[2025] JMSC Civ 83

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2017 HCV 02011

BETWEEN	**BARBARA PEART (Representative of the Estate of Haskell Arnold, Deceased)**	**1ST CLAIMANT/RESPONDENT**
AND	**BARBARA PEART**	**2ND CLAIMANT/RESPONDENT**
AND	**MADGE REMEKIE**	**3RD CLAIMANT/RESPONDENT**
AND	**EVERTON MCDONALD**	**4TH CLAIMANT/RESPONDENT**
AND	**SONIA MCDONALD**	**5TH CLAIMANT/RESPONDENT**
AND	**AVIS PATTERSON**	**6TH CLAIMANT/RESPONDENT**
AND	**BARBARA PEART (Representative of the Estate of Marian Osbourne, Deceased)**	**7TH CLAIMANT/RESPONDENT**
AND	**INGRID FAGAN**	**8TH CLAIMANT/RESPONDENT**
AND	**IDELL FUSILLI**	**9TH CLAIMANT/RESPONDENT**
AND	**ERROL DUNCAN**	**1ST DEFENDANT/APPLICANT**
AND	**ALCOVIA DEVELOPMENT COMPANY LIMITED**	**2ND DEFENDANT/APPLICANT**

IN CHAMBERS

Dr Lloyd Barnett, Mr Weiden Daley and Ms Shaydia Sirjue instructed by Hart Muirhead Fatta for the Claimants/Respondents

Ms Danielle Archer, Mrs Mary Thwaites Whittingham and Mr Joseph Willis instructed by Daly Thwaites & Company for the Defendants/Applicants

Heard: 3 MARCH & 27 JUNE 2025

Civil Procedure Rules – Rule 26.3(1) (a)(b)(c) – Rule 26.3(1)(a) – whether the claim should be struck out for failing to comply with a rule of the CPR – Rule 8.9

– whether there was failure by claimants to annex documents they think necessary to their claim – Rule 26.3(1)(b)- whether the claim should be struck as an abuse of process – Deceit/Fraudulent Misrepresentation – limitation period – whether the claim in fraudulent misrepresentation/deceit is statute-barred – Rule 26.3(1)(c) – whether the claim should be struck out for disclosing no reasonable grounds for bringing the claim

MASTER C THOMAS

Introduction

[1] This is an application by the defendants seeking to strike out the claim. The matter came before me on a number of occasions but the application could not proceed due to various procedural issues raised and dealt with in relation to the application or previous orders made. I therefore adjourned the application for consideration on paper.

Background

[2] In or around June 2005, the 1st defendant, Mr Errol Duncan and his wife purchased the then vacant Lots 10 and 11, part of Harmony Hall and Tower Hill in the parish of Saint Mary, registered at Volume 1029 Folio 121 and Volume 1029 Folio 127 respectively, of the Register Book of Titles. Twenty-nine apartment units were constructed on these lots, forming a strata development which later became known as Tranquility Cove. Each of the nine claimants, on divers dates, entered into negotiations with the 1st defendant, to purchase units in the proposed development. The claimants allege that the 1st defendant, in his personal capacity and as a director of the 2nd defendant, Alcovia Development fraudulently misrepresented certain facts regarding the amenities that would be included in the common areas of the strata development, including but not limited to the beach and seafront, the pool, a deck overhanging the sea, the gazebo and the clubhouse (hereinafter referred to as “the disputed amenities”). Conversely, the defendants maintain that they made no false representations to the claimants and further that the claimants and the other

purchasers, ought to have reasonably known precisely what they purchased with regard to their respective agreements for sale.

[3] The matter has spawned a number of applications before the court including the claimants' application to appoint expert witness; claimants' application to extend time to file and exchange witness statements; 9th claimant's application to file and serve further amended particulars of claim; the application under consideration, filed by the defendants; claimants' application for disclosure or further information; and the claimants' amended application for extension of time and for relief from sanctions.

[4] On 15 November 2024, I made orders on the claimants' application for further information that certain documents in relation to subdivision approval, advertisements and other documents relating to Tranquility Cove were to be disclosed. As I indicated earlier, the instant application was adjourned to be heard on paper.

The application

[5] The grounds relied on are: -

i. That pursuant to Rule 26.3(a),(b) and (c) of the Civil Procedure Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court 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, 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 or that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim;

ii. That the Claimants have failed and or neglected to annex to their Amended Claim Form and Amended Particulars of Claim any supporting documents which they intend to rely

on to support their case against the Defendants pursuant to rule 8.9(3) of the Civil Procedure Rules;

iii. That the Claimants' Amended Claim Form and Amended Particulars of Claim having failed to comply with the requirements of Rule 8.9(3) of the Civil Procedure Rules is an abuse of the process of the court;

iv. That the Claimants' Amended Claim Form and Amended Particulars of Claim have not satisfied the legal evidentiary threshold required to ground a claim as to fraud;

v. That the Claimants have deliberately failed to file their witness statement(s) herein which furthers their failure to offer cogent evidence to substantiate the fraud they allege on the part of the Defendants;

vi. That the Claimants' claims are all statute-barred as per the normal operation of Sections 25 and 27 of the Limitation of Actions Act (1881).

[6] The application was supported by an affidavit sworn to by the 1st defendant, which was refiled, for procedural reasons, on 29 January 2025. An affidavit in response sworn to by the 1st claimant was filed on behalf of the claimants.

Submissions

For the defendants/applicants

[7] It was submitted on behalf of the defendants that the claimants have filed very lengthy particulars of claim but had not attached a single document on which reliance could be placed. It was submitted that it is well-established that allegations of fraud have a high degree of proof and must be specifically pleaded and proven and that the claimant had a duty to prove their case on a balance of probabilities which requires the court to be satisfied that the

pleadings are of a sufficient standard to cause the court to embark upon a trial. The claimants, it was submitted, had failed to make out a prima facie case of fraud against the defendants that is even worthy of furtherance by the court. Reliance was placed on the case of **Son Wheatle v Nerissa Thompson et al** SCCA No 108/1992, 5/1993, 6/1993 (delivered 30 September 1996, **Wallingford v Mutual Society** (1880) 5 App Cases and **Thomas v Morrison** (1970) 12 JLR 203.

[8] It was submitted that where issues of both law and fact arise in the same suit and the court is of the opinion that the case or any part thereof can be disposed of on an issue of law only, it may try that issue first especially if the issue relates to jurisdiction of the court or a bar to the suit is created by any law for the time being in force. Relying on the case of **Nsuli Neville Wadia v Ivory Properties and others** (2020) 6 SCC 557, it was submitted that where the issue of law can be adjudicated on "admitted facts", the court can decide the issue of law as a preliminary issue.

[9] In the instant case, it was argued, all the claimants had admitted at various paragraphs of their amended particulars of claim filed on 9 June 2023 to signing an agreement for sale and that their respective sales had being concluded at different dates in accordance with the "Completion" clause as set out in each agreement for sale. Those facts being admitted, the court is at liberty to rely on them and apply whatever weight is necessary to resolve the issues of fact and law, even at this preliminary stage of the proceedings.

[10] It was submitted that when the four principal elements of the tort of deceit as established in **Derry v Peek** [1886-90] All ER 1 are taken together, the criteria beg for better particulars as to the fraudulent misrepresentation purported to have been committed by the defendants.

[11] In relation to the failure of the claimants to file their witness statements, it was submitted that the claimants in a clear pre-emption of their intended defiance of the court's orders filed an application to extend the time to file and exchange witness statements, which was predicated on the need for further information

and disclosure from the defendants. The application was heard and five of the twelve pieces of information sought were granted. The defendants had complied with the order and no further application for request had been filed. It was submitted that the court was more than gracious in hearing the claimant's application before the defendants' application to strike out the claim and the continued failure of the claimants to file their witness statements was inordinate, inexcusable and is a total disregard for the rules and the orders of the court. It was also submitted that the application for extension of time to file witness statements is of no moment, as the claimants needed to have applied for relief from sanctions and their reason for seeking an extension of time was already adjudicated upon.

[12] In relation to the issue of the limitation period, it was submitted that the claimants had six years in which to bring their claim for fraudulent misrepresentation and that the question for the court is simply to decide when time began to run for the purpose of the Limitation of Actions Act given the nature of the cause of action. With respect to the claimants relying on fraudulent concealment pursuant to section 27 of the Limitation of Actions Act, it was submitted that section 27 requires the court to undertake an objective test to determine when the limitation period starts. It is not a subjective test left to the claimants' determination when they became or could have become aware. Sufficient facts are before the court to allow for the objective test to be undertaken.

[13] Counsel contended that the credibility of the claimants' averment at paragraph 77 of their amended particulars of claim that they did not discover and could not have discovered the matters complained of until on or about 10 April 2016 was undermined by the fact that the strata plan clearly identified the common area of the strata as being fully contained in section 3 of the survey plan submitted by the 1st defendant for approval by the St Mary Municipal Corporation. The strata plan from the date of its registration at the Titles Office on 19 October 2007 became publicly accessible and a public document cannot be said to have remained concealed at the instance of anyone.

[14] It was submitted that the description and boundaries of the property which is the subject of this claim would have been noted on the agreements for sale and the titles provided to the claimants as at 2005 for the 1st, 2nd and 8th claimants, as at 2006 for the 3rd claimant, as at 2007 for the 4th, 5th and 6th claimants, as at 2010 for 7th claimant and the 9th claimant as at 2008. The existence of the certificates of title in the claimants' possession would not allow concealment to be successfully relied upon. That which was purported to have been concealed was visible to the naked eye at the time of possession or at best would have been seen on a visit to the property within 6 years after the claimants had possession.

[15] It was submitted that the claimants had the ability to investigate their title upon the completion of their respective sales and ought to have done so under the circumstances where the sale agreements were subject to subdivision approval, making them subject to validation at a future date (date of completion). As at the date of completion of their respective sales, the claimants would have been placed in possession of their respective certificates of title among other documents which presented them with the ability to investigate the terms of the subdivision approval from the municipality, given each splinter title bore the Strata Plan No. 2365. Reliance was placed on **Bevad Limited v Oman Limited** SCCA No 133/2005 (delivered 18 July 2008). It was submitted that the claimants' ability to determine the state of their title and the amenities they would in fact enjoy would have crystallised first upon approval and registration of the strata and thereafter upon each purchaser obtaining their registered title.

[16] It was further argued that there can be no reliance on what was said between the parties before the execution of a sale agreement, which the execution and delivery of the title would have consummated. At the latter's delivery, the claimants would have been within their rights to make a claim.

[17] Counsel submitted that section 27 of the Limitation of Actions Act does not assist a person who merely shuts his eyes in spite of the circumstances requiring him to ascertain the facts on which he could have discovered the

fraud. The section saves the rights of the defrauded party from lapse of time as long as the party is not at fault on his own account. Reliance was placed on **Saranpul Kaur Anand v Praduman Singh Chandhok** (2022) 8 SCC 401.

[18] It was also argued that to preliminarily determine the issue as to whether the claim is statute-barred does not require the court to venture into a fact-finding exercise as to the nature of the alleged concealed fraud but rather the point at which the said concealed fraud could have been discovered. Counsel also relied on **Canada Square v Potter** [2023] UKSC 1; **Maureen Black v Advantage General Insurance Co Ltd** [2023] JMCC Comm 45; **Barrington Clarke v Kimesha Notice** [2021] JMSC Civ 12.

For the claimants

[19] Counsel for the claimants submitted that rule 8.9(3) of the Civil Procedure Rules ("CPR") uses the word "necessary" in stating that a claimant "must identify or annex a copy of document". Even if the documents such as the minutes of meetings or brochures are not produced, the claimants can still succeed in their claim on the basis of the oral representations made or the grant of permission by the court to give secondary evidence of those documents. Accordingly, while the documents are relevant and supportive of the claimants' case, they are not indispensable or 'necessary' but desirable. Their relevance and desirability were confirmed by the order of the court for their production.

[20] Referring to the duty under Part 24 to give disclosure and the right of a party to obtain information from another party, it was argued that a request for production of documents or disclosure of information is not therefore an implication that the requesting party cannot sustain his case against the party from whom disclosure is sought.

[21] It was submitted that paragraphs 20-68 of the amended particulars of claim provide ample particulars of the fraudulent misrepresentation which were made on behalf of the defendants. In those paragraphs, the claimants had expressly

stated the nature and extent of the false representations made. Not only are the particulars comprehensive but documents disclosed confirm that advertisement inviting persons to purchase units in the scheme included an indication that they would have access to the gazebo, pool, deck, clubhouse, the beach and seafront. The amended defence makes it clear that there are substantial disputed issues of fact which can only be legally and properly determined at trial. Although the 1st defendant asserted that he was unaware of any false representation, it is not legally necessary for the claimants to show that he knew or should have known that they were false, once it can be shown that he had no true belief in them. Reliance was placed on **Smith v Chadwick** [1884] 9 App Cas 187. These fraudulent misrepresentations were made at a time when the claimants were not resident in Jamaica and had no independent legal representation, it was submitted.

[22] It was argued that a principal cannot sit back and ignore the fraudulent statement of its agent, knowing that third parties are likely to rely on them. In support of this submission, reference was made to **Derry v Peek**, **London County Freehold v Berkley Property Co Ltd** [1936] 2 All ER 1039, **Gordon Hill Trust Ltd v Segall** [1941] 2 All ER 379, **Hedley Byrne & Co Ltd v Heller & Partners Ltd** [1964] AC 465, **Bredford Third Equitable Benefit Building Society v Borders** [1941] 2 All ER 205. Thus, it was submitted, the 2nd defendant is liable for the statements made by the 1st defendant. Counsel also relied on the following authorities establishing various principles in relation to misrepresentation **Esso Petroleum Co Ltd v Mardon** [1976] QB 801, **Box v Midland Bank Ltd** [1979] 2 Lloyd's, Rep 391, **Thomas v Witter Ltd v TBP Industries Ltd** [1966] 2 All ER, **Edgington v Fitzmaurice** (1885) 29 Ch D 459, **The Siben** [1996] 1 Lloyd's Rep 35 and **Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd** [1995] 2 AC 501.

[23] It was submitted that the claimants have produced substantial evidential support for the allegation of fraud and it will be for the trial court to determine the issue after hearing all the evidence and being provided with all the relevant documents which are produced and exhibited.

[24] With respect to the defendants' contention that the claim should be struck out for failure to file witness statements, it was submitted that the general powers of the court to strike out on the basis of non-compliance with an order are exercised with reasonable regard to the circumstances. Referring to rule 26.8 of the CPR, it was argued that even where there is a failure to comply with order or rule, relief from sanctions is granted where it is fair and just to do so and would not affect any trial date. Moreover, the court is expressly granted the power to grant relief or rectify matters where there has been a procedural error. No trial date has yet been fixed; accordingly, the application to strike out should be refused.

[25] On the issue of limitation period, it was submitted that it was important to note that the claimants are lay persons with no knowledge or expertise in legal matters. They were not legally represented and most were resident abroad. Essentially, the representations made were that they would be owners of the apartments and as such would be entitled to ownership and/or full and free access to and enjoyment of common areas and that the necessary legal mechanisms would be adopted and implemented to achieve these objectives. They could not as laymen, be expected to know the details of the legal mechanism that would be required or utilised. In the instant case, there is no evidence of any action having been taken by the defendants to deny the claimants access to the disputed amenities. In fact, there is some evidence that the 1st defendant promised that the appropriate arrangements would be made to ensure that they would enjoy the promised access. Therefore, it was an issue for determination at trial as to when the breach first occurred or the appropriate date from which time should be reckoned as having begun to run.

[26] It was argued that the law is well settled that a misstatement of an intention of the defendant in doing a particular act may be a misstatement of fact and if the plaintiff was misled by it, an action in deceit may be founded on it, and that even where the claimant has been induced both by his own mistake and by a material misstatement by the defendant to do an act by which he receives injury, the defendant may be liable in an action for deceit. Reliance was placed on **Edgington v Fitzmaurice** [1884] 29 Ch D 459. It was submitted that at no time

did the defendants correct the misrepresentation made to the claimants that the necessary steps would be taken to achieve the aims and objectives of providing necessary access to the subject amenities outlined prior to their entering into the relevant agreements.

[27] Relying on **Applegate v Moss; Archer v Moss** [1971] 2 WLR 541, it was submitted that this case supported the claimants' contention that time did not begin to run until the fraud was uncovered by them and that the claimants have specifically stated that it was not until 2015 that they discovered that legal steps had not yet been taken to secure the rights and privileges promised to the claimants and even then the 1st defendant represented and/or promised at the Strata Annual Meeting that the claimant would always have the promised access to the said facilities as long as they paid the maintenance fees. Had this promise been kept, there would have been no cause for a legal action. Since the final denial came after this point, the claimants' cause of action may be properly treated as having matured after this point. Accordingly, since the action was filed in 2017, the question of it being statute-barred cannot legally arise.

[28] Counsel also submitted that the court will not readily take the draconian step of striking out unless the case is unsustainable and there is no dispute of facts. For this submission, counsel relied on the cases of **Foote-Doonquah v Jamaica Citadel Insurance Brokers** Ltd 2005 HCV 01078 (delivered 18 August 2006), **Marilyn Hamilton v United General Insurance v United General Insurance Company Ltd** 2007 HCV 01124 (delivered 15 May 2009) and **Wayne Robinson v Basil Jarrett** [2025] JMCA Civ 8. It was submitted that there are clearly substantial questions of fact which can only be determined in a trial and that the issue of limitation is not in the circumstances suitable for determination summarily. Counsel relied on **Lee Roy Clarke v Life of Jamaica Limited** 2003 HCV 0850 (delivered 22 July 2005); **Lethe Estate Ltd v Great River Rafting and Plantation Tour Ltd & Jamaica Public Service Co Ltd** 2011 HCV 03742 (delivered 21 October 2014); [2025] JMCA Civ 3.

Discussion and analysis

[29] The broad issue that arises for determination is whether the claimants' statement of case should be struck out pursuant to rule 26.3(1) of the CPR. The defendants are seeking to rely on subparagraphs (a) – (c) of this rule. Consequently, the sub-issues that arise are:

(i) Whether the claim should be struck out for failing to comply with a rule, order or practice direction; (rule 26.3(1)(a)):

(ii) Whether the claim should be struck out as an abuse of process (rule 26.3(1)(b); and

(iii) Whether the claim should be struck out as disclosing no reasonable grounds for bringing the claim (rule 26.3(1)(c).

[30] Before dealing with each issue separately, I will briefly consider the well-established approach adopted by the court in applications to strike out. In **Bengal Ltd v Wendy Lee & Ors** [2025], McDonald-Bishop P stated:

> [35] The learned editors of Blackstone's Civil Practice 2004, from paras. 33.6 to 33.8 of the text, have provided a helpful guide to the court in interrogating the legal questions that arise for consideration of the learned judge's decision against the background of the provisions of rule 26.3. From this invaluable source and the cases cited therein, it is seen to be well-settled on the authorities that under the CPR, as it was under the old rules, the jurisdiction to strike out must be used sparingly and in the clearest of cases. The reason for this is that the exercise of the jurisdiction deprives a party of its right to a trial and, therefore, its ability to strengthen its case through the process of disclosure and other court procedures, such as requests for further information. Also, the cross-examination of witnesses often changes the complexion of a case. Therefore, the accepted rule was and remains that striking out is limited to plain and obvious cases

where there is no point in having a trial (see **Three Rivers District Council and Others v Governor and Company of the Bank of England No (3) ('Three Rivers No (3)'**) [2003] 2 AC 1, 77).

[36] Before using the procedure under rule 26.3 of the CPR (striking out) to dispose of a case, just like using the summary judgment procedure to do so under Part 15, care should be taken to ensure that the party is not deprived of the right to a trial on issues essential to its case. Like summary judgment applications, striking out applications are to be kept within their proper limits and are not meant to dispense with the need for a trial, where there are issues which should be considered at trial (see **Swain v Hillman** [2001] 1 All ER 91, 92 per Lord Woolf MR speaking of summary judgment applications).

[31] Therefore, the claimants are on good ground in their submission that the court will not readily take the draconian step of striking out a case unless it is clearly unsustainable.

[32] At this juncture, it is convenient to deal with issues (i) and (iii) together as a determination of both issues will necessitate an examination of the pleadings.

Issue (i)
Whether the claim should be struck out for failing to comply with a rule, order or practice direction (rule 26.3(a)):

[33] It seems to me that the defendants' contentions, in summary, are that the claimants have failed to comply with the provisions of the CPR for the documents in support to be attached to the particulars of claim and the order of Orr J (Ag) for the filing and exchange of witness statements.

[34] In dealing with the issue of the attachment of documents to the particulars of claim, it is important that the rule in question is not considered in isolation. In

this regard, it is of note that rule 8.9(3) of the CPR is to be found under the rubric "Claimant's duty to set out case". The relevant portion of the rule states:

> **Claimant's duty to set out case**
>
> 8.9 (1) The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies.
>
> (2) Such statement must be as short as practicable.
>
> (3) The claim form or the particulars of claim must identify or annex a copy of any document which the claimant considers is necessary to his or her case.
>
> (4) …
>
> (5) …

[35] I am of the view that when the rule is considered in the context of the entire rule 8.9, the requirement in rule 8.9(3) to identify **or** annex any document being relied on is with the objective of ensuring that as part of setting out its case, the claimant makes the defendant aware of the entire substance of the claim against the defendant. Thus, it is not mandatory that a document be attached; it will suffice if the document is identified, that is, described in such a manner as to enable the defendant to identify the document even though it is not attached. I note also that this requirement of the rule appears to be based on the claimant's assessment of the documents he/it "considers is necessary", and I agree with counsel for the claimants that the rule is limited to documents that are considered necessary and not to documents that are desirable or merely relevant. Also, unlike the case of rule 8.11(3) of the CPR where it is stated that if the claimant intends to rely on a medical report at the trial, he must attach the medical report, there is no such stipulation in rule 8.9. Therefore, it is my view that even though a document has not been identified or annexed as necessary, this does not mean that it cannot be relied on. It seems to me that where the claimant's case has been set out so that the defendant is aware of the case against him, given the approach of the court to striking out as an option of last resort, it would not be in consistent with the overriding objective to strike out a claim if documents which **the claimant considers necessary** have not been attached.

[36] It is now necessary to consider the claimants' case as set out in their particulars of claim. The pleadings demonstrate that the claimants are all purchasers of lots in the development known as Tranquility Cove. Though they entered into negotiations and agreements for sale with the 1st defendant personally or on behalf of the 2nd defendant at various dates between 2005 and 2010, the pleadings in relation to the representations that were made and the particulars of fraudulent misrepresentation are very similar. It will therefore suffice for me to refer to the pleadings in relation to the 1st and 2nd claimants who entered into negotiations and agreements for sale with the 2nd defendant for the sale of their apartment in Tranquility Cove in or around 2005 and subsequently became registered proprietors in 2008.

[37] The claimants at paragraph 11 of their particulars of claim state that in or about August of 2005, the 1st and 2nd claimants negotiated with the 1st defendant in his personal capacity for the sale by the 1st defendant to the 1st and 2nd claimants of a seaside 2 bedroom apartment in a development to be known as "Tranquility Cove" located in Tower Isle St Mary, Jamaica under the Registration (Strata Titles) Act, which apartment would be a strata lot in the strata corporation and would have a proportionate unit entitlement in the common areas of the strata corporation.

[38] At paragraph 13, it is asserted that in the course of the negotiations and in order to induce the 1st and 2nd claimants to purchase the strata lot, the 1st defendant partly orally, partly in writing and partly by conduct made certain representations. So far as is relevant to the real issue in dispute, among these representations were that the 2nd defendant was the registered proprietor and/or beneficial owner of the lands to form the strata plan for the development; Tranquility Cove would be a seaside development; that the common areas would be proportionately owned by all the owners of the strata lots, and that these common areas would include, among other things, the beach, the seafront at the northern boundary of the strata corporation formed by the Caribbean Sea, a large pool, a deck overhanging the sea, a gazebo and clubhouse; and the claimants and their successors would own a share and

interest in these amenities in proportion to their unit entitlement in their strata lot in common with the other strata lot owners.

[39] It is further pleaded at paragraphs 14 and 15 that by a letter of agreement entered into with the 1st defendant personally, which described the apartment as "seaside apartment" signed and entered into by the 1st and 2nd claimants on or about 10th day of August 2005 and in reliance upon and on the faith of the 1st defendant's representations the claimant confirmed their agreement for the sale and purchase of the said apartment. It was also pleaded that upon and on the faith of the 1st defendant's representations, the 1st and 2nd claimants subsequently signed and entered into a formal agreement for sale.

[40] On 1 October 2007, the lands comprised in certificate of title registered at Volume 1411 Folio 946 became the Proprietors Strata Plan #2365. The splinter titles for the strata lots in the strata were issued in the name of the 2nd defendant company which was the registered proprietor of the land registered at Volume 1411 Folio 946. The claimants assert that the sale was completed after the payment of the full purchase price and all other sums payable under the agreements for sale and the claimants becoming registered proprietors of their lot.

[41] It is pleaded at paragraph 20 that the representations were made by the 2nd defendant to the 1st and 2nd claimants and several of them were false. The 2nd defendant made those several false representations fraudulently, well knowing that they were false or reckless and/or not caring whether same were true or false.

[42] The particulars of fraudulent misrepresentation are set out at paragraph 20 to include that the 1st defendant was not and had never been the registered proprietor or the beneficial owner of the lands to form the strata plan for the development; that the development is not a seaside development; that the registered strata plan and consequently, the common areas owned by the proprietors of the strata do not include any beach or seafront at the northern boundary of the development formed by the Caribbean sea or any beach or any

seafront, or pool, deck overhanging the sea, gazebo or any clubhouse; the defendants have not caused the claimants to be registered as owners of a share or interest in the seafront, pool, deck, gazebo and clubhouse or seafront land; and the 1st defendant had no intention to procure the fulfilment of the agreement which resulted from the said negotiations. It was also pleaded that neither the 1st defendant nor the 2nd defendant disabused the claimants of the said fraudulent misrepresentation before the completion of the sale and that it was not until 2015 that the claimants for the first time discovered and confirmed in the early 2016 that the seafront land was never and is not a part of the strata and that the claimants have no registered share or interest in seafront land or the seafront, pool, deck, gazebo and clubhouse.

[43] It seems to me that the claimants are contending that the misrepresentations were made orally, by conduct and in writing. They have identified pre-contract letters for sale, agreements for sale, certificates of title and the relevant strata plan in their pleadings. Given the pleadings, I do not think it can be said that they have not identified in their particulars of claim the documents they consider necessary to their case. The claimants have asserted that the representations were made orally, by conduct and in writing, and it is my view that it cannot be said that the claim for fraudulent misrepresentation cannot be made out solely on the basis of the oral representations and the representations by conduct along with the documents they have identified. I therefore am not of the view that the claimants have failed to comply with rule 8.9(3) of the CPR.

[44] With respect to the order of Orr J for the witness statements, the issue of whether a statement of case should be struck out for failing to comply with an order for the filing and service/exchange of witness statement has already been dealt with by our Court of Appeal in **Garbage Disposal and Sanitations Systems Ltd v Noel Green & ors** [2017] JMCA App 2. In that case, the Court of Appeal was considering an application for permission to appeal an order made by the court below striking out a statement of case for failing to file witness statement within the time stipulated by the court. In granting permission to appeal, F Williams JA stated:

> [48] ….It must be borne in mind that the application to strike out the applicant's statement of case was grounded on the failure of the applicant to comply with case management orders, in particular to file and serve a witness statement and listing questionnaire within a stipulated time. Rule 29.11(1) of the CPR provides that:
>
> > "Where a witness statement or witness summary is not served in respect of an intended witness within the time specified by the court then the witness may not be called unless the court permits."
>
> [49] Rule 29.11(1) therefore imposes a sanction for the failure to serve the witness statement in the time limited to do so and this sanction takes effect unless relief from sanction is granted by the court. As such, striking out in those circumstances would not only be inappropriate; but, in my view, would operate as a second or double sanction.

[45] This dictum of F Williams JA was applied with approval in **Attorney General of Jamaica v Abigaile Brown** [2021] JMCA Civ 50 (at paragraph [48]). Thus, the application to strike out cannot be granted on this basis. The issue of the consequence of the failure to file witness statements within the time stipulated by the court is best dealt within the context of the claimants' application for extension of time and/or relief from sanctions for failure to file witness statements which is pending before this court.

[46] I will now deal with issue (iii), in light of the law on the approach to be employed by the court in applications which are based on rule 26.3(1)(c) of the CPR, that is there are no reasonable grounds for bringing or defending the claim.

Issue (iii)

Whether the claim should be struck out as disclosing no reasonable grounds for bringing the claim (rule 26.3(c))

[47] This is a well-trodden area and I need only refer to the Court of Appeal decision of **Gordon Stewart v John Issa** SCCA No 16/2009 (delivered 25 September 2009) in which the Court of Appeal made it clear that the court is required to examine the pleadings to determine whether a cause of action has been made out or disclosed. Morrison JA in his judgment stated:

> 31. An application to strike out under this rule [26.3(1) (c)] raises what Gatley (Libel and Slander, 11th ed., paragraph 32.34) describes as "a pleading point", in respect of which the authorities are clear that the court is required only to ascertain whether, as Dukharan JA put it in **Sebol Limited and others v Ken Tomlinson and others** (SCCA 115/2007, judgment delivered 12 December 2008), the pleadings give rise to a cause of action..." (paragraph 18).

[48] From the reliefs being sought, it is clear that the claimants have brought a claim in fraudulent misrepresentation and both parties relied on **Derry v Peek** as establishing the requirements of this cause of action. Harris JA in **Bevad Ltd v Oman** referred, with approval, to the case of **Derry v Peek**. At page 8 of her judgment she stated:

> In **Derry v Peek** [1886-90] All ER, the locus classicus on the tort of deceit, Lord Herschell speaking over a hundred years ago, stated that for an action to lie in tort it must be shown that the statement was not only false but was “made knowingly, or without belief in its truth, or recklessly, careless, whether it be true or false”. In that case, it was held inter alia, that a false statement made carelessly, without reasonable belief in its truth did not amount to fraud but may furnish evidence of it.
>
> Four principal elements of the fraud must be established:

(i) There must be a false representation of fact. This may be by word or conduct.

(ii) The representation must be made with the knowledge that it is false, that is, it must be wilfully false or made in the absence of belief in its truth. **Derry v Peek** (supra); **Nocton v Lord Ashborne** [1914 – 1915] ALL ER 45

(iii) The false statement must be made with the intention that the claimant should act upon it causing him damage.

(iv) However, it must be shown that the claimant acted upon the false statement and sustained damage in so doing. **Derry v Peek** (supra); **Clarke v Dickson** [1859] 6 CBNS 453; 35 Digest 18,100.

[49] The defendants' contention is that the claimants have failed to sufficiently plead fraud, in that the pleadings do not disclose a prima facie case of fraud.

[50] From the pleadings outlined above at paragraphs [37] – [42], it is my view that the claimants have demonstrated in their pleadings that certain representations were made about the ownership of the property on which the strata development would be constructed and that certain amenities would be included in the strata property; that these representations were false; that the 1st defendant knew these representations were false or he was reckless or did not care whether they were true; and that the claimants relied on these representations in purchasing the lots in the strata development. It is also pleaded at paragraph 75 of the amended particulars of claim that the claimants have suffered damage by way of the reduction in the value and/or saleability of their respective properties as a result of the absence of the promised amenities from the strata property, which addresses the fourth ingredient of the tort as outlined in **Derry v Peek**. It is important to note that the claimants have not confined their pleadings to bald assertions about the representations but have

particularised the representations made and the ways in which they have been shown to be untrue.

[51] I am of the view that these pleadings are sufficient to establish the cause of action of fraudulent misrepresentation as outlined in **Derry v Peek** and by Harris JA in **Bevad Limited v Oman**. This is an entirely different case from the case of **Son Wheatle and Nerissa Thompson v L Raymond and Evelyn Donalds**), which was relied on by the defendants. In that case, the court found that the defence in question did not contain the necessary particular of the facts being relied on and that it was "a vague allegation of fraud, the nature of which was not stated". In this case, based on the pleadings, the defendants are not in doubt as to what the claimants' cause of action is against them or the allegations that the cause of action are based on. I am therefore of the view that the claim cannot be struck out under rule 26.3(1)(c) of the CPR.

Issue (ii)

Whether the claim should be struck out as an abuse of process (rule 26.3(1)(b)

[52] The primary contention of the defendants under this ground is that the claim is statute-barred. The decision of the Court of Appeal in **Sherrie Grant v Charles McLaughlin and Anor** [2019] JMCA Civ 4 is instructive on the question of the limitation period for actions in deceit or fraudulent misrepresentation and the time from when the limitation period starts to run. In that case, a claim was brought for breach of contract, misrepresentation, deceit and unjust enrichment. The 1st respondent had purchased a motor vehicle from the appellant, which was registered in the names of the appellant and the 2nd respondent. The vehicle was subsequently seized by a bank which had had a lien on the motor vehicle. The sale of the motor vehicle to the 1st respondent had been procured by means of a new motor vehicle certificate of title. The appellant denied any knowledge or dealings of fraud. An application was made to strike out the claim on the basis that the claim was statute-barred. The court at first instance found

that the question of the limitation period was an issue to be decided at trial. This was upheld on appeal.

[53] Brooks JA carried out an extensive review of the authorities including the relevance of section 27 of our Limitation of Actions Act on the commencement date of the cause of action in fraudulent misrepresentation or deceit. The learned judge of appeal stated:

> [36] **Brown and Another v Jamaica National Building Society** is important for another principle, which is relevant to this case. At paragraph [43] of his judgment, Harrison JA pointed out that the equitable doctrine of fraudulent concealment does not apply to extend the limitation period in respect of actions in tort and contract. He said at paragraph
>
> > [43]: "…Although the equitable doctrine of fraudulent concealment does have a limited area of operation by virtue of section 27 of the Limitation of Actions Act (reproducing section 26 of the English Real Property Limitation Act 1833), it is clear that by its terms that that section is only applicable to suits for the recovery of land or rent…"
>
> [37] In their work, Limitation of Actions, published in 1940, the learned authors, Preston and Newsom seem to be of a similar view. They assert that, prior to the Judicature Act of 1873 in England, fraud did not postpone the running of time for the application of the Limitation of Actions Act. The learned authors so stated at page 356: "At common law neither fraud as part of a cause of action nor the fraudulent concealment of a cause of action was a ground for postponing the running of time: **Imperial Gas Co. v. London Gas Co.** (1854), 10 Ex. 39; **Hunter v. Gibbons** (1856), 1 H. & N. 459." That opinion is accepted as being correct. As will be demonstrated below, however, the introduction of the Judicature Acts allowed for the

postponement of the running of time in the cases of fraudulent concealment of the right of action. That was as a result of the availability of equitable remedies, despite a claim being ostensibly a common law one.

[38] Preston and Newsom contend, at page 355, that the situation in equity was different from that at common law**. In equity, they correctly point out, fraud postponed the running of time. They state: "The equitable doctrine was that the effect of fraud was to postpone the running of time until the person damnified thereby had discovered it or ought to have done so. So stated, the doctrine applied both to (a) causes of actions based on fraud, and (b) cases where a right of action was fraudulently concealed. In neither case was the plaintiff barred until six years had expired after the actual or notional discovery:** see Oelkers v. Ellis [1914] 2 K.B. 139 at p. 150…."

[39] The English Limitation Act, 1939, has ameliorated the situation with regard to claims in common law. Section 26 of that statute postpones the running of time until the victim of the fraud discovers the fraud. The legislature of this country, however, despite nudges by this court in both **Melbourne v Wan and Brown and Another v Jamaica National Building Society**, has failed to pass a modern statute addressing limitations of actions. We, therefore, continue to struggle with the 400 year old, 1623 Limitation Act, received from England (see section 46 of the Limitation of Actions Act).

[40] Section 27 of the Limitation of Actions Act, allows the postponement of the running of time in the case of concealment by fraud, but limits it to the recovery of land or rent. The section does not apply otherwise. (Emphasis supplied)

[41] Based on the above reasoning, it is necessary to discuss the impact of a limitation period, created by the Limitation of Actions Act.

> [42] Usually, the reliance on the provisions of the Limitation of Actions Act as a defence to a claim, is to be demonstrated at a trial. In certain circumstances, however, a defendant may rely on a limitation of actions defence prior to the trial. A defendant may apply to strike out a claim if it appears on the face of the claim, that it is time-barred (see **Lt Col Leslie Lloyd v The Jamaica Defence Board and Others** (1978) 16 JLR 252). The basis of the application is that the claim amounts to an abuse of process. (Emphasis supplied)

[54] Then at paragraph [50], the learned judge of appeal stated:

> [50] The reasoning derived from **Brown and Another v Jamaica National Building Society** demonstrates that Mr McLaughlin's claim against Ms Grant and Mr Smith, in the impugned amendment, for breach of contract, misrepresentation, deceit, and unjust enrichment, is based on a claim at common law. It would be subject, therefore, to a limitation period of six years in accordance with section 3 of the Limitation of Actions Act of 1623. There would normally be no postponement on the running of time. There may yet, however, be a relief in equity, depending on the evidence adduced by Mr McLaughlin.

[55] Applying the reasoning of Brooks JA in **Sherrie Grant**, it can be said that the limitation period for claims alleging fraud is six years. Though the area is not free from difficulty, it appears that by virtue of equity, and not by the provisions of section 27 of the Limitation of Actions Act of Jamaica, time begins to run from the time when the fraud was discovered or "ought to have been" or could have been discovered with reasonable diligence. The claimants are therefore not on good ground in relying on the case of **Applegate v Moss** for their contention that the limitation period does not begin to run until the fraud is discovered, particularly since that case was concerned with the application of section 26(b) of the then Limitation of Actions Act (1939) of the United Kingdom, which is not applicable in this jurisdiction. It follows that the parties also are not on good in

their reliance on section 27 of the Limitation of Actions Act given the facts of this case, which do not concern recovery of land or rent.

[57] The case of **Canada Square Operations Ltd v Potter** [2023] UKSC 41, which was relied on by the defendants is not applicable. In that case, the court was considering the provisions of section 32(1) of the UK 1980 Limitation Act which provided for the postponement of the limitation period where "the action is based upon the fraud of the defendant" or "any fact relevant to the plaintiff's right of actions has been deliberately concealed from him by the defendant' or "the action is for relief from the consequences of a mistake". It provided that the limitation period would not begin to run until the "plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it". The court made it clear from the outset that the issue with which the court was concerned was the meaning of the phrases of "deliberately concealed" and "deliberate commission of a breach of duty".

[58] In this case, the cause of action is in fraudulent misrepresentation or deceit. Therefore, the limitation period would begin to run from the date the claimants discovered the fraud or "ought to have done so" or could with reasonable diligence have discovered it.

[59] It is now necessary to determine the fraud being complained of. The claimants have argued in their written submissions that the representation was that the claimants would be "owners of the apartments and as such would be entitled to ownership and/or full and free access to and enjoyment of common areas which included the beach and seafront at the north, a large pool deck overhanging the sea, a gazebo and a clubhouse and that the necessary legal mechanisms would be adopted and implemented to achieve these objectives". However, it is my view that the crux of the claimants' case may be regarded as being encapsulated in paragraph 13(7) of the amended particulars of claim that "all of the Tranquility Cove development would be a part of the strata corporation and therefore the [claimants] and their successors in title would, as a result of the above, own a share and interest in the seafront, the pool, deck, gazebo and clubhouse in proportion to their unit entitlement in their strata

lot in common with the other strata lot owners" and that the representations are false in that "the [claimants] have not been registered by the defendants as owners of any share or interest in the Seafront Land upon which the seafront, the pool, deck, gazebo and clubhouse are located in proportion to their unit entitlement in their strata lot in common with the other strata lot owners of the strata or at all". So, the primary representations the claimants allege that were made by the 1st defendant related to the disputed amenities being located on the land on which the strata corporation was built and that these disputed amenities would be a part of the common property of the strata corporation, in respect of which each owner would own a share in this common property.

[60] I therefore agree with the defendants' submission that it is not a part of the claimants' case as pleaded that a representation was made by the 1st defendant as an alternative to owning a share in the disputed amenities that the claimants would have access to those amenities. The claimants' pleadings in relation to any statement made by the 1st defendant about free access to the disputed amenities are in reference to the meeting of the strata corporation that took place in 2016 during which, it is alleged, the claimants confirmed the fraud. Therefore, this statement by the 1st defendant was not pleaded as part of the representations which induced the claimants into entering the agreements for sale.

[61] So, it seems to me that based on the pleadings of the claimants, the fraud took place when the strata plan was registered without the disputed amenities being included as part of the common property. This, I think, is confirmed by paragraph 74 of the amended particulars of claim where it is pleaded that: -

> The Claimants say further that even if (which is not admitted) the representations complained of had been true at the time they were made aforesaid and later became false, after the said representations were made it became the duty of each of the defendants to inform each of the claimants of this fact but the defendants failed to communicate this fact to the claimants, and accordingly the misrepresentations would have become, as

> from not later than 1st October 2007 when the lands comprised in Certificate of Title registered at Volume 1411 Folio 946 of the Register Book of Titles became The Proprietors, Strata Plan #2365, false as the defendants well knew.

[62] The judgment of Brooks JA in **Sherrie Grant** makes it clear that the issue of a claim being statute-barred may be determined prior to trial if it appears on the face of the claim. The claimants have argued that the issue of limitation is not in the circumstances of this case suitable for determination summarily without a trial. I am of the view that in light of the claimants' pleadings as to the primary misrepresentations which were made by the 2nd defendant and the clear connection between these misrepresentations and the existence of contemporaneous documents available which directly related to proving the truth of the representations made by the 1st defendant, whether on his behalf or on behalf of the 2nd defendant, the issue of limitation is suitable for determination at this point and need not be left for determination of a trial. There is no dispute that subdivision approval and registration of the strata plan were in 2007, which documents would depict the amenities being included in the strata property.

[63] It is the claimants' contention that the fraud was not discovered until 2015 and confirmed in 2016 at a meeting of the strata corporation. It seems to me that the issue of when the fraud was discovered would be within the subjective knowledge of the claimants. However, I agree with the submission of the defendants, though made in relation to section 27 of the Limitation of Actions Act, that the test of when the fraud ought to have been or could have been discovered is an objective one, which is based on the particular circumstances of the case.

[64] The minutes of the meeting of 26 July 2007, which was exhibited to the affidavit of the 1st claimant, recorded the following:

AP [Avis Patterson] asked about the common area. ED [Errol Duncan] described the infinity pool, the 8 feet wide decking and a gazebo".

The minutes of the meeting dated 15 April 2015 recorded the following:

POOL

Mr Remekie suggests that a timer be put on the pool to assist in reducing costs. However, Mr Duncan said because of health reasons a time could not be used. Mr Brown asked who owns the pool at the clubhouse? Mr Chivers responded stating that it is common property.

The minutes of the meeting dated 10 April 2016 recorded the following:

STRATA PROPERTY

Mr Arnold asked for clarification as to what areas are part of the strata plan and what areas are not.

Mr Duncan responded that the apartments are lots 10 and 11 and the pool and clubhouse are on lot 56 and he was advised by his attorney to not have these areas as a part of Tranquility Cove Strata. However, he maintains that apartment owners will always have access to the pool and clubhouse as long as their maintenance is paid up to date.

Mr Osbourne stated that that was not her understanding when she and her husband purchased their apartment. She stated that they purchased their apartment under the impression that the pool and clubhouse were amenities that came along with the apartment. She also expressed that she was concerned because, heaven forbid, if something were to happen to Mr Duncan, and the property is sold, a new owner could at any time tell her or any other apartment that they will not be granted access to the pool and clubhouse. She also stated that had she known that what they were purchasing was just the apartment they may not have made the purchase.

> Mr Duncan stated that when he first began the development, his attorney advised him that he could have the pool and the clubhouse as part of Alcovia's property and allow access to apartment owners who pay their maintenance fees in full and on time. He stated that it was done so that in the event that he was to add further construction on the property, it could go ahead without difficulty.
>
> Mrs Osbourne stated that the situation has to be clarified as she understood the pool, gazebo and clubhouse were officially common property of the Tranquility Cove Strata.
>
> …

[65] In my view, the minutes demonstrate that there was some doubt from 2007 as to what amenities were included in the common property of the strata corporation. It appears that this is what sparked the enquiry from Ms Patterson and this is why the issue continued to arise in the meetings.

[66] It was argued that the claimants were unrepresented and would not have known what would have been legally required for the defendants to give effect to the representations that had allegedly been made. However, there has been no pleading or evidence that the 2nd defendant represented that his attorney would have represented both the buyer and the seller in the transaction for the sale of the lots in Tranquility Cove. So, there was nothing that prevented the claimants from engaging legal representation on their behalf in the transaction. Given the monies to be paid (ranging from J$12,600,000.00 upwards), I am of the view that a prudent purchaser would have considered it necessary to obtain legal representation and that if this was not done, great care would have had to be taken to ensure that he informed himself of the provisions of the agreement for sale and what was included in the property he was buying.

[67] Some of the claimants have relied on pre-contract letters which would have been the precursor to the agreements for sale as well as the agreements for sale. Exhibit TC3, which is exhibited to the affidavit of the 1st claimant is an example of one such letter in which it is stated that the apartments were seaside properties and that the strata title would be processed and delivered

in the name of the purchaser and that the sale is subject to the approval of the St Mary Parish Council for subdivision of the property into individual lots.

[68] There were two types of agreements of sale which applied to the sale of lots/apartments in the development. There were those that were entered into prior to subdivision approval and registration of the strata corporations; and those which were entered into after subdivision approval was obtained and registration of the strata plan effected.

[69] In the case of the former agreement for sale, one of which was entered into by the 1st and 2nd claimants, the property was described as "All that strata lot called the Unit being a part of the apartment complex being constructed by the vendors at Lots 10 and 11 Tower Isle in the parish of St Mary (which complex is hereinafter called the "development"), the Unit and the Development more particularly described at Item 3 of the agreement for sale. Item 3 described the property as "all that strata lot no… in the proposed strata apartment scheme known as Tranquility Cove being constructed by the vendors at Lots Ten and Eleven part of Tower Isle…being a part of the land comprised and described in certificate of title registered at Vol 1029 Folio 121 and Volume 1029 Folio 127 of the Register Book of Titles, the plans and specification of which apartment scheme are deposited in the Office of the vendors which plans the purchaser hereby acknowledges [sic] have seen and inspected". It was also stated that "[t]he Unit is sold and the Purchaser shall take title subject to the provision of the Registration (Strata Title) Act and the regulations thereunder in general and in particular to the following matters consequent upon the registration of the Strata Plan in respect of the Development" – (a) the Unit entitlement and all other matters contained in or endorsed upon or annexed to the strata plan."

[70] In the case of the latter agreement for sale, one of which was entered into by the 9th claimant, the description of the property was "all that parcel of land, part of Harmony Hall, part of Tower Hill in the parish of St Mary being the Strata Lot numbered SIXTEEN on Strata Plan Numbered Two Thousand Three Hundred and Sixty Five and a Six undivided 1/157 shares in the common property therein and being part of the land formally comprised in certificates of title

registered at Volume 1029 Folio 121 and Volume 1029 Folio 127 and Volume 1414 Folio 956 in the Registered Book of Titles and nor being all that land comprised in Certificate of Title registered at Volume 1415 Folio 160". It is significant that the agreement also provided that the purchaser agreed that the apartment "is sold and the Purchaser shall take title subject to … the unit entitlement and all matters contained in or endorsed upon or annexed to the strata plan".

[71] So, by signing the agreements for sale, the claimants were accepting that they had investigated the relevant plans and were taking title to their lots subject to what was contained in the strata plan. In view of the fact that there is no representation that the claimants were relying on the defendants' attorneys-at-law, it behoved the claimants to have at least read their respective agreements for sale. Having read them, it would have been clear to them that they were required to satisfy themselves as to the extent of the property including the amenities that they were purchasing prior to the completion of the agreement for sale or at the very least upon certificates of title being issued in their names which would have referenced the strata plan. This is especially so in light of the confusion or doubt from as early as 2007 as to what amenities comprised the common property.

[72] I bear in mind that in the July 2007 meeting of the strata corporation, the 1st defendant was recorded as making representations that some of the disputed amenities belonged to the strata corporation. I am of the view that to find that the claimants were entitled to rely on the 1st defendant's representations even after the subdivision plans were approved and the strata plan was in existence in circumstances where their agreements for sale would have stated that they had inspected the relevant documents and/or were buying the property subject to the strata plan would relieve the claimants of the responsibility as a prudent or diligent purchasers to take care of and protect their interests in the property they had contracted to buy.

[73] There is no dispute that the subdivision plans were approved in 2007 and the strata plan registered in 2007. They were then accessible to the claimants for

them to inspect. These documents were not confined to the custody of the defendants but were at the public offices at which they were submitted. It did not require any exceptional kind of resources on the part of the claimants to have viewed the strata plan, which would have been referenced in their respective certificates of title. In these circumstances, it is my view that the claimants ought to have or could have discovered the fraud by 2007.

[74] I am therefore of the view that the latest time at which time for the purposes of the limitation period would have commenced is 2007 in the case of those who entered into the agreements for sale prior to the registration of the strata plan and in the case of those who entered into agreements after the registration of the strata plan, as at the signing of their agreements for sale and in any event upon receipt of their respective certificates of title. Consequently, all the agreements having been concluded and the certificates of titles issued between 2008 and January 2011, the claim filed herein on 22 June 2017 was filed after the expiry of the limitation period.

Conclusion

[75] I am of the view that though striking out is a remedy of last resort, this is a case in which the power to strike out can be properly exercised given my conclusion that the limitation period for bringing the claim has expired. Accordingly, I order as follows:

(i) The claim filed herein is struck out as an abuse of process on the basis that it is statute-barred.

(ii) Costs of the application to the defendants, to be taxed, if not agreed.

(iii) Leave to appeal is granted.

(iv) The defendants' attorneys-at-law are to file and serve this order.