



[2023] JMSC Civ 127

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2008HCV05958

BETWEEN	JOLANES INVESTMENTS LIMITED	CLAIMANT
AND	SAGICOR LIFE JAMAICA LTD (Formerly Life of Jamaica Limited)	DEFENDANT

Mr. Garth McBean KC, instructed by Garth McBean & Co for the claimant

Mr Conrad George and Mr Andre Sheckleford instructed by Hart, Muirhead Fatta
for the defendant

Heard June 19, 20, and 30, 2023, July 7 and 21, 2023

*Adequacy of claimant's pleadings – application to amend statement of case –
defendant requesting that claimant's statement of case be struck out - registered
mortgage and the effect of foreclosure on the equity of redemption -sections 119
and 120 of the Registration of Titles Act*

CORAM: JARRETT, J

Introduction

- [1] This is my decision on 8 preliminary points made by the defendant at the start of trial, and on the claimant's oral application to amend its statement of case. All 8 preliminary points allege deficiencies in the claimant's pleadings.
- [2] In its claim form filed on December 19, 2008, the claimant pleads that it seeks against the defendant: a) an injunction restraining it, its agents or servants from

selling or taking steps to sell its property at Apartment 22 Sea Castles, in St James registered at volume 1244 Folio 266 of the Register Book of Titles (the property); b) damages for breach of contract; c) interest and costs; all arising from a breach of an agreement made in September 2004, with the defendant, through its agent Business Recovery Services Limited (“BRSL”). The claimant alleges that the breach resulted in the defendant wrongfully taking steps to exercise a power of sale under a mortgage dated April 27, 1991, made between the claimant and American Life Insurance Company (“ALICO”).

[3] As part of its response to the preliminary points, the claimant made an oral application to amend its statement of case. The defendant did not seek to have the claimant’s statement of case struck out when arguments were first advanced in support of the preliminary points. It was after submissions were made in response to the preliminary points; after the claimant’s application to amend the claim and, after a draft of the proposed amended particulars of claim was produced, following an adjournment to facilitate its preparation, that the defendant objected to the amendments and asked that the claim be struck out.

[4] Just before the scheduled delivery of my decision on these issues, the defendant asked that consideration be given to further submissions. The further submissions, both oral and written, were in respect of the effect of foreclosure of the mortgage on the claimant’s equity of redemption under the Registration of Titles Act (ROTA), and ultimately on the viability of the claim. Time was given to the claimant to make written and oral submissions in response.

The particulars of claim

[5] A brief outline of the particulars of claim will aid in understanding the preliminary points, the proposed amendments sought by the claimant, and the effects, if any, of the foreclosure, on the proposed amended claim.

[6] The claimant's current particulars of claim are the Amended Particulars of Claim filed on August 8, 2011¹. In summary, the relevant pleadings are that:

- a) The claimant by instrument of mortgage dated April 27, 1991, mortgaged the property to ALICO as security for a loan of \$750,000.00.
- b) The defendant is the successor to Life of Jamaica Limited (LOJ).
- c) There was no assignment of the mortgage on the certificate of title for the property.
- d) The claimant entered into an agreement with BRSL as agents for the defendant, to pay the sum of \$824,845.95, towards settling the principal on the mortgage in two instalments, and thereafter to negotiate and agree the timely payment of interest.
- e) The sum of \$824,845.95 was paid by way of two cheques, however the defendant applied the amount paid towards interest rather than towards principal and said it did not agree to apply it to principal.
- f) The defendant is estopped from breaching its promise.
- g) The defendant advertised the property for sale by public auction and in threatening to exercise its power of sale, acted unlawfully as there was no assignment of the mortgage. The defendant is not a mortgagee or assignee under the mortgage.

¹ Particulars of Claim prior to the amendment was filed on December 19, 2008

- h) There was an implied term in the mortgage that when requested, the defendant would account to the claimant, showing how money paid under the mortgage was applied to principal and interest.
- i) The claimant has requested an account, but the defendant has wrongfully failed or refused to render the account.
- j) The claimant has incurred expenses and suffered loss and damage and seeks an injunction restraining the defendant from selling the property, an account of money paid under the mortgage and, an “*order for the payment by the defendant to the claimant of all monies found to be due to it on the taking of (sic) successful (sic)*”; damages for breach of contract; interest and costs.

The preliminary points

[7] According to Mr Conrad George, counsel for the defendant, the pleadings are defective and pose an “insuperable problem to determine what evidence should be led”. Learned counsel made the following preliminary points:

- a) The claimant’s third item of relief prayed: “An order for the payment by the defendant to the claimant of all monies found to be due to it on the taking of successful (sic)” is incomprehensible and not tied to any cause of action in the pleading.
- b) The claimant has pleaded a breach of an implied term without any pleading as to the genesis or basis of such an implied term.
- c) The claimant has pleaded a breach of an implied term in the context of a security document created by deed, this being a circumstance where the principle of implied terms is not applicable.

- d) The only pleading to which the fourth item of relief sought: “Damages for breach of contract” may be tied is a breach of an implied term to provide an account. For the reasons expressed at (2) and (3) above, the relief sought of damages for breach of contract has no basis.
- e) In light of : a) the relief prayed at (2) (“An account of the monies paid by the claimant to the defendant under the said mortgage”) being founded on defective pleadings of an implied term; b) the incomprehensible item of relief prayed at (3) (“ An order for the payment by the defendant to the claimant of all monies found to be due to it on the taking of successful”) and its lack of connection to any cause of action; c) the relief prayed at (4) (“Damages for breach of contract”) is only capable of being tied to the claim of a failure to provide an account , which is founded on a defective pleading of an implied term; there is no relief for the claimant to pursue against the defendant.
- f) The claimant’s claim that there was a pending improper exercise of the power of sale as there was no assignment of the mortgage from the initial mortgagee (“ALICO”) to the defendant’s predecessor company (“LOJ”) (paras 18-19 of the Amended Particulars of Claim) is not tied to any item of relevant relief sought.
- g) With respect to the claimant’s pleading of an estoppel (para 13 of the Amended Particulars of Claim), promissory estoppel operates as a shield, not a sword, and therefore may only be invoked as a defence.
- h) The claimant’s pleading of an estoppel is not tied to any item of relief sought.

[8] Mr George questioned why the claimant would be seeking an account when it pleads that the defendant was not a mortgagee. He argued that for a term to be implied, it needed to be a part of a contract and there are established criteria in law for implying terms into a contract. He relied on the dictum of Lord Hoffman in **Attorney General for Belize and others v Belize Telecom and others [2009] UKPC 10**. Counsel submitted that the mortgage pleaded is a security for a loan but there are no allegations pleaded to support any implied terms. Furthermore, the claimant has pleaded that the defendant is not a mortgagee. Accordingly, argued counsel, the claimant cannot claim damages for the breach of a term, the implication of which has not been properly pleaded. Learned counsel further argued that as there is no pleading that the property was sold, a case cannot be advanced of an improper exercise of a power of sale.

[9] Mr George also argued that the claimant's acceptance that there was foreclosure, brings into focus its effect on the proposed amended claim². He relied on sections 119 and 120 of the ROTA to submit that foreclosure results in the equity of redemption being extinguished, and it is only capable of being reopened in limited circumstances, including cases of fraud. None of those circumstances arise on the pleadings or on the proposed amended pleadings in this case, posited counsel. The dictum of Laing J (as he then was) in **Millard Dunbar v St Catherine Co-operative Credit Union [2018] JMCC Comm 7 at para. 38**, and **St Catherine Co-operative Credit Union Limited v Herman Rhule and others, [2018] JMCC Comm 12, at para 14**, were cited in support of this submission. The effect of the equity of redemption being extinguished, posited Mr George, is that there is no basis on which the claimant can sustain a claim for an account from the defendant, once there was no challenge to the foreclosure. He argued that with the equity of redemption being extinguished, the claimant has no equitable interest upon which

² In the defendant's intended witness statement, it is stated that the defendant commenced foreclosure proceedings and the property was sold by private treaty in 2016. During arguments, counsel acknowledged that the property was foreclosed.

to base his claim for an account on equitable principles. It was argued that the claim for breach of contract is also unsustainable for the same reasons. Consequently, the claim should be struck out.

The claimant's response

- [10] King's Counsel Mr Garth McBean submitted that paragraphs 5 to 17 of the claimant's pleadings provide a basis on which the court can order an account. He relied on the decision of **JMMB Bank (Jamaica) Limited (Formerly JMMB Merchant Bank Limited) v Winston Finzi and Mahoe Bay Company Limited [2021]JMCA App 36** , in which the dictum of Morrison JA (as he then was) in **Capital and Credit Merchant Bank Ltd v The Real Estate Board , consolidated with The Real Estate Board v Jennifer Messado & Co [2013]JMCA civ 29**, was cited with approval . In this latter decision, Morrison JA after reviewing several authorities on the point, said that they do not suggest to him that the established categories of cases in which an account may be ordered are closed.
- [11] In respect of the pleading that there was an implied term in the mortgage that the defendant would provide the claimant with a true and accurate account, King's Counsel relied on the Privy Council decision of **Attorney General of Belize and others v Belize Telecomm and others** (supra) in which the Board stated the requirements for implying terms into a contract. The requirements were said to be that the term: a) must be reasonable and equitable; b) must be necessary to give business efficacy to the contract; c) must be so obvious that it goes without saying; d) must be capable of clear expression and e) must not contradict a clear term of the contract. Mr McBean said that these five requirements have been met in this case. He said that it is reasonable and equitable that the defendant gives the claimant an account; such a term gives business efficacy to the mortgage loan contract as it allows the parties to know the amount owing with certainty which is important for the exercise of the power of sale and foreclosure; it goes without saying, he argued, that it is obviously capable of clear expression and it does not contradict any express terms of the mortgage deed.

- [12] In his response to preliminary points 1 to 3 and 5 to 6, Mr McBean applied orally to further amend paragraphs 4, 19, 23 and 24(3) of the amended particulars of claim. The nature of the amendments sought will be discussed in detail further on in this judgment. In relation to preliminary points 7 and 8, King's Counsel submitted that estoppel is not being used as a sword, but rather, to support the cause of action of a breach of contract. He placed reliance on the decision of the court of appeal in **Caribbean Cement Company Limited v Freight Management Limited [2016] JMCA Civ 2**, for this proposition.
- [13] In his submissions on the effect of the foreclosure, King's Counsel argued that it is a triable issue whether there was a contract entered between the claimant and the defendant, through its agent BRSL that was breached by the defendant invoking foreclosure proceedings. He quoted excerpts from **Millard Dunbar v St Catherine Co-operative Credit Union [2022] JMCA Civ 41** which he argued, lends support to this submission. In response, Mr Andre Sheckleford on behalf of the defendant, said that **Millard Dunbar v St Catherine Co-operative Credit Union** (supra) is unhelpful, as the aspects of that decision relied on by the claimant, speak to a purported breach of representation, and that necessarily implies a tortious action. In the instant case however, argued Mr Sheckleford, the claimant relies on the decision to contend that had the court found the existence of a contract, it is likely that it would have accepted that proceeding to foreclosure, amounted to a breach by the mortgagee of that contract.
- [14] In relation to the claim for an account, Mr McBean reiterated that the cases in which an account can be ordered are not closed and again relied on the decision of **JMMB Bank (Jamaica) Limited (Formerly JMMB Merchant Bank Limited) v Winston Finzi and Mahoe Bay Company Limited (supra)**. Consequently, he argued, notwithstanding the foreclosure, the claimant would be entitled to an account, based on the compromise agreement.

The application to amend

- [15] The proposed amendment to paragraph 4 of the amended particulars of claim refers to the assignment of the mortgage to LOJ, the defendant's predecessors. As to paragraph 19, that amendment seeks to plead that the property was sold in 2016.³ Paragraph 23 which claims an injunction preventing the sale of the property is being deleted in its entirety, and paragraph 24(3) is being amended to read "An order for the payment by the defendant to the claimant of all monies found to be due to it after the taking of a successful account".
- [16] Mr McBean argued that the claim has always been one for a breach of contract and that in relation to the amendment seeking an account, paragraphs 5 to 17 of the particulars of claim plead that arrears of mortgage were collected and there is therefore a basis in the pleadings to seek an account from the defendant. Even if there is found to be a new cause of action (which he does not admit), King's Counsel argued that it properly arises on the facts previously pleaded, and therefore should be allowed. For this submission, he relied on **Jamaica Railway Corporation v Mark Azan Supreme Court Civil Appeal No.115/05, delivered on February 16, 2006.**
- [17] Mr George opposed the application to amend the particulars of claim and argued that if allowed, the amendments would result in an entirely different case. He submitted that the pleaded case prior to the proposed amendments is one to restrain a party who was not a mortgagee from exercising a power of sale. In contrast, the proposed amendments seek an account from the defendant for breach of an implied term, but even that, argued Mr George, is inadequately pleaded in the proposed draft of the further amended particulars of claim. Counsel submitted that the prayer for relief seeks damages for breach of contract, but

³ The proposed amendment to paragraph 19 on the draft Further Amended Particulars of claim refers to the defendant selling the property under its power of sale in 2016. While on his feet, King's Counsel amended the draft to exclude any reference to a power of sale.

neither the current pleadings nor the proposed amendments support a claim for breach of contract between the claimant and the defendant.

Analysis and discussion

(A) The preliminary points

[18] As observed earlier, the claimant's application to amend the particulars of claim is aimed at addressing preliminary points 1 to 3 and 5 to 6. I view the application as a concession by the claimant that the relevant paragraphs in the particulars of claim are indeed flawed. The 3rd relief in the prayer is incomplete. In relation to the pleading that there was a breach of an implied term in the mortgage to account, it is clearly unsustainable without an acknowledgment that the defendant was a mortgagee. As currently pleaded, the claimant's statement of case is that the defendant was not a mortgagee as the mortgage with ALICO was not assigned. The question, therefore, is whether the application to amend the statement of case should be granted. I will return to this issue presently.

[19] Preliminary point 4 posits that the only pleading in relation to which the prayer for damages for breach of contract can lie is the breach of an implied term to account, but without any basis on which to claim an implied term, there is no basis for the relief. I cannot agree with this argument. As currently drafted, the claimant's statement of case pleads the existence of an alleged contract between the claimant and the defendant entered on the defendant's behalf by its agents BRSL. If there is a finding that there was in fact such a contract and it was breached, then it follows ipso facto that there would be a basis for the prayer for damages for breach of contract.

[20] It is settled law that promissory estoppel operates as a shield and not as a sword. It is equally settled law that while it cannot be used as a cause of action, promissory estoppel can support a cause of action. Paragraph 13 of the particulars of claim (which pleads promissory estoppel), appears after the allegations of a contract entered by the claimant with BRSL on behalf of the defendant, and after the

allegations that the defendant acted contrary to that contract. In **Caribbean Cement Company Limited v Freight Management Limited** (supra), the court of appeal approved the trial judge's treatment of promissory estoppel as supporting a cause of action. Brooks JA said this in relation to the issue at paragraph 76 of that judgment:

“Although in this jurisdiction, the authorities indicate that promissory estoppel may not be used as a cause of action, it may, however, be used to support a cause of action. The learned judge having found on the facts that there was a contract between the parties, was entitled to also find that CCCL was estopped, in the circumstances, from asserting that there was no contract for the supply of the shipping service. The learned judge, therefore, did not treat promissory estoppel as the cause of action. Instead, she accepted that it could have been used to support FML's case.”

Therefore, in relation to preliminary points 7 and 8, I accept King Counsel's submission that as pleaded, promissory estoppel is being used to support the claimant's allegation that there was a contract and that the defendant breached it.

(B) The proposed amendments

[21] The principles on which the court relies to determine whether to grant an application to amend a statement of case are now well known. Each case will turn on its own facts and circumstances, but the court in the exercise of its discretion must give primacy to whether the proposed amendment is necessary in order to determine the real dispute between the parties. Regard must be had to the overriding objective and the need to avoid prejudice to the other party. Amendments which are bound to fail on the merits ought to be disallowed. (See for example, **Jamaica Redevelopment Foundation Inc v Clive Banton and Sadie Banton [2019] JMCA Civ 12**)

[22] In respect of amendments after the limitation period, it is also well known that these will be allowed where they arise from the same or substantially the same set of

facts as those pleaded. However, allowing the amendment must not result in any injustice to the defendant. (See for example, **Jamaica Railway Corporation v Mark Azan** (supra))

[23] Paragraph 3 of the amended particulars of claim alleges that a mortgage was granted to the claimant by ALICO. Paragraph 4 states that there was no assignment of the mortgage registered on the title for the property. In paragraphs 5 to 11, it is pleaded that BRSL, acting as the defendant's agents concluded an agreement with the claimant, which is evidenced by letters dated September 3, 2004, and September 30, 2004. By this agreement, the claimant would pay the principal outstanding of \$824,845.95 in two instalments and after that, it would negotiate with respect to the interest. In letter dated September 30, 2004, two cheques were sent by the claimant to BRSL, and it was said that these were being paid with the understanding that when the second cheque is cleared, the defendant would review the accrued interest charge with a view to adjusting it and agreeing to a timely settlement. The letter also requested that BRSL sign acknowledging receipt and that the terms outlined were in keeping with their understanding. The pleadings allege that the letter was signed by BRSL in its capacity as the defendant's agent.

[24] In paragraph 12, it is alleged that by a letter dated December 7, 2004, the defendant acknowledged receipt of letter dated September 30, 2004, as well as the cheques, but indicated that it did not agree to the application to principal of the money received. The defendant recited the terms of clause 2(b) of the mortgage, and indicated, among other things, that the money was applied first to interest. Paragraph 13 alleges that based on the promise made by the defendant's agent, BRSL, the claimant acted to its detriment and as a result, the defendant is estopped from breaching its promise. In paragraphs 14 to 16, it is pleaded that the claimant wrote to the defendant by letter dated January 27, 2005, and subsequent letters, indicating that the defendant was bound by the settlement agreement reached with BRSL. The defendant maintained its position in letter dated December 7, 2004, and in letters dated March 30, 2007, and July 7, 2007,

respectively, the defendant threatened to exercise its power of sale under the said mortgage.

- [25]** It is clear to me that paragraphs 5 to 11 refer to the alleged agreement between the claimant and BRSL, acting as agent for the defendant. It is also clear that paragraphs 12 to 16, contain the claimant's allegation that that agreement was breached by the defendant. In my view, these averments reflect a claim for a breach of contract.
- [26]** The first proposed amendment is in relation to paragraph 4 and reads: "An assignment or transfer of the said mortgage to Life of Jamaica Limited, the predecessors of the Defendant, was registered on the Certificate of Title on 6th July 1998". This would replace the current paragraph 4 which reads: "No assignment of the said mortgage has been registered on the Certificate of Title for the said property". What this amendment seeks to do is to acknowledge that there was in fact an assignment or transfer of the mortgage referred to in paragraph 3. The defence makes mention of the transfer, and it is endorsed on the copy certificate of title for the property, which is an agreed document. I do not consider that this proposed amendment changes in any significant way, the case the defendant is called to meet. If the amendment is allowed, the claimant would be alleging that there was a transfer of mortgage to the defendant's predecessor, and as such, would no longer be asserting that the defendant was not a mortgagee. This is consistent with the position the defendant has taken in its own pleadings.
- [27]** The second proposed amendment is to paragraph 19. By this amendment, the claimant proposes to delete the existing pleading that refers to the defendant threatening to exercise a power of sale which it did not have because there was no assignment of the mortgage, and to plead instead that the property was sold in 2016. This is a new factual issue being introduced to the claim, but it is consistent with the proposed evidence of the defendant as contained in its witness statement. I bear in mind as well, that the claim was filed in 2008 and amended on August 8, 2011, prior to the date of the alleged sale.

- [28]** To say that the property was sold does not change the claim from being one for breach of contract. What the proposed amendment seeks to do is to abandon the allegation that the breach arose from an unlawful exercise of a power of sale the defendant did not have. The cause of action would remain that of a breach of contract, the alleged contract being the agreement entered with BRSI as agent for the defendant, with the alleged breach being the application by the defendant of the money paid by the claimant to interest rather than to principal. These are allegations which are currently part of the pleadings.
- [29]** The third proposed amendment is to paragraph 23. This paragraph currently reads: 'The defendant threatens unless restrained by this Honourable Court to unlawfully sell the claimant's property'. The amendment seeks to completely delete this paragraph. According to Mr McBean, injunctive relief is no longer being sought as it is acknowledged that the property has been sold. I do not see how this proposed amendment can be objectionable.
- [30]** The fourth and last amendment is to paragraph 24 (3). Paragraph 24(2) seeks an account of the money paid by the claimant to the defendant under the mortgage. Paragraphs 20 and 21 plead an implied term in the mortgage to account when requested and that the defendant has failed, refused or neglected to render an account although the claimant has requested that it do so. The pleaded paragraph 24(3) reads that the claimant seeks: "An order for the payment by the defendant to the claimant of all monies found to be due to it on the taking of (sic) successful (sic). The amendment seeks to add the word "a" before the word "successful" and the word "account" after the word "successful". Paragraph 24(3) as currently drafted is clearly incomprehensible. The proposed amendment is to correct obvious omissions in the drafting of the paragraph. The earlier pleadings in paragraphs 20 and 21 foreshadow a claim for an account. An accepted relief flowing from paragraphs 20 and 21 is an order for the defendant to pay to the claimant money found due to it arising from the account being taken. With the proposed amendment to paragraph 4, which I find unobjectionable for the reasons already given, the pleadings in relation to the implied term in paragraphs 20 and

21 would no longer be inadequate. The consequence of that is that the claim for an order to account would not be a new case to answer. But are these proposed amendments affected by the foreclosure?

[31] In **Millar Dunbar v St Catherine Co-operative Credit Union** (supra), Brooks JA (as he then was) in referring to the effect of foreclosure under section 120 of the ROTA said at paragraph 54 that:

“[54] Upon foreclosure, the mortgagee not only supplants the mortgagor, but unlike an exercise of a power of sale contained in a mortgage, after foreclosure, the mortgagee has no obligation whatsoever to account to the mortgagor. Although the procedure for foreclosure is different under the Torrens system than under the common law, the consequence is the same. The learned authors of **Land Law 6th Edition, Kevin Grey and Suzan Francis Grey**, speaking to the common law and English procedure, describe foreclosure, in paragraph 6112, as:

“...the most draconian remedy open to the mortgagee in the event of default by the mortgagor. Foreclosure abrogates the mortgagor’s equity of redemption and leaves the entire value of the mortgaged land in the hands of the mortgagee irrespective of the amount of the mortgage debt...”

[32] With the equity of redemption being extinguished and the foreclosure not challenged, I agree with Mr George that there would be no basis on which the claimant can seek to have the defendant account for the mortgage payments made on the ground of an implied term in the mortgage. Both Simmons J in **JMMB Bank (Jamaica) Limited (Formerly JMMB Merchant Bank Limited) v Winston Finzi and Mahoe Bay Company Limited** (supra) and Morrison JA (as he then was) in **Capital and Credit Merchant Bank Ltd v The Real Estate Board, consolidated with The Real Estate Board v Jennifer Messado & Co** (supra), stated that the remedy of an account is the means by which money owed by one party to another

party is established. The foreclosure, having not been reopened or challenged, the claimant cannot by its claim, now seek to have the defendant account for the application of mortgage payments with the goal being to ascertain whether money is owed by it or to it under the mortgage. The claimant's right to do so has completely been extinguished. In the fine, I accept that the effect of the foreclosure, is that the claim for an account based on the allegation of an implied term in the mortgage is now unsustainable.

[33] King's Counsel argued in his written submissions that an account in relation to the breach of the alleged contract or compromise agreement, between the claimant and the defendant, acting through its agent BRSL, is sustainable, despite the foreclosure. But the difficulty with this argument is that the current pleadings, as well as the proposed amendments, do not seek an account in relation to this agreement. The account sought is only premised on what is alleged to be an implied term in the mortgage. As I understand the proposed Further Amended Particulars of Claim, paragraphs 23(2) and (3) must be read together. The former seeks an account of the monies paid by the claimant to the defendant under the mortgage. The latter paragraph is the follow-on order which is an order for the payment by the defendant to the claimant of all money found to be due to it on the taking of a successful account. The reference to: "a successful account" in 23(3), is obviously a reference to the account sought to in 23(2).

[34] The foreclosure, however, does not affect the claimant's claim for breach of contract. If there are findings that there was a contract entered by the claimant with the defendant, though it's agent BRSL, which is binding on the defendant and that there was a breach of that contract by the defendant applying the claimant's payment of the sum of \$824,845.00, towards interest rather than towards principal, foreclosure does not bar the claim.

[35] In **Millard Dunbar v St Catherine Co-operative Credit Union** (supra), one of the grounds of appeal raised by the appellant mortgagor, was that the learned trial judge failed to fully appreciate that the breach by the respondent of the

representation it made to the appellant that if a requested payment was made and a buyer for the mortgaged property not found, the property would not be sold; amounted, among other alleged actions, to a scheme to defraud the Registrar of Titles. At first instance, the trial judge had found that the representation made by the mortgagee amounted to nothing more than an “agreement to negotiate” and not a binding contract and could therefore not form the basis on which to argue that pursuing foreclosure proceedings, amounted to a breach of contract. I agree with Mr Sheckleford that in the court of appeal, arguments on this issue focused on a breach of representation as evidence of fraud, and that such an alleged breach lies in tort. But as I understand it, the reliance by the claimant on both the first instance decision and the court of appeal decision is to demonstrate that had there been a finding of a compromise agreement, it is likely that the court would have found that proceeding to foreclosure amounted to a breach of that agreement. I agree with that proposition.

Conclusion

- [36]** The proposed amendment to paragraph 4 of the amended particulars of claim, refers to the transfer of the mortgage to LOJ, a fact pleaded by the defendant in its defence, and therefore will not change in any significant way, the case the defendant has to meet. While the proposed amendment to paragraph 19 of the amended particulars of claim, to refer to the property being sold, is a new factual issue, the defendant’s own witness statement speaks to the mortgaged property being sold by private treaty after foreclosure. This proposed amendment is plainly consistent with the defendant’s own intended evidence and as such, will not in my view, cause any injustice to the defendant. The claimant is therefore permitted to amend paragraphs 4 and 19 of the amended particulars of claim and the defendant will be entitled to file an amended defence.
- [37]** The current pleadings disclose a claim for an alleged breach of contract entered between the claimant and the defendant through its agent BRSL That claim is not barred by the foreclosure. However, the claim to an account based on an alleged

implied term in the mortgage is unsustainable in light of the foreclosure which extinguished the equity of redemption. I therefore find that foreclosure now bars the claimant from relying on an implied term in the mortgage to seek an account. Paragraphs 20, 21, 24(2) and 24(3) of the amended particulars of claim must therefore be struck out.

[38] Since the property was sold in 2016, it is evident that the claimant can no longer seek an injunction restraining its sale. In fact, it was indicated in submissions on its behalf that injunctive relief is no longer being pursued. Paragraphs 23 and 24(1) of the amended particulars of claim must therefore also be struck out.

[39] In my view, the overriding objective favours allowing the proposed amendments to paragraphs 4 and 19 of the amended particulars of claim. These amendments are needed to determine the real disputes between the parties which are: a) whether the correspondence between BRSL and the claimant amount to a contract binding on the defendant; b) whether the defendant is in breach of that contract and c) if there was a breach of contract, whether the claimant is entitled to damages.

Orders

[40] In the result, I make the following orders: -

- a) The claimant's application to amend paragraphs 4 and 19 of the amended particulars of claim is granted.
- b) The claimant's application to amend paragraph 24 (3) is refused.
- c) Paragraphs 20, 21, 23, 24(1) 24(2) and 24(3) of the amended particulars of claim are struck out.
- d) The claimant is to file further amended particulars of claim in accordance with this order on or before July 28, 2023. The defendant is permitted to file an amended defence within 42 days of service. The trial is adjourned part heard to **March 13 and 14, 2024.**

- e) The claimant is to file and serve a Supplemental Judge's Bundle on or before **February 23, 2024**.
- f) Costs of the application to amend to the defendant.

**A Jarrett
Puisne Judge**