[2021] JMCC COMM 17

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. SU2019CD00212

BETWEEN	**EIGER (TCT) THERMAL CONTROL TECHNOLOGIES LIMITED**	**CLAIMANT**
AND	**DENNIS RAPPAPORT**	**1ST DEFENDANT**
AND	**ROBERT GRIFFIN**	**2ND DEFENDANT**
AND	**WILLOWS PROPERTY LIMITED**	**3rd DEFENDANT**
AND	**ANDREW WILLIS**	**4TH DEFENDANT**

IN CHAMBERS

Mr. Garth McBean QC instructed by Garth McBean & Co., Attorneys-at-Law for the 1st Defendant/Applicant

Mr. Kevin Williams and Mr. David Ellis instructed by Messrs. Grant Stewart Phillips & Co. Attorneys-at-Law for the 2nd & 3rd Defendants/Applicants

The Claimant and the 4th Defendant not being present or represented by Counsel

Heard: 25th May and 4th June 2021

Summary judgment – Principles to be applied

Striking out –Principles to be applied- Whether available on the basis of statutory limitation –Whether reasonable grounds for bringing claim - Civil Procedure Rule 26.3 (1) (c)

Limitation of actions – Principles to be applied

Practice and procedure – Preconditions for Court making order of its own initiative

LAING , J

The procedural background

[1] The Claimant by its Claim Form and Particulars of Claim filed 31st May 2019 claimed against the Defendants jointly and severally for damages for breach of contract.

[2] By a Notice of Application filed 18th December 2019 the 1st Defendant filed his Notice of Application to strike out the Statement of Case of the Claimant and in the alternative for Summary Judgment. On 17th February 2020 the 2nd & 3rd Defendants filed a Notice of Application to strike out the Claim. (These two applications are referred to herein together as "the Applications")

[3] By letter to the Registrar dated the 14th February 2020 Ms. Carol Davis, the Attorney-at-Law then representing the Claimant, indicated that Counsel was scheduled to be in the Court of Appeal at 2:00 pm on the 18th February 2020. As a result, she said that it was unlikely that she would be available at 3:00 pm on that day, which was the time at which the matter was fixed for hearing and that furthermore, one hour would have been insufficient. On the 18th February 2020 Ms. Davis and Mr. Hanson appeared and I adjourned the Applications until 13th May 2020 for one day and made case management orders.

[4] As a result of the disruption caused by the Covid-19 pandemic, the Applications were not heard on 13th May 2020. On 24th July 2020 Mr. McBean QC wrote a letter to the Registrar, copied to all the parties, asking to be advised of the new date in light of the adjournment of the 13th May 2020 hearing. There were a number of challenges identifying a date for hearing convenient to all parties but eventually the 13th April 2021 was fixed.

[5] On the 13th April 2021, the Applications came on for hearing which was being conducted remotely using the Zoom meeting platform. Ms. Davis applied for an

adjournment on the basis that the representative of her client, a director by the name of Samuel Speranza had been unable to visit Jamaica in order to give her instructions in person as a result of Covid-19 restrictions. Furthermore, because of a hearing impairment, he wished to have the Applications heard in person at the Court. Counsel for the Defendants opposed the application for the adjournment, but, despite the objections, I granted the application for the adjournment in an effort to give Counsel for the Claimant the opportunity to obtain further instructions. I took this decision primarily because Ms. Davis advised the Court that the Claimant wished to file evidence which could potentially have an impact on the outcome of the Defendants' Applications. I made a number of case management orders including for the participants in the hearing to use suitable microphones to assist in high clarity of the sound transmission for Mr Speranza's benefit. I also permitted the filing and service of evidence by the Claimant on or before 7th of May 2021.

[6] On 22nd April 2021 Ms. Davis filed a Notice of Application to be removed from the record as the Attorney-at-Law representing the Claimant. This application was heard on the 18th May 2021 and granted.

[7] On 25th May 2021 the Claimant was not represented while Counsel for the 1st to 3rd Defendants were ready to proceed. Having regard to the history of the matter and the adjournment on 13th April 2021 in order to accommodate the Claimant, at approximately 10:10 am, after having heard the representations, and not receiving any word as to the Claimants representation, the Court ordered that the Applications proceed.

[8] At 1:49 pm, while writing my decision on the Applications, I received an e-mail from the clerk who was present during the hearing by zoom, forwarding an e-mail which was sent to her at 1:11 pm. This e-mail forwarded an email from Mr. Samuel Speranza to a clerk in the registry of the Commercial Court which was time-stamped 9:46 am (this was 14 minutes before the time scheduled for the commencement of the hearing). It is unfortunate that the Court was not provided with Mr. Speranza's e-mail earlier in order to consider its contents, but that is the

risk a litigant takes when he sends an e-mail so close to the scheduled time for a hearing. The Court staff have numerous duties and as a general rule, are unable to constantly monitor their e-mail inboxes.

[9] In the e-mail Mr. Speranza indicated that he had planned to travel to Jamaica during the weekend but suffered from a medical condition and asked if the Court could postpone the hearing. Mr. Speranza attached two medical documents, neither of which gave a good reason as to why he could not have advised the Court by e-mail earlier or why the Claimant, a corporate entity, was not represented by Counsel.

[10] Whereas I recognize the desirability of a party to have its representative participate in Court proceedings, in the circumstances, I find that the presence of Mr. Speranza at the hearing would not have made any difference to the factual and legal issues which arose for the Court's determination. It must be noted that the Claimant and/or Mr. Speranza did not avail themselves of the opportunity granted by the Court on the last occasion to file affidavit evidence and or preliminary submissions, accordingly, his attendance would not have been of any assistance to the Court.

[11] Most importantly, Counsel representing the Claimant on the last occasion was advised that the hearing would be conducted remotely using the Zoom meeting platform in keeping with the Court's usual safety protocols. The physical presence of Mr. Speranza in Jamaica was therefore wholly unnecessary. The Court made case management orders in an effort to facilitate Mr. Speranza having regard to what was indicated to the Court of his hearing deficiency. The Court has not been presented with any evidence which establishes that Mr. Speranza could not have effectively participated in the hearing remotely using the Zoom platform.

The participants

[12] (a) Eiger (TCT) Thermal Control Technologies Limited ("the Claimant") is a company duly incorporated under the laws of Jamaica which was formerly incorporated under the name Eiger Manufacturing Company Limited.

(b) Eiger Foundation Limited ("Eiger") was a company duly incorporated under the laws of the Cayman Islands and was engaged in, *inter alia*, the business of property development in Jamaica.

(c) Mr. Samuel Speranza ("Mr Speranza") was at all material times a Director and/ or agent of both the Claimant and Eiger.

(d) Mr Paul Mundt and Mrs Jean Mundt (together "the Mundts") were at one time the owners of eight parcels of land comprised in Certificates of Title registered in the Register Book of Titles as follows:

(1) Volume 262 Folio 50 ("the Excluded Land")

(2) Volume 698 Folio 49 ("the Subject Land")

(3) Volume 350 Folio 55

(4) Volume 671 Folio 65

(5) Volume 677 Folio 100

(6) Volume 506 Folio 24

(7) Volume 996 Folio 92

(8) Volume 1126 Folio 984

(Collectively referred to herein as "the Mundts Lands")

(e) Dennis Rappaport ("the 1st Defendant") purchased the Mundts Lands from the Mundts on or about 22nd November 1985, the purchase having been secured by way of a vendors' mortgage.

(f) Robert Griffin ("the 2nd Defendant") was a Director of the 3rd Defendant and purchased the Subject Land from the 1st Defendant.

(g) Willows Property Limited ("the 3rd Defendant") is a company duly incorporated in the British Virgin Islands, and was a nominee of Robert Griffin (the 2nd Defendant) for purposes of the purchase of the Subject Land.

(h) Andrew Willis ("the 4th Defendant") was a member of the law firm Gentles & Willis and was at all material times an Attorney-at-Law who acted as legal representative for the Claimant and the 1st Defendant in relation to the sale and purchase of the Subject Land.

The Claim

[13] The Claimant asserts that by an agreement in writing bearing the year 1994, but which does not have a day or month, ('the High Hope Agreement") entered into between Eiger, the 1st Defendant and the Mundts, the 1st Defendant agreed to complete the purchase of the Mundts Lands by payment of "the personality balance and excepted sum" of Seven Thousand United States Dollars (US$7,000.00), as well as the principal sum as at 1st April 1994 being United States Three Hundred and Six Thousand Five Hundred and Fifty Eight United States Dollars and Twenty One Cents (US$306,558.21). The Mundts agreed to allow Six Hundred and Fifty Thousand United States Dollars (US$650,000.00) of the purchase price to remain outstanding secured by a 1st legal mortgage of the said lands.

[14] It was further agreed that Eiger would pay the sums outstanding on the mortgage to the Mundts, and in return the 1st Defendant would sell seven of the eight parcels

of the Mundts Lands comprising 37.5 acres to Eiger ("the San souci Lands"), and/or transfer to Eiger the said lands which were identified as follows:

(1) Volume 698 Folio 49 ("the Subject Land")

(2) Volume 350 Folio 55

(3) Volume 671 Folio 65

(4) Volume 677 Folio 100

(5) Volume 506 Folio 24

(6) Volume 996 Folio 92

(7) Volume 1126 Folio 984

Notably, the parcel registered at Volume 262 Folio 50 is excluded.

[15] The 1st Defendant also granted a 2nd mortgage to Eiger dated 17th August 1993 in the amount of Five Hundred Thousand United States Dollars (US$500,000.00) secured by the Mundts Lands (eight parcels of land). The prior mortgage to the Mundts of the Mundts Lands is listed as having been secured by the same eight parcels of land.

[16] The Claimant asserts that although the 1st Defendant remained as registered proprietor Eiger was the equitable owner of the San Souci Lands and the 1st Defendant consented to deliver the titles to the San Souci Lands to Eiger and/or its nominee and to cooperate with Eiger and/or its nominee to facilitate the development of the said lands.

[17] Of the seven parcels comprising the San Souci Lands, three parcels were transferred by the 1st Defendant to purchasers on the sole instruction, direction or request of Eiger namely:

(1) Volume 506 Folio 24

(2) Volume 996 Folio 92

(3) Volume 1126 Folio 984.

[18] It was agreed between Eiger and the 1st Defendant that the Subject Land (Volume 698 Folio 49), which contained a water tank, was to be sold to the 3rd Defendant and the three remaining parcels of land were to remain registered in the name of the 1st Defendant but beneficially owned by Eiger or until Eiger directed, instructed or requested their transfer. These parcels were:

(1) Volume 350 Folio 55

(2) Volume 671 Folio 65

(3) Volume 677 Folio 100

("the Remaining Lands")

[19] The Claimant states that at the material time the 2nd Defendant was also contemplating the purchase of an adjacent parcel of land registered at Volume 671 Folio 65 to the Subject Land and on which there was also a water tank.

[20] The Claimant asserts that these two water tanks were important to the development of the Remaining Lands because it was anticipated by the Claimant that as a condition of the approval of the subdivision plan which was submitted to the St. Ann Parish Council, access to the two water tanks was necessary. Therefore, throughout the negotiations between the Claimant, and the 1st and 2nd Defendants in the presence of the 4th Defendant it was known that access to the water tanks would have to be reserved to the Claimant and that the Claimant would also have to retain ownership of the land on which the water tanks were located in order to satisfy the requirements of the Parish Council.

[21] The Claimant avers that letters of intent were signed between Eiger and the 4th Defendant pursuant to which, the 2nd Defendant agreed to establish, *inter alia*, a dedicated road easement to the water tanks for the exclusive use of Eiger forever, this easement being for the purpose of supplying water to neighbouring lot. It was also agreed that the 2nd Defendant and/or the 3rd Defendant/its nominee, would cooperate and facilitate the sub- division or adjustment of the boundaries to allow total access and ownership by Eiger of the part of the Subject Land containing the

water tank. The Claimant asserts that the terms of the letters of intent were acknowledged and agreed by the 1st Defendant and by the 4th Defendant who at the material time was acting as the Attorney-at-Law for the 1st Defendant in the sale of the Subject Land.

[22] The Claimant further avers, that at a time prior to the closing of the transaction between the 1st and 2nd Defendants, a third letter of intention was agreed between the Claimant and the 1st Defendant. It is pleaded that it was previously agreed between the Claimant and the 2nd Defendant that a portion of the lands identified on a survey by Commissioned Land Surveyor Johnson as Lot 13A, be removed from the lands (this is unclear in the pleading but presumably his area identified as Lot 13A is a part of the parcel in respect of which sale was contemplated). It was agreed that this Lot 13A would be transferred to the Claimant for the purpose of satisfying the subdivision approval. The Claimant acknowledged that it only has a written and unsigned copy of the signed letter of intention, but that the signed original was seen by the Claimants agent and was given to the 4th Defendant.

[23] Mr Speranza as agent and/or Managing Director of Eiger instructed the 4th Defendant to prepare an agreement for sale which reflected the terms of this letter of intent. Mr Speranza signed a draft agreement prepared by the 4th Defendant ("the Draft Agreement") which contained the following special conditions:

> *(11). The Purchaser hereby agrees to perpetual access and exclusive use of two (2) water tanks at the south western corner of the property. Further, the Purchaser also agrees to co-operate and facilitate the sub-division or adjustment of the boundaries to allow total access and ownership by the Vendor of the part of the land containing both tanks and to establish a dedicated road to the water tanks at the rear of the property for the use of Eiger Foundation Limited/its agents. The purpose of this easement is to supply water to the neighbouring lots.*
>
> *(12) The Vendor agrees to waive his right to proceed with sub- division or adjustment of the relevant boundaries in the event that there are difficulties in acquiring the same. Further, if the Vendor fails to exercise his right to apply for sub-division, this Agreement for Sale remains unenforceable, with all parties accepting passes to the Purchaser in such an event.*

[24] The 2nd Defendant did not proceed with the purchase of the parcel registered at Volume 671 Folio 65 (which also contained a water tank and the Claimant seems to have accepted by paragraph 36(a) of the Amended Particulars of Claim that although there is a reference to two water tanks, the easement and reservation in respect of Lot 13A related only to the Subject Land).

[25] The Claimant also avers that after 2004 it made several attempts without success to obtain copies of the agreement for sale as signed between the 1st and 2nd Defendants. It was only in or around November 2008, that it was advised by an agent and/or employee of the 4th Defendant that the Draft Agreement as approved by Mr Speranza and delivered to the 4th Defendant was changed by the 1st and/or 2nd and/or 3rd and/or 4th Defendants without the knowledge and/or agreement of Eiger and/or its agent or agents.

[26] The Claimant complains of two new special conditions namely:

> *(10) The Purchaser hereby agrees to perpetual right of way/access to the two (2) water tanks at the south western corner of the property at no charge to Eiger Foundation Limited/its agents. Further, the Purchaser also agrees to co-operate and facilitate the sub-division or adjustment of the boundaries for up to 2 years after completion to allow total access and ownership by the Vendor of the part of the land containing both tanks and to establish a dedicated road to the water tanks at the rear of the property use of Eiger Foundation Limited/its agents. The purpose of this easement is to supply water to the neighbouring lots.*
>
> *(12) In consideration of the Purchaser allowing perpetual right of way to the water tanks mentioned at special condition 10, the parties agree that the Purchaser has perpetual free usage of the said water tanks.*

It is the Claimant's case that the altered agreement for sale with respect to the Subject Land was fraudulent and intended to deprive the Claimant of its road easement and ownership of the portion of the Subject Land identified as Lot 13A on the survey by the by Commissioned Land Surveyor Johnson contrary to the Letters of Intent previously agreed by the parties.

[27] The Claimant alleges that the 1st and/or 2nd and/or 3rd Defendants fraudulently transferred or caused to be transferred into the name of the 3rd Defendant the

Subject Land which is now comprised in Certificate of Title registered at Volume 1380 folio 384 of the Register Book of Titles and neither the easement nor the transfer of Lot 13 A was registered on the title.

[28] The Claimant alleges in the alternative that, *inter alia*, the 2nd and/or 3rd Defendants conspired with the 1st and/or 4th Defendants to defraud the Claimant of its interest in the easement to be granted in the land identified as being part of the Subject Land.

The Applications

[29] The 1st Defendant filed his Defence contesting the Claim from as early as 22nd November 2019. The 1st Defendant on 18th December 2019 filed his Notice of Application for an order that pursuant to rule 26.3 (1) (c) of the Civil Procedure Rules 2002 (the CPR") that the Claimant's Statement of Case be struck out and for summary judgment against the Claimant and in favour of the 1st Defendant pursuant to Part 15.2 of the CPR. The 1st Defendant's application was grounded on his contention that the Claim is statute barred by the Limitation of Actions Act and the Registration of Titles Act.

[30] On 17th February 2020 the 2nd and 3rd Defendants filed a Notice of Application to strike out the Claim also relying on the Limitation of Actions Act.

Striking out

[31] CPR 26.3(1) provides that:

> *"In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court:*
>
> *(a)…*
>
> *(b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;*

> *(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim;"*

[32] In respect of 26.3(1) (b) I adopt the opinion of Batts, J where on examining that provision in **City Properties Limited v New Era Finance Limited** [2013] JMSC Civil 23 he stated as follows:

> *"[9] On the issue of the applicable law, the section is clear and means exactly what it says. There must be reasonable grounds for bringing or defending a claim. These reasonable grounds must it seems to me be evident on a reading of the statement of case. It is well established and a matter for which no authority need be cited, that upon an application to strike out pleading, no affidavit evidence need be filed, the issue is determined by reference to the pleadings.*
>
> *[10] Therefore it seems to me that when the rule refers to "reasonable grounds" for bringing a claim, it means nothing more or less than that the claimant has disclosed in the pleading that he has a reasonable cause of action against the defendant".*

The Limitation Point

[33] The United Kingdom Statute 21 James 1 Cap 16 as far as is relevant provides as follows:

> *"… The said actions upon the case (other than slander) and the said actions for account and the said actions for trespass, debt, detinue and replevin for goods or capital and the said action of trespass…. within 3 years after the end of this present session of Parliament or within 6 years next after the cause of such actions or suit and not after."*

Section 46 of the Limitation of Actions Act, 1881 provides that this statute has been recognized and "*is now esteemed, used, accepted and received as one of the statutes of this island*".

Section 168 of the Registration of Titles Act provides as follows:

> *"No action for recovery of damages sustained through deprivation of land, or of any estate or interest in land, shall lie or be sustained against the Registrar or against the Assurance Fund, or against the person upon whose application such land was brought under the operation of this Act, or against the person who applied to be registered as proprietor in respect of such land, unless such action shall be commenced within the period of six years from the date of such deprivation….*

[34] The effect of these provisions is that subject to exceptions which I need to examine for purposes of this judgment, most claims must be brought within 6 years after the cause of action arose. Although the Claimant's Claim filed 31st May 2019 primarily sought damages for fraud and/or conspiracy to defraud, following the filing of the 1st Defendant's Notice of Application on 18th December 2019 to strike out the Claimant's Statement of case and in the alternative summary judgment, and the 2nd & 3rd Defendants' Notice of Application to strike out the Statement of Case, on 17th February 2020 the Claimant filed an Amended Claim Form and Amended Particulars of Claim seeking numerous additional reliefs including:

> *4. That the Claimant recover from the 3rd Defendant the land identified on the survey by Commissioned Land Surveyor Johnson as Lot 13A and being the part of the land previously registered at Volume 698 Folio 49 of the Registered Book of Titles and now registered at Volume 1380 Folio 384 of the Register Book of Titles.*

[35] Counsel for the 1st Defendant and Counsel for the 2nd and 3rd Defendants acknowledged section 27 of the Limitation of Actions Act which provides as follows:

> *In every case of a concealed fraud, the right of any person to bring a suit in equity for the recovery of any land or rent of which he or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall, or with reasonable diligence might, have been first known or discovered…*

However, reference was made by Counsel to the case of **Bartholomew Brown and Another v Jamaica National Building Society** [2010] JMCA Civ 7 in which Harrison JA at paragraph 43 opined as follows:

> *… Although the equitable doctrine of fraudulent concealment does have a limited area of operation by virtue of section 27 of the Limitations 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…"*

These observations of Harrison JA were accepted by me in **Winston Finzi v Jamaican Redevelopment Foundation and Others** [2017] JMCC COMM 20.

[36] It was submitted on behalf of the 2nd and 3rd Defendants that the date the Claimant's cause of action arose for breach of contract or loss on the basis of unjust enrichment was the 5th November 2004. This was the date that the new certificates of title for the Subject Land was registered at Volume 1380 Folio 384 in the Register Book of Titles. This is because such registration provided notice to the world that the Claimants assertion that the easement or concession in respect to Lot 13A was not endorsed on the certificate of title. Accordingly, any claim against the 2nd and 3rd Defendants arising from such non-registration would be statute barred within 6 years of that date and was in fact statute barred on the 6th November 2010. It was further submitted that the 2nd and 3rd Defendants would be protected by virtue of the proviso to Section 27 because at all material times both these Defendants were bona fide purchasers for valuable consideration having no knowledge of any fraudulent conduct on the part of the Claimant's agents.

[37] Counsel for the 1st Defendant and Counsel for the 2nd and 3rd Defendants both relied on the Claimant's pleadings as to the date of discovery of the alleged fraud. The Claimant averred in paragraph 38 of the Amended Particulars of Claim that:

> *…the Defendants or any of them fraudulently altered the agreement for sale of the subject land, and concealed from Eiger the document signed by them, which said fraud was not and could not have been discovered by Eiger on until on or about November 2008 when it was brought to its attention by an employee of the 4th Defendant.*

Paragraphs 39 to 40a. are in the following terms:

> *39. In or around November 2008 Eiger was advised by an agent and/or employee of the 4th Defendant that the draft Agreement for Sale as approved by Mr. Speranza and delivered to the 4th Defendant was changed by the 1st and/or 2nd and/orr 3rd and/or 4th Defendants, without the knowledge and/or agreement of Eiger and/or its agent(s) (hereinafter called "the altered agreement").*
>
> *40. It was at this time that it came to the knowledge of Eiger that the sale agreement previously agreed by Eiger for implementation by the Defendants or any of them had been altered, or in particular that the terms of the easement were different from what had previously agreed by the parties and that Lot 13A had not been reserved for the Claimant.*

> *40a. On discovering this alteration the Claimant attempted to obtain copies of the agreement for sale signed by the 1st and the 2nd Defendant and the 3rd Defendant as nominee, and was advised by the 2nd Defendant that the said documents were in the hands of the 1st Defendant. The Claimant through its Attorneys then made further efforts to obtain the agreement for sale and other conveyancing documents, 1st and 4th Defendants but these have never been forthcoming.*

[38] Counsel have submitted that these paragraphs are a clear concession on the part of the Claimant that it became aware of the alleged fraud in or around November 2008 when Eiger was advised of the allegedly altered agreement. In light of this acknowledgment, it was submitted that the Claim is in any event, statute barred.

The Court's finding on the limitation issue

[39] I accept that there is considerable force in the submissions of Counsel made on behalf of the 1st, 2nd and 3rd Defendants. It is clear from the Claimant's pleadings that at the latest, in or about November 2008 it became aware of the alleged fraud and by extension any other wrongdoing which could have formed the basis of a cause of action. I therefore find that the claim having been filed on 31st of May 2019 is statute barred.

[40] Counsel referred to a summary on this area of the law provided by Stuart Sime in his text "A Practical Approach to Civil Procedure" Thirteenth edition at page 85 and the following portions are relevant and are worth reproducing:

> *Expiry of a limitation. Provides a defendant with a complete defence to a claim. Lord Griffiths in* ***Donovan v Gwentoys Ltd*** *[1990] 1 WLR 472 said 'the primary purpose of the limitation period is to protect a defendant from the injustice of having to face a stale claim, that is a claim with which he never expected to have to deal'.*
>
> *… Limitation is a procedural defence. It will not be taking by the court of its own motion, but must be specifically set out in the defence (PD 16, para 13.1). Time-barred cases rarely go to trial. If the claimant is unwilling to discontinue the claim, it is usually possible for the defendant to apply successfully for the claim to be struck out (see chapter 22)* ***as an abuse of the court's process.*** *(my emphasis)*

> *Normally, the only consequence of the expiry of a limitation. Is that the defendant acquires a technical defence to the claim. The claimant still has a cause of action, but one that cannot be enforced*

[41] I am of the view that it is also appropriate order in cases such as these involving statutory limitation for a defendant to apply for summary judgment in a clear case. Nevertheless, it is beyond challenge that the case law authorities have established that it is possible for an order to be made that the Claimant's Statement of Case or part thereof be struck out as an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings. However, where there is an application that the statement of case be struck out on the ground that it is frivolous and discloses no reasonable grounds for bringing the Claim, the authorities are less clear where this assertion is based on statutory limitation.

[42] In the English Court of Appeal case of **Ronex Properties Ltd. v. John Laing Construction Ltd. And Others** [1983] Q.B. 398 Donaldson LJ at page 404 - 405 expressed his reservation in the following manner:

> *Under R.S.C., Ord. 18, r. 19, the power to strike out any pleading or the endorsement of any writ in the action or anything contained therein is exercisable:*
>
> *"on the ground that - (a) it discloses no reasonable cause of action or defence, as the case may be; or (b) it is scandalous, frivolous or vexatious; or (c) it may prejudice, embarrass or delay the fair trial of the action; or (d) it is otherwise an abuse of the process of the court; …"*
>
> *In the case of an application under (a) above, which is the present case, no evidence is admissible.*
>
> *Authority apart, I would have thought that it was absurd to contend that a writ or third party notice could be struck out as disclosing no cause of action, merely because the defendant may have a defence under the Limitation Acts. Whilst it is possible to have a contractual provision whereby the effluxion of time eliminates a cause of action - and there are some provisions of foreign law which can have that effect - it is trite law that the English Limitation Acts bar the remedy and not the right; and, furthermore, that they do not even have this effect unless and until pleaded. Even when pleaded, they are subject to various exceptions, such as acknowledgment of a debt or concealed fraud, which can be raised by way of reply.*
>
> *……*

> *Where it is thought to be clear that there is a defence under the Limitation Acts, the defendant can either plead that defence and seek the trial of a preliminary issue or, in a very clear case, he can seek to strike out the claim upon the ground that it is frivolous, vexatious and an abuse of the process of the court and support his application with evidence. But in no circumstances can he seek to strike out on the ground that no cause of action is disclosed.*
>
> *The judge refused to strike out on this ground both for the reasons given in* ***Dismore v. Milton*** *[[1938] 3 All E.R. 762],and because, in the exercise of his discretion, he thought that the application was premature in that at that stage he was not satisfied that no reasonable cause of action was disclosed. In my judgment, he was absolutely right in so refusing.*

[43] Stephenson L.J. at page 408 made the following observation and explained the reason for the difficulty:

> *I agree and desire only to add a few observations on the limitation point. There are many cases in which the expiry of the limitation period makes it a waste of time and money to let a plaintiff go on with his action. But in those cases it may be impossible to say that he has no reasonable cause of action. The right course is therefore for a defendant to apply to strike out the plaintiffs' claim as frivolous and vexatious and an abuse of the process of the court, on the ground that it is statute-barred. Then the plaintiff and the court know that the Statute of Limitations will be pleaded; the defendant can, if necessary, file evidence to that effect; the plaintiff can file evidence of an acknowledgment or concealed fraud or any matter which may show the court that his claim is not vexatious or an abuse of process; and the court will be able to do, in I suspect most cases, what was done in* ***Riches v. Director of Public Prosecutions*** *[1973] 1 W.L.R. 1019: strike out the claim and dismiss the action.*
>
> *That cannot be done here because the third party's summons alleged no reasonable cause of action only and an amendment would have given the second defendants the opportunity of meeting the plea of the statute with a plea of concealed fraud which has been raised in the plaintiffs' reply to the amended defence of the first defendants served shortly before the hearing of this appeal.*

[44] In the case of **Andrew Gillispie v Cons Denton Clarke and Others** (Unreported),Supreme Court, Jamaica, Suit No C.L. G-068 of 2002, judgment delivered September 11, 2003 the applicant had filed a summons seeking to strike out the statement of claim pursuant to the Statute of Limitations and the section 238 of the Judicature (Civil Procedure Code) Law (the precursor to the CPR) and

the inherent jurisdiction of the court on the grounds that, based on a limitation defence:

(a) The action against the defendants is frivolous, vexatious and an abuse of the process of the Court, and

(b) The writ of summons and Statement of Claim discloses no reasonable cause of action against the defendants.

[45] Anderson J accepted the dicta in this case as applicable to the case before him and found that ground (b) above must fail. Consequently, he refused the defendants' summons to strike out the claimant's statement of claim on ground (b). However, he found that the Court had the power under section 238 of the Judicature (Civil Procedure Code) Law to grant the application in paragraph (a) of the summons, by striking out the endorsement and other pleadings in a claim for assault or false imprisonment. In doing so the learned judged acknowledged the effect of a limitation defence.

[46] In the case of **Vanetta Neil v Janice Halstead** [2019] JMSC 68 my learned brother Rattray J, having considered **Ronex** (supra), granted the Defendant's Notice of Application to have the Claimant's claim struck out as an abuse of process of the Court on the ground that the claim was statute barred and rule 26.3 (1)(b) of the CPR, (the abuse of process limb), was applicable.

[47] It is arguable that notwithstanding the observations of their Lordships of the English Court of Appeal in **Ronex**, and the preceding two local judgments to which I have referred (which are first instance judgments), the dicta in these cases is not applicable because the facts before this Court are distinguishable. Firstly, both Counsel have submitted that the decision of **Bartholomew Brown and Another v Jamaica National Building Society** (supra) to which reference was already made, has confirmed that the equitable doctrine of fraudulent concealment is only applicable to suits for the recovery of land or rent, and accordingly the Claimant could in theory only benefit in respect of those heads of claim. Counsel submitted

further, that even as it relates to those claims for relief for recovery of land, on the facts of this case, the Claimant would still be barred from obtaining those reliefs by the Limitation Act. This is because of the date of the Claimants admitted knowledge of the alleged fraud.

[48] Secondly, I find it significant that the Applications were made before the Claimant made its amendments to its Statement of Case and so the Claimant had the opportunity to deploy any appropriate changes or responses to the limitation point even before a reply as in the scenario posited by Donaldson LJ in **Ronex** quoted earlier. To the extent that the Claimant's amendments expanded the plea of concealed fraud, this cannot assist the Claimant because of what the Court has found to be an admission of knowledge of the fraud from in or around November 2008. In such circumstances it is questionable whether it is not appropriate for the 1st, as well as the 2nd and 3rd Defendants to say that the Claimant's Statement of Case has not disclosed a reasonable ground for bringing the Claim.

[49] However, I acknowledge that if the historical reluctance to find that a limitation defence does not engage the "*no reasonable ground*" limb is founded and remains based on the concept that "*Limitation Acts bar the remedy and not the right*", (and this seems to be the case), then the observations in **Ronex** remain apt. I have not been provided with any authority nor have I by my own research been able to identify any authority which supports the striking out of the Claim pursuant to rule 26.3 (1) (c) of the CPR, based on a limitation defence. Accordingly, I am constrained to adopt what appears to be the accepted position as represented in **Ronex,** which is that such a course is impermissible, before as well as after the advent of the CPR. The evolution of the statutory provision does not appear to have changed the principles to be applied.

[50] At this juncture, it is necessary to distinguish between the Notice of Application filed on behalf of the 1st Defendant and the Notice of Application filed on behalf of the 2nd and 3rd Defendants. The 1st Defendant's Notice of Application seeks:

> *1. An order that pursuant to rule 26.3 (1) (c) of the Civil Procedure Rules that the Claimant's statement of case be struck out:*
>
> *2. In the alternative to the above, an order that Summary Judgment be entered on the claim, against the Claimant and in favour of the 1st Defendant pursuant to Part 15.2 of the Civil Procedure Rules.*

[51] The Notice of Application of the 2nd and 3rd Defendants seeks an order that:

> *The Claimant's Claim Form and Particles of Claim filed on the 31st day of May 2019 be struck out.*

The reference to the CPR provision which is being relied on is found in ground two which provides as follows:

> *2. CPR 26.3 (1) (c) permits this Honourable Court to strike out a statement of case if it appears that the said statement of case, or the part thereof, discloses no reasonable grounds for bringing a claim.*

It is of significance that the 2nd and 3rd Defendants have not sought to rely on CPR 26.3 (1) (b) which is the "abuse of process limb". The 2nd and 3rd Defendants have also not sought an order for Summary Judgment in the alternative.

[52] The primary relief sought by the 1st Defendant is for an order that the Claimant's Statement of Case be struck out on the basis that it discloses no reasonable grounds for bringing a claim. I have formed the view that such an order is impermissible and accordingly I shall consider whether he is entitled to the relief of summary judgment which he has sought in the alternative.

The law relating to summary judgment

[53] CPR 15.2 provides as follows:

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

[54] In ***Swain v Hillman*** [2001] 1 All ER 91 at page 92, Lord Woolf MR said:

> *'Under r 24.2, the court now has a very salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words "no real prospect of being successful or succeeding" do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success or, as Mr Bidder QC [counsel for the defendant] submits, they direct the court to the need to see whether there is a "realistic" as opposed to a "fanciful" prospect of success.'*

[55] The Courts have repeatedly cautioned against the granting of summary judgment in certain kinds of cases, see for example the observations of Lord Mummery in the English Court of Appeal case of **Doncaster Pharmaceuticals Ltd v The Bolton Pharmaceutical Company 100 Ltd** [2006] EWCA Civ 661 as follows:

> *"[17] … The classic instance is where there are conflicts of fact on relevant issues, which have to be resolved before a judgment can be given (see Civil Procedure Vol 1 24.2.5). A mini trial on the facts conducted under CPR Part 24 without having gone through normal pre-trial procedures must be avoided, as it runs a real risk of producing summary injustice.*

[56] In **Sagicor v Taylor-Wright** [2018] UKPC 12 at paragraph 17 of the judgment the Court made the following observations:

> *17. There will in almost all cases be disputes about the underlying facts, some of which may only be capable of resolution at trial, by the forensic processes of the examination and cross-examination of witnesses, and oral argument thereon. But a trial of those issues is only necessary if their outcome affects the claimant's entitlement to the relief sought. If it does not, then a trial of those issues will generally be nothing more than an unnecessary waste of time and expense.*

[57] In this case before the Court it is important to appreciate that the applications of the 1st Defendant for summary judgment does not require an examination of evidence or disputed facts, the main issue being the operation of the Limitation Act having regard to the pleaded case of the Claimant. Based on the Court finding that all the reliefs sought by the Claimant would be subject to a defence based on the applicability of the Limitation Act, the Application of the 1st Defendant for summary judgment in the alternative must succeed. This is particularly so in the absence of any pleading or evidence of the Claimant which was deployed in answer and which shows, at this point, that it has a real prospect of countering the limitation defence.

The Claimant of course is not required at this stage to demonstrate that it is bound to overcome it at trial.

[58] Although the 2nd and 3rd Defendants have not made a similar application for summary judgment their Counsel in written submissions had raised an additional ground in support of their Application. The essence of it was that the Claimant's claim of fraud against the 2nd and 3rd Defendants is unsustainable at law because Eiger is bound by the acts of its agents who at all material times carried out the sale of the Subject Land to the 2nd and/or 3rd Defendants, on its behalf. Counsel indicated that he was quite content to rely on his submissions on the limitation point and referred to the agency issue only briefly. I will not consider it in any detail and in any event, I have formed the view that this issue would entail a detailed examination of facts which would not be appropriate on this Application.

Is there any pleading supporting corporate succession and locus standi?

[59] On 17th February 2020 the Claimant filed an Amended Particulars of Claim but paragraph 4 of which remained unamended and averred as follows:

> *"By way of succession the Claimant is entitled to and is vested with the rights assets and interests of Eiger Foundation, which was closed down on December 31, 2019."*

The Claim is replete with references to Eiger and Eiger's involvement and central role. The Claimant's involvement on the other hand is limited The Claim, as a consequence, is premised entirely on the right of the Claimant to seek the remedies for which it prays only as a result of having acquired the rights, assets and interest of Eiger Foundation. The Claimant avers in paragraph 4 of its Amended Particulars of Claim that Eiger "*was closed down on December 31, 2019..*". There is no elaboration as to what is meant by "*closed down*".

[60] I have considered the observations of Lord Woolf MR in **McPhilemy v Times Newspapers Ltd** [1999] 3 All ER 775 at 792 in support of the position that in the modern era of witness statements, there is no longer the necessity for extensive

and fully particularized pleadings so long as the pleadings identify the issues, the extent of the dispute between the parties and the general nature of the case of the party which is pleading.

[61] Nevertheless, in my opinion, it is prudent for the Claimant to plead the facts on which it relies to support its assertion of its right to bring this claim and to permit the Court to determine whether this assertion is valid as a matter of law. CPR 8.9 provides that 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. Where a claim is founded on corporate succession or on a legal or equitable assignment, the facts giving rise to *locus standi* ought to be pleaded. If this is not required, then the floodgates are opened for anyone to bring a claim asserting rights belonging to a third party and to simply assert without more, that it has the right so to do.

[62] On the Statement of Case before the Court, the Claimant has limited pleading of the basis on which it is the appropriate party bringing a claim, as opposed to any other person or entity. There is limited pleading which supports its *locus standi*. I find that this deficiency is, at the very least, an arguable ground on which its Statement of Case could be struck out pursuant to CPR 26.3 (1) (c). This is on the basis that it discloses no reasonable grounds for bringing the claim and/or is an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings contrary to CPR 26.3 (1) (b). Alternatively, this form of pleading in the absence of evidence is arguably a ground supportive of summary judgment.

[63] However, this issue of *locus standi* as I have framed it is not an issue which was raised by Counsel for the 1st Defendant or Counsel for the 2nd and 3rd Defendant. On the last occasion when the Applications were adjourned, I highlighted to Ms. Davis my concern with the form of the pleadings by which the Claimant is asserting that it has a right to bring the claim. However, whereas in my case management orders I permitted the Claimant to file evidence before 7th of May 2021 and to file and exchange skeleton submissions and authorities on or before 21st May 2021, I did not expressly inform Ms Davis that I was inclined to give summary judgment

against the Claimant. I did not advise counsel that as a consequence, the Claimant ought to avail itself of the opportunity which it had to file evidence and submissions, to address me specifically on this *locus standi* point. This is because, I naturally assumed that Counsel would have done so and this issue would be resolved. Accordingly, it would not have been necessary for me to make an order related to this issue which would be adverse to the Claimant. The result of my course of action is that there was no compliance with CPR 26.2 (2) which provides that:

> *Where the court proposes to make an order of its own initiative it must give any party likely to be affected a reasonable opportunity to make representations*

[64] Counsel for the 1st, 2nd and 3rd Defendants adopted my concerns in their oral submissions during the hearing on the 25th May 2021 but their Notices of Application have not been amended to reflect this as a ground of the Applications. As a consequence, this issue of *locus standi* remained an issue raised solely by the Court on its own initiative. I would therefore not be entitled to make an order deciding this issue having not advised the Claimant that the court proposed to make an order of its own initiative. The Court of Appeal case of **National Water Commission v Richard Vernon** [2017] JMCA Civ 4 examined this issue in detail and distils the practical application of the principles having regard to the provisions of CPR 26.2 and I am grateful to the judgment of Brooks JA for the guidance contained in his judgment.

[65] For the reasons stated herein, I make the following orders:

1. Summary judgment is granted on the claim against the Claimant and in favour of the 1st Defendant.

2. The Notice of Application of the 2nd and 3rd Defendants filed 17th February 2020 is refused with no order as to costs.

3. Costs of the Claim, to include the costs of the 1st Defendant's notice of application determined herein, are awarded against the Claimant and in favour of 1st Defendant.