[2023] JMSC Civ 187

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. SU 2022 CV 01659

BETWEEN	**MILLARD DEVELOPMENT COMPANY LIMITED**	**CLAIMANT**
AND	**ROXANN MARS**	**DEFENDANT**

IN CHAMBERS

Jerome Spencer for the claimant

Emile Leiba and Chantal Bennett instructed by DunnCox for the defendant

HEARD: 13 JULY & 4 OCTOBER 2023

Civil Procedure – Rule 15.2 – application for summary judgment – whether there is a real prospect of successfully bringing or defending the claim – Real property law – unpaid purchase price – whether vendor's lien created – whether vendor's lien abandoned – whether there was a variation of the agreement for sale – Limitation of Actions Act – whether the claim for unpaid balance of purchase price is statute-barred – Company law – whether settlement agreement signed by one director is binding on the company

MASTER C THOMAS

INTRODUCTION

[1] The parties in this claim have each applied for summary judgment. The claimant is a real estate and property development private company that is incorporated under the laws of Jamaica and the defendant is an attorney-at-law. These two

applications are connected to a claim that was filed on 20 May 2022, which emanates from an agreement for sale dated 13 February 2014 ("the sale agreement") which was entered into between the claimant and the defendant. By that agreement, the claimant agreed to sell, and the defendant agreed to buy Apartment No. 5 located at Nos. 10-12 Dillsbury Avenue, Kingston 6 in the parish of St Andrew ("Apartment No. 5").

The claim

[2] The claimant seeks the following substantive reliefs:

> 1. The sum of J$12,800,000.00 and interest on that sum at a commercial rate of interest pursuant to the Law Reform (Miscellaneous Provisions) Act for such period of time as this Honourable Court determines.
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> 2. A declaration that all that parcel of land registered at Volume 1482 Folio 911 of the Register Book of Titles bearing the civic address Apartment 5, 10-12 Dillsbury Avenue, Kingston 6 in the parish of St Andrew is charged with repayment of the sum of J$12,800,000.00 and interest on that sum at a commercial interest rate of interest pursuant to the Law Reform (Miscellaneous Provisions) Act for such period of time as this Honourable Court determines until the date of judgment.
>
> 3. An order for the sale of the apartment and for the proceeds to be applied to the satisfaction of the amounts due to the claimant.
>
> 4. …
>
> 5. …

[3] Paragraphs 3-9 of the particulars of claim, in summary, aver that:

(i) The defendant provided legal services to the claimant for approximately seven (7) years commencing 2014 and ceased to represent the claimant in 2022.

(ii) The sale agreement was for the sale of Apartment No. 5 and to provide related services "referable thereto" for the sum of J$25,000,000.00.

(iii) The defendant represented herself and the claimant as well as had carriage of sale of the apartment;

(iv) A deposit of J$3,000,000.00 was paid by the defendant to the claimant on account of the sale and an equitable charge or lien was created in the claimant's favour to secure the payment of the balance purchase price;

(v) The defendant is registered as the owner of the apartment and a further payment of J$8,500,000.00 was paid after the deposit but to date, the defendant has failed to pay the outstanding balance of J$12,800,000.00; and

(vi) The claimant repeatedly demanded payment of the balance purchase price and the defendant has failed to pay the balance purchase price and interest thereon.

[4] The defendant's response, by way of her defence filed 14 June 2022, is:

(i) She is disputing the claim on the basis that the claim form and particulars of claim were not served on her, but on her secretary.

(ii) She did provide legal services for the period pleaded by the claimant.

(iii) She represented herself and the claimant in the sale, and her representation of the claimant was on its instructions.

(iv) The purchase price for Apartment No. 5 was not J$25,000,000; it was J$20,000,000.00.

(v) She had paid the deposit and had complied with the terms of the sale agreement and no charge arose in the circumstances.

(vi) There was an agreed variation of the terms of the sale agreement in which the claimant agreed to accept a reduced sale price and this agreed variation was reflected by the execution of the transfer of property by the claimant upon receipt by the claimant of a reduced sale price of J$11,5000,000.00.

(vi) It was denied that the claimant had made repeated demands for the balance purchase price and the first time that she became aware that the claimant was making any claim in respect of Apartment No. 5 was upon receipt of the claim documents from her secretary.

(vii) The sale agreement having been entered into and performed in 2014, any claim arising from the agreement was statute-barred pursuant to section 46 of the Limitation of Actions Act.

(viii) In May 2022, the principal of the claimant, Mr Michael Millwood ("M Millwood"), executed a document entitled "Settlement Agreement, Release and Discharge" ("the settlement agreement") signing on his own behalf and on behalf of the claimant, whereby in exchange for valuable consideration he and the claimant released and discharged the defendant from any and all claims that either he or the claimant may have against the defendant. The claimant is bound by the terms of the settlement agreement and the claim was filed in breach of the express terms of the agreement.

[5] The claimant filed a reply to the defence, in which it was averred that:

(i) There was no discount or variation; and accordingly, the defendant issued a statement of account dated 8 June 2015, which reflected a balance due to the claimant of J$12,800,000.00.

(ii) By virtue of section 33 of the Limitation of Actions Act, the claim is not statute-barred.

(iii) The settlement agreement was legally ineffectual and unenforceable against the claimant as it was not executed by the claimant nor did the claimant's principal understand that it was intended to bind the claimant. On its true construction, the settlement agreement only applied to sums and items gifted to the defendant and did not apply to sums legally due to the claimant from the defendant for legal services provided by her. Also, the claimant was not afforded the opportunity to seek and obtain legal advice before the settlement agreement was signed by the claimant's principal, as the defendant is aware; and the document did not apply to security interests in real property created in favour of the claimant by operation of law and/or equity. Further, or in the alternative, if the document does apply to security interests in real property, it is an agreement which contravenes section 10 of the Property Rights of Spouses Act ("PROSA").

[6] On 26 September 2022, the defendant filed her application seeking summary judgment; or in the alternative, that the claim be struck out and judgment entered for the defendant. The defendant relied on 10 grounds, the substantive ones being those outlined at grounds 4-8 of the application. I will not set them out because I think that they are encapsulated in the issues identified in the application as requiring a determination by the court. These issues as stated are:

(i) Whether the claimant has a real prospect of succeeding on the claim;

(ii) Whether there were circumstances to vitiate the creation of a lien and instead support a variation of the purchase price and acceptance of the said variation to Eleven Million, Five Hundred Thousand Dollars (J$11,500,000.00);

(iii) Whether an equitable lien or charge was created on the property; and if so, whether the said lien was defeated, discharged and/or waived;

(iv) Whether the claim brought by the claimant company is barred by statute;

(v) Whether the signed Settlement Agreement, Release and Discharge is subject to the PROSA legislation; and

(vi) Whether the signed Settlement Agreement Release and Discharge is legally enforceable and provides a complete defence for the defendant.

[7] The application was supported by an affidavit sworn to by the defendant. Among other things, she deponed that after the sale agreement was signed, due to the then personal relationship between her and the principal of the claimant that existed at the time, the claimant agreed to and accepted a reduced sale price of J$11,500,000.00 and that there was no intention for the creation or operation of a lien for the unpaid sum. She also deponed that by way of a deposit of J$3,000,000.00, and mortgages from National Commercial Bank ("NCB") and National Housing Trust ("NHT") for the combined sum of J$8,500,000.00, she paid the total of J$11,500,000.00 to complete the purchase of Apartment No. 5 and the claimant executed the transfer of the title for the apartment in her name upon the said sum being paid. The sale agreement was completed in 2014 with the final payment made on 5 January 2015. She was let into possession of Apartment No. 5 in 2014 and enjoyed

sole undisturbed possession since that time. Neither the claimant nor its principal made any claim for any sums relating to the apartment until the instant claim was filed. To the contrary, the claimant's principal, sometime after the sale was completed, provided her with funds to settle the balance owing on the loan issued by NCB in respect of the apartment and in 2017, she also purchased the property where her office is currently located from the claimant with assistance of loan financing from NCB.

[8] She deponed that the claim was filed after her relationship with the claimant's principal, M Millwood, ended in March 2022 and that prior to the filing of the claim, the claimant and its principal at no time requested payment of the sums in respect of the apartment. In April 2022, consequent on a claim being made by M Millwood for sums previously given to her as a gift, by M Millwood through the claimant, the claimant was repaid the said sums and accepted these sums in full and final settlement of all sums due and owing to M Millwood and the claimant, M Millwood executing a Settlement, Agreement, Release and Discharge which he signed on his behalf and on behalf of the claimant whereby for valuable consideration he and the claimant released and discharged the defendant from any and all claims that either he or the claimant may have against her. The agreement was signed after feedback from the claimant's employee in which an amendment to the agreement was effected. Further, the claimant's principal acted with competence and was not unduly influenced when he signed the agreement.

[9] She also deponed that the claimant's principal was at all material times a married man and she never contemplated an agreement under section 10 of the Property Rights of Spouses Act ("PROSA"). Also, the claimant is a company and she and the claimant made no agreement in contemplation of section 10 of PROSA.

[10] The claimant's application, filed on 1 May 2023 seeks an order that the defence be struck out and that judgment be entered on the claim for the

claimant. The issues identified by the claimant to be considered by the court are also encapsulated in the grounds, which were stated as follows:

> 1. Does the claimant owe the defendant the balance purchase price from the sale of the relevant apartment?
>
> 2. Does that unpaid purchase price constitute an equitable lien or charge over the apartment?
>
> 3. What is the relevant limitation period?
>
> 4. Is the Settlement Agreement, Release and Discharge enforceable against the claimant?

[11] The claimant's application was supported by an affidavit sworn to Greg Millwood ("G Millwood") which was also relied on in opposition to the defendant's application. G Millwood, who deponed that he is a shareholder and director of the claimant, stated that the sale agreement was for the sale of Apartment No. 5 and to provide the defendant with related services referable to the sale of Apartment No. 5 and that the sale price of the apartment, independent of the price for the claimant's services, was J$20,000,000.00. The sale price of the apartment would ordinarily have been J$30,000,000.00, but as a gesture to the defendant, this price was reduced to J$20,000,000.00.

[12] G Millwood deponed that the defendant represented herself and the claimant in the sale and she had carriage of sale. It was the expectation of the claimant that the defendant would ensure that her personal interests would not impede her professional obligations to the claimant in conducting the sale. G Millwood's evidence in relation to the moneys paid by the defendant under the sale agreement did not differ from the defendant's evidence, save that he stated that the balance owing under the sale agreement was J$12,800,000.00 which remains outstanding. He exhibited two statements of account prepared by the defendant, one of which was dated 8 June 2015 in which it was indicated by the defendant that the balance due to the claimant was

J$12,800,000.00. He stated that to date, the defendant has failed to pay the balance due as per her statement of account dated 8 June 2015.

[13] G Millwood deponed that his father (M Millwood) with whom the defendant had had a romantic relationship at the time of the sale agreement, had advised him that (i) during the course of M Millwood's personal relationship with the defendant, M Millwood gifted her with, inter alia, $5,000,000.00 and jewellery to include a matching gold necklace and bracelet as a birthday gift; (ii) after the relationship ended, M Millwood was so upset and hurt that M Millwood demanded the return of the aforementioned gifts from the defendant; (iii) the defendant agreed to the return of the gifts but solely on the basis that M Millwood and the claimant abandon any claims against the defendant that they had arising from M Millwood's personal relationship and the claimant's professional services, respectively. The defendant subsequently prepared a document called "Settlement Agreement, Release and Discharge" for M Millwood to sign, which he did. He simply signed as he was directed by the defendant, who at no time, encouraged him to seek independent legal advice. G Millwood deponed that having seen the settlement agreement, he had observed that it was undated and was only signed by M Millwood, which is not how the claimant executes agreements and contracts. As the defendant was aware from her former position as the claimant's attorney-at-law, all contracts and agreements executed by the claimant bear the signature of two directors or a director and the company's secretary and are then affixed with the company's seal. This was not done for the settlement agreement and he exhibited an example of a sale agreement dated 14 September 2012, which was signed by two officers of the claimant. He disagreed with the defendant that there was a variation of the sale agreement in respect of the price and this, he contended, was supported by the fact that almost a year after the sale agreement was signed, the defendant had issued her statement of account reflecting the balance of J$12,800,000.00. G Millwood deponed that he was advised by M Millwood that prior to the claim being filed, the claimant through M Millwood, had made oral demands for payment from the defendant.

[14] The defendant responded to G Millwood's affidavit by way of her affidavit filed on 16 May 2023, in which she disputed G Millwood's claim that he is a shareholder of the claimant and asserted that G Millwood was only a director. Exhibited to her affidavit was a status letter issued by the Companies Office of Jamaica. The defendant deponed that she was the attorney for the claimant from 2014 to 2022 and represented it in numerous transactions concerning the sale of strata lots for apartment buildings developed by it and as a result, had drafted numerous agreements for sale for the claimant and had witnessed the vendor's signature on numerous agreements signed solely by a director of the claimant, M Millwood. During the time that she acted as the claimant's attorney, she received instructions solely from M Millwood, who had signed the claim form in the instant proceedings, and based on her experience working with the claimant, it operated as a one-man company headed by M Millwood, who is assisted by a secretary and a front desk clerk.

[15] The defendant deponed that as a gesture of its principal, and, in the context of her relationship at the time with the claimant's principal, in 2015, the sale price for the apartment was reduced to J$11,500,000.00 and the sum was paid. She categorically denied that any money is owed to the claimant relating to the purchase of the apartment or at all. She asserted that she complied with her ethical obligations to the claimant during the sale agreement. She deponed that at the end of the relationship between her and M Millwood, which was between February and March 2022, it became extremely acrimonious as the claimant's principal requested that she return all gifts that she had received, both real and personal; as a result she had requested legal advice and this resulted in her attorneys-at-law preparing the settlement agreement. She also deponed that the settlement agreement was signed by M Millwood in his personal capacity and as director of the company. Further M Millwood had executed numerous sale agreements, instruments of transfer and contracts on behalf of the claimant without another director or the company secretary signing. She personally knew of sale agreements signed solely by M Millwood that were more proximate in time than the 2012 agreement

exhibited by G Millwood. She referred to provisions of the settlement agreement which expressly indicated that by signing it, the signatories (the claimant and M Millwood) received legal advice.

[16] The defendant also deponed that since 2015, neither the claimant nor M Millwood had requested any sums owed in relation to the apartment. It was only after the relationship was unilaterally terminated by the defendant that the claimant is now seeking the monies owed.

[17] As will be observed from the issues raised by the applications, the issues are the same and thus the arguments advanced in relation to each were the same. Therefore, though I had indicated that I would hear the defendant's application first, it would be a duplication of effort to set out the arguments separately and so the arguments advanced by the defendant on both applications will be set out followed by the claimant's arguments in respect of both.

The submissions

Submissions on behalf of the defendant

[18] In written submissions, reliance was placed on the learned author Stuart Sime in his text A Practical Approach to Civil Procedure 5th edn for the submission that striking out is closely related to the jurisdiction to enter summary judgment and on rule 15.2 of the Civil Procedure Rules ("CPR") concerning the power of the court to enter summary judgment. Counsel referred to the authorities of **Swain v Hillman** [2001] All ER 91 for the threshold test and on **Demetrius Seixas v Tricia Maddix-Blair** [2022] JMSC Civ 103 for the principles to be applied to a consideration of an application to enter summary judgment.

[19] It was submitted that despite the general principle that a vendor's lien for the unpaid whole or part of the purchase money subsists until actual payment even where the conveyance has been executed and the purchase money is

expressed in the conveyance to have been paid and received, a lien can be excluded where its retention would be inconsistent with the provisions of the contract for sale or with the true nature of the transaction as disclosed by the documents. Further, an equitable lien may be abandoned if the person entitled to the lien so intends; the intention may be inferred from the lien holder's conduct and the surrounding circumstances, and the test is an objective one. Reliance was placed on Halsbury's Laws of England Vol 68 (2021), paras 960 and 981 and **Farren Loyd Brown and Victoria Brown v Mandolin Investment Group LLC and Metro Funding Corporation** Claim No 2010 HCV 02855 (delivered 20 September 2011) and **Earline Lawrence v Dean Edwards** [2017] JMSC Civ 12. It was argued that based on clause 4 of the sale agreement concerning completion, the issuance of the instrument of transfer and the registration of title, it was never intended for there to be a lien on the apartment. However, if the claimant had a legal lien when the sale agreement was signed, this came to an end when the conveyance was executed and possession given to the defendant without more. With respect to the allegation concerning the statement of account issued for J$12,800,000.00 in June 2015 after the sale proceeds were paid, it was argued that if this amount represented an equitable lien, this equitable lien was abandoned by the claimant based on its actions since 2015 to the filing of the instant claim when at no point did the claimant indicate or request in writing payment of these sums.

[20] Counsel also submitted that if an equitable lien existed and was not discharged through the payment of the remaining purchase price from the mortgage proceeds, the settlement agreement waived the claimant's rights to claim an equitable lien, and in the alternative, by virtue of clause 4 of the settlement agreement, the equitable lien was extinguished. It was also submitted that the basic principle of the common law of contract is that parties to a contract are free to determine for themselves what primary obligations they will accept without the courts adopting an activist approach to renegotiate commercial bargains. With respect to the signing of the

agreement by one director only, in oral submissions Mr Leiba submitted that the claimant has not put forward any copy of the articles of incorporation or commencing document on behalf of the company so as to put the court in a position to determine whether the signature of the claimant's principal was sufficient to bind the company. The signature of M Millwood was not disputed and it was accepted that he is the principal of the company. Relying on **Freeman v Buckhurst Park Properties Mangal Ltd** [1964] 2 QB and **Karin Murray v Brilliant Investments Ltd & Ors** [2022] JMSC Civ 67, it was submitted that companies can act through agents and the actions of directors including a sole director have been held to bind a company. Consequently, the settlement agreement is binding upon the claimant since the claimant's principal acted with actual or ostensible authority in executing it and it was not required to be under seal as there was consideration. The settlement agreement also stated that the claimant's principal signed on his behalf and that of the company and the agreement indicated that its execution was voluntary. His signature would bind the claimant and the burden of proof is on the claimant to disprove this. Also, there was no claim seeking to dispute the validity of the settlement agreement; instead, there is merely a legal argument as to the effect of the agreement.

[21] Mr Leiba also submitted that when the reliefs in the claim form are examined as well as the particulars of claim, it is clear that the claim is in the nature of a debt claim and is not primarily a claim for a lien. Consequently, section 46 of the Limitation of Actions Act would be applicable. The 6-year limitation period had therefore expired as the final payment under the sale agreement was made on 5 January 2015.

[22] Where PROSA is concerned, it was submitted that section 10 of the Act is not applicable as the claimant and the defendant are not spouses as defined under section 2 of the Act. If, however, the court was of the view that section 10 of PROSA is applicable, the agreement meets the requirements of section 10 on the agreed positions between both parties since the agreement included

a voluntary execution clause. Further, notwithstanding whether the agreement meets the formalities of section 10, section 10(7) gives the court authority to determine the effects such an agreement will have, where it does not comply with the formalities. Reliance was placed on **Crooks-Collie v Collie** [2022] JMCA Civ 7 and it was submitted that the settlement agreement was valid and there is evidence that the parties intended for it to be binding by way of email communications between the defendant and the claimant's principal.

[23] Mr Leiba submitted that when the court examines the facts that are not in dispute, specifically that (i) there was a personal relationship between the claimant's principal M Millwood (ii) this relationship was in existence at the time of the sale agreement; (iii) this relationship came to an end in February 2022; (iii) the claim was filed in May 2022; (iv) there is no documentary evidence supporting any demand for payment prior to the filing of this claim; (v) the claimant's principal M Millwood assisted the defendant in paying off one of the mortgage loans for Apartment No. 5; (vi) the defendant purchased the property where her office is located with funds provided by the claimant subsequent to the sale agreement; (vii) the claimant through its principal gifted the defendant with the sum of J$5,000.000.00, they are more consistent with the way in which the defendant asserts that the sale agreement took place rather than what the claimant's director, G Millwood, has put forward. Relying on **Sagicor Bank v Taylor Wright** [2018] UKPC 12, it was submitted that on the undisputed facts, this would be an appropriate case for summary judgment.

[24] With respect to the claimant's application, Mr Leiba submitted that any submissions on the defendant's conflict of interest was irrelevant based on the claim as filed as the claim as filed indicates what is before the court and so the issues as to the personal and professional relationship between the defendant and the claimant's principal do not answer the application.

Submissions on behalf of the claimant

[25] Reliance was placed on **Fiesta Jamaica Limited v National Water Commission** [2010] JMCA Civ 4 and **Swain v Hillman** for the approach of the court to summary judgment and on **Lauriston Stewart v National Commercial Bank** [2014] JMCC Comm 1 and **Sagicor Bank v Taylor-Wright** for the submission that summary judgment may be entered even where there are factual disputes. In the former case, though there were disputes of fact, the court accepted that summary judgment could be ordered where factual assertions made by one party had been contradicted by contemporaneous documents and the behaviour of the claimant.

[26] It was submitted that this case exemplifies the substantial risk involved in an attorney-at-law in a conveyancing transaction representing herself and the vendor and also having carriage of sale. If this were not enough to require that the defendant proceed with caution, any such doubt was removed as a result of the defendant's involvement with the claimant's principal. The defendant placed herself in the most unfortunate of predicaments and failed to take the necessary measures to insulate herself and her client. Although the defendant had acknowledged that she had certain ethical and professional obligations arising from the context of this sale and that she had fully complied, she did not elaborate as to what she had done.

[27] With respect to the variation of the sale agreement, relying on **Barrington Scott Clarke v Kimesha Amelia Debbie-Ann Notice** [2021] JMSC Civ 12, Mr Spencer submitted that because the sale agreement was in writing and its contents were clearly intended to represent the complete agreement between the parties, based on the parole evidence rule, the defendant could not seek to contradict or vary the terms of the agreement. The claimant was represented by the defendant who represented herself and there could be no stronger inference that the claimant and the defendant intended the sale agreement to be final and conclusive. Counsel pointed out the following significant facts as militating against a conclusion that the sale agreement had been varied: (i) the

defendant's statement of account, which was prepared a considerable time after title to Apartment No. 5 was transferred to the defendant, acknowledging that the defendant still owed the sum of $12,800,000.00; (ii) there was no documentary evidence of the supposed reduction to $11,500,000.00; the facts that the defendant represented both herself and the claimant in the sale and that she was in a personal relationship with the claimant's principal, mandated that the defendant adopt a "belt and braces approach" in her representation of the claimant, which would include documenting a material reduction in the sale price; and (iii) when confronted with her statement of account, the defendant sought to contend that the reduction of the sale price was in 2015 instead of 2014 as she had asserted in her previous affidavit.

[28] Mr Spencer relied on the case of **Lysaght v Edwards** [1879] 2 Ch 499 and **Ken's Sales & Marketing Ltd v Cash Plus Development** [2015] JMCA Civ 14 for the submission that when a purchaser fails to pay the purchase price on a property, in equity, the vendor has a lien or charge for the balance of the unpaid purchase price. By virtue of section 33 of the Limitation of Actions Act, the limitation period for claims to recover money secured by a lien at law or in equity on real estate is 12 years. The defendant having acknowledged on 8 June 2015 the $12,800,000.00 as being due, the limitation period would expire on 7 June 2027 and therefore, the claim is not statute-barred.

[29] In relation to the defendant's argument that she had not received any demand after the transfer of title to her, Mr Spencer argued that the statement of account dated June 2015 was issued approximately six months after the transfer of the property to her. So, the defendant well knew that although the property was transferred to her, she still had a pending obligation to the claimant reflected in the statement of account that the balance was owing. Certainly, this must constitute a demand on herself.

[30] It was also submitted that the settlement agreement was signed by a single director and did not bear the claimant's seal. Although the defendant had asserted in her evidence that she had seen countless sale agreements,

instruments of transfer and contracts signed by one director, she did not produce any of these documents nor had she accounted for their absence. This was significant in light of the fact that the claimant had exhibited a sale agreement which a director and secretary had signed with the seal of the company affixed and both the sale agreement for Apartment No. 5 and the instrument of transfer were executed by the claimant's director and secretary. Mr Spencer argued that **Freeman v Buckhurst Park Properties Mangal Ltd** is inapplicable as that case involved the authority of agents of a company vis-à-vis dealings with third parties. In this case, the defendant was not a third party nor a stranger as the defendant had been the claimant's attorney-at-law for several years. This was a case of actual authority. The defendant knew based on documents that agreements and contracts as well as transfers had to be signed by 2 officers of the company and affixed with the company's seal. There can be no doubting that the defendant well knew that to bind the claimant under the purported settlement agreement, in light of her personal relationship with the claimant's principal, two officers had to sign, and the seal had to be affixed.

Preliminary Observation

[31] It is necessary to point out at the outset that even though the defendant had raised in her defence and in her affidavit in support of her application that she had not been served with the claim documents, this was not made the basis of any application by her nor was it included as a ground in the application currently before the court. It is my view that in these circumstances, it is reasonable to infer that the defendant has waived the requirement for service and has submitted to the jurisdiction of this court.

Discussion and Analysis

[32] I am of the view that issues (ii) – (vi) as raised by the defendant, which overlap with the issues raised by the claimant, accurately capture the substantive

issues raised in the claim and will adopt them in my determination of the applications. Issue (i) reflects the test for summary judgment as prescribed by rule 15.2 of the CPR. Before embarking on an examination of the substantive issues, I will briefly set out the principles applying to a summary judgment application. In **Seixas v Maddix Blair,** I adumbrated the following principles as emanating from the various authorities, which are not exhaustive:

> (i) The case [that is the subject of the application] must be more than just arguable; however, it does not require a party to convince the court that his case must succeed (**International Finance Corporation v Utexafrica SPRL** [2001] EWHC 508**,** relied on by Simmons J (as she was then) in **Cecelia Laird [v Ayana Critchlow & Kinda Venner** [2012] JMSC Civ 157]).
>
> (ii) The burden of proof is on the applicant to prove that the other party's case has no real prospect of success (**Island Car Rentals v Lindo** 2015 JMCA App 2; **Cecilia Laird**).
>
> (iii) Where the applicant establishes a prima facie case against the respondent, there is an evidential burden on the respondent to show a case answering that which has been advanced by the applicant. A respondent who shows a prima facie case in answer should ordinarily be allowed to take the matter to trial (*Blackstone's Civil Commentary* 2015, para 34.11).

(iv) The court will be guided by the pleadings as well as the evidence filed in support of the application (**Sagicor Bank v Taylor Wright**).

(v) The court must exercise caution in granting summary judgment in certain cases, particularly where there are conflicts of facts on relevant issues which have to be resolved before a judgment can be given (**Bolton Pharmaceutical Co 100 Ltd Doncaster** [2006] EWCA Civ 1661**; Cecilia Laird**)

(vi) …

It is necessary to add that although the court must exercise caution in granting summary judgment where conflicts of facts arise, this does not inexorably mean that where there are conflicts of fact, the court is disabled or precluded from critically examining the case that is the subject of the summary judgment application to determine whether it meets the required threshold. **Lauriston Stewart v National Commercial Bank** is a case in which Sinclair-Haynes J (as she then was) granted summary judgment on a claim for "an account of the proceeds of a deposit made by the claimant in a commercial paper account with the defendant in the sum of ten million dollars $10,000,000.00". This was disputed by the defendant bank and on the bank's application for summary judgment, Sinclair-Haynes J found that the behaviour of the claimant over twelve years contradicted his assertion that he had $10,000,000.00 in commercial paper with the defendant bank. In coming to this conclusion, the court considered contemporary documentary evidence in the form of letters passing between the claimant and the defendant. **Delroy Howell v Royal Bank of Canada & ors; Ocean Chimo Limited v Royal Bank of Canada & ors** is a Court of Appeal decision in which though there were conflicts of fact and it involved voluminous

documents, the court found that it was an appropriate case for the grant of summary judgment. Indeed, in the instant case, both parties by the filing of their summary judgment applications and submissions made during oral submissions are of the view that though there are clearly issues of fact, this is an appropriate case for summary judgment.

[33] It is now necessary to consider the issues. I am of the view that issues (ii) and (iii) are inextricably bound up and it is therefore appropriate to consider them together.

Whether there are circumstances to vitiate the creation of a lien and instead support a variation of the purchase price and acceptance of the said variation to Eleven Million, Five Hundred Thousand Dollars (J$11,500,000.00);

Whether an equitable lien or charge was created on the property; and if so, whether the said lien was defeated, discharged and/or waived;

[34] The sale agreement supports the defendant's contention that the sale price of the property was J$20,000,000.00. However, the statement of account dated 8 June 2015, which the claimant is relying on and which is not denied by the defendant as being prepared and issued by her, supports the claimant's contention that there was an agreement between the claimant and the defendant for "related services referable" to the agreement for sale for J$5,000,000.00. This is indicated in the statement of account as an "installation price" of J$5,000,000.00. Therefore, while I accept the defendant's contention that the sale price for the apartment was the price of J$20,000,000.00 stated in the sale agreement, I am of the view that there is evidence that there was an agreement between the parties with respect to the provision of services related to the apartment for the price of J$5,000,000.00. However, there being no express term included in the sale agreement speaking to the provision of the installation services, it cannot be said that the sale agreement embodied the agreement for the provision of installation

services. Therefore, any unpaid vendor's lien on Apartment No. 5 would be in respect of the balance owing of J$20,000,000.00 and not J$25,000,000.00.

[35] With respect to the defendant's contention that there was a variation of the sale price from J$20,000,000.00 to J$11,500,000.00, I find that there are a number of difficulties with accepting this position. Firstly, as was submitted by Mr Spencer, the parol evidence rule would operate as a bar. The parol evidence rule, as articulated by Wolfe-Reece J in **Barrington Scott Clarke v Notice** is that there is a rebuttable presumption that where a contract has been reduced to writing the court ought not to look to parol evidence to qualify, add to, alter or contradict the terms of the agreement unless it can be shown that the written agreement does not form the entire contract. In **Harley Corporation Guarantee Investment Company Limited v Daley & Ors; RBTT Bank Jamaica Limited v Daley & Ors** [2010] JMCA Civ 46, Harris JA explained the rule this way:

> As a general rule, where parties embody an agreement in a written document, oral evidence is inadmissible for the purpose of subtracting from, varying, or in any way modifying the written agreement – see **Reliance Marine Insurance v Douskers** (1914) 3 KB 907; and **Jacob v Behari and Anor** (1924) 1 Ch 287. There are, however, exceptions to this rule. Extrinsic evidence may be admitted to show that, on the face of it, what seems to be a binding contract is not in fact a contract – see **Mackinnon v Foster** (1869) LR 4 CP 704; and **Lewis v Clay** (1898) 67 LJ QB 224. Such evidence may also be admitted to prove the true nature of an agreement between parties or the question of their legal relations. Its admissibility may also be used to show custom of a particular locality – see **Smith v Wilson** (1892) 3 B & Ad 728, or a particular trade - **Grant v Maddix** (1846) SM & W 737.

In **Harley Corporation**, the issue was whether a mortgage agreement which required that a mortgagee bank give consent to the sale of the mortgaged property had been varied. Harris JA found that it could not be varied as it did not fall within any of the exceptions outlined above. Although the facts of the case at bar are slightly different from **Harley Corporation**, I am compelled to a similar conclusion, that is, none of the exceptions for variation apply and therefore the sale agreement could not be varied.

[36] Secondly, even if the sale agreement could be varied as falling under one of the established/outlined exceptions, there is no credible evidence as to the nature of the variation. The defendant's own evidence as to when the variation occurred is contradictory: in her affidavit in support of her application, her evidence is that the variation took place in 2014, yet in her affidavit in response to the affidavit of G Millwood, her evidence is that the variation took place in 2015. There is a difference of almost one year between the dates put forward by the defendant without any explanation as to the divergence in the two dates. Further, the assertion that the variation took place in 2015 strongly counters the defendant's argument as articulated by Mr Leiba that the variation was evidenced by the submission of the instrument of transfer in that the executed transfer constituted the agreement between the parties that the property would be sold and transferred at the reduced sale price. Mr Leiba argued that in the ordinary course of a sale of land transaction, the transfer would not be submitted if the vendor was of the view that a balance of the purchase price is owing. However, as will be shown shortly, the law in relation to a vendor's unpaid lien allows for the transfer of title to be effected even where the balance purchase price is outstanding. In addition, the transfer document on which the defendant relies as evidencing the variation does not comport with the defendant's assertion that the variation took place in 2015. Also, it seems to me that given the circumstances of this sale where the defendant was acting on her own behalf and on behalf of the claimant in addition to being involved in a personal relationship with the claimant's principal, it would have been prudent for the

defendant to have set out in writing any agreed variation of the terms. There was absolutely no evidence, other than the defendant's mere say-so, of the terms of the variation.

[37] Mr Leiba pointed to various undisputed facts (see paragraph [23] above) which he argued, suggested that the sale agreement took place in the way asserted by the defendant. While there is no dispute that there was a personal relationship existing between the parties and there is no dispute that the claimant loaned the defendant monies after the transfer of Apartment No 5 to the defendant, it seems to me that those circumstances do not provide a sufficient basis on which to conclude that there was a variation of the sale price to J$11,500,000.00 particularly in light of the glaring contradiction in the defendant's evidence. The contradiction renders her evidence unbelievable. In addition, the contemporaneous document prepared by her undermines her position. In these circumstances, it seems to me that a trial is unnecessary to resolve this issue.

[38] For all the reasons set out at paragraphs [35] – [37] of this judgment, I am of the view that on this aspect of the defendant's case, it cannot be said that the claimant does not have a realistic prospect of success of showing that there was no variation of the agreement. Conversely, I am not of the view that the defendant has more than an arguable case in succeeding in showing that the agreement for sale was varied to reduce the purchase price from J$20,000,000.00 to J$11,500,000.00.

[39] As a result of my finding that the sale price was not varied, I must now consider what is the effect of the non-payment of the full purchase price of J$20,000,000.00. There does not appear to be any dispute on the part of either party that upon the execution of the sale agreement, a vendor's lien arose for the balance of the unpaid purchase price. Indeed, there could not be in light of the dictum of Jessel MR in the oft-cited case of **Lysaght v Edwards** that "the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial

ownership passes to the purchaser, the vendor having a right to the purchase money, and a right to retain possession of the estate for the security of that purchase money". Also, in **Kettlewell v Watson** [1879] KB 65, Baggallay LJ observed that "the prima facie right of an unpaid vendor of land to an equitable lien upon it for the amount of his unpaid purchase money is too well-established to be disputed. The right arises whenever there is a valid contract of sale and the time for completing that contract has arrived and the purchase money is not duly paid". This principle has been repeatedly applied in this jurisdiction (see **Farren Lloyd Brown & Victoria Brown v Mandolin Investment Group LLC & anor**; **Earline Lawrence v Dean Edwards**; and **Ken Sales & Marketing Limited v Cash Plus Development Ltd**). In **Ken Sales,** Brooks JA (as he then was) highlighted two further principles as follows:

> The first is that the mere fact that a document asserts that payment has been made for the property sold, or even if a receipt is given asserting payment, does not relieve the party, who is entitled to a lien, of his entitlement, if payment has not in fact been made. That was recognised in **In re Stucley**. The second principle is that a person who is entitled to a lien may take some other security in place of the lien. On doing so, he is no longer entitled to claim a lien. (Emphasis supplied)

[40] The learned authors of Halsbury's Laws of England (Vol 68 (2021) have recognised that there are circumstances where the lien may be excluded by the contract. At paragraph 960, they state:

> … The vendor becomes entitled to his lien as soon as the contract is entered into, and it does not depend upon completion of the contract. The lien subsists even if the vendor executes an outright

> conveyance and parts with possession of the property and the title deeds. The lien may be expressly or impliedly excluded by the contract between the parties. Whether the lien exists in a given case is to be objectively ascertained from the transaction between the parties, their subjective intention being irrelevant. The lien may arise even though the purchase money is not payable until a future date, for instance at a definite date after the vendor's death. It is not defeated by an agreement that the purchaser will not, without the consent of the vendor and the purchaser's surety, lease or assign the property until the original purchase price has been paid. Nor is the vendor's lien impliedly excluded by conditions of sale providing the vendor with alternative specific remedies on the purchaser's default. However, if the vendor has accepted a purchaser's covenant to pay royalties in satisfaction of his claim for the price, he is not an "unpaid" vendor and has no lien. (Emphasis supplied)

They also point out that "an equitable lien may be abandoned if the person entitled to the lien so intends, and the intention to abandon may be inferred from his conduct and the surrounding circumstances". The learned authors cite the case of **Bank of Africa Ltd v Salisbury Gold Mining Co** [1892] AC 281 as authority for this principle. The headnote of that case reads:

> A lien conferred upon a company by its articles of association on all shares registered in the name of a member for his debts to the company, such member's title to transfer the same, while he

> remains indebted, being thereby made dependent on the approval of the directors, is valid. Such lien may be discharged by a new arrangement between creditor and debtor, the terms of which are incompatible with its retention or which shew an intention to waive it. (Emphasis supplied)

So the case makes it clear that a lien may be waived. The court in that case, was of the view, however, that the lien had not been waived. The court found that where an indebted shareholder applied to a company for time to pay up on all his shares, and the indulgence was granted in consideration of his authorizing certain shares, other than those on which a lien is claimed in this suit, to be sold on default without the delay prescribed by the articles, no limitation of the lien on the shares in the suit was contemplated by either party, and that a transfer by the indebted shareholder of such shares should not be registered.

[41] **Burston Finance Ltd v Speirway Ltd** [1974] 3 All ER 735 is a case in which the court held that the vendor's lien had been abandoned. In that case, the plaintiff agreed to lend the defendant a sum of money, which would be used to purchase properties from a vendor. They agreed to create a legal charge over the properties to secure the loan. The charge was not registered under s 95 of the Companies Act 1948. The defendant failed to pay. The plaintiff sought a declaration that it was entitled to a lien or charge on the properties to secure the payment of the loan and was entitled, by way of subrogation, to the unpaid vendor's lien. The Chancery Division, dismissing the application, held that, by stipulating for and obtaining a legal charge, the plaintiff abandoned any claim to the unpaid vendor's lien, which would rank in priority to any legal charge granted subsequently if it continued to exist. The plaintiff got what it bargained for, which was a legal charge that was valid at its inception. The subsequent invalidity of the charge for want of registration under s 95 of the Act could not affect the position.

. In that case, the court stated:

> The real question in issue between the parties thus appears to me to be the extremely narrow—although difficult and important one—of whether, by taking the 'all moneys' legal charge, which is required under modern legislation two forms of registration, namely: (i) under s 26(1) of the Land Registration Act 1925 in order to perfect it; and (ii) under s 95 of the Companies Act 1948 for the purpose of preserving its validity as against the liquidator or any creditor of the company, the plaintiffs must be taken to have lost the benefit of the unpaid vendor's lien so assigned to them as aforesaid.

Later, the court stated:

> I have no hesitation in answering that question in the affirmative. It appears to me quite clear that by stipulating for a *first* legal charge, the plaintiffs must have abandoned any claim to the unpaid vendor's lien which, if it had continued to exist, must have ranked in priority to any legal charge granted subsequently… common sense suggests that if a vendor takes as a security for the unpaid purchase money a charge over the whole of the property comprised in the contract, he must deliberately be intending to replace his vendor's lien by that security, and that accordingly, either as a result of the doctrine of merger or by presumed intention to waive the

> unpaid vendor's lien, that lien has gone. This is not, of course, to say that the mere taking of security additional to the unpaid vendor's lien will necessarily, without more, involve an abandonment of the unpaid vendor's lien. There may be many forms of additional security which will not have that result, as in *Nairn v Prowse*. But it strains ordinary credulity to breaking point if the court is asked to accept that, in a case where there are no exceptional features (I am not suggesting that it is not possibly within the powers of some conveyance to produce some exotic charge over the whole of the property which might nevertheless be compatible with an unpaid vendor's lien) to think that where the vendor takes as a security for his money a security which (a) is for the full amount of the outstanding purchase price, (b) extends over the whole of the property conveyed, (c) reserves a much higher rate of interest than would be covered by the ordinary unpaid vendor's lien, and (d) comprises all the remedies afforded by that lien, he does not intend to abandon the ordinary lien and to rely on the security he has selected. In the present case it will not be in issue that the legal charge fulfils every one of the four conditions that I have mentioned above.

[42] In **Barclay's Bank plc v Estates & Commercial Ltd** [1997] 1 WLR 415, the second defendant sold land to his son for £70,000 and a share of the profits of its proposed development. The conveyance contained a consideration and receipt clause but only £19,000 of the purchase money had been paid

on completion. Subsequently the son, without the second defendant's consent, conveyed the land to the first defendant, a company, which went into liquidation after granting the plaintiff bank a first legal charge on the land to secure an advance. At first instance, it was held that the second defendant was not entitled to an unpaid vendor's lien preventing the making of an order for possession of the land in favour of the plaintiff. On the second defendant's appeal, it was held that the second defendant retained by operation of law an unpaid vendor's lien on the property because there was no evidence in the sale transaction, or the documents giving effect to it, of the parties' intention to exclude the lien and, therefore, the plaintiff was entitled to possession of the property only on payment of the remainder of the purchase money. In that case, the court stated:

> The lien arises by operation of law and independently of the agreement between the parties. It does not depend in any way upon the parties' subjective intention. It is excluded where its retention would be inconsistent with the provision of the contract for sale or with the true nature of the transaction as disclosed by the documents. It is also excluded where, on completion, the vendor receives all that he bargained for: Capital Finance Co Ltd v Stokes [1969] 1 Ch. 261 and Congresbury Motors Ltd Finance Co Ltd. [1971] Ch.81 in each of those cases the vendor took a legal charge to secure payment. The unpaid vendor's lien was held to be excluded notwithstanding that the charge later became void for want of registration. In Williams on Vendor and Purchaser 1936 edition, p 984, there is a passage which deals with the exclusion of the lien. It is as follows:

> "The vendor may, however, waive or abandon his lien for the unpaid purchase money, and his intention to do so may be either expressed or implied from the circumstances of the case".

After dealing with express waiver or abandonment the author continues:

> "Where such waiver or abandonment is sought to be implied, the onus lies on those who deny the existence of the lien, which arises by the rule of equity in the absence of stipulation to the contrary; the question is one of the parties' intention, to be determined by the documents they have executed and the circumstances of the case; and the test is, whether they have in effect agreed that the vendor shall have some other security or mode of payment in substitution for his lien".

As the authorities demonstrate the test is an objective one. The question is: What intention is to be attributed to the parties from the transaction into which they have entered? In Snell's Equity 29th edition 1990, p 465, the author writes:

> "Occasionally, however, the vendor will have no lien. If he receives all that he bargained for, e.g. If he sells the

> property in consideration of the purchaser giving him a promissory note or a bond to pay him an annuity, and the promissory note or bond is duly given, there will be no lien on the property sold, even though the note is not met at maturity or the annuity is not paid. Similarly, the lien is lost where the vendor takes a mortgage for the money, even if the mortgage later becomes void against successors in title for want of registration. Moreover, the nature of the contract may exclude the vendor's lien, as where the existence of a lien would prevent the purchaser from selling the property, or where the intention of the parties is that the purchaser shall resell or mortgage the property and pay off the vendor out of the proceeds;" (Emphasis supplied)

[43] The brief survey of authorities to which I have referred to does not seem to make a distinction between exclusion of a vendor's lien on the one hand and abandonment or waiver of the lien on the other. It seems to me that for a vendor to be deprived of his entitlement to a vendor's lien for unpaid purchase money, whether by exclusion, waiver or abandonment, the transaction between the parties including the contract or documents involved, as well as their conduct must be examined. It must be shown that the retention of the lien would be inconsistent with the provisions of the contract for sale; or the vendor accepted some other form of security for the payment of the purchase price. These principles were applied in **Farren Lloyd Brown & Victoria Brown v Mandolin Investment Group LLC & anor**; **Earline Lawrence v**

Dean Edwards and **Ken's Sales.** It does not seem to me that mere inaction, is sufficient.

[44] The defendant is seeking to rely on Clause 4 of the sale agreement in addition to the submission of the transfer document and registration of the title to her to support her position that it was never intended for there to be a lien on the apartment. Clause 4 provides as follows:

> The purchaser shall be required to make payment of the balance purchase price stated in Item 3 of the Second Schedule hereof within thirty (30) days after the vendor shall have sent a notice to the purchaser requiring payment of the said balance purchase price and enclosing a copy of the Duplicate Certificate of Title for the unit registered under the Registration of (Strata) Titles Act ("hereinafter called "the Act" and a Practical Completion Certificate of the Unit, prepared by the Architect or the Quantity Surveyor") certifying the unit is ready for occupancy and that the driveway, parking area and other essential community facilities comprised in the said Project have reached a stage of practical completion. The issue of the said certificate shall be conclusive evidence that the Unit as a whole has been duly and satisfactorily completed and that the vendor has faithfully performed and satisfied their obligations hereunder.

[45] The defendant has also argued as an alternative that if there was an equitable lien, it was abandoned by the claimant based on the conduct of the claimant.

[46] I agree with Mr Spencer's submission that there is nothing expressly stated in clause 4 or in any other clause of the sale agreement to indicate that a vendor's lien was excluded. There was no indication that the claimant would accept another form of security. In determining whether the circumstances including the terms of clause 4 are of such as to exclude the creation of the lien, I am also guided by the principles that the intention as to the exclusion of the lien is to be ascertained objectively and that the mere fact that a document asserts that payment has been made or even where there is a receipt asserting payment does not deprive the party who is entitled to the equitable lien from enforcing the lien if payment has not been made. I am of the view that clause 4 as well as the submission of the transfer document and registration of title in the name of the defendant are not sufficient to lead to the conclusion that there was an intention between the parties to abandon or waive the vendor's lien. This is supported by the defendant issuing the statement of account in June 2015 indicating that monies were owing.

[47] I also do not think that the fact that the claimant through its principal may have advanced sums to the defendant subsequent to the transfer of title, even in the context of a personal relationship existing between the claimant's principal and the defendant, is inconsistent with the claimant's retention of a vendor's lien. I note that the defendant asserted that no demand had been made for the purchase price until the claim was filed and served on her secretary and though M Millwood had asserted that oral demands were made, no specifics were given as to when these demands were made. However, in my view, the authorities suggest that some unequivocal act on the part of the vendor in relation to the specific balance purchase price that was owing is required to show an intention to waive or abandon the vendor's lien. A mere failure to act on the part of the claimant's principal, without more, would not be sufficient. It is my view that there is nothing in the circumstances of this case to rise to an intention as revealed by the sale agreement or by the conduct of the parties to exclude, waive or abandon the lien as contemplated by the authorities. The upshot of this is that there would be a

lien on Apartment No. 5 for the balance unpaid purchase price of J$8,500,000.00, there having been no dispute between the parties that the defendant paid J$11,500,000.

Whether the clam brought by the claimant company is barred by statute

[48] The basis on which the defendant is contending that the claim is statute-barred is that the claim is one for a debt that is owing. If the claim is one for a debt which is owing instead of for repayment of a vendor's lien, then the applicable statutory provision is section 46 of the Limitation of Actions Act. It reads:

> In actions of debt, or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence in any of the Courts of this Island, of a new or continuing contract, whereby to take any case out of the operation of the United Kingdom Statute 21 James I. Cap. 16, which has been recognized and is now esteemed, used, accepted and received as one of the statutes of this Island, or to deprive any party of the benefit thereof unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby, or his agent duly authorized to make such acknowledgment or promise; and where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor or administrator shall lose the benefit of the said enactment, so as to be chargeable in respect or by reason only of any

> written acknowledgment or promise made and signed by any others of them :
>
> Provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment, of any principal or interest made by any person whatsoever:
>
> Provided also, that in actions to be commenced against two or more such joint contractors, or executors, or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by the United Kingdom Statute aforesaid as to one or more of such joint contractors or executors, or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given, and costs allowed for the plaintiff, as to such defendant or defendants against whom he shall recover and for the other defendant or defendants against the plaint.

The provisions of 21 James 1, Cap 16 of 1623, in relation to limitation periods for debt, so far as is relevant reads: “

> … all actions of debt grounded upon any lending or contract without specialty … which shall be sued or brought at any time after the end of this present session of parliament, shall be commenced and sued within the time and limitation hereafter expressed, and not after; (that is to say;) … within three years next after the end of this present session of parliament, or within six

> years next after the cause of such actions or suit,
> and not after …

[49] The result of this would be that the debt having been owing from 2014 and acknowledged in writing by way of the statement of account in 2015, the limitation period would have expired in 2021. On the other hand, if the claim is for repayment of the vendor's lien, the applicable provision is section 33 of the Limitation of Actions Act, which reads:

> No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one was given.

By virtue of section 33, the limitation period would expire 12 years after the written acknowledgment.

[50] Mr Leiba drew the court's attention to the reliefs sought as demonstrating the true nature of the claim. I do not agree with Mr Leiba that the claim is one for

monies owing simpliciter. It seems to me that quite apart from how the reliefs have been framed, the facts as pleaded (summarised at paragraph 3 of this judgment) raise the issue of whether by operation of law, a vendor's lien was created upon the signing of the sale agreement where balance purchase price was outstanding, and this lien has not been satisfied. In my view, it matters not whether the words "vendor's lien" were used; there are various dicta from our courts that the failure to state a cause of action is not fatal; what is required is that the facts giving rise to the cause of action are adequately pleaded (see for instance Phillips JA in **Medical and Immunodiagnostic Laboratory Limited v Johnson** at paragraph [53]). In any event, the words "equitable charge or lien" were used in the particulars of claim. In my view, the relief sought at paragraph 2 of the particulars of claim in light of the facts pleaded demonstrates that the claim is for recovery of a vendor's lien. Paragraph 2 of the reliefs sought states:

> A declaration that all that parcel of land registered at Volume 1482 Folio 911 of the Register Book of Titles bearing the civic address Apartment 5, 10-12 Dillsbury Avenue Kingston 6 in the parish of St Andrew ("the apartment") is charged with repayment of the sum of J$12,800,000.00 and interest on that sum at a commercial interest rate of interest pursuant to Law Reform (Miscellaneous Provisions) Act for such period of time as this Honourable Court determines until the date of judgment.

Consequently, I am of the view that the relevant statutory provision is section 33 of the Limitation of Actions Act which provides for a limitation period of 12 years. I therefore am of the view that the defendant has not discharged the burden of showing that the claimant does not have a real prospect of succeeding in showing that the limitation period for the bringing of this claim had not yet expired.

[51] I am of the view that this issue does not require a trial for its resolution as the question is one of law that is resolved on an examination of the statutory provisions and the pleadings.

Whether the signed Settlement Agreement, Release and Discharge is subject to the PROSA legislation

[52] It must be noted at the outset that though the claimant had stated that the settlement agreement was undated, the copy exhibited to the defendant's affidavit bore the date of 4 April 2022.

[53] This issue it seems to me is deserving of short shrift. The claimant contended that the settlement agreement is barred by section 10 of PROSA. Mr Spencer did not, however, advance any arguments on this point. In my view, this was a prudent course to take as it is clear that PROSA is inapplicable to the settlement agreement in light of the definition of "spouse" as stated in the Act. "Spouse" is defined in PROSA as follows:

> "spouse" includes-
> (a) a single woman who has cohabited with a single man as if she were in law his wife for a period of not less than five years; (b) a single man who has cohabited with a single woman as if he were in law her husband for a period of not less than five years, immediately preceding the institution of proceedings under this Act or the termination of cohabitation, as the case may be.
> (2) The terms "single woman" and "single man" used with reference to the definition of "spouse" include widow or widower, as the case may be, or a divorcee.

I agree with Mr Leiba that the claimant does not fall within the contemplation of persons under PROSA since it is a registered company. With respect to the claimant's principal, the defendant's assertion that M Millwood was a married man has not been disputed by the claimant. I therefore am of the view that the defendant has discharged the burden of showing that the claimant does not have a real prospect or even an arguable case of showing that the settlement agreement was rendered invalid or inapplicable by virtue of section 10 of PROSA.

Whether the signed Settlement Agreement Release and Discharge is legally enforceable and provides a complete defence for the defendant

[54] Arguments were advanced by both parties on the applicability of the principle of ostensible authority; but I am of the view that the principle does not apply; I agree with Mr Spencer that this case does not concern a third party as the defendant is not a third party to whom representations were made that M Millwood had the authority to bind the company by signing the type of agreement to which he signed in circumstances where he did not have the authority.

[55] It seems to me that the claimant's challenge to the settlement agreement is not on the basis that M Millwood did not have the authority to bind the claimant to such an agreement, but that this agreement is invalid in light of the fact that it was signed by one director on behalf of the claimant. At paragraph 12 of his affidavit, Mr Greg Millwood states:

> I have seen the Settlement Agreement, Release and Discharge and have observed that it is undated and was only signed by my father, which is not how the claimant executes agreements and contracts. As the defendant well knows from her former position as the

> claimant's attorneys-at-law, all contracts and agreements executed by the claimant bear the signature of:
>
> a. two directors; or
> b. a director and the company's secretary,
>
> and are then affixed with the company's seal. This was not done for the Settlement Agreement, Release and Discharge. By way of further example, please see attached hereto marked "GM 8" a copy of an agreement for sale dated September 14, 2012 from Millard Development Company Limited to Lauren Tenn.

There is no evidence from G Millwood to the effect that M Millwood did not have the authority to enter into the contract on behalf of the company nor was this a part of the claimant's pleadings. The defendant's response to this is:

> … Michael Millwood has executed numerous agreements for sale, an Instrument of Transfer and contracts on behalf of the claimant without another Director or the Company Secretary signing the documents. I personally know of agreements for sale signed solely by Michael Millwood that are more proximate in time than the one signed in 2012 for the sale to Lauren Tenn…

[56] G Millwood also challenges the validity of the settlement agreement on the basis that he was advised by his father that he simply signed the settlement

agreement as he was directed by the defendant, who at no time encouraged him to seek independent legal advice.

[57] The settlement agreement is a simple contract, which, by virtue of the provisions of section 28 of the Companies Act, was not required to be signed by two officers of the companies; it was also not required to be under seal notwithstanding the fact that the execution clause included the words, "signed and sealed". Section 28 states:

> 28.—(1) Contracts on behalf of a company may be made as follows—
>
> (a) a contract which if made between private persons would be by law required to be in writing and if made according to the law of Jamaica to be under seal, may be made on behalf of the company in writing under the common seal of the company;
>
> (b) a contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith may be made on behalf of the company in writing signed by any person acting under its authority express or implied;
>
> (c) a contract which if made between private persons would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied.
>
> (2) A contract made according to this section shall be effectual in law, and shall bind the company and its successors and all other parties thereto.

> (3) A contract made according to this section may be varied or discharged in the same manner in which it is authorized by this section to be made.

It seems to me then that if the claimant's position is that the settlement agreement ought to have been executed in the manner described in paragraph 12 of the affidavit of G Millwood, then it would have to be on the basis that this is required by the articles of incorporation. It is significant that G Millwood stopped short of asserting that the articles of incorporation required this manner of execution of all contracts. Of further significance is the observation made by Mr Leiba that the articles of incorporation of the claimant were not produced to support G Millwood's assertion as to how agreements are to be signed on behalf of the company. I also note that the defendant has not produced any documents to support her assertion that while she acted for the claimant, M Millwood was the only signatory on behalf of the claimant on several agreements for sale. However, it seems to me that if the claimant is asserting that the signature of two officers of the claimant along with the seal was required, it was incumbent on the claimant to produce its articles of incorporation, which it should have in its possession, to support this. The claimant did not exhibit this document and there is no explanation for failing to do so. It seems that this position is unlikely to be improved on at trial. Indeed, Mr Spencer asserted during his submissions that both parties have put all their cards on the table. I am therefore of the view that while the sale agreement in respect of Apartment No. 5 was signed by M Millwood and a company secretary as was the agreement exhibited to G Millwood's affidavit, these are only two examples of what would have been numerous sale agreements signed on behalf of the claimant and are not conclusive of the manner in which all documents on behalf of the claimant should be signed. In these circumstances, I am of the view that the claimant has not shown that it has a more than arguable case of succeeding in establishing at trial that the settlement agreement was invalid because it was signed by one director.

[58] The remaining issue then is whether the settlement agreement may be unenforceable against the claimant because M Millwood may not have gotten independent legal advice given G Millwood's evidence that his father did not get legal advice. The defendant relies on the terms of the agreement.

[59] It is indisputable that clause 19 of the settlement agreement expressly states that it was entered into voluntarily by the parties. It states:

> This agreement is executed voluntarily and without any duress or undue influence on the part of or on behalf of the parties hereto with the full intent of releasing all claims. The parties acknowledge that: -
>
> They have read this Settlement Agreement;
>
> a) They have been represented in the preparation, negotiation of this Settlement Agreement by legal counsel of their own choice;
> b) They understand the terms and consequences of this Settlement Agreement and the releases it contains; and
> c) They are fully aware of the legal and binding effect of this Agreement.

It is my view that there need not be a trial for this issue to be resolved. It cannot be ignored that M Millwood signed this settlement agreement which included in clause 19 a statement to the effect that he had read this agreement. It must therefore be assumed that he was aware of clause 9 which expressly stated that he understood the terms of it. The defendant's evidence that feedback was received from the claimant's employee, following which M Millwood signed the settlement, was not contradicted by anyone on behalf of the claimant asserting that the employee did so without the claimant's instructions or authority. This would support the conclusion that M Millwood read the settlement agreement and would have addressed his mind to its

contents. Also, it is quite telling that G Millwood's evidence was that M Millwood informed him that upon M Millwood requesting the return of the gifts that had been given to the defendant, the defendant agreed "solely on the basis that M Millwood and the claimant abandon any claims against the defendant that they had arising from the personal relationship and professional services rendered (see paragraph [13] of this judgment). It seems to me that M Millwood would have been put on notice as to the contents of the agreement even before it was formalised and would have had the opportunity to consider the possible consequences of the terms being suggested by the defendant. Based on the evidence of both the defendant and G Millwood, at the time of the signing of the agreement in April 2022, the defendant was no longer the claimant's attorney-at-law. The claimant, through M Millwood was therefore at liberty to seek independent advice. In my view, the claimant's principal, M Millwood cannot now ask the court to ignore all of this evidence and accept that he "simply signed the agreement". I think that the claimant's position on this issue is simply not credible. I am of the view, therefore that the defendant has discharged the burden of showing that the claimant does not have a realistic prospect of succeeding in its claim and showing that the settlement agreement is unenforceable against the claimant on this basis.

Conclusion

[60] I have come to the conclusion that although this case involves issues of fact to be resolved in order for a determination of the claim, some of the contentions of both parties are plainly undermined by the contemporaneous documents passing between them, the settlement agreement being one of these documents. In my view, the settlement agreement is dispositive of the entire claim and it is clear from the agreement that it was intended to "resolve and finally determine all matters between the parties in Jamaica or anywhere else throughout the world, relating to all matters or transactions which have taken place over the years

during the course of the personal and professional relationship of the parties" (see Recital E). I am of the view that the claimant is bound by it.

[61] I am of the view therefore that in the circumstances, the claimant does not have a realistic prospect or a more than arguable case at trial of establishing that there is still a lien on Apartment No 5 for the sum of J$12,500,000.00 or for any other amount. Accordingly, summary judgment ought to be entered in favour of the defendant.

[62] Consequently, I order as follows:

(i) Summary judgment is entered against the claimant in favour of the defendant

(ii) Costs of the applications to the defendant to be taxed if not agreed.