[2017] JMCC COMM 20

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2017CD00135

BETWEEN	WINSTON FINZI	CLAIMANT
AND	JAMAICAN REDEVELOPMENT FOUNDATION, INC.	1st DEFENDANT
AND	JONATHAN GOODMAN	2ND DEFENDANT
AND	JANET FARROW	3RD DEFENDANT
AND	DAVID ALEXANDER	4TH DEFENDANT
AND	JASON RUDD	5TH DEFENDANT
AND	NAUDIA SINCLAIR	6TH DEFENDANT
AND	ALLAN WOOD	7TH DEFENDANT
AND	LIVINGSTON, ALEXANDER & LEVY ATTORNEYS-AT-LAW (A Firm)	8th DEFENDANT

IN CHAMBERS

Mr Paul Beswick, Ms Georgia Buckley, Ms Novia Cotterell and Mrs April Grapine-Gayle instructed by Ballentine, Beswick & Company Attorneys-at-Law for the Claimant

Mr Michael Hylton QC, Mr Kevin Powell and Ms Shanique Scott instructed by Hylton Powell Attorneys-at-Law for the 7th and 8th Defendants

Mrs Sandra Minott-Phillips QC, Mr Maurice Manning, Ms Rachel McLarty and Ms Tavia Dunn instructed by Myers Fletcher & Gordon Attorneys-at-Law for the 1st, 5th and 6th Defendants

Heard: 24th, 25th, 29th, 30th May, 7th, 28th June and 28th July 2017

Commercial Law – Claim for fraud - Statute of limitations- Whether there is a statutory extension for claims in fraud in Jamaica – Whether a due diligence test applies to claims for fraud

Legal Profession – Claim for breach of a professional undertaking- Whether there is an undertaking as a matter of construction - Whether statute of limitations applies to claims for breach of undertaking

LAING, J

INTRODUCTION

The Applications

[1] The 7th and 8th Defendants (together referred to herein as the "First Applicants"), by notice of application sought the following orders, that:

> *1. The automatic referral to mediation be dispensed with.*
>
> *2. The 7th and 8th Defendants be granted summary judgment on the claim against the claimant.*
>
> *3. The Claimant pay the costs of these proceedings to the 7th and 8th Defendants on an indemnity basis, with special costs certificate for three counsel.*

[2] The 2nd 3rd and 4th Defendants were not served with the claim and did not participate in these proceedings but the 1st, 5th and 6th Defendants, Jamaican Redevelopment Foundation, Inc. (JRF), Jason Rudd and Naudia Sinclair, respectively, by Notice of Application for Court Orders sought the following orders:

> *(a)The Court should not exercise its jurisdiction to try this claim*

> *(b)The Claim is struck out and judgment entered (summarily or following striking out) in favour of the 1st, 5th and 6th Defendants against the Claimant for costs to be taxed.*

This application on behalf of the 1st 5th and 6th Defendants is made pursuant to rules 9.6, 15.2, 26.3 and 26. 5 of the Civil Procedure Rules, 2002 ("the CPR"), however, emphasis was placed on rule 15.2 by these applicants.

[3] CPR rule 15.2 (a) provides that:

> *"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..."*

Our courts have also repeatedly approved and adopted the statement of Lord Woolf MR in ***Swain v Hillman*** **[2001] 1 All ER 91 at 92 J** that;

> *"The words 'No real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, as, Mr. Bidder QC submits, they direct the court to the need to see whether there is a 'realistic' as opposed to a fanciful prospect of success."*

[4] In determining these applications, the Court is cognisant of the guidance offered by Lord Justice Potter *in* ***ED&F Man Liquid Products Ltd*** **V Patel and Anor [2003] EWCA Civ 472** which was an appeal against the refusal of the trial judge to set aside a judgment in default of acknowledgment of service. In considering the English CPR 13.3 and CPR 24.2 (the English CPR summary judgment rule), at paragraph 10 Lord Justice Potter commented as follows:

> *"It is certainly the case that under both rules, 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: see per Lord Woolf MR in Swain v Hillman [2001] 1 All ER 91 at 95 in relation to CPR 24. However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save cost and delay of trying an issue the outcome of which is inevitable; see the note at 24.2.3 in Civil Procedure (Autumn 2002) Vol 1 p467 and Three Rivers DC v*

Bank of England (No.3) [2001] UKHL/16, [2001] 2 All ER 513 per Lord Hope of Craighead at paragraph [95]"

[5] In these applications, the Court formed the view that although there were "*significant differences between the parties so far as factual issues are concerned*" it was nevertheless possible for the Court to determine the application without having to resolve those factual issues and without embarking on a mini trial, in spite of the considerable submissions by counsel on the relevant legal issues.

[6] Although the Court heard two separate applications for summary judgment, on the assumption that it would lead to an easier presentation of the arguments in respect of each set of defendants, it was thought prudent to permit the submissions of each application separately and to have the Claimant respond to each in turn, rather than to have a composite response to both at the end. While each application had discrete issues there were issues common to both applications and as a result a considerable degree of overlap. For the purposes of this judgment and in an effort to avoid undue repetition I will deal with the common features of both applications together where this can conveniently be accomplished.

The Background

[7] It is a matter of historical record that the 1990's in Jamaica was characterised by a period of extremely high interest rates. The reasons for this will be debated for years to come, but what is undeniable is that this high interest rate regime wreaked havoc on and/or led to the financial ruin of a number of individuals and businesses who became debtors and who were unable to service their debts. There was also what has been termed a financial meltdown of various financial institutions of various sizes and in 1997 the Government of Jamaica established the Financial Sector Adjustment Company (FINSAC) whose mandate was to restore stability to the financial sector. In pursuance of this mandate FINSAC

[7] acquired a number of non-performing loans, debts, liabilities and securities which belonged to those financial institutions which had accepted the intervention and assistance of FINSAC.

[8] This case has its genesis in that era and has a close connection to the financial arrangements born of what is now commonly known as "*the FINSAC era*". The Claimant Winston Finzi ("Mr Finzi"), and his companies, were debtors. Their debt portfolio to Mutual Security Trust and Merchant Bank and/or its subsidiaries or affiliates was eventually acquired by JRF under a Deed of Assignment dated January 30, 2002 ("the Assignment").

[9] Mr Finzi has been involved in extensive litigation with JRF in respect of his personal indebtedness and/or the indebtedness of three companies with which he has had a close connection namely, Jamaica Beach Park Limited ("JBP"), Universal Holdings and Unity Farms Limited. These suits include:

> *(i) 2003 HCV 1858 Winston Finzi, Jamaica Beach Park Limited, Avalon Investments Limited v Joslin Jamaica, Inc., Jamaica Redevelopment Foundation, Inc., National Development Bank of Jamaica Limited, National Commercial Bank of Jamaica Limited*
>
> *(ii) 2004 HCV 00369 Winston Finzi, Jamaica Beach Park Limited v Joslin Jamaica, Inc., Jamaica Redevelopment Foundation, Inc.,*
>
> *(iii) 2004 HCV 2843 Jamaica Redevelopment Foundation, Inc. v Winston Finzi*
>
> *(iv) 2005 HCV 01319 Jamaica Beach Park Limited (In Receivership), Winston Finzi v Jamaica Redevelopment Foundation, Inc., Kenneth Tomlinson*
>
> *(iv) 2005HCV05063 Winston Finzi v Jamaica Redevelopment Foundation*
>
> *(vi) 2005HCV 5397 Jamaica Redevelopment Foundation v Winston Finzi*
>
> *(vii) 2014HCV0331 Jamaica Redevelopment Foundation, Inc. V Winston Finzi*

[10] The 5th and 6th Defendants are servants and/or agents of JRF. The court has found that this does not preclude them from being named as defendants. The 7th Defendant Mr Allan Wood ("Mr Wood"), is a partner in the 8th Defendant law firm

of Livingston Alexander & Levy ("LIVAL"). In 2004 the First Applicants represented the JRF in Claim No. 2004 HCV 2843 which was a claim filed by JRF on 11th November 2004 against Mr Finzi (the "2004 JRF Claim"). This claim was for a debt owed by Mr Finzi and the claim also concerned an issue as to the existence of an equitable mortgage in respect of property, part of Providence Estate, comprised in Certificate of Title registered at Volume 1203 Folio 671 of the Register Book of Titles, (this property will be referred to herein as the "Providence Property" and the title in respect thereof, the "Providence Title".)

THE CLAIM FOR BREACH OF AN UNDERTAKING AGAINST THE FIRST APPLICANTS

A. *The uncontested facts*

[11] On 15th July 2005 judgment was entered against Mr. Finzi in the 2004 JRF Claim and a very detailed written judgment delivered by McIntosh, J (the "McIntosh J Judgment"). The orders and reliefs sought were granted as prayed including judgment in the sum of US$1,147,136.80 being the principal of US$464,472.52 together with interest thereon. The Court also granted the following declarations that:

> *"3 ...an equitable mortgage of the property part of Providence Estate containing by survey nine acres, three roods, thirty-four perches and one-tenth of a perch and being land comprised in Certificate of Title registered at Volume 1203 Folio 691 was created on or about 22nd August 1995 by deposit of the said title deeds in favour of Mutual Security Bank & Trust Company Limited by the Defendant to secure a loan in the sum of us$464,472.52 granted by Mutual Security Merchant Bank & Trust Company Limited to the Defendant;*
>
> *4. ...the Claimant as assignee of the said debt and mortgage of Mutual Security Merchant Bank & Trust Company Limited is now the equitable mortgagee of the said property comprised in Certificate of Title Registered at Volume 1203 Folio 671 holding a mortgage in the sum of US$464,472.52;..."*

[12] Following the McIntosh J Judgment, there was an exchange of written correspondence between Mr Lawrence Broderick, (who was then the Counsel for

Mr Finzi) and Mr Wood/The First Applicants. The chronology of this correspondence is important and requires attention. The first letter was written by Mr Broderick dated 21 April 2006, for the attention of Mr Wood, advising him of the intention to settle the matter in accordance with the McIntosh J Judgment. A request was made by Mr Broderick for the total sum due inclusive of interest and cost. The promise was also made that: *"Payment will be made on your firm's professional undertaking to effect a transfer or cause the said land registered at Volume 1203 Folio 671 to be transferred to Winston Finzi and or his Nominee".*

[13] By letter dated 26th April 2006 Mr. Broderick enclosed a cheque in favour of LIVAL in the sum of One Million Two Hundred and Seventy Thousand Six Hundred and Fifty United States Dollars (US$1,270,650.00). The letter stated:

> *"...This sum is sent to you on your professional undertaking to forward to us duplicate certificate of Title registered at Volume 1203 Folio 671 which your client held as equitable mortgagee as declared at paragraph (4) of the judgment of Justice Norma McIntosh."*

[14] The First Applicants responded by returning the cheque along with a letter signed by Mr. Wood, challenging the computation of the sum due in the amount of US$1,270,650.00 as being inaccurate and asserting that the correct sum as at 27th April 2006 was US$1,292,327.98. In addition, the letter stated as follows:

> *"...We will need to take instructions on this matter as in any event we are in no position at this time to comply with the professional undertaking requested of us which is to forward duplicate Certificate of Title registered at Volume 1203 Folio 671..."*

[15] Mr. Broderick's response to this was by letter dated 1st May 2006 again enclosing the cheque in the sum of $1,270,650.00 along with three other cheques in the amounts of US$21,677.98, US$610.80 and US$55,600.83 respectively (the Judgment Cheques"). The letter went on to state the following:

> *"...These sums are sent to you in exchange for all security documents in possession of you or your client including but not limited to the Certificate of Title registered at Volume 1203 Folio 671, the Transfer Instrument to Avalon Investments Limited, Demand notes executed by Mr. Winston Finzi as well as the guarantee executed by Mr. Winston Finzi.*

> *We are to advise that should your clients fail to comply with our request herein contained our client shall have been left with no alternative but to apply to the Supreme Court for relief."*

[16] By letter dated 2nd May 2006 signed by Mrs Suzanne Risden-Foster who was then a senior associate at LIVAL, the four cheques were returned and it was indicated that the firm's client was unable to accept the conditions attached. A request was also made that should any further payment be tendered, any managers cheques must be made payable to JRF.

[17] Mr Broderick then sent a letter dated 8th May 2006 again enclosing the cheques. The letter stated as follows:

> *...We refer to your telephone discussion this morning with Mr Harold Brady. We now enclose the following cheques in settlement of the judgment debt and costs including costs for the Court of Appeal matter....*

The claim for breach of an undertaking against the First Applicants

B. *The contested facts*

[18] Mr Wood exhibited an e-mail time stamped Friday 5th May 2006 at 4:23 pm which was written by Mrs Risden-Foster and which was sent to Ms Janet Farrow of JRF and Mr Peter Millingen. In the e-mail she referred to a telephone conversation between herself and Mr Harold Brady in which he asked *"...whether we would be prepared to accept the cheques in settlement of the judgment sum without any condition attached?"*. Mrs Risden-Foster in that e-mail also asked to be advised as to "*...whether we are to accede to his request*".

[19] Mr Wood in paragraph 15 of his affidavit states that after Mr Brady's discussion with Mrs Risden Foster, to which reference is made in her e-mail, Mr Brady spoke to him by telephone to the same effect and Mr Wood confirmed to him that JRF would be prepared to accept payment without conditions attached. Mr Wood asserts that it is this conversation with Mr Brady to which Mr. Broderick refers in

his 8th May 2006 letter. Mr Wood noted that this letter did not restate any undertaking or conditions as attaching to the negotiation of the cheques.

[20] Mr Broderick in paragraph 9 of his affidavit filed 23rd February 2017 averred as follows:

> *"9. I am told that LIVAL is asserting that the payment was made without conditions pursuant to a conversation with Mr Harold Brady. Mr Brady was at all times instructed by me through my firm LGS Broderick & Company and it is absolutely untrue that this commitment was made. Furthermore Mr Brady had no authority to make such a commitment on behalf of my client and in any event the reason why the cheques were returned to LIVAL in the name of that firm, despite the demand by Mr Wood's junior that the cheques be made payable to Jamaica Redevelopment Foundation was precisely because I intended to stand on the request for the undertaking for the law firm."*

Mr. Beswick submitted that this evidence of Mr Broderick directly challenges the evidence of Mr Wood and accordingly there is conflicting evidence which cannot justly be resolved without a trial. He argued that furthermore, credibility is an issue in the present case and therefore it is not amenable to summary disposal because a trial is the best venue to resolve these conflicts of evidence. Counsel submitted that since there is a dispute as to the representation made by Mr. Brady, at trial he should be called to give evidence as to any discussion he may have had with the Applicants.

[21] It is clear that the assertion of the First Applicants that Mr Brady had asked for the cheques to be accepted without any condition would tend to strengthen their position that there was no undertaking given, provided of course that it is also established that Mr Brady was duly authorised to make that request. Mr Hylton QC submitted that the conversation between Mr Wood and Mr Brady explains why Mr Broderick's last letter of 8th May 2006 was sent and why the cheques were accepted. For this reason he said, it is therefore corroborative of the First Applicants' position and may assist the First Applicants' case in that regard. However learned Queen's Counsel submitted that he is not asking the Court to find that the Brady conversations with Mr Wood and/or Mrs Risden-Foster

affected the undertaking. His primary submission is that the documentary evidence on which both the First Applicants and Mr Finzi rely, does not disclose the existence of an undertaking.

[22] Mr Beswick also went further and submitted (without conceding that Mr Brady made the request attributed to him by Mrs Risden-Foster and Mr Wood) that any oral assertion by Mr Brady could not override the written request that had been made by Mr Broderick. In the Court's opinion this is a tacit concession that the resolution of the issue relating to what Mr. Brady might or might not have said is not crucial to the determination to this application.

[23] I therefore accept the submissions of Mr Hylton QC on this point and I find that it is not necessary for this Court to resolve the factual dispute as to what Mr Brady might have said, if anything, in order to determine whether Mr Finzi has a real prospect of succeeding on the issue as to whether a professional undertaking was given. Accordingly, I do not find that the nature of the evidence is such that I am precluded from considering the issue of the undertaking in the context of a summary judgment application. Based on this finding, later in this judgment when I conduct my analysis, I will do so without resolving any questions relating to the alleged conversation between Mr Wood and Mr Brady.

C. *Submissions on behalf of the First Applicants as to whether, as a matter of construction, there was an undertaking*

[24] It was submitted on behalf of the First Applicants that when one examines the exchange of correspondence between Mr Broderick and the First Applicants, it is clear that no professional undertaking was given. Mr Hylton QC referred to **Cordery's Law Relating to Solicitors, 6th ed. Chapter 8 page 164** and the statement that:

> *"Whether an undertaking given by a solicitor to the court, his client or a third party may be enforced against him personally depends upon the facts of each case (a), but the undertaking must be a personal undertaking (b) and given by the solicitor professionally, i.e. as a solicitor;*

(c) it must be clear in its terms(d); the whole of the undertaking must be before the court (e); and the undertaking must be one which is capable of being performed ab initio (f)."

[25] Learned Queen's Counsel also submitted that the question as to whether an undertaking has been given is a question of construction in light of the surrounding circumstances and the courts have so held as is evident in the case of ***John Fox v Bannister, King and Rigbeys*** **[1988] QB 925.** The precise undertaking that the claimant is alleging must also be clear. Queen's Counsel submitted that the claim is for breach of an undertaking of 21st April 2006 pursuant to the letter of Mr Broderick that *"Payment will be made on your firm's professional undertaking to effect a transfer or cause the said land registered at Volume 1203 Folio 671 to be transferred to Winston Finzi and or his Nominee."* No payment was tendered and no undertaking could have been given under that letter. It was further submitted that Mr Broderick's letter of 26th April 2006 sought an undertaking to forward to Mr Broderick the certificate of title for the property in exchange for the cheques. Learned Queen's Counsel argued that there are therefore two separate and distinct undertakings which are pleaded on behalf of Mr Finzi and it is unclear which is the one that Mr Finzi is asserting has been breached.

D. *Submissions on behalf of Mr Finzi as to whether, as a matter of construction, there was an undertaking*

[26] Mr. Beswick submitted that once the request for an undertaking in exchange for payment by cheque was made by Mr Broderick (and repeated), the First Applicants had only two options, which were to either return the cheques whenever they were tendered, or accept them. However once the cheques were accepted implicit in that was an acknowledgment by the First Applicants that they were providing in exchange therefor, the undertaking in the terms as requested. Counsel submitted that the intervening events (including anything which Mr Brady might have said) were immaterial.

Analysis of the claim based on an undertaking

[27] I accept the general proposition that in some cases, if there is an offer of payment in return for an undertaking and the payment is accepted (without more) then the conduct of acceptance may be seen as an acknowledgement of the undertaking in the terms requested. However, this is not what happened in this case. The acceptance of the cheques which accompanied the letter dated 8th May 2006 must be viewed against the backdrop of the assertion by Mr Wood that "...*We will need to take instructions on this matter as in any event we are in no position at this time to comply with the professional undertaking requested of us* ...". It must also be viewed in the context of the earlier return of the cheques and the indication that the firm's client was unable to accept the proposed conditions. The acceptance also cannot be divorced from the fact that Mr Broderick's letter of 8th May 2006 did not contain a request for an undertaking or assert that any conditions were to be attached to the Payment as at that date. I do not accept Mr Beswick's submission that, as I understand it, once the issue of the undertaking was raised in the letter dated 21st April 2006, it established an absolute condition. This condition was that acceptance of payment carried with it an undertaking to "*effect a transfer or cause the Property to be transferred to Mr. Finzi and or nominee"* which, in essence, crystallised and remained alive throughout and up until the 8th May 2006 and as a consequence there was no necessity to repeat it on that day.

[28] This submission as to the undertaking having arisen pursuant to the 21st April 2006 letter which was to "*effect a transfer or cause the said land registered at Volume 1203 Folio 671 to be transferred to Winston Finzi and or his Nominee"* is weakened by the fact that it was repeatedly argued by Mr Beswick that the undertaking breached was the one to return the duplicate certificate of title. The Court again highlights for emphasis the fact that the request to forward the duplicate certificate of title arose on Mr Broderick's letter 1st May 2008 offering payment "*in exchange for all security documents in possession of you or your client..*"

Conclusion/Finding on the claim based on an undertaking

[29] The precise nature of the undertaking that is being claimed is therefore unclear. I do not find that in all the circumstances and in light of the intervening communication it was made clear to the Applicants, or that they could have reasonably understood that by accepting the cheques which accompanied the very sparsely worded letter of 8th May 2006, it could be perceived they were purporting to do so pursuant to an alleged professional undertaking, whether that was to "*...effect a transfer or cause the property to be transferred to Mr. Finzi and or nominee...*", or whether it was to return the duplicate Certificate of Title. Accordingly, it is this Court's finding on a balance of probabilities, that there is before it insufficient evidence and there is no evidence which is foreshadowed as being potentially available at a trial, which can ground a conclusion that the Claimant has a real prospect of succeeding on the issue of the existence of an undertaking and/or the breach of that undertaking.

The 2005 JRF Claim

[30] On 2 December 2005 the JRF had also filed Claim No. HCV 5397 of 2005 against Mr Finzi ("the 2005 JRF Claim") in which it claimed that it was the successor in certain facilities granted to JBP in respect of which Mr Finzi had executed a written Instrument of Guarantee dated 31 October 1996. JRF pleaded that as at the 4th October 2005 the Jamaica Beach Park Limited was indebted to it in the amounts of JA$64,837,928.92 plus interest at thirty percent (30 %) per annum and US$6,002,420.45 at twelve percent (12%) per annum.

[31] On 2nd May 2006 Sykes, J granted a freezing order against Mr Finzi in the 2005 JRF Claim and on 11th May 2006 the learned judge granted a consent order (the 2006 Consent Order) pursuant to which the freezing order was discharged. The parties also agreed to a number of orders including a declaration that JRF had an equitable mortgage over the Providence Property and was entitled to enforce that security if Mr Finzi was found liable in HCV 5063 of 2005 or in the 2005 JRF

Claim. JRF had also filed a notice of application seeking the variation of the freezing order in order to accept the Judgment Cheques

[32] Mr Finzi explained in his affidavit that he was faced with such draconian action and only had an allowance of $25,000.00 per week for living expenses. Additionally, with his legal fees rising he said he was faced with severe emotional trauma and mental anguish and was compelled to agree to the 2005 Consent Order to settle the alleged debts and to dispense with the freezing order.

[33] On 4th June 2012 pursuant to an order of Gayle J, judgment was entered in favour of JRF in the 2005 JRF Claim in the sum of $3,761,908.40 with interest at 12% on 1,897,538.05 from 1st May 2012 to the date of the judgment. On 28th August 2012 the judgment of Gayle J was set aside and Mr Finzi and JRF entered into a Settlement Agreement (the "Settlement Agreement") endorsed on Counsel's brief by which (at paragraph 23), the parties agreed as follows :

> *"In Consideration of the mutual promises and agreements set forth herein, the parties jointly hereby completely release and forever discharged each other from any and all past or present claims, demands, obligations, actions, causes of action, contractual claims, rights, damages, costs, losses of service, economic loss, expenses and compensation, whether such claims are known or unknown in connection with any claims that have been filed or litigated between the parties and in connection with any related mortgage(s), loans and events associated with said claims. This release on the part of the parties shall be fully binding and be a complete settlement and satisfaction of any all claims relating directly or indirectly to the actions on themselves, their heirs, successors and assignees."*

[34] It is common ground that the property registered at Volume 1203 Folio 671 of the Register Book of Titles (the "Providence Property") was sold by JRF as mortgagee to RIU Jamaica Hotel Limited for US$7,000,000.00 with the consent of Mr Finzi after he defaulted on his obligations under the Settlement Agreement and the surplus on the sale was paid to him by JRF.

The effect of the 2006 Consent Order on the issue of the undertaking

[35] It is not disputed that on 11th May 2006, the Claimant and his attorneys entered into the 2006 Consent Order in the 2005 JRF Claim. Paragraph 2 of the 2006 Consent Order provided that the equitable mortgage of JRF in the Providence Property shall be a continuing security in respect of that suit and also in respect of the amounts claimed by it under mortgages and guarantees issued by Mr Finzi in Suit HCV 5063 of 2005.

[36] Mr Wood has given affidavit evidence as to the chronology of events which led to the 2006 Consent Order of which I exercise great care in considering, given the summary nature of these proceedings. What is particularly notable is the letter of Mr Broderick dated 9th May 2006 (to the Attention of Mr Maurice Manning of Nunes, Scholefield, Deleon & Co. who represented JRF), in which Mr Broderick stated that his client was prepared to turn over to Manning/Nunes the securities held by LIVAL, if in turn the mareva injunction would be removed.

[37] I accept the submission of Mr Hylton QC that the entry of Mr Finzi into the 2006 Consent Order is evidence which is itself capable of pointing to the non existence of any undertaking by the First Applicants although in my determination I have not placed any reliance on this evidence for that purpose. However, it appears to me that one effect of the 2006 Consent Order would have been to release the First Applicants from any undertaking which Mr Finzi asserts may have existed. This is so because it is inconceivable that the First Applicants could have been expected to comply with the alleged undertaking since in doing so they would assist Mr Finzi in frustrating the clear terms of the 2006 Consent Order while the order remained legally binding and was unchallenged.

[38] Having earlier determined that there was no undertaking capable of enforcement, I have addressed the possible effect of the 2006 Consent Order merely as an academic exercise.

The law relating to abuse of process

[39] All the Applicants relied on the principles established in ***Henderson v Henderson*** **[1843-60] All ER Rep 378 at 381** in which Sir James Wigram, V-C made the often quoted statement as follows:

> *"..... I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time' ."*

[40] In ***Johnson v Gore Wood & Co (A Firm)*** **[2002] 2 AC 1** at **30H-31C**, Lord Bingham reviewed the authorities on *res judicata*, issue estoppels and the public policy considerations that arise under the **Henderson** principle and concluded as follows:

> *"It may very well be, as has been convincingly argued (Watt, "the Danger and Deceit of the rule in Henderson v Henderson: A new approach to successive civil actions arising from the same factual mater "(2000) 19CLJ 287), that what is now taken to be the rule in Henderson v. Henderson, has diverged from the ruling which Wigram V-C. Made which was addressed to res judicata. But Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceeding may without more amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty but where those elements are*

present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceedings involves what the court regards as unjust harassment of a party."

At page 31F his lordship continued as follows:

"...While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent the rule has in my view a valuable part to play in protecting the interests of justice."

[41] The Applicants relied on the House of Lords decision in ***Phosphate Sewage Company Limited, and the Official Liquidator Thereof v Molleson*** **(1879) 4 App. Cas. 801** in which Cairns, L.C. said at page 814:

"...As I understand the law with regard to res judicata, it is not the case, and, and it would be intolerable if it were the case that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. My Lords, the only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show you that this is a fact which entirely changes the aspect of the case, and I will shew you further that it was not, and could not by reasonable diligence have been, ascertained by me before..."

[42] The Applicants also relied on the statement of Morrison J.A. (sitting in the Belizean Court of Appeal) in ***Belize Port Authority v Eurocaribe Shipping Services Limited and Another*** Civil Appeal No 13 of 2011 (Belize) at paragraph 43 as follows:

"On the basis of these authorities, I would therefore conclude that the doctrine of res judicata in the modern law comprehends three distinct components, which nevertheless share the same underlying public interest that there should be finality in litigation and that a party should not be twice vexed in the same matter. The three components are; (i) cause of action estoppel, which, were applicable, is an absolute bar to relitigation between the same parties or their privies; (ii) issue estoppels which where applicable also prevents the reopening of particular points

> *which have been raised and specifically determined is previous litigation between the parties, but is subject to an exception in special circumstances; and (iii)* ***Henderson v Henderson*** *abuse of process, which gives rise to a discretionary bar to subsequent proceedings, depending on whether in all the circumstance taking into account all the relevant facts and the various interests involved 'a party misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before' (per Lord Bingham, in* ***Johnson v Gore Wood & Co (a Firm)****, ..."*

[43] Mr Beswick in his response relied on the Judgment of Lord Bingham of Cornhill in ***Johnson v Gore Wood & Co*** **[2002[2 AC 1** at page 31 C-D where he stated as follows:

> *"...It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before..."*

[44] Mr Beswick submitted that the evidence of fraud in this case is an important feature to be considered in analysing the Defendants arguments in relation to abuse of process. Counsel also relied on the case of ***Hayward (Respondent) v Zurich Insurance Company plc*** **(Appellant) 2016 UKSC 48** in which the United Kingdom Supreme Court, in its judgment given on 27th July 2016, affirmed the decision of the English Court of Appeal and held at paragraph 53 as follows:

> *"The Court of Appeal rightly rejected Mr Hayward's application to strike out the action on the ground that the issue was res judicata or that the action was an abuse of the process of the court: [2011] EWCA 641. The claim had been compromised by an agreement but, as Lord Bingham of Cornhill emphasised in HIH Casualty and General Insurance Ltd v Chase [2003] UKHL 6, [2003] 2 Lloyd's Rep 61 paras 15 and 16, "fraud is a thing apart" and "unravels all" . Once proved, "it vitiates judgments, contracts and all transactions whatsoever": (per Denning LJ in Lazarus Estates Ltd v Beasley [1956] 1 QB 702, 712 cited by Lord Bingham)."*

[45] Mr Beswick repeatedly made the point that the Settlement Agreement into which Mr Finzi entered does not create an estoppel and may be set aside if it is shown

that it was obtained by fraud. Counsel referred the Court to the decision of the English Court of Appeal in ***Zurich Insurance Company PLC v Colin Richard Hayward*** **[2011] EWCA Civ 641** in which Lady Justice Smith at paragraph 26 made the point quite clearly that:

> *"...It is well established that any judgement, whether resulting from a judge's decision or by consent of the parties is capable of being set aside if one party can show that it was obtained by fraud.."*

[46] Mr Beswick also submitted that the instances of fraud alleged in this claim were neither argued nor decided in any of the previous actions. He argued that as a consequence there are no specific allegations of fraud which Mr Finzi seeks to repeat and this claim therefore falls outside of the ***Henderson v Henderson*** principles.

[47] The point was made by Mr Manning in submissions on behalf of the 1st, 5th and 6th Defendants that in the United Kingdom Supreme Court case *of* ***Hayward (Respondent) v Zurich Insurance Company plc*** **(Appellant) 2016 UKSC 48** (supra), the United Kingdom Supreme Court in its judgment upheld the right of an insurer to bring proceedings to set aside a settlement agreement on the basis of fraud. Counsel submitted that the Court was clearly influenced by the earlier unavailability of relevant evidence to support what was at that time the insurer's suspicion that its insured Mr Hayward had been dishonest in the pursuit of his claim.

[48] In ***Hayward v Zurich*** the Supreme Court was primarily concerned with whether the Insurer in making the settlement was induced or influenced by the statement of Mr Hayward as to the extent of his injuries. I have noted the submission of Counsel before me as it relates to the impact of ***Hayward v Zurich***, but it appears to me that the Court did not have to, and did not determine, what the position would have been if at the time when the insurer made the settlement it had known, or could have known, the full extent of Mr Hayward's fraud. The postscript to the judgment of the UK Supreme Court clearly demonstrates why the case does not provide any robust assistance to this Court in relation to the

issues which fall for determination. The postscript at paragraph 73 of the judgment is as follows:

> *It was expressly conceded on behalf of the insurers for the purposes of the present appeal that whenever and however a legal claim is settled, a party seeking to set aside the settlement for fraud must prove the fraud by evidence which it could not have obtained by due diligence at the time of the settlement. It makes no difference to the outcome of the present case and the court heard no argument about whether the concession was correct. Any opinion on the subject would therefore be obiter, and since the court has not considered the relevant authorities (including Commonwealth authorities such as Touba v Schwenke [2002] NSWCA 340 or academic writing, it is better to say nothing about it.*

[49] Mr Beswick also sought support in the case of ***Beautifit Limited v Financial Institutions Services Limited et al*** **Suit No HCV 02209/2003** (delivered 16th March 2004) a first instance judgment of Sinclair–Haynes, J (Ag.). However, as Mr Manning correctly pointed out, it is clear that in that case the learned Judge specifically found that the Claimant was unable to plead fraud in the first case because of the rules related to pleading a case of fraud. The Judge referred to the Privy Council case of ***Yat Tung Investment Company Limited v Dao Heng Bank Ltd.*** **and Another [1975] AC 581,** and found that there were "special circumstances" and therefore the justice of the case demanded a rehearing. For this reason, I must confess that I do not find the **Beautifit** case to be of much assistance given its special facts. Additionally Mr Manning submitted that that case concerned a second application for an injunction at the interlocutory stage before trial.

[50] Mr Beswick also relied on the case of ***Syal v Heyward and Another All England Law Reports*** **[1948] 2 All ER 576** which was a case in which the defendants had obtained an order that the registration in England of a judgment obtained in India be set aside on the ground that it was obtained by fraud. The UK Court of Appeal held that it was immaterial that the facts on which the defendants relied to establish the prima facie case of fraud were known to them at the time of the Indian judgment and therefore could have raised and had those

issues tried and determined in those proceedings. Mr Manning in his submissions, which find favour with me, distinguished **Syal** and demonstrated that in ***Owens Bank v Bracco*** **[1992] 2 All ER 193** at page 203 D-E, Lord Bridge explained why cases such as **Syal** involving foreign judgments have a narrow application. He said:

> *"An English judgment, subject to any available appellate procedures, is final and conclusive between the parties as to the issues which decides. It is in order to preserve this finality that any attempt to reopen litigation, once concluded, even on the ground that the judgment was obtained by fraud, has to be confined within such very restrictive limits. In the decisions in* ***Abouloff v. Oppenheimer & Lawes*** *the common law courts declined to accord the same principle of finality to foreign judgments, but preferred to give primacy to the principle that fraud unravels everything"*

[51] The Court therefore heard submissions as to two approaches where a litigant is seeking to set aside a judgment on the basis of fraud. The first approach commended by the Applicants, is that an action which attempts to do so will be an abuse of process where the litigant is seeking to raise an issue of fraud which could have been raised before, that is to say it will be an abuse in the ***Henderson v Henderson*** *res judicata* sense. Accordingly the litigant alleging the fraud must prove the fraud by evidence which it could not have obtained by due diligence at the time of the settlement or judgment. This can perhaps conveniently be divided into two constituent components both of which must be satisfied:

(a) the evidence of fraud must be new evidence in the sense of not having been previously available to the litigant at the time of the settlement or judgment (the fresh evidence condition); and

(b) the new evidence of the fraud could not reasonably have been discovered at the time of the settlement or judgement by the litigant who is now seeking to rely on it having exercised due diligence (the due diligence condition).

Using this formulation, depending on the particular facts of each case the due diligence condition may not be a live issue if it is patently clear that the evidence was not discoverable. The second approach, commended by Mr Beswick is founded on the "fraud unravels all" concept and proposes a broad based approach in the interest of justice which imposes none of the above conditions on the litigant which is consistent with, as Counsel puts it, "*the Court's abhorrence to supporting a fraud*".

Is there a reasonable diligence test under Jamaican law

[52] Mr Beswick submitted that even if the claim could have been brought before by the Claimant exercising reasonable diligence (which he did not admit could have been done by the Claimant), that is irrelevant because there is no reasonable diligence test under the laws of Jamaica. In support of this position Counsel relied on the dicta in the case of ***Balber Kaur Takhar v Graceland Developments Limited and Others*** **[2017] EWCA Civ 147**. In this case there was a trial in which it was asserted by the Defendants that the Claimant had signed a joint venture agreement. The Claimant denied this and asserted that she had never seen it until the dispute arose. The Court found that there was a joint venture agreement which evidenced the agreement between the parties. The Claimant did not advance a case of forgery but subsequently issued a new claim in the Chancery Division seeking to have the Judge's order set aside on the basis that it had been obtained by fraud and sought to rely on the evidence of an handwriting expert who expressed the view that the Claimant had not signed the joint venture agreement as the Defendants asserted. The Defendants asserted that the claim should be struck out as an abuse of process for a number of reasons including the fact that an application to adduce expert evidence of a graphologist was dismissed by the judge and not appealed. The Judge in the second trial, Newey J, concluded that there was no binding authority which required due diligence condition to be satisfied and that in deciding whether the new action was an abuse of process he was free to adopt the broad merits based test as laid out by Lord Bingham in ***Johnson v Gore Wood*** (supra). The main

issue in the appeal was it was whether the Judge was correct to hold that the due diligence condition need not be satisfied.

[53] In paragraph 24 of the judgment of the English Court of Appeal in **Takhar,** the court acknowledged that it was common ground that the requirements as to what a litigant needs to prove in order to set aside a judgment for fraud were accurately set out by Aikens LJ in ***Royal Bank of Scotland v Highland Financial Partners LP et al*** **[2013] EWCA Civ 328, [2013] 1 CLC 596 at paragraph 106** as follows:

> *"There was no dispute between counsel before us on the legal principles to be applied if one party alleges that a judgment must be set aside because it was obtained by the fraud of another party. The Principles are, briefly, first there has to be a 'conscious and deliberate dishonesty' in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned... Secondly, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be 'material'. 'Material' means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court's decision to give judgment in the way it did. ...Put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision... Thus the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was. Thirdly, the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence."*

[54] After examining a number of authorities in which it was held that the "reasonable diligence test" applies to fraud cases, the Court concluded without any doubt that there was such a condition to be applied according to the current law of England. Because Newey J had been influenced in his decision to the contrary, the Court of Appeal deemed it necessary to review some of the authorities that the learned Judge purported to rely on. One such authority is the Privy Council case of ***Hip Foong Hong v H. Neotia & Co*** **[1918] AC 888** which concerned an application for a new trial on the basis that newly discovered evidence including

documentary evidence proved that the judgment was obtained by fraud. The application and the appeal failed because of the quality of the evidence. Lord Buckmaster delivering the judgments of their Lordships said at page 894:

> *"...In all applications for a new trial the fundamental ground must be that there has been a miscarriage of justice. If no charge of fraud or surprise is brought forward, it is not sufficient to show that there was further evidence that could have been adduced to support the claim of the losing parties: the applicant must go further and show that the evidence was of such a character that it would, so far as can be foreseen, have formed a determining factor in the result. Such considerations do not apply to questions of surprise, and still less to questions of fraud. A judgment that is tainted and affected by fraudulent conduct is tainted throughout and the whole must fail; but in the present case their Lordships are unable to say that such a case has been established..."*

It is important to highlight the fact, acknowledged by Lord Buckmaster at paragraph 52 of the judgment, that the passage quoted above contains no reference to the due diligence condition and in fact, that was not an issue on appeal in the case. For this reason, I do not accept that as a matter of law, **Hip Foong Hong** is binding precedent on this Court. Similarly I do not accept that it establishes conclusively that there is no due diligence condition to be applied in Jamaica.

[55] Mr Beswick submitted that:

> *"... the analysis of Patten LJ in the Court of Appeal "leads to the inescapable conclusion that the "reasonable diligence test" is the rule in the United Kingdom but is certainly not good law in Jamaica. This is so because decisions of the Court including the Privy Council which were handed down before independence in Jamaica have settled the rule that a complete exception exists to the concept of reasonable diligence where fraud is alleged".*

Counsel's bold assertion in this regard is based largely on Patten LJ's view of the Privy Council decision of **Hip Foong Hong** and other Commonwealth authorities in which the concept that fraud unravels all was expressed. Counsel referred to paragraph 52 of the judgment where Patten, LJ states:

> *"52... there is clearly a powerful argument that the rule of policy against re-litigation ought to admit of an exception in cases of fraud regardless of*

whether the due diligence condition is satisfied. As Newey J put it in the present case:

> *"37. To my mind, the reasoning in the Australian and Canadian cases is compelling. Finality in litigation is obviously of great importance, but "fraud is a thing apart". Supposing that a party to a case in which judgment had been given against him could show that his opponent had obtained the judgment entirely on the strength of, say, concocted documentation and perjured evidence, it would strike me as wrong if he could not challenged the judgment even if the fraud could reasonably have been discovered. Were it impossible to impugn the judgment, the winner could presumably have been sent to prison for his fraudulent conduct and yet able to enforce the judgment he had procured by means of it: the judgment could still, in effect, be used to further the fraud."*

[56] Notwithstanding the attractiveness to Patten LJ of the powerful policy argument to the contrary, he reiterated the applicability of the due diligence test where one was alleging fraud as an exception to the ***Henderson v Henderson*** rule of policy. He stated as follows:

> *54. The view taken in all these cases is that the point in issue has been decided authoritatively by the Court of Appeal and House of Lords in Hunter which, although not a case of fraud, expressed the test in general terms in relation to whether an attack on a previous judgment constituted an abuse of process. As I have endeavoured to explain in this judgment, this a question of whether the Henderson v Henderson rule of policy admits of an exception when it comes to actions of the kind under consideration on this appeal. The cases referred to demonstrate that an exception exists but on terns which include the application of the reasonable diligence condition. The Phosphate Sewage Co case involved an attempt to make a second identical claim on the basis of new evidence of fraud. Although this meant that the defence raised was one of res judicata, that makes no difference in my view to the essential policy question which is in issue. A different result cannot be justified simple on the grounds that one is considering the matter in terms of abuse of process. The due diligence condition has been applied in Hunter and stated to be law in Owens Bank Ltd v Bracco. So far as this Court is concerned it represents the balance struck by the English authorities between the two policy considerations which are in play and in my view are obliged to apply it."*

[57] In the case of ***Yat Tung Investment Company Limited And v Dao Heng Bank Ltd and Another* 1975 AC 581,** which was a decision of the Privy Council on

appeal from the full court of the Supreme Court of Hong Kong, the owners of property brought a claim against the bank challenging its sale of property on the basis that the sale was a sham. The owners brought a second claim one month after their claim was dismissed claiming that the sale by the bank to the purchaser was void or voidable as being fraudulent. The statement of claim was struck out by the judge who held that the allegation of fraud and voidability of the sale were matters which were available for litigation in the first action. The Full Court affirmed the decision and on appeal to the Privy Council, the appeal was dismissed. The Privy Council at page 590 (D-F) of the judgment, after quoting the classic formulation of Wigram V-C in ***Henderson v Henderson*** in relation to *res judicata*, opined as follows:

> *The shutting out of a "subject of litigation" – a power which no court should exercise but after a scrupulous examination of all the circumstances - is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless "special circumstances" are reserved in case justice should be found to require the non application of the rule.*

This case is therefore evidence of the Privy Council acknowledging the existence of the reasonable diligence condition subsequently to **Hip Foong Hong**.

[58] This Court therefore has two streams of precedent from which to draw. There is on the one hand the Commonwealth position preferred by Newey J in **Takhar** which he found to be represented by cases such as the Australian case of ***Touba v Schwenke*** and the Canadian case of ***Canada v Granitile Inc*** **(2008) 302 DLR (4th) 40** and which are considered to represent the "*fraud unravel all*" school of thought. Although it appears to me to be doubtful as to whether ***Touba v Schwenke*** actually goes that far, I will assume, without deciding, that it does. On the other hand, there is the current English position as accepted by the English Court of Appeal in **Takhar** as being settled.

[59] In ***Jamaica Carpet Mills Ltd. v First Valley Bank*** **(1986) 45 WIR 278**, the Court of Appeal of Jamaica considered the issue of *stare decisis* primarily in relation to

a Privy Council decision overturned by a subsequent decision of the House of Lords. However, this Court is not faced with that situation because, as I have indicated earlier, the **Hip Foong Hong** case did not consider and therefore did not conclusively decide the issue in respect of the applicability of the due diligence condition. As a consequence this court does not have a binding Privy Council judgment in support of the due diligence condition. Accordingly, in my view, as a matter of precedent it is open to this Court to find that the current English position is persuasive and I do so find. I adopt the view of Patten LJ, that the English position as found in the case of **Takhar** has been settled in respect of the existence of the due diligence condition. I also adopt his view that the current English approach represents the balance struck by the English authorities between the two policy considerations which are in play of, firstly, finality of litigation and secondly fraud being "a thing apart" which "unravels all". The English approach in my view, evidences a manifestly pragmatic compromise and it is only fair and prudent that this Court adopts it in the absence of any binding authority to the contrary.

[60] Mr Manning submitted that the Judgment of the Jamaican Court of Appeal in the case of ***DYC Fishing Limited v Perla Del Caribe Inc*** **[2014] JMCA Civ 26** is authority for our courts adopting a due diligence condition and Counsel prays in aid the statement of Her Ladyship Harris JA, who at paragraph 83, after reviewing several authorities, made the following statement:

> *" In **Beals, Close & Anor v Arnot** and **Hong Pian Tees v Les Placements Germain Gauthier** the courts expressed the view that where the issue of fraud was unsuccessfully raised in a foreign court , seeking to raise it in a domestic court would amount to a re-litigation of the issues concluded in the foreign court. It is clear from the decisions in **Beals, Hong Pian Tees v Les Placements Germain Gauthier** and **Keele v Findley**, that the courts, by the modern approach, have clearly abandoned the traditional approach heralded by **Abouloff**. The courts have demonstrated that the applicable test in challenging the foreign judgment, must accord with the rule in the domestic courts relating to the setting aside of judgments obtained by fraud. It expressly shows, that where fraud is raised on a foreign judgment it will only be set aside where newly discovered evidence, which could have some material effect on the trail, which was not before the foreign court, had come to the attention of*

> *the party who seeks to set aside the judgment. This makes good sense jurisprudentially.* ***Abouloff*** *defies the principle of the finality of judgments. There cannot be one rule for the impeachment of a judgment entered in the domestic court and another for foreign judgments."*

[61] In **DYC Shipping** Harris JA at paragraph 17 of the judgment summarised the submissions of Counsel for the Appellant as suggesting, *inter alia,* that:

> *"... that the learned judge erred by applying the modern approach which shows that fraud which goes to jurisdiction may be taken at any time but the allegations and evidence of fraud ought to be raised for the first time and that it was not raised in the foreign court, therefore, the defendant must show that he could not, with reasonable diligence, have raised the allegations in the foreign court".*

The issue of the due diligence condition was therefore raised, even if tangentially and in the context of enforcement of judgments.

[62] Mr Beswick has submitted that nowhere in the judgment in **DYC Fishing** was the House of Lords decision in **Boswell v Coates (No.2) (1894) 6 R. 167** or the Privy Council decision in **Hip Foong Hong** referenced and therefore the *obita dicta* in **DYC Fishing** is not binding on this Court. Because **DYC Fishing** at its core had to do with the enforcement of a foreign judgment, I am hesitant in attaching much weight to the pronouncement on the "*rule in the domestic courts relating to the setting aside of judgments obtained by fraud*" (which is the very rule which this Court is tasked with trying to determine) and thus equally hesitant in finding that it supports Mr Manning's submission that **DYC Shipping** is authority for the proposition that the reasonable diligence condition is incorporated in our local jurisprudence.

[63] In fact in paragraph 70 of the judgment the court examined ***Owens Bank v Etoile Commercial SA*** and quotes its reference to ***Boswell v Coaks*** **(No. 2).** Despite the fact that ***Boswell v Coaks*** **(No. 2)** might not have attracted full treatment does not make difference in the weight that is to be attached to **DYC Fishing** because in ***Boswell v Coaks*** **(No. 2)** the Court considered the applicability of the fresh evidence rule and the Court held that the new evidence lacked any probative value. There was no issue or any reference to the

reasonable diligence condition by the court. If **DYC Fishing** were to be considered authority on the reasonable diligence condition then as it relates to the non-reference to **Hip Foong**, it is at the very least arguable that **DYC Fishing** could be considered to be a *per incuriam* judgement.

[64] However, I do not find it necessary to make any conclusive findings on these matters and will not place any reliance on the **DYC Fishing** decision, but that does not in any way affect this judgment. This is because, for the reasons previously disclosed herein, I have found that the current English position applies to Mr Finzi's claim in respect of which the Applications have been made.

THE CLAIM FOR FRAUD AGAINST THE FIRST APPLICANTS

The current allegation of fraud

[65] The essence of the Claim as against the First Applicants is that they were parties to a fraudulently concocted claim against Mr Finzi in the 2004 JRF Claim which they knew had no basis, because given the nature of the fraud they must have known that the claim was fraudulent. It was also submitted that the First Applicants as Counsel for JRF had a responsibility to validate the claim and failed to confirm the accuracy of the figures and calculations used. It was submitted on behalf of Mr Finzi that the First Applicants have not produced any evidence addressing the allegations of fraud against them and have simply relied on a bare denial.

[66] Mr Beswick further submitted that the issues were never properly litigated in that claim despite the reasonable diligence of Mr Finzi. It was submitted as follows:

> *"That the deceit occasioned on the Court before McIntosh, J. caused her to erroneously award judgment to the 1st Defendant in the amount of US$1,147,136.80 with interest for the Avalon Property and this amount was paid over to the 1st Defendant company by the respondent through his attorneys at the relevant time"*

[67] Mr Finzi complains that the litigation process did not allow him to expose the fraud and pointed to the unsuccessful Notice of Application filed 13th May 2005

seeking a statement under and by virtue of section 10 of the Money lending Act as well as a copy of the loan commitment and agreement between the Claimant and the Defendant. Mr Beswick submitted that as a result of the inability of Mr. Finzi to obtain the relevant information in order to test the accuracy of the claim against him, he accepted the calculations and so did the Court.

[68] In assessing whether there is a right accorded to Mr Finzi to properly bring the present claim, it bears acknowledging that the litigation process places the burden of proving the case on the Claimant. It is my view that the need to discharge this burden on a balance of probabilities coupled with the process of discovery, permits the testing of claims whether for a debt or declaration as to whether there is an equitable mortgage as was the case in the 2004 JRF Claim. It is noted that the Amended Defence and Amended Counterclaim of Mr Finzi were struck out and that resulted in the McIntosh J Judgment against him without a trial. However it was argued on behalf of the Applicants that if the learned Judge improperly exercised her discretion and did not permit Mr Finzi sufficient discovery of relevant documentation or if the learned Judge satisfied herself as to the existence of a claim without sufficient evidence then either of these missteps would have provided the basis for an appeal, but no appeal was pursued.

[69] The basic thrust of the submissions on behalf of Mr Finzi was that he did not discover the fraud against him until after he had received an answer to his request for the disclosure of certain information from FINSAC in the form of a letter dated 9th August 2011 from Mr Errol Campbell the General Manager of that entity (the "Errol Campbell Letter"). Following the receipt of that letter and further investigations he was placed in a position to assert that there was a complex fraud perpetrated against him and this ultimately led to the filing of this Claim No. 2017 CD 00135.

[70] Mr Beswick submitted that one of the conclusions arrived at, as stated in the particulars of claim at paragraph 86 of the current claim before the Court is as follows:

> *"a. That the Avalon property never had any lien and was never in jeopardy as no loan/s for Avalon Investments were ever sold to JRF and more importantly, the title bears no history of any mortgage. The Claimant had pleaded repeatedly in his various defences to JRF's claims that he did not owe any debt on the Avalon property as same was settled by collateral security and by the line of credit secured by JBP."*

In paragraph 3 of the Fixed Date Claim Form in the 2004 JRF Claim the following was pleaded:

> *" 3. The Defendant obtained a loan in the sum of US$464,472.52 from Mutual Security Merchant Bank and Trust Company Limited pursuant to a loan agreement and which loan was secured by equitable mortgage created on or about 22nd August 1995, by deposit of the duplicate Certificate of Title registered at Volume 1203 Folio 671 together with Transfer from the registered owner to Avalon Investments Limited, a company owned or controlled by the Defendant. The terms of the loan agreement specified that interest was payable on the principal sum at the rate of 16% per annum computed from 10th March 1995, this being the date when the said loan was disbursed to the Defendant.*

At paragraph 8 of the same Fixed Date Claim Form the following is pleaded:

> *8. The said debt secured by equitable mortgage remains unpaid despite demand having been made by the Claimant to the Defendant for payment of same by letter dated 30th August 2004.*

[71] It bears noting from the pleading that JRF never claimed that there was a loan to Avalon. Mr Finzi in his Amended Defence and Counterclaim denied paragraph 3 of the claim and averred that he entered into an agreement with the Mutual Security Merchant Bank and Trust Company Limited whereby the Bank agreed to make the loan for the purpose of acquiring the Providence Property and that the loan was the subject of a Letter of Commitment dated 10th March 1995 from the Bank to him (the Defendant).

[72] McIntosh J commenced the examination of the Statement of Case in the 2004 JRF Claim with an analysis of the Claimant's case and referred to the documents exhibited to the Affidavit of Jonathan Goodman the Vice President and Director of JRF. These included:

> *(a) the Promissory note (the US claim with 16% interest);*

(b) the Mortgage Instrument signed by the Defendant. (noting that his signature was witnessed by an Attorney at law):

(c) the loan Agreement.

[73] Her Ladyship noted that the first Defence and Counterclaim filed on behalf of Mr Finzi on 25th February 2005 asserted that he was the guarantor of the loan made to Avalon. However after the Claimant had filed its Reply and Defence to the Counterclaim, an Amended Defence and Counterclaim was filed on behalf of Mr Finzi in which it was averred that it was Mr Finzi which had entered into the agreement with the bank for the loan. McIntosh J also noted that it was asserted that this loan was the subject of Letter of Commitment dated 10th March 1995 from the Bank to Mr Finzi and that this was the same Letter of Commitment exhibited by him.

[74] In view of the repeated assertion that the orders granted and the declarations made by McIntosh J were procured by fraud, it is necessary to quote extensively form a portion of the judgment of McIntosh J which demonstrates the issues with which the Court grappled. The learned Judge stated as follows:

> *"In my view, it was not a matter of drawing conclusions as to what the agreement was. The Claimant produced documentary evidence as to the terms of the agreement and the Defendant offered no real challenge to those documents. He maintained that the Letter of Commitment contained the terms of the agreement and he made no reference to any subsequent rectification of that document. In oral submissions it was afterwards contended that he had signed the loan agreement and the mortgage instrument in blank as though to suggest that they did not contain all that they should but there was no pleading to that effect nor was there any affidavit challenging the terms of the documents which he said were signed in blank and, in any event, those documents are consistent with the Letter Commitment which he acknowledged as embodying the terms of the agreements.*
>
> *The issues formulated by the Defendant were for the most part based on the allegation that there was a term in the agreement between the Bank and the Defendant that the Bank would ensure that title to the property was in his name before disbursing the proceeds of the loan to the vendor's Attorneys-at-Law. So, it was submitted, for instance, that Defendant did not obtain a personal loan from the Bank for the purpose of paying the purchase price in accordance with the Consent Judgment, as asserted by the Claimant but had borrowed money from the Bank to*

complete the purchase in his name in order to have the registered title in his name and for the Bank to have a first legal mortgage.

He questioned whether it could be said that cheques issued in the name of the vendor's Attorneys-at-Law in exchange for the certificate of title endorsed in the Defendant's name amounted to a disbursement to him if the transfer document received by Crafton Miller & Co. in exchange for the cheques was not in his name and he submitted that these were issues of fact and law that ought to be left to be resolved at trial.

At the same time, he admitted the non-payment of monies due under the loan agreement but submitted that "the breakdown seems to be because the Claimant is insisting that they are entitled to interest. The Defendant is maintaining that they are not entitled to interest the agreement has been executed, it is then that time will begin to run."

It is to be noted that although it was submitted that the defendant was not obliged to put forward any evidence at this point, he nevertheless attached certain documents including items of correspondence to his amended pleadings which were said to be of importance to the defence and upon which the defence intended to rely. None of these were of any assistance in disclosing the alleged term of the agreement which had been breached and it is at least curious that the Defendant did not use that opportunity to put before the court the supporting evidence which he indicated would be available at trial, if indeed any such evidence existed.

In my view, the documentary evidence put before this court contradicts the Defendant's assertion that any other agreement exited apart from the agreement contained in the Letter of Commitment on which he relied. The documentary evidence including the items of correspondence exhibited is entirely inconsistent with the allegation that the Bank undertook to ensure that the title was registered in the name of the Defendant before disbursing the loan."

[75] McIntosh J found that this was a debt owed by Mr Finzi and that he admitted in his amended Statement of Case that he was the borrower. The evidence of the original loan of US$464,472.52 to Mr Finzi remains incontrovertible and is reflected in the Letter from Mutual Security Bank and Trust Company Limited to Crafton S Miller & Company dated 10 March 1995 enclosing two cheques totalling that sum. What Mr Beswick now asserts is the position that this particular debt was not properly assigned to JRF. Mr Beswick made reference to the affidavit of Jonathan Goodman sworn to on 12th November 2004 and filed in support of the Claim. Mr Goodman in paragraph 18 of his affidavit referred to a

copy of a page of a list of Mr Finzi's debts which were assigned to JRF. He stated that the list contained Mr Finzi's debt inclusive of interest to that date and is identified in United States Dollars as well as Jamaican Dollars at the then prevailing interest rate. Exhibited at page 89 was a copy of the Deed of Assignment pursuant to which JRF acquired Mr Finzi's debts. The Assignment expressly stated that what was being assigned was the seller's rights title and interest in and to all the assets described in exhibit A. Exhibit A showed a debt attributed to Mr Finzi in the sum of Jamaican dollars, $30,980,631.00. Mr Beswick submitted that because the $30,980,631.00 arose from Jamaica Beach Park obligations (after the proceeds of sale of Mahoe Bay lots was applied to those debts), it is patently clear that there was no separate debt of US$464,472.52 which was assigned and which could have formed the basis for the claim.

[76] It is worth noting that during the hearing of the application before me, Mr Beswick conceded that Exhibit A is not a complete list of all the debts acquired under the Deed of Assignment but is an edited list which contains Mr Finzi's loan obligations. Counsel did make it clear however that this did not affect his submissions to the extent that Exhibit A, as produced, did purport to be a representation of all Mr Finzi's debts.

[77] JFR had pleaded in paragraph 6 of its Fixed Date Claim Form as follows:

> *The Defendant's debt and the equitable mortgage in favour of Mutual Security Merchant Bank and Trust Company Limited was vested in NCB Trust & Merchant Bank Limited and was subsequently assigned to Recon Trust Limited and thereafter to Refin Trust Limited and by virtue of a Deed of Assignment dated 20th January 2002, all rights and interest in the debt secured by the equitable mortgage as aforesaid was assigned by Refin Trust Limited absolutely to the Claimant.*

Mr Beswick submitted that the US$464,472.52 debt not having been assigned to JRF, JRF was not a proper claimant. Counsel argued that JRF failed to disclose this to the Court and accordingly there was a fraud on Mr Finzi and on the Court.

Mr Beswick also asserted that in any event that sum had been repaid by Mr. Finzi before FINSAC acquired that debt from National Commercial Bank.

Are the allegations capable of amounting to fraud as against the First Applicants?

[78] It should be noted at the outset that there are significant differences between the claim against the First Applicants and the claim against the 1st, 5th and 6th Defendants as it relates to the allegations of fraud. This arises in part as a result of the differences in the degree of interaction between the Claimant and the two separately represented sets of Defendants.

[79] This Court must therefore remain cognisant of the fact that the First Applicants were only involved in the 2004 JRF Claim and must be careful to guard against the possibility of the First Applicants being tainted and/or prejudiced by the allegation of a global and more complex fraud as is now being alleged against the 1st, 5th and 6th Defendants, comprised of elements of which the First Applicants did not have any connection.

[80] I find that many of the various strands of allegations comprising the web of actions on which Mr Finzi seeks to rely simply cannot have the effect of supporting the allegations of fraud as against the First Applicants. This is because of their non-involvement in those aspects of the case on which Mr Finzi now relies. I also find that, the mechanics of the fraud as Mr Finzi now alleges was perpetrated in the 2004 JRF Claim, are incapable of imputing any knowledge of a fraud on the part of the First Applicants or supporting the allegation of their knowing participation in the presentation of a fraudulent claim to the Court. Counsel is entitled to rely on cogent instructions which appears on its face to be logical, credible and arguable. The evidence does not indicate that the 2004 JRF Claim was based on anything other than instructions which were such in nature.

[81] The Court must examine the conduct of the First Applicants in the context of the extent of their participation and their involvement in the 2004 JRF Claim. The

Court has considered the respective positions as pleaded by the parties and the issues raised. The Court concludes that, the evidence before the Court and the evidence that can reasonably be expected to be before the Court in a trial is wholly insufficient to support the Claimant's pleading that the First Applicants were a party to a fraud. Even if JRF was not the proper claimant in respect of the US$464,472.52 that, without more is not and cannot, without more, be sufficient evidence of the First Applicants' knowledge and participation in a fraud even if there was a fraud committed by the 1st, 5th and 6th Defendants.

Does the Claim against the First Applicants amount to an abuse of process?

[82] The First Applicants assert that in any event the claim against them in these proceedings is an abuse of process because the issues raised should have been asserted in the 2004 JRF Claim or the 2005 JRF Claim.

[83] In the 2004 JRF Claim, pleadings were filed supported by documentary evidence. There was no pleading by Mr Finzi that those particular documents were fraudulent. What is now being alleged is that the foundation of the claim was fraudulent in that the debt on which the claim was based either did not exist or that there was no legal right of JRF to claim that debt. As it relates to the issue of the existence of the debt, I have earlier referred to how that issue was addressed by the learned Judge. As it relates to the issue of the JRF not being the proper party. Although the submissions on behalf of the Claimant that relevant information which permitted him to discover the full extent of the fraud was only provided on 9th August 2011 via the Errol Campbell Letter. It is clear that all the information required to assert that the claim could not properly have been brought by JRF as Claimant was contained in the affidavit of Mr Jonathan Goodman filed 18th November 2004 in 2004 JRF Claim to which I have been referred by Mr Beswick. It was therefore at all times possible for Mr Finzi to have appealed against the decision of McIntosh J on the ground that the learned Judge had failed to properly address the issues before her and erred in entering

judgement in favour of the JRF having regard to, *inter alia*, the question as to whether JRF could properly have brought that claim.

[84] Mr Beswick submitted that allegations of fraud must be specifically pleaded and proved and it would not have been prudent of Counsel to mount a challenge at that time given the strict code of conduct applicable in cases of fraud. However, it is evident that, certainly as it relates to the First Applicants, there is no new information which was acquired after the judgment of McIntosh J which today makes the claim against the First Applicants more viable than at the time when McIntosh J had conduct of the 2004 JRF Claim. Any information as to events subsequent to the judgment in that claim is wholly irrelevant since the First Applicants did not act for JRF thereafter in respect of those matters which Mr Finzi argued were a part of the overall fraud. As a consequence none of those allegations can serve to affix the First Applicants with culpability for fraud. The current claim as against the First Applicants could therefore have been brought in the 2004 JRF Claim.

Conclusion on the issue of abuse of process in relation to the claim against the First Applicants

[85] Considering all these factors in the round the Court finds that the First Applicants on whom the burden of proof rests, have discharged that burden and have satisfied the Court that the claim against them amounts to an abuse of process.

THE CLAIM FOR FRAUD AGAINST THE 1ST, 5TH AND 6TH DEFENDANTS

[86] MR Finzi in the claim before the Court alleges that he was the victim of a complicated fraud perpetrated by JRF and its agents. He states that on the 9th August 2011 he received the Errol Campbell Letter detailing all the relevant debts and that based on the information received, a number of conclusions are evident which are extensively outlined in paragraph 86 of the Particulars of Claim from letters a-v. Mr Beswick, Counsel for Mr Finzi also helpfully included in the particulars a colour coded flow chart detailing the alleged fraud. I do not propose

to reproduce all the conclusions which were outlined by Mr Beswick as supporting the alleged fraud but will attempt to summarize some of the key features of the fraud.

[87] One key feature of the fraud allegedly perpetrated by the 1st, 5th and 6th Defendants has already been addressed (since that is the element with which it is alleged that the First Applicants had a connection). That element has to do with the 2004 JRF Claim and the assertion of Mr Finzi that the Avalon Property never had any lien, and that loan/s for Avalon Investments were never sold to JRF. Furthermore, that there were no mortgage debts owing in respect of the Avalon Property as same was settled by collateral security and by the line of credit secured by JBP.

[88] The scope of the fraud alleged against the 1st, 5th and 6th Defendants is much wider than the fraud alleged against the First Applicants and includes the conduct of JRF and those defendants subsequent to the 2004 JRF Claim. In support of this alleged fraud, which is broader in scope, it was submitted by Mr Beswick that the sums claimed in the 2005 JRF Claim were also fraudulent. Another key feature of the fraud as alleged, is that the JBP loans which formed the basis of the 2005 JRF Claim did not exist. This, it was argued, is because JRF on the 30th day of June, 2005 purported to exercise a power of sale over property registered at Volume 1255 Folio 157 (the Mahoe Bay Lots) and realised the sum of US$6,000,000.00 from that sale, which Mr Finzi alleged was in excess of the total indebtedness of JBP as expressed by the Claimant. The point was made by Mr Beswick that the United States Dollar principal amounts acquired by JRF in respect of the five JBP loans which were transferred in January 2002 totalled US$1,897,538.05. This sum is the total of the five JBP US dollars accounts acquired by FINSAC which were sold to JRF according to the table included in the affidavit of Errol Campbell sworn to in claim No 2016 CD 00135. However, after the sale of property for US$6 million the JRF was nevertheless claiming US$6,002,420.45, plus an additional JA$64,837,928.92 in the 2005 JRF Claim.

[89] As far as the sum of JA$64,837,928.92 is concerned, Mr Beswick submitted that exhibit A to the Deed of Assignment contains a reference to an "*Ex A*" account number 10201928 with borrower named as Winston Finzi in the sum of US$30,980,631.00. Mr Beswick argued that what JRF did was to use this sum and improperly calculate interest going back to 1997 at varying interest rates ranging between 30% to 45% and furthermore, to compound the interest calculations which resulted in the amount being inflated to a sum of JA$358,899,098.68 as at 2nd September 2005.

[90] Mr Beswick appears to be correct in his submissions as to the method employed in calculating this figure because this sum of US$30,980,631.00 exhibited to the Assignment appears to be the same facility described as the "JBP Overdraft Account" referred to in the statement of account provided to LGS Broderick & Co by letter dated 18th May 2017 from Mr Maurice Manning of Nunes, Scholefield, Deleon & Co. (as per the aforementioned statement of account provided by Mr Manning). In this statement of account it is shown that after the sum of JA$295,194,279.27 (being part of the proceeds of sale of the Mahoe Bay Lots) was applied to the debt, there remained a balance of JA$63,704,819.4. When interest was applied to this sum at the rate of 30% it reached JA$64,837,928.92 as at 5th October 2005. This appears to be the basis for the Jamaican dollar sum claimed in the 2005 suit.

[91] An important feature of the fraud as alleged against the 1st, 5th and 6th Defendants is that after they acquired the debt from FINSAC they improperly applied interest going back prior to the date of such acquisition. Mr Beswick submitted that JRF acquired only the sums indicated in schedule A to the Deed of Assignment and any calculation or recalculation of interest before this date was wrongful. In response it was submitted by Mrs Minott-Phillips QC that Mr Errol Campbell indicated in the Errol Campbell Letter that the database did not save the interest balances at the time of the sale of the debts to JRF. Mr Beswick's counter was that if the database did not save the interest calculations then the interest could not have been subsequently recalculated by JRF. Mrs

Minott-Phillips QC also submitted that the Deed of Assignment conveyed with it the right to charge interest since interest must follow the loan. Mr Beswick's counter to that was that even if there was such a right (which was not accepted) it could only be from 30th January 2002 forward.

[92] Another element of the fraud alleged against the 1st, 5th and 6th Defendants was that JRF applied compound interest to debts they acquired and in respect of which there was no provision for compound interest to be charged. Mr Beswick submitted that the basis for charging compound interest was not disclosed to the Court nor was it disclosed to the Court by JRF that it was charging compound interest.

[93] Mr Beswick submitted that JRF made a fraudulent claim in asserting that five Jamaican Dollar accounts for JBP were transferred to it since FINSAC never sold any Jamaican dollar loan accounts for JBP to the JRF. This, he said, is evidenced by the absence of these Jamaican dollar loans from the list of accounts provided by FINSAC in the table included in the affidavit of Errol Campbell sworn to in claim No 2016 CD 00135 to which reference has already been made. Mr Beswick submitted that there were no Jamaican Dollar JBP loans transferred to JRF because these JBP accounts were consolidated into a single JA$30 million account. He argued that the JRF collected on the balance of these six accounts as well as separately on the JA$30 million account thereby resulting in Mr. Finzi being fraudulently made to repay the same loan on more than one occasion.

[94] A number of other constituent components of the pleaded fraud against the 1st, 5th and 6th Defendants were highlighted to the Court in the submissions by Mr Beswick, for example, that JRF did not show in their accounting an acknowledgment of JA$50,000,000.00 and JA$12,000,000.00 which Mr Finzi had paid to JRF to settle debts allegedly owed by Universal Holdings and to save his home from a sale as part of an enforcement process. However for purposes of these applications I do not think it is necessary to address them all.

Are the allegations capable of amounting to a fraud as against the 1st, 5th and 6th Defendants?

[95] Mr Beswick submitted that the Defendants did not produce any evidence to rebut Mr Finzi's allegations of fraud and were instead relying on technical/legal and procedural points. Mr Manning challenged Counsel's submissions on this point and sought to identify evidence which he said was supportive of a defence in this regard. I am firmly of the view that whereas the Court is able to consider whether the evidence of fraud as pleaded against the First Applicants is sufficient to establish a prima facie case, it would not be appropriate for the Court to attempt such an exercise as it relates to the 1st, 5th and 6th Defendant. This is so because whereas the facts pleaded in support of the claim against the First Applicants are limited and relatively straightforward, the allegation of fraud as against the 1st, 5th and 6th Defendants are complicated and would require a Court to make specific findings in respect of a number of disputed facts or matter of law and fact.

[96] By way of illustration, two issues which a Court would have to determine in deciding whether there was a fraud by the 1st, 5th and 6th Defendants are, firstly, whether JRF was legally entitled to charge interest prior to the effective assignment of debts and secondly, whether JRF could properly have charged compound interest on the loans. I will therefore decline to reach any conclusions as to whether a finding in the negative on either of these issues, by itself or when considered in conjunction with the other allegations, could point to the existence of a prima facie case of fraud against the 1st, 5th and 6th Defendants which would amount to a real prospect of success on that issue or on the claim. For the avoidance of doubt it bears repeating that for reasons indicated earlier in this judgment these issues of interest calculations are issues which would not fall for determination in respect of the allegation of fraud against the First Applicants. This is so because as I have found, the answer to these questions, whatever the answers are, could not in any event without more, amount to conclusive evidence of fraud against the First Applicants who were, legal representatives.

Does the Claim against the 1st, 5th and 6th Defendants amount to an abuse of process?

[97] Although I do not find it possible to make any determinations as to the allegation of fraud as alleged against the 1st, 5th and 6th Defendants, I will nevertheless approach this application on the assumption that the claim for fraud has been substantiated, without so deciding and focus on the issue as to whether the claim amounts to an abuse of process. I am attracted to the guidance contained in the statement by James LJ in **Flower v Lloyd 10 Ch. Div. 327 at 333-334** which was commended to the Court by Mr Manning as follows:

> *"...Assuming all the alleged falsehood and fraud to have been substantiated, is such a suit as the present sustainable? That question would require very grave consideration indeed before it is answered in the affirmative. Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants sui juris and at arm's length could be set aside by a fresh action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogatories, or a misleading production of documents, or of a machine, or of a process, had been given? There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting, and must be on one side or other wilfully and corruptly perjured. In this case, if the Plaintiffs had sustained on this appeal the judgment in their favour, the present Defendants, in their turn, might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subornation of perjury; and so the parties might go on alternately ad infinitum...Perjuries, falsehoods, frauds, when detected, must be punished and punished severely; but in their desire to prevent parties litigant from obtaining any benefit from such foul means, the Court must not forget the evils which may arise from opening such new sources of litigation, amongst such evils not the least being that it would be certain to multiply indefinitely the mass of those very perjuries, falsehoods, and frauds."*

[98] It was submitted by Mr Beswick that if the Court finds that there is a reasonable diligence requirement then the Court should also find that Mr Finzi has done all that he could have reasonably done and that the Court cannot expect perfection of a litigant. As it relates to the 2004 JRF Claim Counsel submitted that the litigation process did not afford Mr Finzi sufficient opportunity to assert his defence. I have already indicated that I do not so find. It was submitted that he was wrongly deprived of information as a part of the discovery process, however

I find no merit in that complaint because this could have been a ground of appeal. Mr Finzi did not pursue an appeal against that judgment. As it relates to his entering into the 2006 Consent Order, Counsel submitted that Mr Finzi felt that he had no choice because a mareva injunction had been obtained against him which gave him a "pittance" of Twenty Five Thousand Dollar (JA$25,000.00) per week. However Mr Finzi was permitted reasonable legal expenses of Two Hundred and Fifty Thousand Dollars (JA$250,000.00) pursuant to that freezing order, as is the usual practice and he could have utilised that provision to pursue his defence to the 2005 JRF Claim if in consultation with his legal advisors it was concluded that such a course was prudent.

[99] I accept the submissions of Counsel for the Defendants that although the Claimant is now pleading fraud for the first time, none of the various alleged components of the fraud are new in the sense of not being founded on facts and issues previously raised by Mr Finzi. I have earlier addressed some of the key elements of the defence to the 2014 JRF Claim. Paragraph 3 of the Defence to the 2005 JRF Claim similarly raised many of the issues which are being raised in the claim currently before the Court and a perusal of that paragraph reproduced below aptly demonstrates the point.

> *"3. Paragraph 3 of the Particulars of Claim is denied. The Defendant will state that he is not indebted to the Claimant in the sum claimed and in this regard, will rely on the following matters:*
>
> *i. That by letter dated December 30, 2002, the Claimant and /or its agent or representative averred that the total indebtedness of Jamaica Beach Park Limited under the loan facilities extended to it by the former Mutual Security Bank Limited which debt was assigned to Refin Trust Limited and subsequently acquired by the Claimant to be Jamaican Thirty Four Million One Hundred and Fourteen Thousand Eight Hundred and Seventy Four Dollars and Twenty Seven Cents ($34,114,874.27), with interest accruing at thirty percent (30%) per annum and United States Two Million Nine Hundred and Eighty Thousand Nine Hundred and Fifty Two Dollars and Eight Cents (US$2,980,952.08), with interest accruing at twelve percent (12%) per annum.*
>
> *ii. That in order to recover the sum allegedly due and owing by Jamaica Beach Park under the said loan facilities, the Claimant on the*

30th day of June, 2005 exercised its alleged power of sale over the premises for a stated consideration of US$6,000,000.00.

iii. That the said sum of US$6,000,000.00 received by the Claimant with reference to the sale of the property registered at Volume 1255 Folio 157 of the Register Book of Titles, was in excess of the total indebtedness of Jamaica Beach Park as expressed by the Claimant as aforesaid.

iv. Further and in any event, the Defendant will state that the sum realized by the sale of the property registered at Volume 1255 Folio 157 was in excess of any debt owed by Jamaica Beach Park Limited to the Claimant.

vi. That by letter dated the 10th October 2005, aforesaid, the Claimant made a demand on the Defendant for the sum of US$6,002,420.45 and $64,837,928.92, expressed as being the outstanding indebtedness of Jamaica Beach Park under the loan facilities extended to it. The Defendant in light of the sale of the asset registered at Volume 1255 Folio 157 of the Registered Book of Titles and the sum thereby realized, believes this demand to be unlawful and baseless.

[100] It is accepted by the Court that in this claim currently before the Court, what is being pleaded is a claim for fraud which was never previously asserted or decided. Furthermore it is in this area of the Court's analysis that the application of the reasonable diligence test has an impact. This is because it is patently clear that Mr Finzi had ample opportunity to deploy his pleading of fraud before the instant claim and before he concluded the Settlement Agreement. It is worth noting that the Court is not required to make any findings in respect of disputed facts to so hold. This is because the pleadings on behalf of Mr Finzi makes this pellucid. Mr Finzi has pleaded in paragraph 79 of his Particulars of Claim that he conducted an audit of the loan accounts of JBP and Avalaon concerning debts that he was sued for by JRF and at paragraph 80 he states that "*in furtherance of this audit*", on the 8th of July 2011 he made an application under the Access to Information Act, 2002 for the disclosure of certain information from FINSAC. Mr Finzi then speaks of having received on 9th August 2011 the Errol Campbell Letter to which reference has already been made.

[101] Counsel for the 1st, 5th and 6th Defendants submitted that there is ample evidence of Mr Finzi having received this information before, but to the extent that this is denied by Mr Finzi I will for purposes of this judgment assume that the pleaded date of 9th August 2011 is the date Mr Finzi received the information which enabled him to reach the numerous conclusions detailed by him in his Particulars of Claim at paragraph 86 a.- v. What this placed beyond question is that when Mr Finzi entered into the Settlement Agreement on 28th August 2012 he had all the information which he is now saying supports his claim for fraud and which he is using to effectively set aside the Settlement Agreement.

[102] It also appears that Mr Finzi (referred to in the agreement as the Defendant), had the benefit of legal advice in pursuing the course he did, since Clause 24 of the Settlement Agreement into which he entered provides as follows:

> *"The Defendant acknowledges that he has had the benefit of legal advice and has freely and voluntarily entered into this settlement and will offer no defence or objections to (i) the Claimant's right to enter Judgment in accordance with this settlement; (ii) or the Claimant's right to exercise its powers of sale in respect of the property comprised in Certificate of Title registered at Volume 1203 Folio 671; or (iii) any exercise by the Claimant of its powers of sale by private treaty pursuant to section 22 of this Agreement; and for the avoidance of doubt the Defendant relinquishes and foregoes any challenge or rights of appeal he may have or which may accrue to him."*

I therefore find that Mr Finzi did not do as much as he reasonably could have done to assert his claim of fraud in the Court. Armed with the information he says he received in the Errol Campbell Letter and the conclusions he asserts can be drawn from it, instead of entering into the Settlement Agreement it was open to him to apply to amend his Particulars of Claim to elevate the claim to one of fraud along the lines of the pleading in the instant case

[103] In his judgment in ***Jamaica Beach Park Limited (in receivership) v Winston Finzi, Jamaica Redevelopment Foundation, Inc. and Kenneth Tomlinson*** **HCV 01319 of 2005,** Sykes J commented that *"it is virtually impossible to adjudicate upon abuse of process claims without recounting the history of the*

matter". In analysing that claim my learned brother also reviewed Claim number HCV 1858/2003, Claim number HCV 0369/2004. I do not find it again necessary to review those claims in detail. I have concentrated my analysis on the 2004 JRF Claim and the 2005 JRF Claim. However the legal implication of the Settlement Agreement cannot be overemphasized given the effect it had in ending the then only extant claim.

[104] Having entered into the Settlement Agreement in such circumstances, and the parties having acted on the agreement and effecting the sale of the Providence Property by private treaty with the concurrence of Mr Finzi and with the surplus of US$2,165,896.42 after the settlement of the JRF debt having been paid to him, it does not now lie in Mr Finzi's mouth to allege a fraud which he could have pleaded before he entered into the Settlement Agreement.

Conclusion on the assertion of abuse of process in relation to the claim against the 1st, 5th and 6th Defendants

[105] For the reasons outlined herein, considering the circumstances and taking into account all the relevant facts and the various interests involved, I find that the 1st, 5t and 6th Defendants on whom the burden of proof rests have discharged that burden and have satisfied this court that the claim against them is a breach of the **Henderson v Henderson** abuse of process, which gives rise to a discretionary bar to these proceedings.

ACCORD AND SATISFACTION

[106] It was submitted on behalf of the 1st, 5th and 6th Defendants that accord and satisfaction would be a complete defence to this claim brought by Mr Finzi against JRF and its agents. It was also submitted that this defence would be sufficient to dispose of this action independently of any other point. The consideration on each side for their accord was an executory promise which is contained in paragraph 23 of the August 28, 2012 Settlement Agreement

between JRF and Mr Finzi, to which reference has been quoted earlier in this judgment.

[107] It was submitted on behalf of the 1st, 5th and 6th Defendants that the applicable law on accord and satisfaction is settled and was set out succinctly by Scrutton, LJ in the case of **British Russian Gazette and Trade Outlook Limited v Association Newspapers Limited** as follows:

> *"Accord and satisfaction is the purchase of a release from an obligation whether rising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative. Formerly it was necessary that the consideration be executed: "I release you from your obligation in consideration of 50l. now paid by you to me." Later it was conceded that the consideration might be executor: "I release you from your obligation in consideration of your promised to pay me 50l., and give me a letter of withdrawal." The consideration on each side might be an executor promise, the two mutual promises making an agreement enforceable in law, a contract. Comyns puts it in his Digest....." An accord, with mutual promises to perform is good, though the thing be not performed at the time of the action; for the party has a remedy to compel the performance: that is to say, a cross action on the contract of accord..... Lord Atkinson's statement in Morris v Baron ..... is to the same effect. "if, however, it can be shown that what a creditor accepts in satisfaction in merely his debtor's promised and not the performance of that promise, the original cause of action is discharged from the date when the promise is made..... there are numerous cases where promise against promise is held, if not satisfaction, to be a valid subject for a cross action:..... the document is to be construed in accordance with the intention of the parties as expressed in it, and if there doubt, as Parke B says in one of the cases cited, the construction which makes it effective to carry out that intention prevails. ....."*

Conclusion on the issue of accord and satisfaction

[108] Based on the Court's finding in relation abuse of process, I do not find it necessary to deal with the submissions on accord and satisfaction as a separate issue since the Court has already considered and adequately dealt with the Settlement Agreement and its significance in assessing the conduct of Mr Finzi.

THE LIMITATION ISSUE

[109] Mr Hylton QC submitted that in any event the claim before this Court is statute barred and relied on the case of ***Lloyd McGregor v Verda Francis*** **[2013] JMSC Civ 172.** In that case the court considered a plea that a claim has been statue barred, and held that:

> *It is settled law that where a defendant raises the defence that a claim is barred by virtue of the expiry of the relevant limitation period, this provides him with a complete defence to the action. This statement of the law was dealt with at paragraphs 7.01 and 7.02 of Sime, A Practical Approach to Civil Procedure, 14th edition where it was stated:-*
>
> *"Expiry of a limitation period provides a defendant with a complete defence to a claim. Lord Griffiths in Donovan v Gwentoys [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.' If a claim is brought a long time after the events in question, the likelihood is that evidence which may have been available earlier may have been lost, and the memories of witnesses who may still be available will inevitably have faded or become confused. Further, it is contrary to general policy to keep people perpetually at risk. Limitation is a procedural defence. It will not be taken by the court of its own motion, but must be specifically set out in the defence..... 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 ..... as an abuse of the court's process."*

[110] Mr Hylton QC argued that a claim against an attorney to enforce a professional undertaking is akin to a breach of contract and accordingly the limitation period is six years from the date the cause of action arose. The cause of action in this claim for breach of the undertaking would have arisen from the date when the undertaking should have been satisfied which on Mr Finzi's claim would have been either 21st April 2006 when Mr Broderick sent his first letter to Mr Wood or 8th May 2006 when the cheques were tendered.

[111] Learned Queen's Counsel also relied on the case of ***Bartholomew Brown, Bridgette Brown v Jamaica National Building Society*** **[2010] JMCA Civ 7** and the Judgment of Harrison JA which made it clear that the broad fraudulent concealment extension of the limitation period provided by section 32 of the UK

Limitation Act 1980 as amended in 1986 and 1987 had no equivalent in Jamaica. Harrison JA at paragraph 43 of the judgment stated as follows:

> *"...Although the equitable doctrine of fraudulent concealment does have a limited area of operation by virtue of section 27 of the Limitation of Actions Act (reproducing section 26 of the English Real Property Limitation Act 1833), it is clear that by its terms that that section is only applicable to suits for the recovery of land or rent...."*

[112] Mr Beswick in response agreed that this clearly was not an action for recovery of land or rent but was an action for breach of an undertaking which is not covered by the Limitation Act. He argued that as a consequence there was no limitation period in respect of such a claim. He further submitted that:

> *"...the breach of undertaking was part of ongoing conduct of the Applicants which amounted to fraud and which the Claimant did not have knowledge of until it was able to conduct a forensic review of various documentation it reviewed.' It is submitted that the letter from FINSAC of August 2011 is at best the earliest the Limitation period could be said to have started running."*

[113] Mr Beswick argued that the concept of a concealed fraud does not extend to fraud in the context of a suit or claim and that it would fly in the face of public policy to allow the court to be used as an instrument of fraud. These submissions were consistent with the general thread running through Counsel's submissions that "fraud unravels everything".

Conclusion on the limitation issue

[114] In the absence of a fraudulent concealment extension, both the claim in respect of the undertaking and the claim for fraud as against the First Applicants would be statute barred since their involvement ended in or about 2006, which is more than ten years prior to the filing of this claim. However as it relates to the claim against the 1st, 5th and 6th Defendants at least one element of the fraud as alleged has to do with the sale of the Providence Estate pursuant to an Agreement for Sale dated 3rd March 2015 and would not be outside the limitation period. Accordingly the 1st, 5th and 6th Defendants would not be able to benefit from the limitation provisions.

COSTS

[115] The First Applicants have applied for costs of the proceedings to be awarded to them. They have also applied for such costs to be awarded on an indemnity basis. The parties were agreed that the applicable principles were those found in the judgment of Sykes J in **RBTT Bank Limited v YP Seaton et al 2014 JMSC Civ. 139** (delivered 24th September 2014). Sykes J reviewed a number of authorities including ***Mayor and Burgesses of the London Borough of Southwark v IBM UK Ltd* [2011] EWHC 653** in which Akenhead J held as exceptionable a number of propositions. These included the proposition that for such an award to be made there must be some conduct which takes the case out of the norm and this conduct must be unreasonable to a high degree which does not mean merely wrong or misguided in hindsight. Reference was also made by Sykes J to ***The Three Rivers District Council v The Governor and Company of the Bank of England* (No 6) [2006] 5 Costs LR 714** where at paragraph 25 Tomlinson J posited that an award may be merited "*where a claim is speculative, weak, opportunistic or thin*".

[116] It was submitted on behalf of the First Applicants that the claim against them was hopeless both on a substantive and procedural basis and that in making the claim against them Mr Finzi "*...acted in a manner that was unreasonable and completely irreconcilable with the contemporaneous documentary evidence*". It was also argued that the claim was in any event statute barred."

[117] Mr Beswick on the other hand submitted that the case against the First Applicants was neither thin nor far-fetched and did not evidence any bad behaviour on the part of the Claimant which is deserving of an award of costs on an indemnity basis against him.

[118] For the reasons given earlier in this judgment the Court has found that the Claimant has no real prospect of succeeding against the First Applicants on a number of bases. The 7th Defendant is a senior member of the bar and the 8th

Defendant is the firm in which he is a partner. I do not think it can be gainsaid that the First Applicants are prominent participants in the legal field as a practitioner and a law firm, respectively. The allegations which have been pleaded are serious allegations which go to the heart of one's ability to practice in the field of law. The assertion that "*my word is my bond*" would be severely diminished when used by the First Applicants if the allegations were to be proved. Similarly, a finding by the Court that the First Applicants had knowingly participated in a fraud of the type alleged by the Claimant would no doubt have disastrous consequences for them. In my view the Court must also take into account the position of the First Applicants in the legal profession and the considerable risk of damage to their professional reputations by even an unsuccessful claim, a consideration which must have been forefront in the Claimant's mind and in the mind of his legal advisors. In these circumstances, taking all the facts in the round and especially the hopeless case against the First Applicants, I find that the Claimant's conduct was so unreasonable as to justify an order for indemnity costs. The First Applicants have been unreasonably put to expense in order to defend their professional reputations and deserve to be adequately reimbursed.

ORDERS

[119] For the reasons aforesaid I make the following orders:

1. Summary judgment is granted in favour of the 1st, 5th, 6th, 7th and 8th Defendants on the claim against the Claimant.

2. Costs of the claim is awarded to the 1st, 5th and 6th Defendants against the Claimant to be taxed if not agreed, and a special costs certificate is granted for 2 counsel (one Senior and one junior) as well as instructing counsel.

3. Costs of the claim is awarded to the 7th and 8th Defendants against the Claimant on an indemnity basis with such costs certified fit for two Counsel (one senior and one junior) as well as instructing counsel.

4. The claimant's application for leave to appeal is refused.

5. The 1st 5th + 6th Defendants attorneys-at-law to prepare file + serve the order.