[2018] JMSC Civ.115

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2017HCV02050

BETWEEN	**LLOYD GOLDSON**	**CLAIMANT**
AND	**DEVON EVANS**	**1ST DEFENDANT**
AND	**NORTH AMERICAN HOLDINGS COMPANY LIMITED**	**2ND DEFENDANT**
AND	**NATIONAL COMMERCIAL BANK LIMITED**	**3RD DEFENDANT**

IN CHAMBERS

Mrs. Denise Senior-Smith instructed by Oswest Senior-Smith and Company for the Claimant

1st and 2nd Defendant not served

Mr. Kevin O. Powell instructed by Hylton Powell for the 3rd Defendant

Heard: July 17th and 31st 2018

Application for Summary Judgment and to dispense with mediation – Rules 15.2 and 74.4(1) Civil Procedure Rules

WINT-BLAIR, J

Application for Summary Judgment and to dispense with mediation – whether the bank is entitled to retain the duplicate certificate of title to the property purchased

by bona fide purchaser – whether the interest of the mortgagee is superior to that of the bona fide purchaser – estoppels by conduct – Real Estate Board charge whether it ranks in priority over that of the mortgagee – whether there is a real prospect of success – Rules 15.2 and 74.4(1) Civil Procedure Rules – sections 26, 31, 33 Real Estate (Dealers and Developers) Act, section 70, Registration of Titles Act

Background

[1] The 3rd defendant ("the bank") made a loan of $197,000,000 to the 2nd defendant ("NAHC"). The proceeds of that loan was used by NAHC and the 1st Defendant in the construction of townhouses at 24 Paddington Terrace, Kingston 6 which is registered at Volume 1378 Folio 356 of the Register Book of Titles ("the property").

[2] As security for the loan, the bank took two mortgages of the property ("the mortgages") dated December 11, 2008. Both were registered on the certificate of title for the property on January 22, 2009. NAHC has defaulted on its loan repayments and remains indebted to the bank to the tune of $1,822,915,762.86 as at January 2018.

[3] The property was later sub-divided and splinter titles issued in respect of each townhouse. The claimant entered into an agreement with NAHC to purchase townhouse no. 5 on July 1, 2011. He asserts that his entering into the agreement for sale was some seven months before the bank became involved, however this is not the case. The claimant spent some $3,000,000 improving the complex in addition to completing his townhouse. He lodged a caveat on October 12, 2012 by virtue of the said agreement for sale dated July 1, 2011. To date, the title to townhouse no. 5 has not been transferred to him.

[4] This claim is brought by the purchaser of townhouse no. 5, the title to which is registered at Volume 1454 Folio 909. Both mortgages are registered on the certificate of title to townhouse no. 5 and the bank has refused to discharge the

said mortgages or release the certificate of title to the claimant unless he pays the sum of USD$278,142.94 to the bank.

[5] The Real Estate Board has also, pursuant to the Real Estate (Dealers and Developers) Act registered its own charge on the certificate of title to the property on the October 23, 2009.

[6] The claimant seeks an order from this court to have the bank release the title for townhouse no. 5 to him in addition to damages, interest and costs. It is noteworthy that the Real Estate Board is not a party to this action.

[7] This application is brought by the bank on the ground that the claim has no real prospect of succeeding against it. The bank's position is that it is entitled to retain the duplicate certificate of title to townhouse no. 5 as it possesses a legal interest which is indefeasible and superior to the claimant's interest.

[8] Further, the bank argues that it has a strong case for summary judgment and has no desire to negotiate a settlement, having given due regard to a previous unsuccessful attempt at resolving the matter and submits that as a consequence mediation should be dispensed with under rule74.4(1).

Submissions

[9] Mr. Powell argued on behalf of the bank that based upon the particulars of claim filed on June 26, 2017 the claimant believes that he is entitled by virtue of his agreement for sale with NAHC to have the title for townhouse no. 5 transferred to him in circumstances where he has no agreement with the bank and neither has the bank received any of the proceeds of sale. The bank has not made any representations to the claimant in respect of any payments he may have made towards improvements to the complex which should have been done by NAHC and the first defendant.

[10] It is undisputed that the claimant has lodged a caveat against the title for townhouse no. 5 to protect his beneficial interest. Counsel relied on the case of

Life of Jamaica Ltd v Broadway Import & Export Limited SCCA 17/96 delivered on October 27, 1997 to bolster his submission that the lodging of a caveat does not affect the priorities between parties or give the caveator any greater rights, it merely prevents transactions from taking place without the caveator having been given an opportunity to stop them or to otherwise exercise any rights he may have.

[11] It is also undisputed that the bank has refused to release the title for townhouse no. 5. The bank relies on clause 4(n) in the instruments of mortgage which entitles it to retain the duplicate certificates of title issued in respect of the property and any and all documents relating to the title to the mortgaged premises at all times during the continuance of the security. Mr. Powell submits that the bank is the proprietor within the meaning of the Registration of Titles Act and has a legal interest in the property. He relied on **Duke and others v Robson and others** [1973] 1 All ER 481 for the proposition that where there has been no assertion of bad faith on the part of the bank as well as when the mortgagor contracts to sell the equity of redemption, this does not put the person with whom the mortgagor has contracted in a better position vis-à-vis the mortgagee and their power of sale than the mortgagor himself.

[12] Lastly counsel submitted that there is no good reason to proceed to mediation as prior amicable discussions have broken down between counsel. The matter should proceed to summary judgment on its merits.

[13] Mrs. Senior-Smith for the claimant responded first to the issue of whether this matter should proceed to mediation. She submitted that good faith negotiations have not been attempted and therefore the matter should be referred to mediation as required by the Rules.

[14] On the issue of the status of the claimant as regards the bank, counsel argued that the claimant was a pre-payment purchaser within the meaning of the Real

Estate (Dealers and Developers) Act. ("The Act"). The Real Estate Board having registered a charge on the title to the property under that Act.

[15] Counsel also argued estoppel by conduct as the claimant's interest was protected by the Real Estate Board's charge. In support of this proposition she cited **JMMB Merchant Bank Ltd (formerly Capital and Credit Merchant Bank Ltd) v Real Estate Board** [2015] UKPC 16. Further, the purpose of the loan was not stated in the mortgage document therefore the bank's interest would not be protected by the proviso to section 31(5) of the Real Estate Dealers and Developer's Act.

[16] In addition counsel submitted that the bank asserts priority as a mortgagee and demanded a payment in order to release the title to townhouse no. 5, where no document had been produced showing a charge per townhouse. This is unlawful as the bank cannot prove a specific charge per townhouse and is therefore estopped from making a demand for payment from the claimant. There is therefore a serious question to be tried. In all the circumstances the court should grant a conditional order in relation to the amended particulars of claim filed and if the court should treat the amendment as not being made then counsel sought an order to have the amended particulars of claim stand as filed.

[17] In further submissions in response, Mr. Powell having reviewed the Real Estate (Dealers and Developers) Act argued that the proviso to section 31(5) says that a financial institution shall have their charge rank pari passu and there must be construction of buildings or works. He argued that if the claimant is correct that the bank's charge did not rank pari passu with that of the Real Esate Board, its mortgage had not been extinguished. The charge registered by the Real Estate Board is in favour of the Real Estate Board not the purchaser and is therefore not exercisable by the claimant.

Issues

[18] The court is guided by the following issues:

Whether the bank is entitled to retain the duplicate certificate of title to townhouse no. 5.

[19] The bank pursuant to clause 4(n) of the mortgage instrument (which is re-produced below) set out clearly its entitlement to retain the duplicate certificate of title and other related documents in respect of the property.

> *"That the Bank shall be entitled and is hereby authorized to keep and retain the duplicate Certificates of Title issued in respect of the mortgaged premises and any and all documents relating to the titles to the mortgaged premises at all times during the continuance of this security, subject only to the production of the duplicate Certificates of Title at the request and expense of [NAHC] to the Registrar of Titles by the Bank to enable the endorsement thereon of any dealings or transactions affecting the mortgaged premises or otherwise which may be expressed to be subject and subsequent but not prejudicial to the security hereby created."*

[20] It would seem to me that clause 4(n) as drafted entitles the bank to retain the duplicate certificates of title for the life of the security in respect of the mortgaged premises which is defined in clause 1 to include both land and buildings.

Fisher and Lightwood's Law of Mortgage says at para 3.69:

> *"It is advantageous for a mortgagee to have custody of the title deeds because the absence of the title deeds in the hands of the legal owner puts a third party proposing to deal with the legal estate on notice that the estate has previously been mortgaged. In addition, the mortgagee's control of the deeds further protects his position by making it difficult for the legal owner to deal with the property (in a manner prejudicial to the mortgagee) without his concurrence."*

The bank is therefore entitled to retain its duplicate certificate of title for the life of the security to protect its interest.

a. Whether the bank's interest as a registered mortgagee is superior to that of the claimant's interest as a bona fide purchaser.

[21] Sections 70 of the Registration of Titles Act confers protection upon a party in whom registered lands have been vested. Save and except in the case of fraud,

the Act confers an indefeasible interest upon a registered proprietor of land. Section 70 is set out below:

> *"Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the folium of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser."*

[22] The claimant's interest is subject to the mortgage issued by the bank and upon entering into an agreement to purchase townhouse no. 5, the claimant acquired only an equitable interest in that property.

[23] In **Ken Sales and Marketing Limited v Earl Levy** and others SCCA No. 21/2008 delivered July 30, 2009, Cooke J.A. at paragraph 14 citing **Lysaght v Edwards** [1876] 2 Ch. D. 499 at 506, said:

> *"It appears to me that the effect of a contract for sale has been settled for more than two centuries…it is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser…"*

[24] Further on in paragraph 14, Cooke, J.A. cites **Riverton City Ltd. v. Haddad** (1986) 40 WIR 236 at 258: per Campbell, J.A:

> *"the immediate effect of a binding contract for sale of land is to pass the equitable estate in the land to the purchaser; the legal estate remains in the vendor until conveyance has been executed, but meanwhile equity regards the vendor as a trustee for the purchaser."*

[25] The beneficial owner of townhouse no. 5 is the claimant, the legal estate remains in NAHC who remains indebted to the bank whose mortgages in turn are

registered on the certificate of title to townhouse no. 5. The bank therefore has a registered legal interest in townhouse no. 5.

Fisher and Lightwood at paragraph 24.22 states:

> *"In English law the order of priority between two competing interests in the same property depends primarily on whether they are legal or merely equitable interests… Where both interests are equitable or both legal, the basic rule is that 'where the equities are equal, the first in time prevails', i.e. the two interests rank in the order of their creation. The absence of notice of the earlier interest by the party who acquired the later interest is irrelevant, even if he gave value."*

[26] A mortgagee's interest has been described as encompassing two rights. They are:-

(i) Its contractual right to sue for the debt; and

(ii) Its proprietary rights in the security

[27] The bank is the duly registered mortgagee over the title to all the units in the development. The purchase of townhouse no. 5 by the claimant from the developer NAHC was done in 2011 subsequent to the mortgage of the property in 2008. Consequently, there can be no dispute that the claimant purchased townhouse no. 5 subject to the mortgage held by the bank. This means that at the time of purchase the claimant had knowledge of the existence of the mortgages on the property, on not just his townhouse, but on the entire complex under development.

[28] NAHC has defaulted on the mortgages Section 71 of the Registration of Titles Act confers on the bank as a mortgagee, certain rights. The section reads:

> *"Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity*

> *to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."*

[29] The bank did not owe the claimant a common duty of care as no fiduciary relationship existed between them as argued by Mr. Powell and none has been advanced by the claimant's counsel. Given this position, it is difficult to see on what has been presented the basis on which the bank has demanded that the claimant pay the sum of USD$278,000 in order to release the title to townhouse no. 5.

Estoppel

[30] A party who raises the doctrine of an estoppel must show that he acted to his detriment, on the faith of and reliance on an assurance given to him by the other party, or, by the conduct of that other party. Detriment is an essential requirement. In **Gilett v Holt** [2000] 2 All ER 289, Lord Walker said at pages 307- 308:

> *"The overwhelming weight of authority shows that detriment is required. But the authorities also show that it is not a narrow or technical concept. The detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial. The requirement must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances. … Whether the detriment is sufficiently substantial is to be tested by whether it would be unjust or inequitable to allow the assurance to be disregarded – that is, again, the essential test of unconscionability. The detriment alleged must be pleaded and proved."*

[31] I am unable to construe any of the clauses set out in the instruments of mortgage exhibited to say that the bank agreed to the appellant acquiring an interest in the property, or gave any assurances to the claimant. The claimant himself does not argue that the bank offered him any such assurances or that he acted to his detriment other than voluntarily.

c. Whether the claimant has a real prospect of succeeding on his claim for the discharge of the bank's mortgage over townhouse no.5.

[32] I find that in the circumstances of this case, the bank is under no obligation to the claimant's in respect of his equitable interest in townhouse no. 5. It was not shown that there was some evidence that the bank, by its conduct, had led the claimant to believe that the title to townhouse no. 5 would have been delivered to him, he having entered into the sale agreement with NAHC and paid the purchase price. There is nothing before me to suggest that the claimant was misled by the bank, or, that the bank had a duty not to mislead him and that in misleading him, he acted to his detriment.

d. Real Estate Board Charge

[33] The Real Estate Dealers and Developers Act provides in section 31(3)(b), (4) and (5):

> *(3) Moneys so deposited in respect of a prepayment contract may be withdrawn from the account prior to the completion or rescission of the contract and applied by the vendor in the payment of stamp duty and transfer tax payable in respect of that contract and in partial reimbursement of the costs of materials supplied and work done in the construction of any building or works which is the subject of the contract, subject to the undermentioned conditions, that is to say-*
>
> > *(b) the owner of the land on which the building or works is being constructed has executed and lodged with the Registrar of Titles a charge upon the land in accordance with subsection (4).*
>
> *"(4) The charge mentioned in paragraph (b) of sub- section (3) shall be a charge upon the land on which the building or works in question is being constructed in favour of the Board charging the land with the repayment of all amounts received by the vendor pursuant to the contract which shall become repayable by him upon breach by him of the contract.*
>
> *(5) Such charge shall rank in priority before all other mortgages or charges on the said land except any charge created by statute thereon in respect of unpaid rates or taxes, and shall be enforceable by the Board by sale of the said land by public auction or private treaty as the Board may consider expedient:*

> *Provided that where a mortgage or charge of the said land has been duly created in favour of an authorized financial institution to secure repayment of amounts advanced by that financial institution in connection with the construction of any buildings or works on the said land the charge created by this section shall rank pari passu in point of security with the mortgage or charge in favour of that authorized financial institution."*

[34] The Privy Council in **Jamaica Redevelopment Foundation Inc v the Real Estate Board** [2014] UKPC 28 having reviewed sections 26 and 31 of the Real Estate Dealers and Developers Act stated the order of priority where there is mortgagee whose interest is registered on the title as well as a charge registered on the title by the Real Estate Board ("REB"). The Board stated at paragraphs 21 and 22:

> *"The effect of a construction of section 31(5) which demotes the priority of JRF's mortgage so that it ranks behind that of the REB is that it penalizes JRF without any identifiable justification. This would in the opinion of the Board be contrary to the scheme of the Act, which was that any mortgagee who had not advanced money in connection with the construction of any buildings or works on the land would be paid out in full before any prepayment contract was made. In these circumstances, the Board concludes that the expression "all other mortgages and charges" in section 31(5) means such charges as may (consistently with the scheme of the Act) remain to be considered but not those which section 26(1)(b) requires to have been discharged.*

It appears to the Board that this approach receives some support from section 33 of the Act. By para(c)(ii) of section 33, the Act provides that, if the REB sells the land in order to enforce its charge, after applying the proceeds of sale (after expenses) in satisfaction of its own charge and that of any authorized financial institution with a charge which ranks pari passu (i.e. under the proviso to section 31(5), it must thereafter apply the balance rateably to the person legally entitled thereto pursuant to the prepayment contracts. It appears to the Board that this is a further demonstration of the assumption made by the statute that a section 31(4) charge such as the REB in this case would never be in competition with a mortgagee like JRF. That can only be achieved by construing section 31(5) as set out in para 21 above. The result is that such a mortgagee retains its priority under section 70 of the Registration of Titles Act 1889 quoted above.

[35] Section 33 of the Act provides:

> *"Where a vendor defaults in completing any prepayment contract for the sale of land in a development scheme in accordance with the terms and conditions of such contract and the Board is satisfied that such default (together with any other default by the vendor in the completion of other prepayment contracts for the sale of land in that scheme) are of such a substantial nature as to amount to a failure of the scheme, the Board shall-*
>
> > *(a) require the financial institution with which the upon default trust account is maintained pursuant to section 29 to pay over to the Board all money (including interest) standing at credit of the trust account; and*
> >
> > *(b) enforce any charge in favour of the Board executed pursuant to section 31 either by the sale of the land subject to the charge or by such other action, consequent on the charge, as the Board thinks fit; and*
> >
> > *(c) if it sells the land-*
> >
> > > *(i) apply the proceeds of such sale (after deducting the expenses thereof) in satisfaction rateably of the amount due to the Board under such charge and of the amount due to any authorized financial institution under any mortgage or charge ranking pari passu with the charge in favour of the Board; and*
> > >
> > > *(ii) thereafter apply the balance of such proceeds of sale together with the moneys received by the Board out of the trust account pursuant to a requirement made under*

para graph (a) rateably to the person legally entitled thereto pursuant to the prepayment contracts under which moneys were received by the vendor and deposited in the trust account."

[36] The Privy Council in **JMMB Merchant Bank v Real Estate Board** said at para 4:

> *"Section 33 [of the Real Estate(Dealers and Developers)] Act provides for the sale of the land by the REB [Real Estate Board] if the vendor defaults in completing any prepayment contract of sale. If the REB is satisfied that that default itself or taken with other such defaults in the development scheme amounts to a failure of the scheme it can (a) require the financial institution to pay over such sums as remain in the trust account and (b) enforce the charge over the land by sale or otherwise. If the REB sells the land it (a) divides the free proceeds between it and the authorised financial institution which has a pari passu mortgage or charge under s. 31(5) and, thereafter, (b) distributes the aggregate of sums from the trust account and its share of the free proceeds among the purhasers rateably according to their prepayment contracts."*

[37] In the case at bar, the mortgages were registered on the title to the property before the registration of the REB's charge or the claimant's agreement for sale was executed. The Board stated at paragraph 19 of the Jamiaca Redevelopment Foundation Inc. that:

> *"Under section 26(1)(b), a vendor is prohibited from entering into a prepayment contract unless the relevant property is free of any mortgage or charge. It seems to the Board that there were a number or policy reasons behind that prohibition. It would protect purchasers because they would have possession of the property which was not encumbered by a prior mortgage or charge and it would protect existing mortgagees and charges because they would have to be paid off in order that section 26(1)(b) could be satisfied.*

[38] The decisions of the Privy Council make it plain that under section 26(1)(b), a vendor is prohibited from entering into a prepayment contract if he has entered into mortgage which is other than for construction or works.

Section 26(7) of the Act provides:

"26(1)A person shall not enter into a prepayment contract as a vendor in connection with any land which is, or is intended to be, the subject of a development scheme to which section 35 applies unless-

(a) the vendor under the prepayment contract is a registered developer;

(b) such land is free from any mortgage or charge securing money or money's worth (other than a mortgage or charge in favour of an authorized financial institution referred to in the proviso to subsection (5) of section 31)"

[39] On the correct construction to be given to sections 26(1) and 31(5) the Privy Council at paragraph 20 of **Jamaica Redevelopment Foundation Inc.** said:

> *"The expression "all other mortgages or charges" in section 31(5) cannot be limited to all subsequent mortgages and charges because the exception in section 26(1)(b) excludes mortgages and charges referred to in the proviso to section 31(5), which are those duly created in favour of authorized financial institutions to secure amounts advanced in connection with the construction of any buildings or works on the land. The purpose of the proviso is that claims under such mortgages and charges should rank pari passu with the charge conferred on the REB by section 31(4)."*

[40] The mortgagee who had advanced money but not in connection with the construction of any buildings or works on the land would have to be paid out in full before any prepayment contract was made in order to satisfy section 26(1)(b).

[41] It is difficult therefore to accept the submission of Mrs. Senior-Smith that the claimant is a prepayment purchaser if he is simultaneously asserting that the mortgages do not refer to or were not for the purpose of construction or building works. This would mean that they fall outside of section 26(1)(b). It would seem to me that the claimant having entered into an agreement for sale of property which was subject to the banks mortgages ought to have ensured that he did his due diligence and ensured that the property he sought to purchase was

mortgage or charge free. Having entered into the transaction the property is subject to the mortgage held by the bank.

e. Whether summary judgment should be entered

[42] In determining that there was no serious question to be tried I am mindful of rule 15.2(a) of the Civil Procedure Rules and the principles of summary judgment which are set out in **ASE Metals NV v Exclusive Holiday of Elegance Limited** [2013]JMCA Civ. 37 and **Three Rivers District Council v Bank of England (No.3)** [2001] 2 All E.R. 513. In ASE **Metals**, Brooks, J.A. said:

> *"the overall burden of proving that it is entitled to summary judgment lies on the applicant for that grant… the applicant must assert that he believes that the respondent's case has no real prospect of success…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 that is better than merely arguable…the defendant must show that he has a 'realistic' as opposed to 'fanciful' prospect of success."*

In the case of **Three Rivers District Council v Bank of England** (No 3) [2003] 2 AC 1, the test set out is whether the claimants have a real prospect of succeeding on the claim. Citing **Swain v Hillman** [2001] 1 All ER 91, 92, Lord Woolf MR said:

> *The test is whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."*

[43] Stuart Smith LJ, in **Taylor v Midland Bank Trust Co. Ltd**. [1999] ALL ER 831, said that, the court should look to the CPR and also to what will happen at the trial and that, if the case is so weak that it had no reasonable prospect of success, it should be stopped before great expense is incurred.

[44] In **Swain v. Hillman** Lord Woolf gave this further guidance at pp 94 and 95:

> *"It is important that a judge in appropriate cases should make use of the powers contained in Part 24. In doing so he or she gives effect to the overriding objectives contained in Part 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 this as soon as possible….*
>
> *"Useful though the power is under Part 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. this does not involve the prospect of judge conducting a mini trial, but to enable cases, where there is no real success either way, to be disposed of summarily."*

Conclusion

In my opinion, there is no serious issue to be tried as the claimant's claim reveals no reasonable triable issue against the bank. A judge, in the discretionary exercise of his or her case management powers may strike out a claim in a plain and obvious case and enter summary judgment, in circumstances where the statement of case discloses no reasonable cause of action. I bear in mind that rule 26.3 of the Civil Procedure Rules permits the court to do. In the instant case, it cannot be said that the appellant has a claim which ought to be resolved at a trial.

[45] For the foregoing reasons the court makes the following orders:

Orders

1. Automatic referral to mediation is dispensed with as between the claimant and the 3rd defendant.
2. The claimant's statement of case against the bank is struck out.
3. The 3rd defendant is granted summary judgment on the claim against the claimant.
4. The 3rd defendant is awarded the costs of these proceedings.
5. The amended claim and particulars of claim filed on July 19, 2018 not served on the 3rd defendant are to stand as filed in respect of the 1st and 2nd defendants.