



[2022] JMSC Civ 171

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012HCV04499

BETWEEN	LIZ ZHOU	1ST CLAIMANT
AND	BO XANG LIANG	2ND CLAIMANT
AND	YVONNE SPENCER	DEFENDANT
	(As administrator ad litem of the estate of Barsey Spencer, deceased)	

Ms Tavia Dunn and Ms Alexandria Fennell instructed by Nunes, Scholefield, Deleon & Company for the claimants.

Mr Garth Taylor for the defendant.

Heard: 20TH June, 21ST July and 30TH September 2022

Civil Procedure - Application to amend statement of case to add new causes of action, defendants and reliefs; Whether limitation period has expired; whether new allegations amount to new causes of action - whether defendants should be added after expiry of limitation period. Civil Procedure - Application for summary judgement - whether the claimants have a real prospect of succeeding in the claim.

MASTER C. THOMAS (AG.)

Introduction

[1] The two applications before this court concern land described as “all that parcel of land part of number 61 Red Hills Road known as State Gardens in the parish of St Andrew being lot numbered fifty-five on the plan of No 61 Red Hills Road”

¹previously registered at Volume 950 Folio 117 and now registered at Volume 1456 Folio 106 of the Register Book of Titles.

- [2] By way of an amended notice of application for court orders filed on 17 June 2022, the claimants are seeking to amend the claim to add causes of actions, additional reliefs and three defendants; and the defendant, by way of notice of application filed on 15 October 2019, is seeking to obtain summary judgment against the claimants.

The claim and procedural history

- [3] On 10 August 2012, a fixed date claim form and particulars of claim were filed on behalf of the claimants seeking specific performance of a “written and duly executed agreement for sale dated 17 February 2012 between the claimants and Barsey Spencer whereby Barsey Spencer agreed to sell and the claimants agreed to purchase the land registered at Volume 950 Folio 117” in the Register Book of Titles at a price of Five Million Dollars (J \$5,000,000.00).
- [4] At paragraphs 4 and 5 of the particulars of claim, the claimants allege that they dutifully performed their side of the agreement and paid the sum of One Million Five Hundred Thousand Jamaican Dollars (J \$1,500,000.00) and Forty Thousand Six Hundred Fifty United States Dollars (USD \$40,650.00) representing full and final payment and Barsey Spencer wrongfully refused and/or neglected to complete the sale in spite of the claimants being always ready, willing and able to complete the sale.
- [5] On 26 July 2013, the claimants were permitted by the court to file an affidavit in support of their fixed date claim form. This they did on 13 November 2013. In that affidavit, they deponed that they are businesswoman and businessman respectively, residing at 36 Hugh Miller Drive, Kingston 20 in the parish of Saint Andrew and that Barsey Spencer is a retiree of England. The evidence contained

¹ See fixed date claim form filed on 8 August 2012

in the affidavit was similar to the pleadings in the particulars of claim as to the existence of the agreement for sale between them and Barsey Spencer and that they dutifully performed their side of the agreement for sale and made “full and final payment for the said property”. They deponed that in attempting to have the property transferred into their names, they became aware that the property had instead been transferred by way of gift from Barsey Spencer to himself, Yvonne Spencer, Rudolph Spencer and Adam Spencer (hereinafter referred to as Barsey Spencer’s children”) as joint tenants by way of a transfer registered on 25 January 2012 and a new certificate of title was issued on 21 February 2012. They also stated that on 5 September 2013, they were served with a Notice to Quit.

[6] The claimants exhibited to their affidavit the following documents: copies of Barsey Spencer’s Taxpayer Registration Number, National Insurance Scheme card and United Kingdom passport; an agreement for sale which was purportedly signed by Barsey Spencer and both claimants and witnessed by a justice of the peace and which save for the year 2011, was undated; receipts dated 17 February 2011 and 25 March 2011 in the sum of J\$1,500,000.00 and US\$40,650.00 respectively; copies of certificates of title for the property registered at Volume 950 Folio 117, which was cancelled, and Volume 1456 Folio 106; and notice to quit dated 2 August 2012.

[7] On 7 April 2015, the defendant filed three documents: a defence, a counterclaim and witness statement of Yvonne Spencer. In the defence, among other things, it was denied that Barsey Spencer entered into any agreement to sell the property or received any deposit for any property from anyone, specifically from the claimants.² It was stated that no documents were signed by Barsey Spencer and that the purported transaction the claimants sought to rely on “is bogus and known to be bogus”.³ In addition, Barsey Spencer never had any intention to sell the property as it is family land and that the signature on the agreement for sale was

² Paragraph 1 of defence

³ Paragraph 3 of defence

not that of the deceased.⁴ It was also stated that considering the location of the property and its size, the sum of \$5,000,000.00 is ridiculous on the face of it and “no person obtaining competent legal advice would attempt to purchase anything so obviously undervalued”. The defence also responded to the claimant’s affidavit in support of the fixed date claim form. In essence, save for admitting the transfer of the property to Barsey Spencer and his children and service of the notice to quit, the claim was denied.

[8] The counterclaim asserted that Barsey Spencer did not know the claimants and had no idea how they came to be on his property and that he had served on them a notice to quit.⁵ Further, that Barsey Spencer had no knowledge of the agreement for sale and his signature was forged for the purpose of fraudulently transferring the property. In addition, Barsey Spencer did not receive any money from the claimants and was unaware whether they had paid the sums to anyone. The claimants were squatters as Barsey Spencer did not give them permission to reside on the property nor had they paid Barsey Spencer any rental. As the witness statement does not constitute pleadings and cannot be regarded as evidence before the court until it is so admitted as the witness’ evidence in chief at the trial, it is unnecessary for me to refer to its contents. By way of the order of the court made on 14 October 2019, the defence and counterclaim were ordered to stand.

[9] On 9 April 2015, the court ordered that the claim was to proceed as if begun by claim form. Mediation was ordered, case management orders were made including the trial of the claim on 9 and 10 November 2015. Since then, the matter has had several pre-trial review and trial dates.

[10] On 2 October 2017, the court was informed that Barsey Spencer had died and an order was made for an application to be made for the appointment of a personal representative for the deceased’s estate. The application to appoint Yvonne Spencer as administrator ad litem was filed and was set for hearing on 30 July

⁴ Paragraph 4 of defence

⁵ Paragraph 5 of counterclaim

2019 but the court file does not indicate whether the application was in fact heard on that day or whether any order was eventually made on the application and neither counsel who appeared before me was able to provide any further information on the disposal of the application. Nonetheless, the parties have been proceeding on the basis that the order was made. For the avoidance of doubt, therefore, I will make an order appointing her as personal representative of Barsey Spencer's estate.

The claimants' applications to amend

- [11] The claimants have filed several applications seeking primarily, to amend their statement of case, among orders. The first such application was filed on 16 June 2016 seeking to amend the claim to add Yvonne Spencer and Rudolph Spencer as defendants; for the statement of case to be amended to include a cause of action; and for Beverley East to be appointed as an expert witness at the hearing of the matter. None of the applications appears to have been heard and thus the culmination of these applications is the amended notice of application filed on 17 June 2022. The amended application seeks orders for Yvonne Spencer, Rudolph Spencer and Adam Spencer to be added as defendants to the claim; for the claim form and particulars of claim to be amended in accordance with a proposed amended claim form and amended particulars of claim; for leave to be granted to serve the amended claim form and particulars of claim outside the jurisdiction by registered mail; and for consequential orders in respect of the filing of acknowledgments of service and defence. The defendant's application for summary judgment was filed on 15 October 2019.
- [12] On 16 October 2019, Master Hart Hines (as she was then) set the matter for trial on 6-8 May 2024 and made other consequential orders as well as an order that the defendant's application for summary judgment is to be determined after the claimants' application.

- [13] In accordance with the orders of the court, I will therefore proceed to consider the application to amend first. Let me state at the outset, that all the affidavits filed in support of the application and in opposition to the application were considered; however, I will only refer to those aspects of the evidence that I regard to be most material.
- [14] The claimants' application was supported by various affidavits filed by Dennis Richards, an attorney from the firm that previously represented the claimants. The two which appear to include the principal facts on which the claimants are relying were filed on 16 October and 3 December 2019; the latter of these two appears to replicate the former and therefore it is unnecessary to refer to both. It is also impracticable to rehearse the contents. I will, however say that an important part of Mr Richards' evidence was that it was during the preparation of the matter for trial that the claimants received a copy of a letter dated 2 September 2011 which had been written by Mr Lorne, the defendant's former attorney-at-law, and which was addressed to one Pauline Bennett, who had assisted the claimants in the purchase. Mr Richards deponed that the letter indicated that Barsey Spencer had received "the sum as claimed" and that at least one sibling was aware of the payment. Consequently, the claimants wished to amend their statement of case in light of it. The letter, which was exhibited to Mr Richards' affidavit, indicated that it had been copied to "Rudy Spencer", that Barsey Spencer arrived in England with approximately US\$19,000.00 on the inside of his shirt; and that Mr Lorne had advised that the money be returned "forthwith" and that the premises be vacated as "per Notice". Two affidavits sworn to by Allyandra Thompson were also filed in support of the latest amended application to amend. I will make reference to the contents of these affidavits later only where necessary.
- [15] The defendant, on 17 December 2019, filed an affidavit sworn to by Yvonne Spencer in opposition to the application to amend statement of case. She stated, among other things, that Mr Lorne was mistaken when he referred to Barsey

Spencer being in possession of US\$19,000.00.⁶ She deponed that that money was sent to the deceased by her and her siblings.⁷ She stated that neither she nor her siblings know anything of any fraud in relation to the transfer of any property including the 61 Red Hills Road property and that her father had not committed any fraud against the claimants.⁸ She also deponed that the claimants had obtained an expert report dated 10 January 2016 from Ms Beverley East, handwriting expert, whose opinion is that the signatures on the “purported transfer document and sale agreement” are not authentic signatures of Barsey Spencer.⁹ Pages 1 and 3 of the report were exhibited.

Submissions

For the claimants

[16] Ms Dunn submitted that there would be no real prejudice to the defendant as the trial date is some 23 months away. The claim could therefore be ready and proceed to trial even if the amendment is granted. She submitted further that there is no real contest that there was some agreement between the claimants and Barsey Spencer with respect to the subject property.

[17] Referring to the expert report of Beverley East, she acknowledged that the finding of Ms East as stated in the report was that the deceased Barsey Spencer had not signed the instrument of transfer. However, she pointed out that among the known documents which were relied on by the expert in her analysis as being authentic evidence of Barsey Spencer’s signature were receipts dated 17 February and 25 March 2011. The receipts indicated that Barsey Spencer had received the full purchase price from the claimants. She submitted that these receipts can be considered as sufficient memorandum in writing evidencing the agreement for the

⁶ Paragraph 3 of affidavit

⁷ Paragraph 4 of affidavit

⁸ Paragraph 7 of affidavit

⁹ Paragraph 13 of affidavit

sale of the subject property in that the receipts speak to the purpose for which the sums were paid to Barsey Spencer.

[18] Relying on ***Robert Cartade v Pan Caribbean Financial Services*** 2006 HCV 02956 (delivered 15 September 2008), it was submitted that the threshold that the claimants had to meet in order for the amendments to be granted is that there is a real prospect of success of establishing the case proposed. Also, the court should consider whether the amendments would allow the court to determine the real issues in controversy. Ms Dunn submitted that in seeking to amend the claim, the claimants are not backtracking on the facts as the allegations of fact remain the same and there was just a change in the reliefs sought. The reliefs, Ms Dunn submitted, are more but this is necessary as all the defendants need to be before the court so that the issues arising in relation to the property can be properly ventilated and so that the court can make a determination in this regard. It was also submitted that the amendments are being made in good faith and the claim is not frivolous. In respect of the limitation period, Ms Dunn submitted that Mr Lorne's letter dated 2 September 2011 would have affected the start of the limitation period and these are issues which should be brought before the trial court. In addition, she submitted that it cannot be said that the claimants' claim could be defeated by laches in light of when the claim was filed.

[19] Mr Taylor submitted that the authorities make a distinction between how amendments are to be treated depending on whether they are made before or after the expiry of the limitation period. When the limitation period has not expired, the amendment should be granted where it is necessary to bring all the issues in controversy before the court, regardless of how late the amendment is being brought. Relying on ***Peter Salmon v Master Blend Feeds*** CL 1991/S163 (delivered 26 October 2007), he submitted that where the limitation period has expired, the only amendments that should be allowed are those which detail what has already been pleaded. He argued that in ***Peter Salmon***, the prohibition on the amendments was not limited to new causes of action but also to new injuries and in the instant case, adding new reliefs would be akin to adding new injuries.

- [20] Referring to the cases of *Muir v Morris* (1979) 16 JLR 398, *Violet Allison v Josephine Lawrence Johnson & Anor* [2019] JMSC Civ 149 and *Vincent Lee Ferguson v Air Jamaica Limited* [2017] JMSC Civ 27, Mr Taylor submitted that the limitation period for all torts is six years. He referred to section 27 of the Limitation of Actions Act and submitted that where concealed fraud is being alleged, the six-year period would begin to run from the discovery of the fraud or when the fraud could have been discovered with reasonable diligence. He submitted that based on the affidavit filed on behalf of the claimants on 13 November 2013, at the time of the filing of the affidavit, the claimants were aware of the transfer of the property to Barsey Spencer's children and therefore the limitation period would have expired on 12 November 2019. Referring to the proposed amended particulars of claim and the claimants' averments that they had not become aware of the fraud until 2015, he submitted that the cause of action would now be statute-barred. Mr Taylor also submitted that it did not matter whether the application to amend had been made before the expiry of the limitation period, the effect of granting the amendment now would be to extend the limitation period. Further, this would not stop the defendant from pleading the expiry of the limitation period as a defence.
- [21] Mr Taylor submitted that there would be clear prejudice to the defendant if the amendments were to be granted because the subject matter of the claim is real property and case law makes it clear that there is a presumption of prejudice where land is involved because each property is unique. For this submission, he relied on *Lorenz Redlefsen v Silver Sands* [2021] JMCC Comm 11. There would also be prejudice because the individual best able to rebut the facts asserted by way of the amendments, was no longer alive and the substitute defendant could never be in a position to speak adequately for him because the claimants have made no allegation that the substitute defendant was privy to the contract for the sale of the property.

Discussion and Analysis

[22] The proposed amended claim and particulars of claim seek to add Barsey Spencer's children as defendants. The proposed pleadings appear to recast the pleadings which were originally filed. In summary, they seek to plead the following facts:

- (i) Payments on account of the purchase price were made on diverse days;
- (ii) Transfer tax was paid in respect of the agreement for sale on 2 March 2011.
- (iii) Pursuant to the terms of the agreement for sale, whether expressly or impliedly, the claimants entered into possession of the property.
- (iv) An instrument of transfer was executed on or around 3 March 2011.
- (v) Despite payment of the purchase price, the deceased failed, neglected and or refused to effect the transfer.
- (vi) On or around 25 January 2012, Barsey Spencer transferred the property to himself and his three children as joint tenants.
- (vii) Prior to the transfer to the three children, Pauline Bennett, who provided paralegal services, in respect of the agreement for sale advised Michael Lorne, former attorney for the defendant, of the said agreement for sale.
- (viii) By letter dated 2 September 2011, Mr Lorne wrote making reference to the payment of \$5,000,000.00 and that a proper "agreement of transfer" was not prepared and signed and that the allegedly signed receipts would not be enough to effect transfer. He asserted that the recipients of the balance of the purchase price were not the deceased's caregiver and grandson as alleged; and that the deceased arrived in England with approximately US\$19,000.00

- (ix) Barsey Spencer's children would have had notice, prior to effecting the said purported transfer in their favour on or around 25 January 2012 of the claimant's acquisition of the property and their interest.
- (x) At all material times, Barsey Spencer's children knew or ought reasonably to have known that the claimants had acquired the property, were in possession and had an interest, whether legal or beneficial.
- (xi) In reliance on the representation by and/or the agreement with Barsey Spencer, the claimants entered into possession and in further reliance on the representation and/or agreement with the deceased, they expended sums on the repair, renovation and construction of the property, as a result of which they acted to their detriment and sustained loss, damage and expense. Particulars of special damages in the amount of J\$20,660,074.70 were included.

Particulars of fraud were pleaded against Barsey Spencer separately and against Yvonne Spencer, Rudolph Spencer and Adam Spencer jointly.

[23] In respect of the reliefs now being sought in the proposed amended claim, the claimants are still seeking specific performance of the agreement for sale; however, they are seeking to add a number of reliefs: declarations as to the existence of the agreement for sale of the property between the claimants and that Barsey Spencer held the property on trust for the claimants; declarations that the transfer of the property was fraudulently obtained and that Barsey Spencer's children hold the property on trust for the claimants; damages for fraud, unjust enrichment and damages in addition or in lieu of specific performance; and special damages in the sum of \$20,660,074.70. They are also seeking an order for the appointment of a valuator to determine the value of the property in its original state and to be compensated for the difference in the values of the property in its original

state as though the construction had not been done as against the value of the building in its present state.

[24] In this case, there are two aspects to the application to amend: an amendment of the claim to add three defendants and an amendment to add causes of action and additional reliefs in respect of the present defendant. I will consider the application to amend to add the proposed defendants first.

[25] Part 20 of the Civil Procedure Rules ('CPR') governs the addition and substitution of parties. Rule 19.2(1) and (2) provides for the addition of parties prior to the case management conference and is therefore inapplicable. Rule 19.2(3) provides for the addition of a new party without an application in the following circumstances: (i) where it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or (ii) there is an issue involving the new party who is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue. Rule 19.3 provides for the making of an application for permission to add, substitute or remove a party by an existing party; or by a person who wishes to become a party and rule 19.3(5) empowers the court to add, remove or substitute a party at or after a case management conference. It should be readily appreciated that while Part 19 of the CPR expressly provides for the considerations that the court should take into account where it is adding parties on its own initiative, it does not expressly so provide in circumstances where an application is made. Phillips JA in ***National Commercial Bank v International Assets Services Limited*** [2015] JMCA Civ 7, had this to say in relation to the approach of the court where an application to add parties is made:

*[36] On a perusal of these provisions, it is not clear whether the test under CPR 19.2(3) which allows the court to make the order without an application is the same to be applied when the application is being made by a party or an existing party under rule 19.3(2). In ***Prophecy Group LC v Seabreeze Co Ltd***, SCB*

Claim No 185, decided 6 April 2006, Conteh CJ, in the Supreme Court of Belize, stated that regardless of which of the provisions is applicable the matter was one of discretion which had been expressly conferred on the court, and which discretion must be informed by the overriding objective always, bearing in mind the factors set out in rule 19.2(3)(a) or (b).

- [26]** Therefore, the proposed defendants may be added where it is desirable to add them so that the court can resolve all the matters in dispute in the proceedings or where there is an issue involving them which is connected to the matters in dispute in the proceedings and it is desirable to add them so that the court can resolve that issue.
- [27]** There is no dispute that the proposed defendants, who are Barsey Spencer's children, are registered as proprietors of the property which was the subject of an agreement for sale between the claimants and Barsey Spencer and in respect of which the claimants are seeking specific performance to have the property transferred to them. There is therefore the issue involving the transfer of the property to them that is connected to the matter in dispute in the claim. It could therefore be said that it would be desirable to add them because giving the claimants the reliefs they seek would result in these proposed defendants being divested of their property.
- [28]** Had these been the only considerations to add them as parties, then the application to amend to add Barsey Spencer's children as defendants could be granted. However, by virtue of the fact that fraud is being claimed against the proposed defendants, it seems to me that the issue raised by Mr Taylor in respect of the present defendant as to whether the limitation period has expired would be equally applicable to the proposed defendants.
- [29]** Rule 19.4 of the CPR expressly recognises that addition of a new party is subject to the limitation period. Rule 19.4(2) and (3) provides:

- “(2) *The court may add or substitute a party only if –*
- (a) *the relevant limitation period was current when the proceedings were started; and*
 - (b) *the addition or substitution is necessary.*
- (3) *The addition or substitution of a party is necessary only if the court is satisfied that –*
- (a) *the new party is to be substituted for a party who was named in the claim form in mistake for the new party;*
 - (b) *the interest or liability of the former party has passed to the new party; or*
 - (c) *the claim cannot properly be carried on by or against an existing party unless the new party is added or substituted as claimant or defendant.*

These rules would suggest that where the limitation period was current at the start of the claim, despite the fact that at the date of the joinder of the new party, the limitation period would have expired, the joinder or addition of the new party is permissible. However, these provisions may not be interpreted so broadly, as to do so would be in clear disregard for the various provisions of the law that provide a limitation period for causes of action.

[30] In *Tikal Limited v Wayne Chen and Everley Walker* [2020] JMCA Civ 33, in which the issue for consideration by the Court of Appeal was “the power of the court to allow an amendment to add a defendant to a claim form and particulars of claim after the expiry of a relevant limitation period”¹⁰, Morrison P had this to say in relation to rule 19.4:

¹⁰ See paragraph [1]

[22] *By its clear terms, rule 19.4 pre-supposes an existing power to add or substitute a party to an action which is already in train after the expiry of the relevant limitation period. But, as Sykes J (as he then was) explained in **Peter Salmon v Master Blend Feeds Limited**, this is problematic:*

19. These submissions highlight an important issue. It appears that the CPR is conferring a power to override an Act of Parliament. The Limitation Act has not been amended to provide for this power to add parties after the end of a limitation period. It does seem remarkable that subsidiary legislation such as the CPR can override an Act of Parliament which provides a defence for a defendant not sued within the limitation period. The usual way of dealing with claims after a limitation period is by conferring a discretionary power on the court by an Act of Parliament to extend the time within which the claim can be brought (see section 4(2) of the Fatal Accidents Act; section 13(2) of the Property Rights of Spouses Act.

20. I reinforce this observation by making a comparison with the English position. Rule 19.4(2) (Jam) is, for practical purposes, identical in effect, to rule 19.5(2) (UK) ... the general consensus, in England, is that rule 19.5 (UK) was designed to give effect to sections 33 and 35 of the Limitation Act of 1980 (UK) which give power to the court to allow new claims after the limitation period. The point is that I am not sure that rule 19.4 (Jam) can be applied without an Act of Parliament expressly conferring the power to sue defendants after the end of the limitation period.

[23] *Statements to like effect may be found in (i) **Shaun Baker v O'Brian Brown and Angella Scott-Smith**, in which Edwards J (as she then was) concluded, again after a detailed review of the legislative history and existing provisions, that “there is no discretion to extend time under the Statute of Limitations ... or the Civil Procedure Rules 2002”; and (ii) **Shawna Williams v Garry Gilzene et al** in which Simmons J states that “there is no provision which is similar to the 1980 UK Act which supports the judicial extension of the limitation periods prescribed by [the legislation]*

[24] *I entirely agree with these dicta. It is a jurisprudential commonplace that subsidiary legislation is entirely derivative of primary legislation and, as such, cannot override it. As Lord Scott of Foscote stated in **Beverley Levy v Ken Sales & Marketing Ltd**, in which the issue was whether provisions of the CPR relating to the making of charging orders had any efficacy in the absence of enabling legislation, “while Rules can regulate the exercise of an existing jurisdiction they cannot by themselves confer jurisdiction”. It is therefore not possible for rule 19.4, whether expressly or by implication, to confer jurisdiction on the court to extend a limitation period in the absence of any statutory warrant for such a course.*

[25] *It follows from this that the application to add a defendant after the expiry of the limitation period in this case was governed by the long settled rule of practice at common law, which is that “the court will not allow a person to be added as a defendant to an existing action if the claim sought to be made against him is already statute-barred and he desires to rely on that circumstance as a defence to the claim.*

[31] It is therefore necessary to determine whether the limitation period for fraud has expired.

[32] It is by now well established that the limitation period for all torts including fraud is 6 years. In addition, by virtue of section 27 of the Limitation of Actions Act, where the claim is for recovery of land or rent on the basis of fraud, the cause of action of fraud begins to run from the date that the fraud could have been discovered with reasonable diligence. Section 27 of the Limitation of Actions Act provides:

[27] In every case of a concealed fraud, the right of any person to bring a suit in equity for the recovery of any fraud. land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall, or with reasonable diligence might, have been first known or discovered : Provided, that nothing in this section contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents on account of fraud, against any bona fide purchaser for valuable consideration who has not assisted in the commission of such fraud and who at the time that he made the purchase did not know, and had no reason to believe, that any such fraud had been committed.

[33] In ***Bartholomew Brown v Jamaica National Building Society***, Harrison JA stated at paragraph [40]:

*actions based on contract and tort (the latter falling within the category of ‘actions on the case’) are barred by section III, subsections (1) and (2) respectively of the 1623 statute after six years (see ***Muir v Morris*** (1979) 16 JLR 398, 399 per Rowe JA)*

Later, at paragraph [43], the learned judge of appeal stated:

[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 very terms that that section is only applicable to suits for recovery of land or rent ...

[34] In this case, the claimants are alleging by their proposed amendment that the transfer of the title to Barsey Spencer's children was fraudulent in that Barsey Spencer's children knew or ought to have known of the agreement for sale of the property from Barsey Spencer to the claimants at the time of the transfer. It seems to me that the cause of action would have accrued 25 January 2012, the date on which, according to the evidence contained in the claimants' affidavit filed on 26 July 2013, the transfer to Barsey Spencer's children was effected. But Mr Richards' evidence seems to suggest that the claimants did not know of the alleged fraudulent actions of Barsey Spencer's children until they were in preparation for trial. However, Mr Richards did not give a specific date when the alleged fraud was uncovered.

[35] I agree with Mr Taylor that the claimants' affidavit filed on 26 July 2013 makes it clear that as at the date of the filing of that affidavit, they would have been aware of the transfer. However, in my view, it does not automatically follow that on that date the claimants would have known or could have uncovered the information that Barsey Spencer's children knew about the agreement for sale between the claimants and the defendant. The fact is that this information would have been within the knowledge of Barsey Spencer and his children. It is significant, however, that notwithstanding that the claimants, by their proposed amended pleadings, suggest that Ms Pauline Bennett, the person to whom Mr Lorne wrote the letter of 2 September 2011, acted on behalf of both parties, Mr Richards' evidence is that Ms Bennett assisted the claimants. It therefore, seems to me that it is reasonable to assume that when Ms Bennett received this letter, the existence of the letter and its contents would have been relayed to the claimants although it is not clear when

this would have been. In any event, in my view, in light of the contents of a letter dated 29 October 2015 from Mr Richards to Mr Lorne, it is reasonable to conclude that the claimants were aware of the alleged fraud of Barsey Spencer's children in 2015. In the letter dated 29 October 2015, which was exhibited to the affidavit of Yvonne Spencer, Mr Richards informed Mr Lorne that he had received instructions, among other things, to make an application to add Barsey Spencer's children as defendants. He informed that in the circumstances he would be applying for the trial dates of 9 and 10 November 2015 to be vacated. This information contained in the letter when viewed in the light of Mr Richards' evidence leads to the conclusion that the claimants became aware of the alleged fraud of Barsey Spencer's children by latest October 2015. It is my view, therefore that, even in circumstances where the fraud could be regarded as being concealed, the cause of action in fraud against Barsey Spencer's children would have become statute-barred sometime in 2021.

[36] I note that the application was first filed in June 2016 which was within the limitation period and did not apparently come before the court until 2019. In fact, it seems that the filing of the subsequent applications was fuelled by the claimants' desire to have the court make an order on the application. However, the court file reflects that on 14 October 2019 when the application came on for hearing, the applications had not been served on the defendant. Thus, part of the reason for the delay in the hearing of the application was on account of a lack of readiness. It is unfortunate that the application appears to have been filed within the limitation period and is now being determined after the expiry of the limitation period. That notwithstanding, I am still constrained by the law that outside of statutory provisions extending the limitation period, I do not have the power to extend the limitation period, which would be the effect of any order I would make granting the application to add Barsey Spencer's children as defendants in respect of fraud.

[37] Similar considerations concerning the expiry of the limitation period would be relevant in relation to the cause of action of unjust enrichment against Barsey Spencer's children. The ingredients of the cause of action are that: the defendant

has been enriched; the enrichment was at the claimant's expense; and the enrichment was unjust (see *Equilibrio Solutions (Ja) Ltd v Peter Jervis & Associates* [2021] JMSC Comm 26. The claimants have not stated in their proposed amended pleadings when the sums were expended. This may have been an issue for trial but in light of the evidence in the claimants' affidavit in support of the fixed date claim form that they discovered the transfer to Barsey Spencer's children when they tried to effect transfer of the land to themselves in 2012 and that they were subsequently served with a notice to quit on 5 September 2013, it seems to me that the elements necessary to establish the cause of unjust enrichment would have crystallised at the point of service of the notice to quit. Any expenditure on the property by the claimants after this date could not be regarded as unjust in the face of the transfer and the clear intention expressed by way of the notice to quit to have the claimants leave the property. I am therefore of the view that the cause of action in unjust enrichment is also now statute-barred.

[38] Consequently, I find that the causes of action of fraud and unjust enrichment against Barsey Spencer's children are statute-barred and it would be an exercise in futility to add them as defendants, particularly in light of the position taken by one of them, Yvonne Spencer, in her capacity as the representative of Barsey Spencer's estate, as expressed by Mr Taylor.

[39] In relation to the application to amend the claim against the defendant, I am guided by the test as stated by Brooks J (as he then was) in *Robert Cartade & anor v Shakespeare & Ors* 2006 HCV 02956 (delivered 15 October 2008) that is, whether the proposed amendment has a real prospect of success.¹¹ Of course, to this would be added the consideration of whether the limitation period has passed. I am also guided by the dictum of Harrison JA in *Jamaica Railway Corporation v Azan* in respect of the circumstances in which an amendment should be granted. Harrison JA stated that the principle has always been that an amendment should

¹¹ See page 3 of the judgment. On appeal, the test was utilised by the Court of Appeal (see *Pan Caribbean Financial Services v Cartade & Ors* [2011] JMCA Civ 2 at paragraph [56])

be allowed if it can be made without injustice to the other side. He expressed the view that if the original claim was commenced within the relevant limitation period, and an amendment is allowed adding a cause of action after the expiry of the limitation period, the defendant would be deprived of a limitation defence and will usually suffer injustice not compensable by an order for costs.¹² He set out the following principles in determining what amounts to a new cause of action, which he stated, are not exhaustive:

- (i) *If the new plea introduces an essentially distinct allegation, it will be a new cause of action. In **Lloyds Banks plc v Rogers** (1996) *The Times*, 24 March 1997, Hobhouse LJ said inter alia: ...if factual issues are in any event going to be litigated between the parties, the parties should be able to rely upon any cause of action which substantially arises from those facts.*
- (ii) *Where the only difference between the original case and the case set out in the proposed amendments is a further instance of breach, or the addition of a new remedy, there is no addition of a new cause of action. See **Savings and Investment Bank Ltd v Finckin** [2001] EWCA Civ 1639, *The Times*, 15 November 2001.*
- (iii) *A new cause of action may be added or substituted if it arises out of the same facts, or substantially the same facts, as give rise to a cause of action already pleaded.*

[40] These principles have been consistently applied by our Court of Appeal (see for example **Attorney General v Vassell** [2015] JMCA Civ 47 and **Sandals Resort International v Neville L Daley Ltd & ors** [2016] JMCA Civ 35).

¹² See paragraph 26 of the judgment

[41] It is now necessary to set out the proposed pleadings against the defendant in relation to fraud:

15. *The said purported transfer of the said property from the said Barsey Constantine Spencer, now deceased, to himself and the 2nd, 3rd and 4th defendants was obtained by fraud:*

Particulars of Fraud of the 1st Defendant

- (i) Falsely representing that he was the legal and beneficial owner of the said property.*
- (ii) Effecting the transfer of the said property to himself, the 2nd, 3rd and 4th defendants as joint tenants in circumstances where he had entered into an agreement to sell the said property to the claimants and the claimants having paid the total purchase price.*
- (iii) Causing and/or permitting the transfer of the said property to himself, the 2nd, 3rd and 4th defendants when at all material times he knew or ought reasonably to have known that the claimants had purchased the property.*
- (iv) Causing and/or permitting the transfer of the said property to himself, the 2nd, 3rd and 4th defendants when at all material times he knew or ought reasonably to have known that the claimants had an interest whether legal and/or beneficial, in the said property.*
- (v) Causing and/or permitting the transfer of the said property to himself, the 2nd, 3rd and 4th defendants when at all material times he knew that the claimants were in possession of the said property.”*

[42] It is indisputable that these precise facts were not pleaded in the particulars of claim that was filed in August of 2012 when the fixed date claim form was filed.

However, it is significant that the claim was commenced by the filing of a fixed date claim form. Therefore, putting aside for a moment the question of whether this was the appropriate originating process in light of the nature of the claim, in accordance with rule 8.8(2)(a) of the CPR, the fixed date claim form ought to have been accompanied by an affidavit in support. It seems that the court had this in mind when it permitted the claimants to file an affidavit in support. The court subsequently ordered that the claim should proceed as if commenced by way of claim form. The court in making the latter order did not order that amended particulars of claim should be filed. In my view, the claimants' case as it then stood would have to be regarded as including the affidavit in support of the fixed date claim form.

[43] I have already made reference to the contents of the claimants' affidavit in support of the fixed date claim form in which the claimants did make reference to the fact that it was in seeking to effect the transfer to them that they discovered the transfer from Barsey Spencer to himself and his children. Also, they were subsequently served with a notice to quit. It seems to me then that the amended pleadings set out at paragraph 40 of this judgment, which the claimants are seeking to rely on, are consistent with and are really just additional details of those facts stated in the affidavit. In my view, therefore, though there was no use of the word fraud in the particulars of claim, the facts as stated in the particulars of fraud to be added do not give rise to a new cause of action. The fact that the label fraud is now being used is not fatal. As the authority of *Lloyds Banks plc v Rogers* (1996), which was referred to in the above dictum of Harrison JA makes plain, the claimants ought to be able to rely on whatever cause of action arises on the facts as pleaded. This was also the view expressed by Phillips JA in *Medical and Immunodiagnostic Laboratory Ltd v Johnson* [2010] JMCA Civ 42, that, "[o]nce the facts establishing the cause of action have been pleaded, it is not fatal that the claimant has not identified the cause of action".¹³ Consequently, I am of the view that the claimants should be allowed to amend their particulars of claim to add the

¹³ See paragraph [53]

particulars of fraud, and which are, in fact required in a claim for fraud. No injustice would be suffered by the defendant if these amendments are allowed as he would have had notice that the claimants were raising this allegation from in 2013 by way of their affidavit in support of the fixed date claim form and the defence did in fact respond to the allegations.

[44] The claimants are also seeking to rely on the following allegations with respect to the claimants' entry onto and occupation of the premises:

16. *In reliance on the representation by and/or agreement with Barsey Spencer, now deceased, that on payment of the purchase price, the claimants would be entitled to possession and the issuing of the certificate of title in the claimants' names respectively, the claimants entered into possession of the said property in or around March 2011.*

17. *On entering into possession of the said property, the claimants, in further reliance on the said representation and/or agreement with Barsey Constantine Spencer, now deceased, expended sums for the repair, renovation and construction of the said property.*

18. *The claimants, having acted to their detriment in reliance on the said representation and/or agreement with Barsey Constantine Spencer, now deceased, have sustained loss, damage and expense.*

PARTICULARS OF SPECIAL DAMAGES

*Cost of effecting repair, renovation \$20,660,074.70
and construction work at the said property*

19. *By virtue of the repair, renovation and construction works, the defendants would receive a benefit and would be unjustly enriched.*

[45] I am of the view that whereas it may be said that the allegation of entering into possession of the property at paragraph 16 may have been foreshadowed by the claimants' evidence that a notice to quit was served on them, the allegations contained at paragraphs 17 to 19 as to the claimants relying on the defendant's representations and acting to their detriment by expending sums on constructions are entirely new facts that are sought to be pleaded to provide a basis for the claim of unjust enrichment. My finding with respect to the claim being statute-barred in relation to Barsey Spencer's children would apply equally to the defendant in relation to unjust enrichment. Therefore, the allegations at paragraphs 17 to 19 ought not to be allowed.

[46] However, where the additional remedies of damages and declarations are concerned, I disagree with Mr Taylor's submissions that they would be akin to new injuries. In fact, the principles espoused by Harrison JA in *Mark Azan* make it clear that the addition of new remedies is permissible. In view of my finding on unjust enrichment, I would not, however, allow the amendment to include the remedy of damages for unjust enrichment.

[47] I am therefore of the view that in respect of the pleadings in relation to fraud and unjust enrichment, only the amendments in relation to fraud should be allowed as well as the allegations in relation to the claimants' entry onto the premises. All the other amendments are attempting to introduce new facts to establish unjust enrichment as a new cause of action. In addition, all the reliefs except that of damages for unjust enrichment should be allowed.

The defendant's application for summary judgment

[48] It is now necessary to set out the grounds of the defendant's application. They are:

- a. The claimants have filed a claim herein against the deceased Barsey Spencer in which specific performance is sought and no fraud is alleged against the defendant in relation to a sale

agreement concerning property registered at Volume 950 Folio 117 of the Register Book of Titles.

- b. The title to the property in question has subsequently been transferred to the joint names of himself and his children, namely Barsey Spencer, Adam Spencer and Rudolph Spencer.
- c. The title now in the names of the siblings is indefeasible in the face of the claimant's claim
- d. Specific performance is therefore not available to the claimants.

[49] The application was supported by the affidavit of Garth Taylor, paragraphs 2 and 3 of which correspond to grounds "a" and "b" of the application respectively. Mr Taylor also deponed that the new title was registered at Volume 1456 Folio 106 of the Register Book of Titles on 25 January 2012.

Submissions

For the defendant

[50] Ground one of the application has been overtaken by the decision I have come to in the application to amend. However, Mr Taylor has maintained that even if all the amendments had been granted, the claimants have no real prospect of success in the claim.

[51] Mr Taylor submitted that there are three premises for the entry of summary judgment against the claimants. The first premise is that the claim is for specific performance and to obtain this remedy, it is necessary for the claimants to establish an agreement for sale which is specifically enforceable against the vendor. To support this submission, Mr Taylor relied on ***Aubrey Faulknor v Pearjohn Investments Ltd and anor*** Claim No CL 1994/F-097 (delivered 15

September 2000). He submitted that to establish the existence of the contract for the sale of the land, the claimants are seeking to rely on receipts purportedly received from Barsey Spencer. However, because Barsey Spencer had denied signing the agreement for sale and had denied that the signature on the receipts were his, the claimants would need to prima facie establish why those receipts would constitute a sufficient memorandum in writing of the contract by submitting the receipts to a handwriting expert. This, they failed to do because based on the report of the handwriting expert, the expert had treated the receipts as documents containing the undisputed signature of Barsey Spencer. These receipts were then compared to the signatures on the disputed documents. There was therefore no analysis in respect of the signatures on the receipts to determine their authenticity. Mr Taylor submitted that in the absence of any prima facie basis to use the receipts, they could not be used as sufficient memorandum in writing.

[52] Mr Taylor submitted that the second premise on which summary judgment should be granted is that the law is clear that for the purposes of the Registration of Titles Act, in establishing fraud to set aside a transfer, the fraud must be established against the current registered proprietor and not the predecessor in title. The claimants would therefore have to establish fraud not against Barsey Spencer but against the current joint proprietors. To support this submission, Mr Taylor referred to ***Cynthia Bravo v Avia Baxter and Anor*** Suit No HCV 00326 of 2005 (delivered 12 October 2006).

[53] The third premise, Mr Taylor argued was that the practice of the sale of land is so well established in our jurisdiction that it would be strange for parties to embark on a sale of land without either of them using an attorney-at-law. For the claimants who claim to be business persons to enter into a transaction and sign the agreement for sale drafted by the vendor and pay the full purchase price to the vendor would be so uncanny that the purchasers should prima facie give an explanation why they would have acted in such a manner and the claimants had not provided such an explanation. The claimants are asking the court to believe

them as to the circumstances surrounding the sale of the property and the court should not do so.

[54] Ms Dunn submitted that the court's jurisdiction to grant summary judgment was not intended to usurp the position of the trial judge by allowing a judge or master in chambers to embark on a trial on affidavits without discovery and in the absence of oral evidence which has been tested by cross-examination. She submitted that this is not a proper case for summary judgment as there are issues of fact and law which need to be fully ventilated at trial. The issue as to belief and analysis is best suited for a trial. It is at trial that the claimants would be cross-examined as to the circumstances surrounding their purchase of the property. It would be a matter of credibility for the trial judge to make findings of fact having heard the evidence and seen the parties under cross-examination. Ms Dunn also submitted that the issues as to the analysis of the signatures on the known documents and the appropriateness of the methodology employed are also matters for trial. These are questions for the handwriting expert who could be required to attend the trial. She also argued that the known signatures used by Ms East were not restricted to the receipts but also included Barsey Spencer's United Kingdom passport and the instrument of transfer.

[55] Ms Dunn submitted that there was evidence by way of the receipts and the letter from Mr Lorne that the claimants paid significant sums to Barsey Spencer on account of the purchase price and there was no evidence that the sums were repaid. Ms Dunn also argued that the issue as to the authenticity of the receipts is also one to be determined at trial. The court should not accept the self-serving statements of Yvonne Spencer explaining how the deceased came to be in possession of the US\$19,000.00 without the veracity of same being tested by cross-examination.

[56] She submitted that there is a signed agreement for sale for the purchase of the property. She accepted that the handwriting report of Beverley East concluded that the signature was not that of Barsey Spencer and submitted that this

notwithstanding, in accordance with the Statute of Frauds, there was a sufficient note or memorandum in writing of the agreement evidenced by the receipts. The uncontroverted evidence was, she argued, that the said receipts were signed by Barsey Spencer and this was supported by the expert report of Beverley East. Although no completion date was inserted on the receipts, the court may imply that completion ought to have been within a reasonable time. The principle of part performance would be applicable in that beyond the receipts, the claimants had also been put into possession of the land and these facts would constitute sufficient acts of part performance. She relied on the case of **Aubrey Faulknor**.

[57] She submitted that Barsey Spencer had acted in breach of the agreement by transferring the legal interest to himself and the other proposed defendants. Where the contract is breached by the vendor, the purchaser may sue for damages and where damages is not an adequate remedy, the purchaser may seek specific performance compelling the vendor to convey the legal estate to him. The rule concerning parties to actions for specific performance is that the proper parties to the action are only those parties who were parties to the contract except where the transferee is a pure volunteer; the transferee takes with notice of the prior contract; and where the transferee takes only an equitable title. Counsel relied on *Atkins Court Forms Vol 33(3)*; **Marjorie Knight v Hume** [2017] JMSC Civ 51; and **Earline Lawrence v Dean Edwards** [2017] JMSC Civ 21. If any land is occupied by any person other than the vendor, this occupation is constructive notice of the estate or the interest of the occupier, the terms of the lease or other right of occupation or of any other right of the occupier. For this submission, reliance was placed on *Snell Principles of Equity (27 Edn)*, **Bogges and anor v Badder Hassan** (1991) 46 WIR 72; and **Life of Jamaica Ltd v Broadway Import and Export Limited and Ors** (1997) 34 JR 526. It was submitted that the absence of a pleading of fraud did not prevent an order for specific performance against “the children of Barsey Spencer” because although there was the principle of indefeasibility of title, a personal equity or equitable right in personam may be enforced against a registered proprietor of an estate or interest in land where a purchaser has a right

to seek specific performance of an agreement for sale of that interest or estate. Counsel relied on **Cuthbertson v Swan** [1877] 11 SALR 102.

Discussion and Analysis

[58] There is no doubt that the applicable test in an application for summary judgment is whether the party whose statement of case is the subject of the application has a real, as opposed to a fanciful prospect of success. Having said that, I think it is necessary to set out some principles applicable to a determination as to whether an application to enter summary judgment ought to be granted as has been established by the authorities. Some of these principles were set out by Brooks JA in **Island Car Rentals v Headley Lindo** [2015] JMCA App 2 as follows:

- a.
- b. In applications for summary judgment “the overall burden of proof rests upon the [applicant] to establish that there are grounds for his belief that the respondent has no real prospect of success” (see **ED&F Man Liquid Products Ltd v Patel and Another** [2003] EWCA Civ 472; [2003] CPLR 384 at paragraph 9). It is true that the comment was not made in a case dealing with summary judgment, but the principle that an applicant for summary judgment must be required to do more than assert that the respondent “has no real prospect of succeeding on the claim or issue”, is supported by rule 15.5 (1) which requires the applicant to “file affidavit evidence in support with the application”. That evidence must necessarily address the claim or issue, on which the applicant seeks its relief. Support for the principle that the burden of proof, at the stage of summary judgment, rests on the applicant, may be found in the decision of this court in **ASE Metals NV v**

Exclusive Holiday. The court, at paragraph [14] of the judgment endorsed the principle as set out in **ED & F Man**.

- c.
- d. “Where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini trial” of the issues (see **ED & F Man** at paragraph 10).
- e. In considering an application for summary judgment, the court must also bear in mind that granting summary judgment is a serious step. The words of Judge LJ in **Swain v Hillman** [2001] 1 All ER 91 are to be considered. He said, in part, at page 96: “To give summary judgment against a litigant on papers without permitting him to advance his case before the hearing is a serious step.

[59] The following principles are also relevant:

- (i) The case for the respondent to the application for summary judgment must be more than just arguable; however, it does not require a party to convince the court that his case must succeed (**International Finance Corporation v Utexafrica SPRL** [2001] EWHC 508, relied on by Simmons J (as she was then) in **Cecelia Laird v Ayana Critchlow & anor** [2012] JMSC Civ 157).
- (ii) Where the applicant establishes a prima facie case against the respondent, there is an evidential burden on the respondent to show a case answering that which has been advanced by the applicant. A respondent who shows a prima facie case in answer should ordinarily be allowed to take the matter to trial (*Blackstone’s Civil Commentary* 2015, para 34.11).

- (iii) The court will be guided by the pleadings as well as the evidence filed in support of the application (***Sagicor Bank v Taylor Wright*** [2018] UKPC 12).

[60] A central plank of Mr Taylor's argument that summary judgment should be granted is that the title to the property was transferred to Barsey Spencer and his children and no allegations of fraud have been alleged against Barsey Spencer's children. The fact of the transfer is not in dispute. The new certificate of title registered at Volume 1456 Folio 106 indicates that Barsey Spencer's children were registered as joint tenants and by virtue of the principle of survivorship, at Barsey Spencer's death, the property would now be owned by his children.

[61] The claimants' counsel have pointed to several authorities which, they argue, support their position that an order for specific performance could be made against Yvonne, Rudolph and Adam in the absence of fraud. However, putting aside the question of whether specific performance can be obtained against these registered proprietors in the absence of fraud, I am of the view that as a matter of fairness, an order should not be made against them depriving them of their property without them having been named as parties and given an opportunity to be heard. I find support for my view in ***Albert Smith v Hazel Steer*** SCCA No 91/2008 (delivered 8 May 2009). In that case, the appellant had transferred title to his property to his son and wife eight (8) years prior to the delivery of judgment in a personal injury claim brought by the respondent against him. An application was granted by the court at first instance rescinding the transfer on the basis that it had been done to defeat the execution of the judgment. This was set aside on appeal. In addition, to finding that the incorrect court process had been used to set aside the transfer, the Court of Appeal found that the wife and son ought to have been joined as parties in a separate action. Harris JA, in her judgment, stated:

A further matter of importance is that, at the time of the application, the appellant's wife Anita and son Trevor were the registered proprietors of the property. They were not parties to the

action in which the judgment had been handed down against the appellant. They were joined in the action in a representative capacity after the appellant's death. Although they were the duly qualified legal representatives of the appellant's estate, the respondent would have been under a duty, to commence a separate action against the appellant joining them as parties thereto ...

I have already determined that the amendment to Barsey Spencer's children as defendants should not be granted and as a consequence, I am of the view that the claimants do not have a real prospect of obtaining the remedy of specific performance of the agreement for sale.

[62] However, this is not the end of the matter. In light of my order allowing for the claimants to add reliefs seeking declarations and damages to include damages in lieu of specific performance, I must now determine whether the claimants have a real prospect of succeeding in their claim bearing in mind the reliefs that have been added.

[63] By their claim, the claimants are seeking to establish that Barsey Spencer breached the agreement for the sale of land made between himself and them. If the claimants have a real prospect of establishing this, then the application for summary judgment must be refused. As the applicable principles have established, the claimants need not establish that they are bound to succeed, but must show that their case is more than just arguable.

[64] There appear to be two hurdles that stand in the way of the claimant relying on the agreement for sale which was purportedly signed by all parties, and which, was undated save for the year 2011. First, it is not clear whether the agreement was stamped. If it was not, then the cases of ***Maria Grey Grant v Wood & anor*** [2020] JMSC Civ 188 and ***Aubrey Faulknor v Pearjohn Investments Ltd*** establish that the claimants could not rely on it. However, in ***Maria Grey***, the court accepted that

by virtue of section 44, it was empowered to assess the duty payable together with the penalties applicable and the agreement for sale would thereby become admissible into evidence after it has been endorsed showing payment of stamp duty and penalties. In that case, the court was unable to assess the duties and penalty payable as there was uncertainty about the purchase price. In this case, the purchase price is clearly stated to be \$5,000,000.00 and therefore, there does not appear to be any impediment to the course submitted by Ms Dunn that the court at trial could assess the duties. But even if that hurdle was overcome in that way, there is the greater hurdle that presents itself in that the very expert report that the claimants are seeking to rely contains the critical finding that the signature of Barsey Spencer on the agreement was forged. It is my view that in these circumstances, it is doubtful that the claimants have a real prospect of success if they rely on the agreement for sale at trial.

[65] Ms Dunn has, however, submitted that in compliance with the Statute of Frauds, there is a sufficient memorandum in writing in the form of the receipts and sufficient acts of part performance to establish the existence of the contract. Mr Taylor has not challenged the law that the contract for sale of the land may be established in this way and indeed he would be severely challenged in doing so in light of the plethora of authorities in this area including *Aubrey Falknor*. Mr Taylor has instead pointed out that Barsey Spencer denied signing the receipts and receiving the monies stated on the receipts.

[66] In assessing this issue, I bear in mind that I am not required to conduct a mini-trial of the claim. I agree with Mr Taylor that there is no analysis by the handwriting expert of the purported signatures of Barsey Spencer on the receipts to confirm that the signature was his. However, it is my view that it is for the claimants to decide the evidence to deploy in the pursuit of their claim and therefore, while the report of a handwriting expert verifying the authenticity of the signature would have assisted, this is not fatal to the claimants' reliance on the receipts. In my view it is for the court at trial to make a finding of fact as to whether the receipts were signed by Barsey Spencer. I accept Mr Taylor's argument that this determination may be

affected by the fact that Barsey Spencer will not be available at trial. But this could not be a basis for concluding that the claimants have no real prospect of success and thereby grant summary judgment. To grant summary judgment on this basis alone would be to penalise the claimants for something over which they have no control, that is, the death of Barsey Spencer. It is for a court at trial to determine this issue based upon its assessment of the credibility of the claimants after observing them under cross-examination. I am firmly of the view that this is not an appropriate stage for this issue to be determined.

[67] Where the acts of part performance are concerned, there is no indication as to whether the claimants were put into possession of the premises as a consequence of the agreement for sale or whether they were mere tenants as suggested by the notice to quit. This too is a question of fact that will be impacted by evidence at trial and therefore ought properly to be left for that stage.

[68] In the final analysis, it seems to me that if the trial court were to accept the claimants' evidence in respect of the signing of the receipts by Barsey Spencer for payment of the purchase price and that they had entered into possession of the premises pursuant to the agreement for sale of the property evidenced by the receipts, then the claimants would have more than an arguable case of proving that they and Barsey Spencer were parties to a contract for the sale of the land in question and that it was dishonest of him to transfer the legal title to the property to himself and his children. It would then be a matter for the court to decide the reliefs including damages that should be awarded. I therefore find that Mr Taylor has not demonstrated that the claimants have no real prospect of succeeding in their claim and consequently, his application for summary ought to be dismissed.

[69] In the circumstances, I make the following orders on both applications:

- (i) Yvonne Spencer is appointed administrator ad litem for the estate of Barsey Spencer for the purpose of continuing these proceedings.

- (ii) The application to add Yvonne Spencer, Rudolph Spencer and Adam Spencer as defendants to the claim herein is refused.
- (iii) The fixed date claim form filed on 10 August 2012, which was converted to a claim form, is to be amended in accordance with the draft amended claim form save for the reliefs sought at paragraphs (10) and (11).
- (iv) The particulars of claim filed on 10 August 2012 is to be amended in accordance with the draft amended particulars of claim save for paragraphs 11, 12, 13, 14, 15 (in relation to the “Particulars of Fraud by the 2nd, 3rd and 4th Defendants”), 17, 18 and 19; and the reliefs sought at paragraphs (10) and (11). All references to Barsey Spencer’s children as the 2nd – 4th defendants, where they are necessary, shall be replaced by the designation “Barsey Spencer’s children”.
- (v) The amended claim form and amended particulars of claim are to be filed and served on or before 28 October 2022.
- (vi) The defendant shall file an amended defence, if necessary, on or before 9 December 2022.
- (vii) The application for summary judgment is refused.
- (viii) The defendant shall pay one half of the claimants’ costs on the application to amend statement of case and the claimants’ entire costs in relation to the application for summary judgment.
- (ix) Pre-trial review is set for 16 February 2023 at 10am for one hour.
- (x) Leave to appeal is granted.