphasis supplied)

[65] Having examined these specific sections and the agreement as a whole, it is clear that the agreement for sale did not expressly provide for vacant possession. At the section dealing specifically with possession, all that is stated is that possession would be given "upon payment of the full purchase price".

[66] However, that was not the end of the matter, because even where the obligation to provide vacant possession is not expressly stated, there are circumstances in which it may be argued that there was an implied obligation to do so. In the case at bar, the special conditions were useful on this issue. At special condition 6, the agreement stated that the bank was selling in the capacity of a mortgagee. When this occurs, it is reasonably foreseeable that there may well be challenges with tenancies or even mortgagors being unwilling to give up occupation of the property.

[67] Furthermore, special conditions 7 and 8 seemed to suggest that if issues arose, such as the question of vacant possession, the bank was not obliged to rectify them, and also provided that the respondent agreed to take the said property as it stood. Although counsel for the respondent argued that special condition 8 did not touch and concern the issue of vacant possession, I believe that all three special conditions, when read together, made it clear that the bank did not have an obligation to provide vacant possession of the property. The documentary evidence, therefore, contradicted the factual assertion which the respondent made.

[68] In any event, the respondent's claim that it was entitled to vacant possession appears insincere. In its reply in Suit No CL H 094 of 1996, the matter in which the respondent had sued Mr Walters to recover possession of the property, the respondent stated:

> "9. That [the respondent's] agent enquired of the Jamaica Citizens Bank whether the premises would be sold with vacant

> possession and **the Bank's agent responded that the premises would be subject to tenancies**.
>
> 10. That [the respondent] agreed to buy and the Bank agreed to sell the said premises to [the respondent] for Two Hundred Thousand Dollars ($200,000.00) under power of sale contained in mortgage No. 654674 dated February 11, 1991, from Rudolph Daley." (Emphasis supplied)

[69] After the respondent pleaded as above in its reply, it did not provide any explanation for the contrary position which it took, in suing the bank for breach of contract on the basis that it failed to provide vacant possession. Furthermore, the respondent, after the determination of the extensive litigation in which it was involved concerning the property, involving the bank, as well as Mr Daley and Mr Walters, was declared as the owner of the property. In addition, the claim was returned to the Supreme Court for the assessment of mesne profits, which Mr Walters, who had occupied the property, was to pay to the respondent. This court had also awarded the respondent costs in the appeal and in the court below. This meant that Mr Walters was to have compensated the respondent for the period of time when it was wrongfully deprived of the possession of the property.

[70] Contrary to the respondent's submissions, there was no dispute as to the terms of the agreement for sale, and there were no facts that needed to be brought out at trial for the court to determine the issues. Instead, this was a matter in which the substantial facts relevant to the respondent's case were before the court, and were undisputed with no reasonable prospect of them being successfully disputed. There was also no real prospect of oral evidence affecting the court's assessment of the issues.

[71] In all the circumstances, the bank had shown that the respondent did not have a real prospect of succeeding on its claim for breach of contract.

[72] In light of the fact that -

a. the respondent's claim was statute barred; and

b. there was no express or implied term in the agreement for sale for the bank to give the respondent vacant possession of the property,

the judge erred in law in refusing to grant the bank's application for summary judgment.

Striking out

[73] On the same bases outlined above, which ought to have led the judge to grant summary judgment to the bank, the bank was entitled, in the alternative, to have the respondent's claim struck out, as there was no reasonable basis for the respondent to have brought the claim.

[74] The bank was also correct that the respondent's claim amounted to an abuse of the process of the court in light of the principles outlined in **Henderson v Henderson**.

[75] The respondent ought to have brought the claim for breach of contract at the same time that it was suing Mr Etal Walters to recover possession of the property. The matter would have then fallen to be determined in the context of the other matters surrounding the property, and involving the bank's predecessor institutions and the former registered owner of the property. The respondent should have brought forward its whole case at that time, and it was an abuse of the process of the court for it to have waited until 2018 to sue the bank for breach of contract.

[76] In all the circumstances, the judge erred in law when she refused to grant summary judgment or strike out the respondent's claim.

[77] It was for the above reasons that I agreed that the appeal should be allowed.