[2022] JMSC Civ 135

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016HCV00600

BETWEEN	**GODFREY McALLISTER**	**CLAIMANT**
AND	**CHRISTOPHER WEBB**	**DEFENDANT**

IN CHAMBERS

Ms. Claudia Forsythe and Mr. Nelton Forsythe instructed by Forsythe and Forsythe for the Claimant.

Mr. Abe Dabdoub instructed by Dabdoub and Dabdoub for the Defendant.

Heard: June 1, 2022, June 9, 2022 and July 29, 2022

Civil procedure: Application to strike out Claim on the basis of res judicata, cause of action estoppel and issue estoppel- Abuse of process - Application for Summary Judgement - Limitation on Simple Contracts - Acknowledgement-Security for Costs

O. SMITH, J (AG)

[1] In this matter two applications were filed, one by each party. The first application was filed on behalf of the Claimant, Godfrey McAllister on the October 5, 2021. It is a Notice of Application for Court Orders for Entry of Summary Judgment, in short summary judgment. An Amended Notice of Application for Court Orders for Entry of Summary Judgment was filed on behalf of the Claimant on February 3, 2021. The second application was filed on behalf of the Defendant, Christopher Webb,

and is a Notice of Application for Court Orders for Declaration and to Strike out Claim, in short strike out. This second application was filed on March 4, 2022.

[2] I intend to start with the Application to strike out filed on behalf of the Defendant. As such I will refer to Mr. Christopher Webb as the Applicant and Mr. Godfrey McAllister as the Respondent. Submissions were however, first heard on behalf of the Respondent in support of his application and in response to the Application to Strike Out. Counsel representing the Applicant, Mr. Dabdoub, made submissions in response to the Respondent's application for Summary Judgment and in support of his Application to Strike Out.

[3] The Respondent is a Justice of the Peace and Mediator whose stated addresses are Apartment 4400, 1830 SW 81st Avenue, North Lauderdale, Florida 33068 in the United States of America and 24 Bygrave Avenue, Kingston 20 in the parish of St. Andrew. The Applicant is a businessman of 6 Montgomery Road, Kingston 8. In order to understand the two applications before me I believe it is necessary to go to the root of the matter. That lies in the Claim Form and Particulars of Claim filed by the Applicant on the February 16, 2016.

The Claim

[4] By virtue of the Claim Form and Particulars of Claim, Mr. McAllister is alleging that he advanced the sum of US$ 287,077.26 to Mr. Webb as a loan for him to develop premises registered at Volume 429 Folio 18 of the Register Book of Titles. Based on the agreement, after a year, the defendant would repay to him the sum of JA$39M Jamaican Dollars or in the alternative the Defendant would transfer into his name one of the dwelling houses of equal value being constructed on the said land. This agreement was evidenced in a written document dated April 27, 2007.

[5] The Particulars of Claim set out in detail the effort made by Mr. McAllister to recover the money. It states inter alia, that after December 2009 Mr. McAllister attempted to recover the JA$39,000,000.00 to no avail. This attempt continued up to 2013. Mr. McAllister eventually lodged a caveat against the property

registered at Volume 429, Folio18 at which time he discovered that Scotia Jamaica Building Society (SJBS) and the National Housing Trust (NHT) were joint mortgagees ahead of him on the title.

[6] On February 12, 2016, SJBS informed him that the property was sold and that the proceeds had been lodged with SJBS. SJBS also gave notice of its intention to pay over all the proceeds to Mr. Webb unless he authorized payment to Mr. McAllister. Thereafter, Mr. Webb acknowledged the debt of $39,000,000.00 owed to Mr. McAllister and agreed that he would pay the plaintiff from the proceeds of the sale after SJBS and NHT were paid. However, it would be a reduced figure. This did not materialize and as such he is claiming the sum of JA$39,000,000.00 from the proceeds of the sale plus interest of 6% pa from January 2010 to January 2016.

The Agreement

[7] The entirety of the agreement is outlined below:

> *"Additional terms of agreement between Chris Webb and Godfrey McAllister re part funding for advancement of Irish Town Bellencita Ministry Resort Venture. Without prejudice to any and all other terms of agreement already decided on, except where the terms and conditions herein contradict and override previous agreements, the parties to this agreement hereby contract as follows with the understanding that when the final contract is signed, having reflected all terms and agreements contained herein, this contract shall expire.*
>
> *In exchange for US$287,077.26 Chris Webb guarantees that Godfrey McAllister will in 14 months from today's date receive real estate the value of Thirty-nine Million Jamaican dollars ($39,000,00.00) arrived at by the average of two independent valuators selected by both parties to this contract.*
>
> *In the event that the aforementioned value is not achieved at the time of the handing over of the keys to the house, this contract shall not be deemed to be breached if valuators project that the desired value will be achieved on completion of the project within 32 months of today's date.*
>
> *Christopher Webb contracts with Godfrey McAllister that at the option of Godfrey McAllister, and within three months of such request, Godfrey*

McAllister's interest in the project will be encashed for an amount equal to the JA$39M.

Signed at Kingston this 27th day of April, 2007 in the presence of each other and in the presence of witness, Patricia McAllister."

The agreement has three signatures affixed.

The Defence

[8] In his Defence filed on April 15, 2016 Mr. Webb asserts that the claim is an abuse of process as the Claimant had filed a previous claim in 2013 claiming, in essence, the very same thing as the 2016 claim. In the circumstances, the 2016 claim was "frivolous and vexatious on the basis of cause of action estoppel, issue estoppel and abuse of process". The Defence further indicated, that an Application for Default Judgment was before the Registrar in the 2013 claim. That the Registrar had made a requisition that the Affidavit of Service was defective and had directed the Claimant to rectify it. As such a final judgment was available to the claimant as at the date of the withdrawal of the 2013 claim on the 15th of March 2016.

[9] In addition, no application was made to the court to refile in circumstances where res judicata was applicable. The defendant also indicated in his Defence that section 46 of the **Limitation of Actions Act**, (**LAA**) applied as the current claim was filed on the 16th of February 2016 by Claimant in circumstances where the agreement between them is dated April 27, 2007. A such the claim is statute barred.

[10] He also asserted that he is entitled to summary Judgment as the Claimant has no real prospect of succeeding. He reasons are similar to ones outlined above in support of abuse of process and res judicata.

The Applications

[11] It was made clear at the commencement of this hearing that both applications, for summary judgment and for strike out were being heard together. As a consequence, submissions were made on behalf of each party in support of and in response to the respective applications.

Summary Judgment

[12] The Amended Notice of Application for Court Orders filed on behalf of the Mr. McAllister is seeking the following orders:

1. That pursuant to Rule 15.2 of the Civil Procedure Rules, 2002, there be Summary Judgement for the Defendant.
2. That damages be assessed in the sum of JA$39M together with interest at 6% from June 28, 2008 to May 19, 2016, being 2883 days at a daily rate of JA$6,410 being a total of JAD$81,482,797.68.
3. An order that Scotia Bank from the proceeds of sale of property registered at Volume 429 Folio 18 of the Register Book of Titles pay to the Claimant's Attorneys-at-law, Messrs. Forsythe and Forsythe, the sum of JAD$19,501,930.00 being the sum of funds frozen on account by His Lordship, the Honourable Mr. Justice Sykes by way of Order entered in this Honorable Court on the 25th day of October 2016 in partial satisfaction of a defendant's indebtedness to the Claimant…"

[13] In his affidavit in support of summary judgment filed on February 3, 2022, Mr. McAllister among other things stated that Mr. Webb is a Canadian citizen who has continuously resided in Canada for the last six years and who has vehemently refused to disclose his address and hides behind the address of his attorneys at law. He indicated that the Mr. Webb was served with the Claim Form, Particulars of Claim, Prescribed Notes and other documents on the 19th of February, 2016.

That on the 15th of March 2016 the Mr. Webb filed an Acknowledgment of Service followed by his Defence which was filed on April 15, 2016. In his affidavit Mr. McAllister reiterated the indebtedness of Mr. Webb in the sum of $39,000,000.00 the details of which have been outlined above.

[14] He also asserted that Mr. Webb, having filed his Defence, failed to deny the several allegations that he laid out in his Particulars of Claim. In fact, he went on to say that Mr. Webb has failed to put forward anything regarding his nonfulfillment of the sums. Mr. McAllister averred that Mr. Webb did not in any particular way deny his claims but instead admitted his indebtedness to him.

Strike Out

[15] The Notice of Application for Court Orders filed on behalf of Mr. Webb on March 4, 2022 was a response to the Application for Summary Judgment. It seeks the followings:

1. That this Application be heard together with the Claimant's Amended Application for Summary Judgment fixed for the 16th of May 2022.
2. A declaration that the document dated April 27, 2007, is statute barred and therefore unenforceable.
3. That unless the Claimant produces a Notice of Discontinuance dated prior to February 16, 2016 in respect to Claim No. HCV 5641 which was duly served on the Defendant, the Claim and Particulars be struck out in its entirety, with costs to the defendant to be taxed or agreed, on the basis of being an abuse of the process of the Court and/or discloses no reasonable grounds for bringing the claim.
4. That security for costs in the sum of Eight Million Five Hundred and Fifty Thousand Dollars ($8,550,000.00) or such other sum as may be ordered by the Court be provided by the Claimant within fourteen (14) days of

the date of this order failing which the Claim Form and Particulars of Claim be struck out.

5. That this sum fixed as security for cost be held at the Bank of Nova Scotia Jamaica limited in the joint names of the attorneys at law for the Claimant and the Defendant…"

[16] In his affidavit in support Mr. Webb states that the Respondent no longer resides at 14 Belgrave Avenue but instead has as his permanent residence an address in the United States of America. In support of this he relies on the affidavit of Donovan O. Malcolm filed on March 22, 2016.

[17] He goes on to state that he on the other hand while being a naturalized citizen of Canada moved back to Jamaica from 2017 and has been residing here since then.

[18] He drew the courts attention to the first claim filed in this Court by and on behalf of the claimant in 2013 and indicated that Mr. McAllister was not open with the Court when filing the 2016 Claim, as he did not disclose the existence of the 2013 Claim.

[19] He averred that his Defence raises the issue of the Statute of Limitation, res judicata and issue estoppel and if he were successful in any of them he would defeat the claim.

[20] He denied that Mr. McAllister loaned him any money and instead said that the sum of US$287,077.26 was paid for the "purpose of purchasing the interest of Mr. John Bailey and Ravers Limited for their interest in a joint venture agreement in which they agreed to develop the property" part of the subject matter of this claim. That in consideration of his investment Mr. McAllister was to receive one of the houses in the proposed development valued at $39M. In support of this he referred the Court to the affidavit of Raby Danvers Williams filed on March 4, 2022.

[21] Mr. Webb also says that at the time of the agreement the property was mortgaged to the Bank of Nova Scotia Building Society and that this was known to Mr. McAllister. He used his affidavit in support of his application to deny the Claim in

that, he insists that the money was not a loan for the purpose of developing his property registered at Volume 429 Folio 18 of the Register Book of Titles, but that the Respondent paid by managers cheque, drawn in favour of Ravers Limited, for the sum of US$287,077.26 for the planned development of Irish Town Bellencita Ministry Resort Venture registered at Volume 429 Folio 18 of the Register Book of Titles which was registered in his and his wife's name. He reiterated that he received no money from Mr. McAllister.

[22] The development failed as a result of Scotia Building Society selling the land by exercising their power of sale in the mortgage and as a consequence the joint venture was frustrated.

Affidavit of Raby Danvers Williams

[23] He was at the material time the Director of and a shareholder in Ravers Limited. That in or around 2003, Mr. John Bailey and Ravers limited entered into a joint venture where they agreed to develop property owned by Mr. Webb, registered at Volume 429 Folio 18 of the Register Book of Titles. This property was to be developed into houses. He says that at no time during the agreement was it ever contemplated by any of the parties that they would acquire an interest. It was always understood that they would obtain an interest after the venture was completed.

[24] In about 2007 there was a disagreement with the partners to the venture and as a consequence Ravers Limited and Mr. John Bailey wanted to sell the lots without going further to develop houses but Mr. Webb still wanted to construct houses. To that end, in 2007 Mr. Webb informed him that Mr. McAllister was interested in acquiring the interest of Mr. John Bailey and Ravers Limited in the venture.

[25] In furtherance of the buyout he stipulated that he should be paid via managers cheque and as a consequence he received from Mr. McAllister a managers cheque in the sum of $287,077.26 which amount represented the value of the interest of

John Bailey and Ravers Limited. He denied that the money received was on account of any debt owed by Mr. Webb.

Affidavit of Mr. Godfrey McAllister in response to Affidavit of Christopher Webb

[26] Having received the Application for Strike Out filed on behalf of Mr. Webb and having read his affidavit, Mr. McAllister filed an affidavit in response in which he confirmed that he primarily resides in the United States of America. He explained that 14 Bygrave Avenue is owned by him and that he occasionally resides there for short periods of time. He went on to say, in relation to the 2013 Claim, that the Claim Form had expired and was never properly served on the Defendant. An application for extension of the life of the Claim Form was never pursued and as such the Defendant was improperly served with an expired Claim Form. The relevant Notice of Discontinuance was not filed until March 15 2016.

[27] In relation to the issues of limitation, issue estoppel and res judicata, he indicated that those issues had been adjudicated on in the presence of Webb's attorneys, Dabdoub and Dabdoub. He categorically denied that he entered into a joint venture with the Defendant and insisted that he loaned the Defendant money for the sole and express purpose of enabling the Defendant, who complained to the Men's Group of which he and the Defendant were members, about his relationship with Raby Danvers Williams and his partner in relation to how the project should proceed and as such he loaned him the money because he, Mr. Webb, indicated that he needed to buy out their interest in the project. He decided to assist the Defendant who attached a high degree of urgency to the matter.

[28] The Defendant came to his home and impressed upon him the urgency of the situation and that is why he entered into a temporary loan agreement, pending the completion of a full blown legal document that was to be drafted by an attorney of the Men's Group. However, when the formal agreement was ready Mr. Webb refused to sign and claimed that he and McAllister had entered into a gentleman's agreement.

[29] He never at any time met with either or both of the men being John Bailey and Raby Danvers Williams (Ravers Limited) and that he at no time entered into any agreement with John Bailey, Ravers Limited or with any other principal thereof to effect the transaction in which their interest in the defendant's project would be bought. He agrees that the sum was paid directly to Ravers Limited/R. Danvers Williams but this was on the specific instruction of the members of the Men's Fellowship Group who felt the need to guarantee that the funds would be used "solely and exclusively for the purpose stated by the defendant and for which the sums were solicited from the claimant." The cheque was given directly to Mr. Webb.

[30] The intention of Mr. Webb was to pay out his financial partners for their equity in the project and by so doing cause full ownership to revert to himself and his wife.

Affidavit of Ewan Allan Wood

[31] An affidavit was filed on behalf of Mr. Wood in support of Mr. McAllister. Mr. Wood is an accountant by profession and knows both Mr. McAllister and Mr. Webb. In fact, he is also a member of the Thursday Morning Bible Study Group of which both Mr. Webb and Mr. McAllister are a part.

[32] In 2007 both Mr. McAllister and Mr. Webb were regular attendees at the group meetings. In the early part of 2007 Mr. Webb shared the details of a problem he and his wife were facing with the development of their property in Irish Town. This problem was with the financial arrangements they had with Raby Danvers Williams and Mr. John Bailey. According to Mr. Wood, Mr. Webb informed them that the financial partners were not in agreement with the approach he and his wife were taking. Consequently, Mr. Webb expressed a desire to pay out the financial partners for their equity in the project causing full ownership to revert to himself and his wife. He however, did not have sufficient funds to do so.

[33] Mr. Webb needed a loan and as such he approached Mr. McAllister for a loan. Both men met with one Malcolm McDonald, who was an attorney in the group to

prepare an official contract. However, before the contract was ready Mr. Webb declared that he was in a hurry to pay out his financial partners and persuaded Mr. McAllister to loan him the money before the formal contract was ready. As a consequence, they signed an interim contract on April 27, 2007. It was the understanding that once the formal agreement was complete both men would sign. However, when the formal agreement was ready Mr. Webb refused to sign despite several attempts by Mr. McAllister.

[34] The content of the formal agreement is laid out in full in his Affidavit and it indicates in essence that the money was given to Mr. Webb as a loan which was to be repaid on June 30, 2008. That for three years thereafter Mr. McAllister tried to get Mr. Webb to commence repayment with no success. As a consequence, Mr. Webb agreed to provide Mr. McAllister with an authorization to place a caveat on the Irish Town property to protect his financial interest. To this end the draft authorization was prepared however, Mr. Webb refused to sign it.

Submissions on behalf of Mr. McAllister

[35] The parties filed written submissions. I have tried to encapsulate their full import in a condensed fashion. The submission began with the history of the matter that has been outlined above and expressed in the various affidavits sworn to by the Respondent. Ms. Forsythe identified the legal issues as;

1. Whether the claimants claim is statute barred, if not
2. Whether the Claimant should be granted summary judgment on his claim as the Defendant has not denied his indebtedness to the Claimant.
3. Whether the Claimant advanced US$287,077.26 to the Defendant
4. Whether the terms on which the US$287,077.26 was advanced were honoured by the Defendant, if the terms were not honoured,
5. Whether the Claimant has a legitimate cause of action.

[36] In relation to issue one, counsel admitted that based on section 46 of the **Limitation of Actions Act**, the Claimants case was indeed statute barred but argued that the Act also makes provision that where there is evidence in writing acknowledging the debt or where there is a promise to repay, then the debt would remain owing and subsisting. She submitted that the Defendant has acknowledged in writing that he is indebted to the claimant as evidenced by the affidavit and also emails dated December 2, 2015. Secondly, the Claimant has also obtained injunctive relief in the matter and as such the issue of his case being statute barred is res judicata, consequently, the claim is valid and properly before the court.

[37] In relation to issue two, as identified by Ms. Forsythe, they relied on the Civil Procedure Rules 2002 as amended, in particular Rule 15.2. They also relied on the case of ***Keane v Vendryes*** [2009] SCJM. This is a case decided by Sykes, J and speaks to when the Court is likely to exercise its initiative and give summary judgment.

[38] In terms of the definition of "real prospect of success", counsel for Mr. McAllister relied on the judgment of Lord Woolf MR in ***Swain v Hillman*** [2001] 1 All ER 91 where he opined that it was for the court to ascertain whether there is a "'realistic' as opposed to a 'fanciful' prospect of success." Finally, on that point she indicated that the principles enunciated in **Swain v *Hillman*** were applied by Brooks JA in ***ASE Metals NV Limited v Exclusive Holiday of Elegance Limited*** [2013] JMCA Civ. 37.

[39] In relation to issue three, it was argued that the Mr. Webb did not deny borrowing and receiving the sums. This is evidenced by the written contract and numerous emails between the parties.

[40] In relation to issue four, it was submitted that for an agreement to be binding and enforceable there must be an offer, acceptance, consideration and the parties must intend for the agreement to be legally binding. Ms. Forsythe submitted that it

is advisable to have the terms evidenced in writing. In this regard counsel argued that there was an initial written contract but that there was an understanding between the parties that a more detailed contract would be prepared by an attorney at law. When this contract was ready the defendant refused to sign and argued that he and the applicant had entered into a 'gentlemen's agreement'. Despite this, there was a written agreement and based on the conduct of the parties it can be inferred that their intention was for the agreement to be legally binding. Counsel relied on the case of ***Branca v Cobarro*** [1947] KB 854 where, although the parties were considering a further agreement the court held that the provisional agreement was a binding contract.

[41] Ms. Forsythe ended by submitting that the defendant's case has no real prospect of success and that there is no triable issue before the court on the Defence as the legal issues raised have been judicially adjudicated in previous proceedings.

Submissions on behalf of Mr. Webb.

[42] The Defendant began his submissions with what he referred to as a relevant background. Much of the submissions involved a detailed account of the history of the case, laying out the content of the Particulars of Claim, Applications and the several orders made thus far. He stated that an application to strike out claim had been filed on behalf of the Applicant on the 22nd day of March, 2016 and has not been heard to date.

[43] Based on my assessment of both applications filed on behalf of the Defendant, most of what was contained in the March 2016 application was replicated in the March 2022 Application to Strike Out. There is therefore no need for it to be heard and it ought properly to be withdrawn by the Defendant.

[44] Mr. Dabdoub indicated that on October 14, 2013 the Respondent filed particulars with Claim No. 2013HCV05641 in respect of money invested with the Applicant. Subsequently the Respondent filed another Claim Form and Particulars of Claim on the 16th of February 2016 with the Claim No 2016HCV00600. The second

Claim Form was accompanied by a Formal Order dated February 19, 2016 and a Without Notice Application for injunctive relief and freezing orders and of urgency and an affidavit of Richard Bonner in support of the Without Notice Application for Injunctive Relief and Freezing Orders and of urgency.

[45] The Claim Form and Particulars of Claim were also accompanied by an Affidavit of Godfrey McAllister in support of the Without Notice Application. His complaint in this regard is that the documents were delivered to the offices of Messrs. Clough, Long and Co., who at the time were not authorized to accept same. As such counsel submitted that that cannot constitute proper service on Applicant. He therefore argued, that in the circumstances, the Respondent deprived the Applicant of his right to choose counsel and this was in direct abrogation of the **Civil Procedure Rules**, Rules 5.1 and 8.13 as well as in breach of the formal order of Mr. Justice Chester Stamp. On that basis counsel argued that the claim ought to be struck out for failure to comply with the **Civil Procedure Rules**.

[46] He then went on to argue that to date there has been a total of in excess of eight affidavits filed by the Respondent which indicates the Respondents' failure to disclose material facts to the Honourable Court at the time of the application for injunctive relief and freezing order. The non-disclosure he says includes possible defences available to the Applicant.

[47] To substantiate his point, he outlined the particulars of Claim Number 2013HCV5641 as well as the orders sought, to support his point that the Respondent had two subsisting claims before the court at the same time. In the first claim he indicates that there was an application before the Registrar for default judgment. The circumstances are outlined at paragraph 8 supra. He submitted, that *"...but for the negligence and/or failure of the Claimant, a final judgment was available to the Claimant in that claim as at the date of its withdrawal on the 15th day of March 2016. No application was made by the Claimant to refile the claim in the circumstances where res judicata, issue estoppel and cause of action estoppel should prevail".*

[48] Counsel also placed reliance on **the Limitation of Actions Act** which sets out the time periods within which certain claims may be brought before the court. He cited the case of **International Asset Services Ltd. v Arnold Foote** [2009] JMSC Civ 1326 where on page 8 of the judgment it states that:

> *"Simple contracts include all documents which are not contracts of record or contracts made by deed. Simple contracts may be express or implied. Or partly express (sic) and partly implied".*

Based on the forgoing since the 'purported Agreement' is dated the 27th day of April, 2007 and the term of the purported Agreement is One (1) year, the Cause of Action arose on the 27th day of April, 2008. Consequently, the Claim which was filed on the 6th day of February, 2016 was commenced about eight (8) years after the cause of action arose.

[49] Counsel went on to submit at paragraphs 38 – 41 of his written submissions that,

> *"the Claimant has contended that it was a loan which was made to the Defendant and that the Defendant by emails revived the loan by emails to the Claimant.*
>
> *No evidence is offered as proof that the emails are in fact emails from an email account of the Defendant. Any such assertion is a matter for trial, at which evidence has to be presented, and any such evidence is subject to cross-examination.*
>
> *It is for a trial court to resolve the issue as to whether the Claim is statute barred or after examination of the contents of the emails the Claimant is entitled to rely on the proviso in Section 46 of the Limitation of Actions Act."*
>
> *It is not open to a Court on the hearing of a Summary Judgment Application to conduct a mini-trial and there are quite a number of decided cases which establish such trite law."*

He relied on the case of ***Frederick Fagan v Kenneth Perry*** [2019] JMSC Civ 132 in support of this point.

[50] In relation to his ground of abuse of process counsel repeated his submissions in relation to the filing two claims against the Applicant and argued that on the basis of Issue Estoppel, Cause of Action Estoppel and res judicata the claim should be struck out pursuant to Civil Procedure Rule 26.3(1).

[51] He went further and argued that by failing to comply with the direction of the Court and the **Civil Procedure Rules** and by failing to disclose the previous claim that was still before the Court, the injunction should be set aside. He relied on the cases of ***The Minister of Housing v New Falmouth Resorts Limited*** [2016] JMCA Civ 20 and ***Henderson v Henderson*** 3 HARE 100 in relation to the abuse of process issue. Counsel also directed the Court to ***Johnson v Gore Wood & Co (a firm)*** 2000 UKHL 65 which distinguished the rule in ***Henderson v Henderson*** from the strict application of the principle of res judicata, issue or cause of action estoppel as stated in ***Barrow v Bankside Members Agency Limited*** [1996] 1 ALL ER 981, by Sir Thomas Bingham MR.

[52] In response to the Respondent's application for Summary Judgment, it was argued that in order to obtain summary judgment there must be no dispute of facts and no question of legal issues. The Respondent has claimed that he loaned money to the Applicant in circumstances where the Applicant is saying that the money represented payment to Ravers Limited for the purchase of their joint venture interest in a housing development. He retreaded the submissions made in relation to the claim being statute barred and stated that whereas the Respondent is saying the contract was revived by subsequent emails between the parties, that raises triable issues to be determined at a trial.

[53] Counsel directed the courts attention to the definition of "real prospect of success" as laid out in ***National Commercial Bank Jamaica Limited v Owen Campbell, Toushane Green*** [2014] JMCA CIV 19 and ***Swain v Hillman***.

[54] Mr. Dabdoub submitted that a claim would be fanciful "where, for example, it is clear that a statement of case is contradicted by all the documentary evidence or other material on which it is based as is the situation in the instant Claim".

[55] Counsel ended his submissions by saying that this was a case that ought properly to be in the commercial division. He also sought an order for security for costs on the basis that the Respondent has his primary place of residence overseas in

circumstances where he has no assets in Jamaica. He framed the order as follows:

> *"…that the Claimant do provide, within fourteen days of the date of this order, security for costs in the sum of Eight Million Five Hundred and Fifty Thousand Dollars ($8,550,000.00) to be held in an interest bearing account at the Bank of Nova Scotia Jamaica Limited, Knutsford Boulevard Branch in the joint names of the Attorneys-at-Law for the Claimant and the Defendant failing which the Claim and Particulars of Claim filed herein stand as struck out."*

ISSUES

[56] As previously indicated, I will commence with the application to strike out first. As such the issues I have identified are:

1. Whether this is a case is an abuse of process by reason of res judicata, cause of action estoppel and issue estoppel and should consequently should be struck out.

2. Whether the Claim is statue barred by reason of the Limitation of Actions Act.

3. Whether there was a subsequent acknowledgement of the debt.

4. Whether this is a fit and proper case to make an order for security of cost.

The Law

[57] The Rules empowers the Court under Part 26 to strike out all or a part of a statement of case if it has no reasonable grounds for bringing or defending a claim. Specifically Rule 26.3 gives the court the discretion to strike out a statement of case or part thereof. It states that,

> *"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) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;*
>
> *(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; or*

(d) *that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10".*

[58] The relevant rules in relation to Summary Judgment are found under Part 15 of the Civil Procedure Rules. Rule 15.2 (a) states that;

> *"The court may give summary judgment on the claim or on a particular issue if it considers that –*
>
> *(a) …*
>
> *or*
>
> *(b) the defendant has no real prospect of succeeding on 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.)"*

[59] Section 46 of the ***Limitations of Actions Act***, which stipulates:

> *"In actions of debt, or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence in any of the Courts of this Island, of a new or continuing contract, whereby to take any case out of the operation of the United Kingdom Statute 21 James 1 Cap. 16, which has been recognized and is now esteemed, used, accepted and received as one of the statutes of this Island, or to deprive any party of the benefit thereof* ***unless such acknowledgment or promise shall be made or contained by or in some writing****, to be signed by the party chargeable thereby, or his agent duly authorized to make such acknowledgment or promise; and where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor or administrator shall lose the benefit of the said enactment, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: …"*

Preliminary Issue

[60] In response to the Claim filed by Mr. McAllister, Mr. Webb complained about service of the Claim Form and the Without Notice Application for Injunctive Relief on Messrs. Clough, Long & Co. (Clough, Long) The details of this complaint have been outlined above. I believe now is as good a time as any to dispatch with this complaint/ground for striking out. Service on attorneys-at-Law is governed by Rule 5.6 of the CPR. Service on an attorney is normally done in circumstances where the attorney is *"…authorised to accept service of the claim form on behalf of a party; and has notified the claimant in writing that he or she is so authorised."* This was not done. Despite this, Clough, Long accepted service and as per Rule 5.6(2), the Claim Form is "deemed to have been served" on the date that service was accepted.

[61] Throughout the email exchange between the parties during December 15, 2015 to February 29, 2016 Mr. Webb mentioned attorney-a-law Raymond Clough as the Attorney who was advising him on the matter and who would be the attorney to draft up the new agreement between the parties. More specifically, Mr. Webb, by email dated February 23, 2016, declined to provide his personal address by reason that his attorneys advised him not to do so and instead expressly authorised that service on them was enough. Clough, Long was therefore not randomly chosen for service. Service on Clough, Long was a direct result of Raymond Clough being involved in the discussions between the parties.

[62] Even if it is found that the email is not sufficient, Clough, Long was under no obligation to accept service, yet they did. They went further and advised Mr. Webb of the service. According to Mr. Webb because he had no choice, he instructed them to file "a limited Acknowledgment of Service," which they did on March 15, 2016. However, he thereafter gave them further instructions as a result of which they filed a Defence on his behalf on April 15, 2016. Prior to that, they also appeared for Mr. Webb before The Honourable Mr. Justice Sykes (as he then was) on March 16, 2016 and thereafter on April 13, 2016, May 19, 2016 and October 25, 2016. The Defence, with this complaint went before Justice Sykes three times. On all occasions the injunction was extended. It was always a choice, available

both to Mr. Webb and Clough, Long to insist that service was bad, change attorneys or decline to represent respectively, but those options were never exercised.

[63] Thereafter, no less than four Judges has had conduct of this case with Mr. Webb always being represented by Clough, Long. There is no reason to regurgitate that complaint at this point. Clough, Long accepted service of the documents, both Clough, Long and Mr. Webb crystalized that service by their subsequent actions. The foundation of the Civil jurisdiction, as I see it, is service. The court must be satisfied that the document in question has come to the attention of the intended party through one of the acceptable means of service. Mr. Webb was properly served. There is no merit to this complaint.

Whether this is a case is an abuse of process by reason of res judicata, cause of action estoppel and issue estoppel.

[64] Striking Out a claim is generally used as a means of preventing the misuse of the courts processes on the grounds that it is an abuse of process. It is also a tool to ensure compliance with the courts' rules, orders and practice directions. In this case the Applicant has relied on the former. However, striking out a claim is a tool of last resort and is generally reserved for the most egregious of cases.

[65] An application to strike out should also be made as soon as possible. Although this particular application was filed on March 4, 2022, the Applicant had filed an earlier application to strike out on March 22nd, 2016, mere weeks after the Claim was filed but it was never heard. The Applicant was therefore not dilatory in filing his application.

Abuse of Process

[66] Mr. Dabdoub has submitted that this Claim is an abuse of process, the Respondent having filed a similar claim previously, that Claim being 2013HCV5641 and as such Res Judicata, cause of action estoppel and issue estoppel applies.

[67] There are several cases on the issues raised by counsel. However, I have found that the judgment of McDonald-Bishop J in the case of ***Fletcher & Company Limited v Billy Craig Investments Limited etal*** [2012] JMSC Civ 128 is very comprehensive and is indeed sufficient to assist the court in dealing with the several issues raised by counsel on res judicata, cause of action estoppel and issue estoppel.

Res Judicata

[68] In **Blackstone's Civil Practice 2002, 3rd Edition,** the authors define res judicata as "a narrow form of estoppel… (a thing or matter which has been decided), which is the rule that the issues which were actually adjudicated upon by the court have been finally resolved between the parties to the claim." This is fundamentally what is at the heart of the doctrine. In ***Henderson v Henderson***, the case relied on by Mr. Dabdoub, Wigram VC explained the principle of res judicata in the following fashion:

> *"…where a given matter becomes the subject of litigation in, and of 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 in 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 judicator applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and produce 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."*

[69] This well-known quote makes it clear that res judicata, cause of action estoppel and issue estoppel are usually treated together as the latter arises from the former.

Res Judicata cause of action estoppel and issue estoppel at the end of the day are all based on public policy that there must be an end to litigation.

[70] Mr. Dabdoub has pleaded cause of action estoppel and issue estoppel which he argued ultimately results in an abuse of process. I will therefore examine each one. In **Fletcher** McDonald-Bishop J in addressing the issue of cause of action estoppel relied on the cases of ***Arnold v National Westminister Bank Bank Plc (No. 1)*** [1991] 2 AC 93 and ***Carl Zeiss Stiftung v Rayner 7 Keeler Ltd. (No. 3)*** [1970] 1 Ch 506.

Cause of action Estoppel

[71] Lord Keith of Kinkel commented on cause of action estoppel at page 104 of **Arnold v National Westminster Bank**,

> *"Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the later having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgement…"*

[72] The cases establish that in order for cause of action estoppel to arise a matter must have been litigated and determined in a court of law concerning the same parties and the same cause of action.

[73] In applying the principles to the case at bar Mr. Dabdoub's complaint is that a previous matter, almost similar in every respect to the current case was filed by the plaintiff. The previous case should therefore be examined. The Claim Form and Particulars of Claim for the previous claim were almost similar to the statement of case of the matter at bar. This is not denied by the Claimant. The parties even acknowledge that a Claim Form and Particulars were served on the defendants on the 2nd day of April 2015. The added ground for Mr. Dabdoub was that a Request for Default Judgement was filed in the old claim. As such he argues that the Claimant could have pursued the default judgment and failed to thus rendering this second claim, res judicata and an abuse of process.

[74] Both parties also acknowledge that a Notice of Discontinuance was filed on March 15, 2016 almost one month after the current claim was filed in this court. What counsel for the Applicant did not disclose to the court was that when the Claimant sought to serve the Claim Form and Particulars of Claim, the Claim Form was dead having expired a year after it issuance pursuant to Rule 8.13 of the **Civil Procedure Code 2002**. The Claimant did not pursue an application to extend the life of the Claim Form. As such, its service and every step taken thereafter was of no legal effect. To take it a little further, the Applicant did not file a defence. The first claim, I should directly state, was not heard and determined by a court of competent jurisdiction in any way that could have given rise to an appeal. The application therefore fails on the issue of cause of action estoppel.

Issue Estoppel

[75] Whereas cause of action estoppel speaks to the entirety of a claim, issue estoppel does not. It addresses a particular issue or issues which may arise in a cause of action. It may serve to remove one of several issues from a case or it can arise out of an entirely different cause of action. In ***Arnold v National Westminster Bank*** Lord Kirk of Kinkel defining issue estoppel said that it

> *"...may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue."*
>
> *Accordingly, issue estoppel applies in circumstances where a court has handed down a judgment on a particular issue in previous a case in which the issue in question was crucial to that decision. See **Blair v Curran** (1993) 62 CLR 462. In applying the principles, the reasons are the same as those given under cause of action estoppel. No case or issue has been determined by a court of competent jurisdiction between the parties. The application fails on this ground as well.*

[76] It would therefore seem that despite counsels' insistence that the claim is an abuse of process by reason of cause of action estoppel and issue estoppel, neither arise

in this case. The effect of this, is that counsel's submission that the current claim is res judicata and as such an abuse of process is without merit.

Whether the Claim is statue barred by reason of the Limitation of Action Act.

Whether there was a subsequent acknowledgement of the debt.

[77] I will treat with issues 2 and 3 together for expediency as the contemplation of one leads naturally into the other. Counsel also argued that the Claim should be struck out as an abuse of process on basis that the Claim is statute barred. He submitted that the agreement dated April 27, 2007 is statute barred pursuant to section 46 of the ***LAA***. Ms. Forsythe conceded this ground but argued that section 46 also states that where there is evidence 'in writing acknowledging the debt or where there is a promise to repay then the debt would remain owing and subsisting."

[78] To this end, she indicated that emails had been exchanged between the parties during December 2015 to February 2016 in which Mr. Webb admitted owing the money. This she argued qualifies as an acknowledgment of the debt owed to Mr. McAllister by Mr. Webb and as such, as I understand it, time began afresh in 2015. Accordingly, the filing of the new claim in 2016 is not statute barred. Mr. Dabdoub in response argued that Mr. McAllister has to prove that the emails were from Mr. Webb.

[79] By virtue of the **LAA**, the limitation period for a cause of action in simple contract is six years. There is no discretion to extend time after the expiration of the six years. The authors of **Halsbury's Laws of England, Vol. 9(1), (4th Ed.)** at paragraph 618 *defines simple contracts as including all contracts which are not contracts of record or contracts made by deed*. The agreement in question was merely signed by the parties and witnessed. It is indeed a simple contract and there is no issue in this regard between the parties. A cause of action accrues for breach of contract when the breach occurs. Based on the agreement Mr. McAlister should have received $39,000,000.00 14 months after April 27, 2007. He did not. The agreement also states that his interest could be encashed, at his option, within

three months of his request. On Mr. McAllister's affidavit, he requested the money several times after June 2008 to no avail. On that interpretation the cause of action accrued in June 2008. The claim therefore became statute barred in 2014.

[80] The **LAA** provides what I call, a savings clause, that takes a contract out of the limitation period of six years and deems that there is a new or continuing contract where there is an acknowledgment or promise in writing. In the case of **Ricco Gartmann v Peter Hargitay** SCCA 116/2005, page 6, Cooke, JA, in dealing with a similar issue, being that of a claim for breach of contract in which the action was said to have been brought after the expiration said,

> *"However, the Limitation Act does not provide an absolute bar against the initiation of a suit after the expiry of 6 years from the date when the cause of action for debt arose. If there is an acknowledgment by the debtor time begins to run afresh from such acknowledgment."*

[81] Also in ***Gartmann v Hartigay*** Harrison JA, in discussing the application of section 46 of the **LAA** at page 20, quoted from **Halsbury Laws of England Vol. 24** (3rd Ed.), where the authors at page 376 said:

> *"Where there is an acknowledgment in writing or part payment, a fresh cause of action accrues."*

She concluded;

> *"It is abundantly clear that so long as there is sufficient acknowledgement in relation to the plaintiff's claim, time under the **LAA** would run afresh from the date of the acknowledgement."*

She also relied on ***Dungate v Dungate*** [1965] 3 All ER 818 and ***Spickernell v Hotham*** 69 ER 285. See also ***Hyleing v Hastings*** 1699 Ld Rayn 389.

[82] However, in order for Mr. McAllister to benefit from an "acknowledgement" it must be pleaded in either his statement of case or in his reply. In ***Gartmann v Hartigay,*** having examined the authorities on the point, Harrison JA on page 22 stated:

> *"The authorities are therefore clear that the acknowledgment can be either pleaded in either the statement of claim or the reply."*

[83] Rule 2.4 of the **CPR** defines a Statement of Case as:

> *"(a) a claim form, particulars of claim, defence, counterclaim, ancillary claim form or defence and a reply; and*
>
> *(b) any further information given in relation to any statement of case under Part 34 either voluntarily or by order of the court; and…"*

[84] In the Particulars of Claim filed on behalf of Mr. McAllister on February 16, 2016, Mr. McAllister indicated that "Mr. Webb at all material times has acknowledged his indebtedness to the Claimant and has at all material times declared his intent to honour his debt…" He went on to further mention that "Mr. Webb has asked him not to leave him penniless after the satisfaction of all his legal debts…especially since he expects SJBS and NHT to extract their pound of flesh." He goes on inter alia to state, that Mr. Webb entered into a gentleman's agreement with him, without prejudice to his right to extract $39,000,000.00 plus interest," that Mr. McAllister should ensure that he, Mr. Webb, realized a percentage of the proceeds of sale after SJBS and NHT were paid. Although he does not give a specific date or period of the acknowledgement, a reading of the Particulars suggests that the acknowledgment occurred shortly Mr. McAllister registered the caveat in 2015 and discovered the joint interest held by SJBS and NHT. He therefore referenced the acknowledgment made via email and set out certain terms subsequently discussed between the parties in the emails.

[85] A Notice of Intention to Tender into Evidence Hearsay Statement made in a Document was filed on April 22, 2022. This notice exhibited the emails exchanged between the parties. The emails substantiate the Particulars of Claim and disclose that the acknowledgment via email is dated December 3, 2015. In that email Mr. Webb expressly acknowledged that he owed $39,000,000.00 to Mr. McAllister, which he framed as his "indebtedness to Mr. McAlester."

[86] Finally, the acknowledgement, according to **Halsbury's Laws of England Vol. 28** (4th Ed.) paragraphs 880 and 881 "…must be in writing and signed by the person making the acknowledgment, or his agent…" In the case at bar there is

communication via email. The genesis of which I appreciate is being questioned. The emails do not bear a signature as we know signatures to be nor is there an electronic signature. An electronic signature is a digital replication of a person's original signature adapted to an application that allows the user to affix his/her signature to an electronic document. What the emails have, is the name of the purported senders. Mr. McAllister is saying that the emails represent an exchange between himself and Mr. Webb. Mr. Webb has not directly denied their authenticity and has only said that the Respondent is put to proof that the email address is his.

[87] The law surrounding the use of emails in establishing contracts is a developing area in the law. The general rule is that the acceptance must be communicated to the offeror. In **Chitty on Contacts Vol. 1** (27th Ed.) at paragraph 2-027, the learned authors stated that for "acceptance to be communicated it must normally be brought to the notice of the offeror." In that regard, the emails reflect that the parties responded to each other**.** Having found that there is evidence of an acknowledgment. It is my opinion that this is not a clear case that the Claim is statute barred. The ground that the Claimants Claim is statute barred and as such an abuse of process also fails.

[88] **Blackstone's** relying on ***Kent v London Ambulance Service*** [1999] PIQR P192**;** ***Farah v British Airways*** plc (1999) The Times, 26 January 2000**,** at paragraph 33.6, states that: *"where the law is in a state of development, it will usually be inappropriate to decide questions, such as whether a duty of care exists in a novel situation, on hypothetical facts. Such questions are usually best dealt with at trial."* On this point, I agree with Mr. Dabdoub that all the issues surrounding the emails are matters for the trial court when evidence can be heard in relation to the genesis of the emails.

[89] Mr. Dabdoub based his application to strike out on Rule 26.3(1) (a) which has been recited above. However, counsel made no detailed submissions in relation to this, except to say that the claimant failed to comply with the direction of the court and the **CPR** in that he failed to file an Affidavit in Response to the new matters raised

in the Affidavit of Christopher Webb and Shanakay Moss on or before April 21st,2016 as ordered by Justice Sykes on April 13, 2016. In response to this order, the Claimant filed his response less than a month later on May 10, 2016. I have considered the importance of ensuring that the rules of the Court are complied with, however, an application to strike out on that ground alone is doomed to fail. See ***Charmaine Bowen v Island Victoria Bank Limited, UnionBank Limited et al*** [2014] JMCA App 14.

[90] Counsel also called for the claim to be struck out on the basis that the Respondent filed some eight affidavits after he was granted injunctive relief. He claims that this is indicative of the fact that Mr. McAllister was not open with the court. The effect of this he argues, is that the injunction was thus obtained without full disclosure to the court and secondly, it denied his client a possible defence. The orders on record reveal that the Applicant was given the opportunity to respond to every affidavit filed by the Respondent. The content of the affidavits was not expounded on by counsel. He also provided no example of how Mr. McAllister mislead the court. Moreover, he did not reveal the possible defences that his client was denied. There is no merit to this ground.

[91] In his book, **A Practical Approach to Civil Procedure**, 22nd Edition, Stuart Sime points out that "…the jurisdiction to strike out is to be used sparingly, because striking out deprives a party of its right to a fair trial, and of its ability to strengthen its case through the process of disclosure and other court procedures. The result is that striking out is limited to plain and obvious cases where there is no point in having a trial". I find that this is not a 'clear and obvious case'. The parties are diametrically opposed on all matters concerning the purpose for which the money was advanced. Throughout his submissions Mr. Dabdoub repeatedly pointed out to the court that the issues between the parties were such that they should be fully considered by a judge at trial. I agree.

Summary Judgment

[92] The application for Summary Judgment on behalf of Mr. McAllister, is made pursuant to Rule 15.2(b) which is set out supra. The test to determine whether there is a triable issue is whether there is a 'realistic' as opposed to a fanciful, prospect of success. See ***Swain v Hillman*****.** The question of what is fanciful can be found in the decision of Lord Hope of Craighead in **T*hree Rivers District Council v Bank of England*** [2001] 2 AER 513. At paragraph 95 of the judgment he said;

> *"For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance."*

[93] In **Celador Productions Ltd v Melville** [2004] EWHC 2362, The Vice-Chancellor after being referred to Civil Procedure 2004 Vol.1 and after examining the cases of ***Swain v Hillman, Three Rivers District Council v Bank of England,*** and ***ED&F Man Liquid Products Ltd v Patel*** [2003] EWCA Civ 472, listed the following as his understanding of real prospect of success:

> *"a) it is for the applicant for summary judgment to demonstrate that the respondent has no real prospect of success in his claim or defence as the case may be;*
>
> *b) a "real" prospect of success is one which is more than fanciful or merely arguable;*
>
> *c) if it is clear beyond question that the respondent will not be able at trial to establish the facts on which he relies then his prospects of success are not real; but*
>
> *d) the court is not entitled on an application for summary judgment to conduct a trial on documents without disclosure or cross-examination."*

[94] In ***Doncaster Pharmaceuticals Group Ltd & Ors v The Bolton Pharmaceutical Company*** 100 Ltd [2006] EWCA Civ 661. At paragraph 5 of the judgment,

Mummery LJ posited that summary judgements should not be granted where there are conflicts as to facts on relevant issues. He stated that:

> *"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".*

[95] On my analysis of the cases therefore, it is the party that requests summary judgment who must prove that the case for the other side has no real prospect of success. The Applicant in an application for Summary Judgment, must satisfy the court that the Respondent's case has no substance/merit. The Respondent in turn must demonstrate that their case is more than just arguable and that they have a good prospect of succeeding. In order to do this the court must examine the Statement of Case and affidavits filed in support by the parties. However, in carrying out this exercise I bear in mind that I should not conduct a min trial. Much of the information has already been discussed above. I will restrict any mention of the facts of the case to the salient points.

[96] This is restricted to the Claim Form, Particulars of Claim, the Defence and any documents being relied on by each party along with the affidavits filed in support of and in response to the application. The Claimant's case is that in 2007 he entered into an agreement with Mr. Webb whereby he loaned him US$287,077.26. The terms of the agreement have been laid out in full supra. However, based on the agreement he was to reap returns of JA$39,000,000.00 or in the alternative the defendant was to transfer into this name a house of equal value. He has not realised the JA$39,000,000.00 or the house.

[97] The crux of this agreement is twofold; first, within 14 months from April 27, 2007 Mr. McAllister was to receive a house valued thirty-nine Million Jamaican dollars ($39,000,00.00), or secondly, Mr. McAllister's interest in the project could be encashed for the sum of Thirty-nine Million Jamaican dollars ($39,000,00.00) at his option, within three months of his request.

[98] Mr. Webb has said that no monies were paid to him but rather that the Claimant issued a cheque to Ravers Limited to purchase their share in the joint venture. If this is indeed so and the monies represented an investment, in what can now be called, a failed venture, then Mr. McAlister would not be able to recover any of the sums he invested since he took the risk inherent in investments

[99] In ***Silvers, Donald Rose et al v Curtis, Alphonso*** [2017] JMSC Civ. 221, Y. Brown J (Ag) adopted the definition of joint venture given in ***The Encyclopaedia of Terms and Precedents 5th Edition***, Volume 19, at paragraph 63 of her Judgment. It reads;

> *"A joint venture may be defined ... as any arrangement*
>
> *whereby two or more parties cooperate in order to run a*
>
> *business or to achieve a commercial objective."*
>
> *Brown J went on to say that;*
>
> *"At paragraph 31, it states that in a joint venture it is important to establish the nature of the business or the project which the parties have in mind, including the type of activity, its geographical scope, and the extent to which any party is committed to it to the exclusion of other similar activities.*
>
> *Paragraph 3.2 states –*
>
> *"It will have to be decided in what proportions the parties*
>
> *will share profits and losses..."*
>
> *Paragraph 3.3. posits:*
>
> *Provisions must be made for the joint venture to be adequately financed both at the initial stage and in the future...".*

[100] In this case Mr. Webb is asking the Court to find that the April 27, 2007 agreement represents the terms of a joint venture agreement. These are issues that must be considered by a trial judge. It is my considered opinion that to embark on an analysis of the evidence vis a vis whether it was a joint venture or a loan at this time without the benefit of hearing evidence from the witnesses is to overstep the role of a judge at this interlocutory stage. I have highlighted the differences in the case as presented by the parties to demonstrate that there are issues to be tried that will necessitate the calling of witnesses and the production of documents.

Whether this is a fit and proper case to make an order for security of cost.

[101] Rule 24.2 of the CPR deals with applications for security for cost. It states that a Defendant may apply for an order requiring the claimant to give security for the defendants' cost of the proceedings. At subsection (3) the rules indicate than an application for security must be supported by evidence on affidavit.

[102] Rule 24.3 of the CPR sets out the bases on which a court may make on order for security of cost:

> *"(a) the claimant is ordinarily resident out of the jurisdiction;*
>
> *(b) …*
>
> *(c) the claimant –*
>
> *(i) failed to give his or her address in the claim form;*
>
> *(ii) gave an incorrect address in the claim form; or*
>
> *(iii) has changed his or her address since the claim was commenced, with a view to evading the consequences of the litigation;*
>
> *(d) …*
>
> *(e) …*
>
> *(f) …*
>
> *(g) the claimant has taken steps with a view to placing the claimant's assets beyond the jurisdiction of the court."*

[103] This application was not filed separately, nor was it supported by any affidavit that addressed solely and separately the issue of cost. Rather it was sought as an order in the Notice of Application for a Declaration and to Strike out Claim filed on behalf of Mr. Webb. The full text of the order is set out at paragraph 55 supra. The grounds on which this application is made is that the Respondent lives outside of Jamaica and there is no evidence that the Respondent has any assets in Jamaica.

[104] In his affidavit in opposition to the Mr. McAllister's application for summary judgment and in support of his application strike out claim, Mr. Webb averred that Mr. McAllister does not reside at the given address in Jamaica and that his permanent residence is in the United States of America. He relied on the Affidavit of Donovan O. Williams who deponed that he visited the local address provided by the plaintiff and confirmed that Mr. McAllister no longer resided at the premises.

[105] Mr. McAllister responded and deponed that the Applicant was correct that he no longer resides at the address in Jamaica but has as his usual place of residence an address in the United States of America. He further indicated that the property in Jamaica is owned by him and that he occasionally resides there for short periods of time. No other evidence was provided for or on behalf of the parties in relation to this aspect of the application.

[106] In submissions. Mr. Dabdoub alluded to the preparation of a Bill of Cost for legal services provided thus far as justification for the sum requested however same was never provided to the court.

[107] The court has a complete discretion whether to order security for cost. However, in exercising this discretion, the court will examine the relevant circumstances of each case. In the case at bar, Mr. Dabdoub's complaint lies in the fact that Mr. Webb's primary place of residence is outside of the jurisdiction. In **Porzelack KG v. Porzelack (UK) Ltd** (1987) 1 All ER 1074 Sir Nicolas Browne-Wilkinson, Vice Chancellor, said:

> *"The purpose of ordering security for cost against a plaintiff ordinarily resident outside of the jurisdiction is to ensure that a successful defendant will have a fund available within the jurisdiction of this court against which it can enforce the judgment for costs."*

[108] He also sought to set out the principles that a court should be guided by when considering an application for security of cost. At page 1077, paragraph e, he said,

> *"Undoubtedly, if it can clearly be demonstrated that the plaintiff is likely to succeed, in the sense that there is a very high probability of success, then that is a matter that can properly be weighed in the balance. Similarly, if it can be shown that there is a very high probability that the defendant will succeed, that is a matter that can be weighed. But for myself I deplore the attempt to go into the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure."*

[109] Mr. McAllister has stated that his primary home is in the United States of America. Based on Rule 24.3(c)(iii) one of the consideration is whether is a Claimant is trying to evade the consequences of litigation by failing to inform the court of his correct address. In the Claim Form filed on February 16, 2016, Mr. McAllister gave two addresses as his point of contact. The first, was an address in the USA and the second was an address in Jamaica. That is a clear indication that he is not trying to evade the court. He went beyond what was required and provided two addresses. I make note that he owns the home in Jamaica and resides there from time to time. Mr. McAllister brought this Claim before the court. He began the process in 2013, albeit that Claim Form was discontinued. I mention this to demonstrate that Mr. McAllister has always been serious about pursuing his case in these courts. The record of this case reveals that Mr. McAllister for the most part has been present for every hearing whether in person or by video link. It is not my view that he is trying to evade the court.

[110] This case concerns a very large sum of money, US$287,077.26 that was given to Mr. Webb by Mr. McAllister. There is a signed agreement attesting to that fact. Mr. Webb accepts that he was given a cheque, in the name of Ravers Limited, in that amount by Mr. McAllister. The narrow point of dispute as I see it, is whether or not

the money was a loan or an investment. Mr. McAllister has filed affidavits in support of the substantive applications and has also filed a Notice of Intention in relation to documents he intends to rely on to support his case Without making any decision on the merit of this case the pendulum swings in favour of the former.

[111] Under the agreement, Mr. McAllister was to recoup $39,000,000.00. At present, the injunction granted in his favour has only secured $19,501,930.02 of that amount. If Mr. McAllister is successful Mr. Webb has not demonstrated that he will be able to satisfy the Claim. I am quite aware that that is not the issue in an application for security of cost, however, I am minded that I am to look at the probability of success either way.

[112] I also bear in mind that an application for an injunction was dealt with by more than one judge. Issues of this nature are normally settled in those proceedings. In fact, by order of The Honourable Mr. Justice C. Stamp on February 19, 2016, the Respondent gave an undertaking to abide by all orders for cost and damages. He also owns property in Jamaica. At that time, the Learned judge had at his disposal the Claim Form with the USA address as did the Defendants.

[113] Although the application was made pursuant to the relevant rules of the CPR. Apart from stating the sums claimed, I have not been provided with any evidence in support of or to justify the amount claimed as security for cost. I am not at all convinced of the genuineness of the application. It seems to be part of the scorched earth approach that the Applicant has taken towards this Claim.

[114] I will refrain from exercising my discretion in favour of Mr. Webb in this application.

Disposition

[115] The application for declaration and to strikeout claim is denied.

[116] The application for summary judgment is denied.

[117] The Application for security of cost is denied.

[118] Case management Conference is fixed for the 20th of February 2023 at 12MD for half an hour.

[119] Cost of the applications to be cost in the claim.