[2019] JMSC Civ 132

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2015HCV03124

BETWEEN	**FREDERICK FAGAN**	**CLAIMANT**
AND	**KENNETH PERRY**	**DEFENDANT**

Mrs. Tamara Riley-Dunn and Ms. Melissa Watson instructed by Nelson-Brown, Guy & Francis for the Claimant/Respondent.
Mr. Canute Brown instructed by Brown Godfrey & Morgan for the Defendant/Applicant.

Heard: May 9, 2019 and June 13, 2019.

Civil procedure – Application for summary judgment – Rule 15.2 of the Civil Procedure Rules.

Civil Procedure – Amendment of statement of case before Case Management Conference – Application to strike out statement of case – Rule 26.3(1) of the Civil Procedure Rules – Whether additional claims amount to new causes of action – Whether additional claims are statute barred.

MASTER N. HART-HINES

[1] On May 9, 2019 I heard an application for summary judgment, filed on behalf the defendant on February 27, 2019. In the alternative, the defendant sought an order that parts of the amended particulars of claim be struck out on the basis that the amendments represented fresh causes of action which are statute barred and which are an abuse of the process of the court. I delivered an oral judgment on June 13, 2019 and promised to put my reasons in writing. This judgment is the fulfilment of that promise.

BACKGROUND

[2] By claim form filed on June 18, 2015 the claimant alleges that property previously registered in his name was fraudulently transferred into the defendant's name by virtue of a conspiracy between the defendant and his servants and/or agents and persons unknown. The subject property is located at 27 Paisley Avenue, Palmers Cross in the parish of Clarendon and is comprised in Certificate of Title registered in Volume 1333 Folio 804 of the Register Book of Titles. An instrument of transfer purportedly signed by the claimant as vendor, was registered on July 15, 2004 thereby procuring the endorsement of the defendant's name on the said Certificate of Title. The claimant denies that he signed a sale agreement and the instrument of transfer which facilitated the fraudulent transfer of his legal interest in the property to the defendant. The allegation of fraud was particularised as follows at paragraph 8 of the amended particulars of claim:

a) Making a false declaration contrary to the Voluntary Declaration Act
b) Conspiring with others to procure the making of false declarations contrary to the provisions of the Voluntary Declaration Act
c) Whether personally or through her agents preparing or causing to be prepared a fraudulent Vesting Instrument
d) Uttering or causing to be uttered to the Registrar of Titles a fraudulent vesting instrument and causing said instrument to be lodged consequently allowing the subsequent transfer of the said property to the Defendant
e) Fraudulently obtaining an original Duplicate Certificate of Title registered in the name of the Defendant
f) Whether personally or through his agents and/or servants forged the name of the Claimant.

[3] In his amended particulars of claim filed on May 29, 2018, the claimant pleaded that the defendant was his tenant at the time an oral agreement for sale of the property was made and that the defendant also owes rent between 2002 and May 2018, and continuing, which totalled JMD$2,256,000.00. The claimant also pleaded that the defendant further owes USD$5,000.00 which represents the value of tools sold to the defendant in September 2002. Though the original particulars of claim also pleaded that the defendant owed USD$5,000.00 for tools sold to him, no remedy was sought in respect of the

alleged breach of contract. In his amended particulars of claim, the claimant now seeks the following remedies:

> *"AND THE CLAIMANT CLAIMS*
>
> 1. *A Declaration that the Defendant whether personally or through his agents and/or servants fraudulently obtained and procured that vesting instrument/transfer bearing number 1309331 registered on July 15, 2004.*
> 2. *A Declaration that the Defendant fraudulently uttered the said vesting instrument/transfer bearing number 1309331 registered on July 15, 2004 knowing the same to be fraudulent.*
> 3. *A Declaration that the Defendant personally or through his agents and/or servants fraudulently and dishonestly procured the endorsement of the Defendant's name on the original Certificate of Title being all that parcel of land comprised in Certificate of Title registered at Volume 1333 Folio 804 of the Register Book of Titles.*
> 4. *Payment of the sum of USD$5,000.00*
> 5. *Payment of the sum of $2,256,000.00 and continuing*
> 6. *General Damages*
> 7. *Interest on said sum at such rate and for such period as this Honourable Court think fit, pursuant the Law Reform Miscellaneous Provisions) Act*
> 8. *Costs."*

[4] In his defence filed on March 8, 2018, the defendant alleges that he paid the full purchase price to the claimant and he exhibits a sale agreement dated March 30, 2004, purporting to bear the signatures, addresses and TRN numbers of the parties and indicating a purchase price of JMD$500,000. The completion date is indicated as November 30, 2002 and the attorneys-at-law with carriage of sale were indicated as Scott Bhoorasingh & Bonnick.

[5] There are several facts in dispute between the parties. The particulars of claim and the defence delineate the factual disputes as follows:

i. The claimant alleges that in September 2002 an oral agreement was entered into with the defendant to sell the property to the defendant. The purchase price is in dispute, with the claimant alleging that it was JMD$1,800,000.00 and the defendant alleging that it was JMD$900,000.00. The claimant denies signing an agreement for sale.

ii. On February 15, 2002, JMD$800,000.00 was paid towards the purchase of the property. The receipt in respect of the payment is accepted by both parties. It is however disputed that a further JMD$100,000 was ever paid to the claimant.

iii. The defendant alleges that on March 30, 2004, the claimant signed the agreement for sale.

iv. On July 15, 2004 an instrument of transfer was registered in respect of the alleged purchase, and the certificate of title issued to the defendant.

v. In June 2012 the claimant alleges that he discovered the fraud when he decided to make checks at the Office of the Registrar of Titles. Thereafter a caveat was lodged against the title. Criminal proceedings ensued which were discontinued on or around April 2015 by the claimant who opted to pursue this claim in order to have the alleged fraudulent transfer cancelled.

vi. On June 18, 2015 the claimant filed the claim and particulars of claim in respect of the alleged fraudulent transfer of title.

vii. On May 29, 2018 the claimant filed the amended particulars of claim adding claims for the rent due from 2002 and for the monies owed in breach of the contract for sale of tools.

THE APPLICATION

[6] The application was filed on February 27, 2019, on the date that the matter was first fixed for Case Management Conference. In support of his application, the defendant swore to an affidavit, in which he sought to explain why the claim is unlikely to succeed, and in which he sought to explain his defence in some detail. The application sets out the orders sought as follows:

1. *"Summary Judgment against the Claimant on the Amended Particulars of Claim pursuant to Part 15.2(a).*
2. *Alternatively, paragraphs 4 and 5 of the Claimant's Amended Particulars of Claim filed on the 29th of May 2018 be struck out pursuant to Rule 26.3(1)(b)(c) of the Civil Procedure Rule 2002 (as amended in 2006);*
3. *Costs to the Defendant;*
4. *Such further and other relief as this Honourable Court deems fit."*

The grounds on which the application is made are as follows:

a) *"Pursuant to Rule 15.2 (b) the Claimant has no real prospect of succeeding on the claim or the issue;*
b) *The Claimant has failed to put forward a prima facie case especially in relation to the allegations of fraud by the Defendant.*
c) *Pursuant to Rule 15.2 of the Civil Procedure Rules, the court must seek to give effect to the overriding objective where it exercises any discretion given to it by the Rules or interprets any rules.*
d) *Pursuant to Part 26.3(a) the court may strike out a statement of case or part of a statement of case if it discloses no reasonable grounds for bringing or defending the claim.*
e) *Pursuant to Part 26.3(b) the court may strike out a statement of case or part of a statement of case if it appears to the court that it is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings.*

f) At the time the Further Amended Particulars of Claim was filed the Limitation period for bringing a claim for breach of had expired pursuant to section 46 of the Limitation of Actions Act Jamaica."

[7] In response to the application, the claimant swore to an affidavit which was filed on April 30, 2019. Therein, the claimant repeated the allegations of fraud contained in his statement of case and averred that there were issues of credibility to be decided at a trial.

SUBMISSIONS ON BEHALF OF THE APPLICANT

[8] Learned counsel Mr. Brown submitted that the claimant's statement of case included a vague statement of the alleged fraud relating to the transfer of the title to the defendant. Counsel submitted that there are no particulars of the fraud initiating the instrument of transfer, and that the failure to particularise the fraud is a ground on which summary judgment may be entered for the defendant pursuant to rule 15.2 of the Civil Procedure Rules (hereinafter "CPR"). Mr. Brown submitted that in conducting my assessment of whether summary judgment ought to be granted to the defendant, I must also give consideration to the recanting by the claimant of a previous admission that he received $100,000 towards the purchase price. This he said demonstrated that the claimant's case did not have a realistic prospect of success.

[9] Counsel also submitted that the claims in respect of the value of tools (USD$5,000.00) and the rent owed (JMD$2,256,000.00) are statute barred. As the cause of action in relation to the contractual debt accrued in 2002, that claim became statute barred six years later. Likewise, the claim for rent owed in 2002 became statute barred twelve years later. Consequently, Mr. Brown submitted that these claims should be struck out pursuant to rule 26.3(1)(b) or 26.3(1)(c) of the CPR, on the ground that they are an abuse of the process of the court or, there are no reasonable grounds for bringing the claim.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

[10] Learned counsel Mrs. Riley-Dunn submitted that the claim in respect of the fraud is adequately pleaded. Counsel further submitted that the claims for the

value of the tools sold and for the outstanding rent were not statute barred because time did not commence running until the date of discovery of the fraud in respect of the transfer of the property. Essentially, counsel submitted that it was only when the fraud was discovered that the claimant became aware that the defendant had no intention of honouring his contractual agreements in relation to the purchase of the property and purchase of the tools, and in relation to the payment of rent. Counsel submitted that it was from that point (in June 2012) that the respondent became entitled to file the claims. Counsel submitted that there was an ongoing monthly obligation to pay rent and that claim was therefore not statute barred. It was also submitted that the six-year limitation period in respect of the debt of USD$5,000.00 would not expire until June 2018.

ISSUES

[11] I have identified the following issues for determination in this application:

1. Whether the claimant's statement of case is sufficiently particularised;
2. Whether an inconsistency between the particulars of claim and the amended particulars of claim suggested that the claimant's case had no realistic prospect of success;
3. Whether new claims were added which are statute barred.

THE LAW

[12] The application before this court seeks to invoke the court's powers under rule 15.2 and rule 26.3(1) of the CPR. The CPR provides the court with the power to strike out a hopeless claim or defence, or to enter summary judgment where a claim or defence can be shown to have no real prospect of success and where there is no compelling reason why the case should be disposed of at trial. In deciding whether or not to exercise my powers under rules 15.2 and 26.3(1), I must assess the strength of the claims and I am guided by the principles enunciated in case law and the overriding objective.

[13] I thank counsel for their industry in preparing detailed submissions and for the authorities supplied to me. Counsel should feel assured that I have

considered all the authorities, though reference is only made herein to some of those cited to me, and to others which I have found in my own research.

The need for the claimant's statement of case to be sufficiently particularised

[14] Part 8 of the CPR and case law on this area make it clear that a claim must be sufficiently particularised. Rules 8.7(1), 8.9 and 8.9A provide as follows:

> *"**8.7(1)** The claimant must in the claim form (other than a fixed date claim form)*
> *(a) include a short description of the nature of the claim;*
> *(b) specify any remedy that the claimant seeks (though this does not limit the power of the court to grant any other remedy to which the claimant may be entitled);*
> *(c) ….; and*
> *(d)….*
>
> *"**8.9(1)** The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies.*
> *(2) Such statement must be as short as practicable.*
> *(3) The claim form or the particulars of claim must identify or annex a copy of any document which the claimant considers is necessary to his or her case.*
> *(4) Where the claim seeks recovery of any property, the claimant's estimate of the value of that property must be stated.*
> *(5) The particulars of claim must include a certificate of truth in accordance with rule 3.12.*
>
> *"**8.9A** The claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission."*

[15] In ***Akbar Limited v Citibank NA*** [2014] JMCA Civ 43, Phillips J.A. considered the issue of whether a party had specifically pleaded his claim for special damages, and observed at paragraph 64 that:

> *"[T]he important point is that the defendant must not be taken by surprise. The defendant is entitled to know the type of claim being made by the claimant and the amount that is being claimed."*

[16] Whether the claimant's statement of case is sufficiently particularised is be determined based on an analysis of the nature of the claim. I will address this issue below at paragraphs 36 to 38.

The test for the granting of summary judgment

[17] The test for granting summary judgment is whether the relevant statement of case discloses a "real prospect of success". This is considered having regard

to the overriding objective of dealing with the case justly. It is settled that when considering an application for summary judgment, the court is required to conduct an assessment of the merits of the respondent's statement of case, and determine whether the respondent's prospect of successfully establishing the facts he relies on, is "realistic" and not "fanciful" or "merely arguable".

[18] Rules 15.2, 15.6(1) and 26.3(1) of the CPR provide as follows:

> *"**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."*
>
> *"**15.6 (1)** On hearing an application for summary judgment the court may-*
> *(a) give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end;*
> *(b) strike out or dismiss the claim in whole or in part;*
> *(c) dismiss the application;*
> *(d) make a conditional order; or*
> *(e) make such other order as may seem fit. ..."*
>
> *"**26.3(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*
> *(a) …;*
> *(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…."*

[19] It is also settled that in considering a summary judgment application, the court is not obliged to accept written evidence at face value and may disregard evidence which is incredible. A court is required to conduct a careful assessment of the case, without conducting a mini-trial. In ***Swain v Hillman and another*** [2001] 1 All ER 91 Lord Woolf MR in referring to Part 24 of the English CPR, which is equivalent to Part 15 of our CPR, stated at page 95:

> *"...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."*

[20] The law is also clear that were there are triable issues or issues of credit to be assessed, the most appropriate forum for the resolution of those issues is in a trial court. In such circumstances, summary judgment should be refused. I have given consideration to the cases referred to me by Mrs. Riley-Dunn on this point, and in particular to the case of ***Doncaster Pharmaceuticals Group Ltd & Ors v The Bolton Pharmaceutical Company 100 Ltd*** [2006] EWCA Civ 661. At paragraph 5 of the judgment, Mummery LJ spoke of the benefits of a determination at trial, and at paragraph 17 he cautioned against granting summary judgment where there are issues which were best determined at trial. He said:

> *"5. [A trial Judge] will usually have a better grasp of the case as a whole, because of the added benefits of hearing the evidence tested, of receiving more developed submissions and of having more time in which to digest and reflect on the materials [provided]"….*
>
> *"17. It is well settled by the authorities that the court should exercise caution in granting summary judgment in certain kinds of case. The classic instance is where there are conflicts of fact on relevant issues, which have to be resolved before a judgment can be given (see Civil Procedure Vol 1 24.2.5). A mini-trial on the facts conducted under CPR Part 24 without having gone through normal pre-trial procedures must be avoided, as it runs a real risk of producing summary injustice".*

[21] The court should have regard to the pleadings and affidavits filed in support of or in response to the application, and the court should also consider whether the case is capable of being supplemented by evidence at trial (see ***Royal Brompton Hospital NHS Trust v Hammond*** [2001] EWCA Civ 206). Mrs. Riley-Dunn indicated that it was counsel's intention to rely on the expertise of a forensic document examiner at trial and relied on dictum in ***Bolton***, at paragraph 18 where Mummery LJ said:

> *"18. The court should also hesitate about making a final decision without a trial where … reasonable grounds existed 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."*

[22] The guidance from the authorities is that merely making an allegation of fraud is insufficient to cause a case to proceed to trial. However, where there is real substance in the allegations of fraud made, which are disputed and which are incapable of being substantiated by inference from documentary or written evidence during the summary judgment application, it is inappropriate to enter

summary judgment. The case of ***Fashion Gossip Ltd v Esprit Telecoms UK Ltd & Ors*** [2000] EWCA Civ 233 concerned a claim for unjust enrichment and involved allegations of fraudulent or deceitful misconduct. Though Lord Justice Judge was careful to say that he was not seeking to lay down any rule of general application that it may never be appropriate to enter summary judgment in a case involving allegations of fraud, he said that he was

> *"troubled about entering summary judgment in a case in which the success of the claimant's case involves, as this one does, establishing allegations of dishonesty and fraud, which are strongly denied, and which cannot be conclusively proved by, for example, a conviction before a criminal court".*

Whether an amendment is made in good faith or is disingenuous

[23] Mr. Brown submitted that the amendment of the claimant's statement of case in relation to the receipt of $100,000, was done after he had attended mediation, and this was made in bad faith. Below, at paragraphs 39 to 45 I will address this specific issue of whether the claimant resiled from a previous allegation of fact and whether this appears to have been made in good faith.

[24] I am guided by the decision in ***Index Communications v Capital Solutions and others*** [2012] JMSC Civ. No. 50, where Mangatal J considered whether an amendment of a defence was to be disallowed on the basis that it was made in bad faith or amounted to "backtracking on allegations of fact". In summary, Mangatal J considered the following:

1) the original pleadings, previous amendments, and the nature and number of proposed amendments;
2) whether an explanation was offered for the proposed amendments;
3) whether the amendments served some useful purpose;
4) whether a reason was offered as to why the claimant should be allowed to make the proposed (further) amendments; and
5) whether the claimant put forward evidence that would lead to the view that it had a real prospect of successfully arguing its case based on the proposed amendments.

[25] The learned judge concluded that by virtue of the proposed amendments, the claimant was presenting an "entirely different case" (paragraph 58), and that this was quite disingenuous and insincere (paragraph 65). Applying principles discussed in ***Moo Young and another v Chong and others*** (2000) 59 WIR 369, she found that the amendments had no real prospect of succeeding at trial, and that they were not necessary in order to decide the real issues in controversy between the parties, and they would have an adverse effect on the defendants. Mangatal J said at paragraph 49 that an application to amend a statement of case "*to plead something contrary to a specific allegation of fact previously made… [was] impermissible and …. [A] court will not countenance an application for an amendment not made in good faith*".

Amendments to a statement of case after the end of a limitation period

[26] Rule 20.1 provides that a party may amend a statement of case at any time before the Case Management Conference without the court's permission unless the amendment is one to which rule 19.4 or rule 20.6 applies. Rule 19.4 concerns the changing of parties after the end of a relevant limitation period and rule 20.6 concerns an amendment after the end of a relevant limitation period to correct a mistake as to the name of a party. There is no provision in the CPR for the amendment of a statement of case to add a new cause of action after the end of a limitation period. I therefore considered authorities on when a statute barred claim might be struck out, and when a proposed amendment of a statement of case might be permissible even after the claim is statute barred.

[27] If there is a factual dispute as to the date a cause of action arose, or if the date when a claim became statute barred is obscured, for example, because of an acknowledgement of a debt, case law suggests that the matter should proceed to trial (see ***Div. Deep Ltd and others v Topaz Jewellers and another*** [2017] JMCC Comm 26). However, where it is clear that a claim is statute barred, the court may strike out the claim, having regard to the overriding objective of saving expenses and ensuring that cases are dealt with expeditiously and fairly. In ***Ronex Properties Limited v John Laing***

Construction Limited and others (Clarke, Nicholle and Marcel (a firm) third parties) [1982] 3 ALL ER 961, the England and Wales Court of Appeal indicated that there were two options available to a defendant who believed the claim against him was statute barred. Such a defendant could plead the limitation defence, or alternatively, seek to strike out the claim. At page 966 Donaldson LJ said:

> *"Where it is thought to be clear that there is a defence under the Limitation Act, the defendant can ...* ***in a very clear case*** *… seek to strike out the claim on the ground that it is frivolous, vexations and an abuse of the process of the court and support his application with evidence…". (My emphasis)*

[28] Prior to the CPR, courts construed the provisions of the Civil Procedure Code as preventing a plaintiff from amending his claim by adding fresh causes of action which had, since the issue of the writ, become statute barred. The same principles apply under the CPR. An amendment of a statement of case might be permissible after the claim is statute barred, provided that the amendment does not amount to an entirely new or distinct cause of action. Where an amendment seeks to add a cause of action after the end of a relevant limitation period, a careful assessment must be conducted to determine whether that which has been added is a new or fresh claim, or whether it substantially arose from the same incident as the cause of action previously pleaded.

[29] In the pre-CPR decision of ***Moo Young and another v Chong and others*** (2000) 59 WIR 369, Harrison JA said at pages 375 to 376:

> *"In the instant case, the amendment granted may be permissible if:*
> *(1) it is necessary to decide the real issues in controversy, however late,*
> *(2) it will not create any prejudice to the appellants, and is not presenting a 'new case' to the appellants,*
> *(3) is fair in all the circumstances of the case, and*
> *(4) it was a proper exercise of the discretion of the trial judge on the state of the evidence.*
>
> *However late may be the application for amendment, it should be allowed in the above circumstances if it will not injure or prejudice the applicant's opponent. Different considerations, however, govern each case, and it is a matter in the discretion of the trial judge."*

[30] The post-CPR decision in ***The Attorney General of Jamaica and Aaron Hutchinson v Cleveland Vassell*** [2015] JMCA Civ 47 is also instructive. The Court of Appeal gave consideration to the cases of ***Lloyds Banks Plc v Rogers*** (1996) The Times, 24 March 1997, ***Savings and Investment Bank Ltd v Fincken*** [2001] EWCA Civ 1639, and ***The Jamaica Railway Corporation v Mark Azan*** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 115/2005, judgment delivered 16 February 2006, and distilled the relevant principles. At paragraphs 17 and 22, Dukharan JA promulgated the following guidance:

> *"17. In assessing whether a proposed amendment in fact amounts to a new cause of action, it is necessary to consider the statement of case as a whole. To determine whether a proposed amendment introduces a new cause of action for the purposes of the Act, it is necessary to examine the duty alleged, the nature and extent of the breach alleged and the nature and extent of the damage claimed. If the new plea introduces an essentially distinct allegation, it will be a new cause of action….*
>
> *"22. …*
>
> *a. If the new plea introduces an essentially distinct allegation, it will be a new cause of action. If factual issues are in any event going to be litigated between the parties, the parties should be able to rely upon any cause of action which substantially arises from those facts.*
>
> *b. Where the only difference between the original case and the case set out in the proposed amendments is a further instant of breach, or the addition of a new remedy, there is no addition of a new cause of action.*
>
> *c. A new cause of action may be added or substituted if it arises out of the same facts, or substantially the same facts, as to give rise to a cause of action already pleaded."*

[31] The Court of Appeal held that though new causes of actions of false imprisonment and malicious prosecution were added, such causes of action were permitted as they arose out of substantially the same facts which gave rise to the cause of action for assault, previously pleaded, and it was in the interests of justice to allow the amendment.

<u>The operation of the Limitation of Actions Act and when causes of action accrue</u>

[32] The **Limitation of Actions Act** ("the Act") was enacted in 1881. For the purposes of this decision, the Act indicates the limitation periods in respect of (1) actions arising from a breach of a simple contract (section 46), and (2)

actions to recover land or to recover rent, including where fraud is alleged (sections 3, 25 and 27). Intrinsically linked to the relevant limitation period is the need to the identify when a cause of action accrues. In ***Read v Brown*** (1888) 22 QBD 128, Lord Esher MR said "*… time runs from the point when facts exist establishing all the essential elements of the cause of action"*.

(a) actions to recover land or to recover rent

[33] Sections 3 and 25 of the Act state that the twelve-year limitation period starts to run when the right to make entry or to bring an action shall have first accrued to the previous owner or the current owner of the land. The cause of action would therefore arise when an interference with the entitlement to, or, enjoyment of land, (such as an act of trespass or nuisance) first occurred. Similarly, the cause of action in respect of rent would arise on the first occasion that there is a failure or refusal to pay rent.

[34] Where fraud is alleged, section 27 of the Act states that the right to bring a suit for the recovery of land or rent shall be deemed to have first accrued, when the fraud might first have been discovered or is discovered. Section 27 therefore creates an exception to sections 3 and 25 and suspends the operation of the twelve-year limitation period in those sections until the date of the discovery of the concealed fraud, or, the date at which such fraud could, with due diligence, have been discovered. After the discovery of the fraud, time would run up to the twelve-year limitation period. Sections 3 and 27 of the Act provide:

> *"3. No person shall make an entry, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such entry, or to bring such action or suit shall have first accrued to some person through whom he claims, or, if such right shall have not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to the person making or bringing the same."*
>
> *"27. In every case of a concealed fraud, the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall, or with reasonable diligence might, have been first known or discovered…."*

(b) actions in respect of simple contracts

[35] To identify the six-year limitation period in respect of simple contracts, regard must be had to section 46 of the Act and to section 3 of an old English Act incorporated by way of reference in section 46 of our Act. Section 46 makes reference to the United Kingdom Statute 21 James I. Cap. 16, entitled "**An Act for limitation of actions, and for avoiding suits in law**", and section 3 of that English Act stipulates the limitation period for simple contracts. Halsbury's Laws of England (Volume 9(1) at paragraph 618) states that a "simple contract" includes all contracts which are not contracts of record or contracts made by deed and a simple contract may be express or implied or partly express and partly implied. Halsbury's Laws of England (Volume 28 at paragraph 662) also states that in an action for breach of contract, the cause of action is the breach. Consequently, the action must be brought within six years of the breach. Section 3 of the English Act provides:

> *"…all actions of debt grounded upon any lending or contract without specialty;…, shall be commenced and sued within the time and limitation hereafter expressed and not after… within six years next after the cause of such action or suit and not after…"*

ANALYSIS

Is the allegation of fraud sufficiently particularised?

[36] I am satisfied that the claimant's statement of case is sufficiently particularised to satisfy the requirements of Part 8 of the CPR. I find that there is no need for the claimant to amend his statement of case to provide further particulars of the fraud. Paragraph 8 of the amended particulars of claim adequately indicates how the alleged fraud was perpetrated by the defendant and/or his servants or agents, namely by "*[u]ttering or causing to be uttered to the Registrar of Titles, a fraudulent vesting instrument, and causing said instrument to be lodged"*. Paragraph 8 therefore clearly indicates that it is the claimant's case that the fraud was committed through a forgery of the claimant's signature or through the preparation and lodging of an Instrument of Transfer purporting to be signed by the claimant. However, I find that the statement of case could have been amplified by further detail to indicate how the fraud came to be discovered. In order to establish that the claim is not in

fact time-barred, the circumstances surrounding the discovery of the fraud could have been better particularised. At paragraph 12 of his affidavit filed on April 30, 2019, the respondent said "*[i]t was not until June of 2012 that I found out what the Defendant had done when I decided to make checks at Titles Office*." However, he did not indicate why he made checks. Notwithstanding, I find that this omission is insufficient to cause me to either strike out the claim or to grant summary judgment to the defendant as the further detail can be provided in the form of a witness statement at a later date.

[37] In my opinion, it will be insufficient for the claimant merely to plead that there was fraud or forgery. At the trial, actual evidence of fraud must be presented by the claimant. While I am satisfied that the claimant's statement of case is sufficiently particularised to enable the defendant to know the case he has to meet, it seems apparent that compelling evidence establishing forgery might be required at a trial. I am mindful that handwriting analysis is not an exact science and may be fraught with difficulties, for example, if there are insufficient questioned documents, or if the sample signatures or writing available for comparison is limited, or if writing has changed over time. Notwithstanding, it is accepted that evidence of a forensic document examiner can be cogent and of a sufficiently high quality to assist the court in determining the authenticity of a signature on a document. However, it is a matter for the claimant how he wishes to proceed in relation to handwriting analysis and he can always seek orders in relation to the appointment of an expert at a later date.

[38] In his affidavit filed on February 27, 2019, the applicant averred that the respondent signed the agreement for sale and instrument of transfer and that these documents were witnessed by an Attorney-at-Law. In the respondent's affidavit filed on April 30, 2019, he alleges that the said documents were never executed by him. The credibility of the parties is clearly in issue. The authenticity of a signature purporting to be the claimant's signature on the agreement for sale and instrument of transfer, is an issue at the heart of the case. Applying the principles indicated in ***Bolton Pharmecuticals***, I am

satisfied that the allegations of fraud in this case merit fuller investigation. There are triable issues and issues of credibility to be resolved.

What is the effect of the inconsistency in the pleadings?

[39] I have carefully considered the pleadings filed on behalf of the claimant. The claimant signed the certificate of truth in both the original and amended particulars of claim.

[40] Paragraphs 4 and 5 of the original particulars of claim state:

> "4. *That the defendant paid a deposit of $900,000 in two instalments in the amounts of $800,000 and $100,000. Exhibited hereto and marked "B" are receipts reflecting the same".*
>
> "5. D*espite not paying the requisite deposit, the claimant gave the defendant possession of the said premises subject to the completion of the sale within ten (10) months". (My emphasis)*

[41] Paragraphs 5 and 6 of the amended particulars of claim state:

> *"5. That the Defendant was required to pay a deposit of $900,000.00. The Defendant only paid $800,000.00 of the required deposit of which I gave the Defendant a receipt reflexing same"*.
>
> *"6. Despite not paying the sum of $100,000.00 being the balance of the requisite deposit, the Claimant gave the Defendant possession of the said premises subject to the completion of the sale within ten (10) months."*

[42] The claimant's affidavit filed on April 30, 2019 in response to the application for summary judgment states the following at paragraphs 7, 8 and 9:

> *"7. In response to paragraph 8 the Claimant will reiterate that the agreed purchased price was One Million Eight Hundred Thousand Dollars ($1,800,000.00) and not Nine Hundred Thousand Dollars ($900,000.00) as alleged by the Defendant. That the sum of Nine Hundred Thousand Dollars ($900,000.00) was only a down payment on the purchase price.*
>
> *8. That on the 15th day of February 2002, the Defendant paid Eight Hundred Thousand Dollars ($800,000.00) as part payment of the required deposit of the purchase price with the understanding that he would pay me the remaining One Hundred Thousand Dollars ($100,000.00) of the deposit.*
>
> *9. That I never receive the balance of the deposit. That the Defendant in an attempt to defraud me of my property forged my signature and signed the said receipt of One Hundred Thousand Dollars ($100,000.00) exhibited to his Affidavit and marked "KP2"."*

[43] Whilst it would at first appear that the claimant resiled from a previous admission regarding the receipt of the $100,000, on closer examination it becomes apparent that there was an error at paragraph 4 of the original particulars of claim, or at least, that there was an inconsistency between paragraphs 4 and 5. It is apparent from paragraph 5 of the original particulars of claim that the claimant was indicating that he did not receive "*the requisite deposit*". The claimant did not seek to explain how this inconsistency came about. However, I am satisfied, by the very fact that there was an inconsistency, that paragraph 4 of the original particulars of claim contained an error. The ambiguity caused by the inconsistency in the pleadings at paragraphs 4 and 5 of the original particulars of claim is resolved when the claimant asserts in the amended particulars of claim that he did not receive the $100,000 balance of the deposit.

[44] Further, I believe that this single inconsistency in the pleadings is insufficient for me to find that the claimant's case has no real prospect of success. I believe that this case is distinguishable from the ***Index*** case referred to earlier where there were numerous inconsistences and where Mangatal J said that the number and nature of the amendments meant that the claimant was presenting an "entirely different case". The amendment in the instant case does not change the nature of the claimant's case that:

1. the full purchase price of $1,800,000.00 was not paid to the claimant,
2. he did not sign a sale agreement and instrument of transfer, and
3. the defendant fraudulently uttered a transfer or vesting instrument and thereby dishonestly procured the endorsement of his name on a Certificate of Title registered in Volume 1333 Folio 804 of the Register Book of Titles.

[45] In the circumstances and for the reasons indicated in the preceding paragraphs, I am satisfied that the amendment appears to be for the purpose of correcting an error made in the original particulars of claim, rather than being actuated by bad faith or insincerity. The amendment is fair in the circumstances and does not create any prejudice to the defendant/applicant.

I therefore see no reason to strike out paragraphs 5 and 6 of the amended particulars of claim. I am also satisfied that the claimant/respondent has a real prospect of success and I do not deem it appropriate to grant summary judgment to the defendant/applicant.

Do the additional claims amount to fresh claims which are statute barred?

[46] In assessing whether or not the claims for rent and for the value of the tools arise out of the same facts as the claim regarding the alleged fraudulent transfer of the title to the property, I have considered the claimant's statement of case as a whole and applied the principles stated in the decisions in ***The AG of Jamaica and another v Vassell*** and ***Moo Young***. It is my opinion that the claims for rent and breach of contract are distinct from the fraud claim and the cause of action accrued in 2002 when there was a breach of a duty to pay rent or to pay for the tools. As discussed above in relation to actions concerning rent, sections 3 of the Act states that time begins to run when the right to file suit in respect of some interference first accrued. In this case, it is my opinion that the right to file suit in respect of the rent owed would have accrued when the defendant first failed to pay the rent. Likewise, the right to file suit in respect of the tools bought, would have accrued whenever the breach of the duty to pay for the tools occurred.

(a) The outstanding rent

[47] I do not find that the breach of the duty to pay rent is inextricably linked to the alleged fraud. It seems that counsel Mrs. Riley-Dunn might be seeking to rely on section 27 of the **Limitation of Actions Act** in her submissions that it was only when the claimant discovered the fraud that he appreciated that the defendant had no intention of paying the rent, and the cause of action accrued. However, the defendant's failure to pay rent was known in 2002.

[48] The duty to pay rent monthly was breached when the rent became due and the defendant failed to pay it. The duty to pay rent is not affected by the fact that the parties entered into an oral agreement for the sale of the property. That duty would only cease once the sale of the property was completed. The

claimant failed to enforce his contractual right to receive rent, even though he knew of the defendant's breach in 2002. His decision not to take legal action is not caused by his ignorance of the alleged fraud. The breach of the duty to pay rent in 2002 is a separate incident from that which brought about the fraudulent transfer of the title to the property in 2004. The claim for rent therefore represents an entirely new and distinct claim and pursuant to section 3 of the **Limitation of Actions Act**, it is statute barred as regards the twelve-year period between 2002 and 2014. However, the claimant may claim mesne profits for the period in which he was dispossessed.

(b) The contract for the sale of tools

[49] The alleged contract between the parties for the defendant to buy tools from the claimant would be a simple contract and therefore the claimant ought to have brought the claim within six years of the breach of the duty to pay the USD$5000. The unique problem in this case is that the claimant says that there was no oral agreement regarding when payment for the tools became due. It is accepted that there is a general presumption in law that the parties to a contract have expressed every material term which they intended should govern their agreement, whether oral or in writing (***Luxor (Eastbourne) Ltd v Cooper*** (1941) AC 108 at 137). Consequently, the court will not imply a term unless the term is necessary to give effect to the intention of the parties and to make the contract work. If a contract does not specify the time for compliance with the contractual obligations, the court will imply a term that the obligations must be complied with within "a reasonable time".

[50] In order to give business efficacy to the contract, it would be necessary for a court to infer that a reasonable time frame was contemplated by the parties. Though the parties might have been friends, the sale of such valuable tools was a business contract, and the breach of the duty to pay for the tools would occur after the expiration of a reasonable period. In my opinion, a reasonable time frame for payments would be a few months after delivery of the tools. It could not be regarded as "reasonable" to afford the defendant a ten-year period (from 2002) to make a single payment. I therefore find

untenable the submission by Mrs. Riley-Dunn that the cause of action accrued in June 2012, when the claimant discovered the fraud and discovered the defendant's lack of an intention to pay. On my assessment of the claimant's assertions, the amendment to his statement of case to claim the value of tools sold in 2002 seeks to introduce an entirely new claim which is statute barred.

[51] There being no clear connection between the sale of goods or rent issue and the alleged fraud in relation to the transfer of title, and there being no subsequent acknowledgement in writing by the defendant of the debts, I do not find that the two additional claims bear a real prospect of success. The additional claims for rent and for the value of the tools are clearly statute barred and are an abuse of process. I therefore strike out those parts of the claims which are clearly statute barred and direct the claimant to file a further amended statement of case removing reference to those causes of action. However, upon hearing an oral application by the claimant's counsel on June 13, 2019, I grant permission for the claimant to file a further amended statement of case to include a claim for mesne profit.

DISPOSITION AND CASE MANAGEMENT CONFERENCE ORDERS

[52] The following orders are made:

1. The application filed on February 27, 2019 for summary judgment is dismissed.
2. The defendant's application to strike out paragraphs 4 and 5 of the claimant's amended particulars of claim headed "And The Claimant Claims", is granted.
3. The claimant is permitted to file a further amended particulars of claim without reference to the claims for rent and tools sold.
4. The claimant is permitted to file a further amended particulars of claim to include a claim for mesne profit.
5. The trial is fixed for April 22, 2024 through to April 24, 2024 before judge alone in open court.
6. Standard disclosure to be completed by January 15, 2021.

7. Inspection to be completed by January 29, 2021.
8. Witness statements to be filed and exchanged by December 17, 2021.
9. Listing Questionnaire and Pre-trial memorandum are to be filed by March 1, 2023.
10. The Pre-trial Review hearing is fixed for April 12, 2023 at 10am for 1 hour.
11. The attendance of the parties at the Pre-trial Review hearing is excused.
12. Issue of experts is reserved for the Pre-trial Review hearing.
13. The parties are restricted to three (3) ordinary witnesses each.
14. Costs to be costs in the claim.
15. The Claimant's Attorney-at-law is to prepare, file and serve this order.