[2019] JMCA Civ 17

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 36/2018

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

BETWEEN	**ROBERT DALE BRODBER**	**APPELLANT**
AND	**EW ABRAHAMS & SONS LIMITED**	**1ST RESPONDENT**
AND	**MAXELL ORMSBY**	**2ND RESPONDENT**

Written submissions filed by Caroline P Hay QC for the appellant

Written submissions filed by Chen, Green & Company for the respondents

4 March and 24 May 2019

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

F WILLIAMS JA

[1] I have read in draft the judgment of my sister Straw JA. I agree with her reasoning and conclusion. There is nothing that I wish to add.

STRAW JA

Introduction

[2] The appellant ("Mr Brodber") filed an amended claim on 9 January 2017 against his former employer, the 1st respondent company ("EW Abrahams") and its agent, the 2nd respondent ("Mr Ormsby").

[3] Mr Brodber is claiming damages against EW Abrahams for:

1. Breach of contract by the wrongful withholding of sums due upon the cessation of employment as at 29 May 2015; and

2. Breach of contract for the sale of a 2002 Toyota Sprinter motor vehicle.

He is also claiming against EW Abrahams and Mr Ormsby, jointly and/or severally for:

3. Damages, aggravated and/or exemplary damages for trespass to his property at 3 McKenzie Close, Kingston 8 in the parish of Saint Andrew;

4. Damages, aggravated and/or exemplary damages for detention and conversion of 2002 Toyota Sprinter;

5. Damages and vindicatory damages for breach of his rights guaranteed by section 13(3)(j) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011;

6. Interest pursuant to the provisions of the Law Reform (Miscellaneous Provisions) Act; and

7. Costs.

[4] After instituting his claim, Mr Brodber filed an amended application for summary judgment on 21 March 2017 seeking that summary judgment be entered against EW Abrahams and Mr Ormsby ("the respondents"), pursuant to rule 15.6 of the Civil Procedure Rules 2002 (CPR), on the basis that there was no real prospect of successfully defending the claim. The effect of such an order, if granted, would have made Mr Brodber entitled to the relief sought in his claim without having a trial. In the alternative, Mr Brodber sought an order striking out the respondents' statement of case pursuant to rules 26.3(1)(b) and (c) of the CPR, on the basis that the defence was an abuse of the process of the court and it disclosed no reasonable grounds for defending the amended claim.

[5] On 23 March 2018 Nembhard J (Ag), as she then was, refused Mr Brodber's application for summary judgment and awarded costs against him. This is an appeal from that decision. It is noted that no orders were made with regard to the alternative application for striking out and no appeal was pursued in this respect.

[6] On 6 April 2018 notice and grounds of appeal were filed. Subsequently, an amended notice and grounds of appeal were filed on 26 April 2018. Both refer to the judgment being orally delivered. This court has, however, obtained a copy of a written

judgment[1] from the library of the Supreme Court, which indicates that the delivery date was 23 March 2018. It is unclear whether the parties had the benefit of this written judgment as it was not included in the bundles filed, nor was it referred to by them. It is a known practice that from time to time judgments are delivered orally and later made available in writing. What would be unusual is for the judgment to be reduced to written form and the parties not be made aware. Notwithstanding this anomaly, since this court has obtained a copy of the written judgment, reference has been made to it.

Background to the claim

[7] Mr Brodber was employed as a sales representative to EW Abrahams for about 13 years. His employment commenced in or about March 2002 and ended some time in or about May 2015 when he resigned.

[8] In January 2015, EW Abrahams offered to sell Mr Brodber one of its motor vehicles. The reason given was that the company was finding maintenance of its motor vehicles too burdensome. As such, Mr Brodber was asked if he wished to purchase a 2002 Toyota Sprinter motor vehicle, which had been previously assigned to him. The offer was to sell the said motor vehicle for $400,000.00, which according to EW Abrahams, was valued in excess of $590,000.00.

[9] By way of letter dated 23 January 2015, EW Abrahams proposed that Mr Brodber could pay $3,000.00 weekly and that completion would take approximately three years.

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[1] [2018] JMSC Civ 84

Mr Brodber would also be required to pay approximately $30,000.00 yearly for the insurance starting in 2016, as EW Abrahams had already made arrangements for 2015. The letter also indicated that on the completion of transfer, EW Abrahams intended to pay Mr Brodber $6,000.00 weekly, for the use of the motor vehicle.

[10] Mr Brodber accepted the offer and, in a second letter dated 20 February 2015, EW Abrahams indicated that their arrangement would come into effect on 6 March 2015. It was indicated that the transfer of the motor vehicle could not be effected until January 2016 as the insurance had already been paid. It was noted that EW Abrahams considered itself to be in a "vulnerable position" as it would be responsible for any claim made by Mr Brodber as far as the insurance company was concerned. Nonetheless, EW Abrahams indicated to Mr Brodber that it would honour any claims as long as he was not at fault.

[11] The agreement took effect on 6 March 2015 and EW Abrahams began deducting $3,000.00 weekly from Mr Brodber's salary.

[12] According to Mr Brodber, sometime between April 2015 and May 2015 he gave EW Abrahams due notice (both orally and in writing) of his intention to resign. The alleged written notice was not included in the documentary evidence before the court. This allegation of due notice being given is disputed by EW Abrahams, whose contention is that Mr Brodber left its employment without due notice after giving the impression that he intended to remain for the period it would take him to complete

payment for the motor vehicle. It appears that payment would have been completed sometime in 2018.

[13] Much is in dispute between Mr Brodber and EW Abrahams. Mr Brodber contends that he had an unconditional agreement with EW Abrahams for the sale of the motor vehicle. In his view, this agreement was not contingent upon his employment and as such, he was entitled to remain in possession of the motor vehicle and make the weekly payments as agreed.

[14] EW Abrahams takes a contrary view. It was asserted that the agreement was clearly conditional and that it was orally communicated to Mr Brodber that the sale of the motor vehicle was a part of his "contract of engagement". In particular, "the terms of payment and the price for which the car was b[e]ing offered was a term of the contract of employment....since the motor car was to be used as a tool for marketing and sales of [EW Abrahams'] products".

[15] As such EW Abrahams contended that as soon as it became aware of Mr Brodber's resignation, an immediate request was made for the return of its motor vehicle and that repeated requests were subsequently made. It would not sell the motor vehicle to Mr Brodber for his personal use and benefit as that was a privilege which was only for its employees. However, Mr Brodber was informed that he could keep the vehicle if he paid to EW Abrahams the sum of $80,000.00 for the five-month period following the return of the funds to pay off the balance of the purchase price. He

failed to do so. Mr Brodber acknowledged that EW Abrahams refused to accept payments of $3,000.00 weekly after he separated from their employ.

[16] The motor vehicle remained in Mr Brodber's possession and EW Abrahams assigned its agent, Mr Ormsby, the responsibility to recover the motor vehicle. On or about 2 July 2015, Mr Ormsby recovered the motor vehicle by going to Mr Brodber's home (for a second time) and gaining access with the use of force. Mr Brodber contended that the locks on his home were forcibly cut and removed. It appears that the motor vehicle was removed from Mr Brodber's garage and transported to EW Abrahams' premises with the use of a wrecker.

The appeal

[17] The amended notice and grounds of appeal sought the following orders:

> "1. The appeal be allowed and the order of the learned judge be set aside.
>
> 2. That the Appellant's Amended Notice of Application for summary judgment on the claim be granted.
>
> 3. Costs here and below be paid by the Respondents to the Appellant.
>
> 4. Such further or other relief as this Honourable Court deems just."

[18] The grounds of appeal relied on are as follows:

> "1. The learned judge fell into error when she found that the Appellant had not averred or proved the giving of due notice to sever the contract of employment to the 1st Respondent in both his statement of case and his unchallenged Affidavit evidence. That averment was plain on the Appellant's statement of case and Affidavit evidence.

2. The learned judge fell into error and/or misdirected herself on the question of whether the notice given by the Appellant to the 1st Respondent was 'short notice' in circumstances where there was ample evidence from the Appellant of the giving of due notice but no evidence from the 1st Respondent to the effect.

3. The learned judge abandoned or abdicated her duty to assess whether in law and on the Appellant's detailed evidence, the 1st Respondent complied with its statutory and internal policy obligations as an employer towards an employee separating from its employ.

4. The learned judge wholly failed to treat with the [Appellant's] claim that the 1st Respondent's act of withholding and making deductions from monies lawfully attributed to the Appellant's pension for debt not identified or proved by the 1st Respondent to be lawfully due to it from the Appellant, or for any reason whatsoever, was impermissible and in breach of the Pensions (Superannuation Funds and Retirement Schemes) Act.

5. The learned judge fell into error when she found as a matter of fact that the 1st Respondent's letters dated 23 January 2015 and 20 February 2015 do not "per se" form the basis of a contract for the sale of a motor car and/or that the said letters did not reflect the entire agreement of the parties.

6. The trial judge erred when she found as a matter of fact and law that consequent to her finding that breach of contract of the sale of the motor car was a triable issue, the following also arose as triable issues:

- whether by refusing to accept any further payment for the motor car, demanding the return of the motor car and forcibly taking the motor car from the Appellant, the 1st Respondent acted in breach of the terms of the contract for sale of the motor car between the Appellant and the 1st Respondent would now be liable to the Appellant in damages, interest and costs;

- whether the 1st Respondent had any lawful right to reclaim the motor car from the Appellant's lawful possession without the consent of the Appellant, without court order and without evidence of larceny and to the extent that the 1st Respondent admitted to doing so, would it be liable to the Appellant in damages, interest and costs for the torts of detention and conversion;

- Although there was no denial that the Appellant's initial possession of the motor car was lawful, whether the 1st and 2nd Respondents have a claim of right to use any force whatsoever to gain access to the motor car and remove it from the Appellant's lawful possession without judicial intervention;

- By forcibly gaining access to the Appellant's home, cutting off the lock to remove the motor car and by removing the motor car without consent, whether the 1st and 2nd Respondents committed trespass to the Appellant's home and by reason thereof would be jointly and/or severally liable to the Appellant in damages interest and costs;

- By forcibly gaining access to the Appellant's home, cutting off the lock to remove the motor car and by removing the motor car without consent, whether the 1st and 2nd Respondents infringed on the Appellant's Charter right to privacy and by reason thereof would be jointly and/or severally liable to the Appellant in damages interest and costs;

- whether the 1st and 2nd Respondents' admissions to forcibly gaining access to the Appellant's home, cutting off the lock to remove the motor car and by removing the motor car without consent or judicial intervention, there still needs to be any trial to determine the measure of damages or whether those are questions for the assessment of damages hearing.

> 7. The learned judge fell into error and /or misdirected herself on the law when she found that a court cannot give summary judgement on a claim where the Appellant seeks aggravated and/or vindicatory and/or exemplary damages.
>
> 8. The learned judge below fell into error and/or misapprehended the claim when she held that the Appellant's claim for damages for breach of his fundamental right to privacy to dwelling and to property as guaranteed by section 13(3)(j) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 in the present claim amounted to 'proceedings for redress under the Constitution' for which summary judgment is not available pursuant to CPR Rule 15.3;"

Discussion

[19] The decision to grant or refuse an application for summary judgment is an exercise of the judge's discretion. It is quite settled that this court must defer to the judge's exercise of discretion and must not interfere with it merely on the ground that the members of this court would have exercised the discretion differently. As such, this court will only set aside the exercise of a discretion by a judge where it was (i) based on a misunderstanding of the law or evidence; or (ii) based on an inference which can be shown to be demonstrably wrong; or (iii) so aberrant that no judge regardful of his duty to act judicially, could have reached it (see **Hadmor Productions Ltd and others v Hamilton and another**[2] and **The Attorney General of Jamaica v John Mackay**[3]).

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[2] [1982] 1 All ER 1042, 1046
[3] [2012] JMCA App 1 at paras [19] and [20]

Relevant principles in respect of granting summary judgment

[20] In determining whether or not to grant summary judgment at the request of Mr Brodber, the learned judge had to consider whether the respondents had a real prospect of successfully defending the claim or the issues. This is the criterion laid down by rule 15.2(b) of the CPR:

> "15.2 The court may give summary judgment on the claims or on a particular issue if it considers that –
>
> (a) …
>
> (b) the defendant has no real prospect of successfully defending the claim or issue."

[21] The expression "real prospect of success" is said to need no amplification as the words speak for themselves. The word "real" simply means that the question for the court is whether there was a realistic, as opposed to fanciful, prospect of success (per Lord Woolf MR in **Swain v Hillman**,[4] which has been adopted in a number of decisions of this court including **Gordon Stewart et al v Merrick (Herman) Samuels**[5] and **ASE Metals NV v Exclusive Holiday of Elegance Limited**[6]).

[22] The applicant bears the burden of proving that he is entitled to summary judgment. It is for the applicant to establish that there are grounds for his belief that the respondent has no real prospect of successfully defending the claim or issue (per

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[4] [2001] 1 All ER 91
[5] (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 2/2005, judgment delivered 18 November 2005
[6] [2013] JMCA Civ 37

Potter LJ in **ED & F Man Liquid Products v Patel and another**[7]). Once this is credibly established by the applicant, it is for the respondent who seeks to resist the application for summary judgment, to show that he has a case "which is better than merely arguable"[8], that is, a 'realistic' as opposed to a 'fanciful' prospect of success (per Brooks JA in **ASE Metals NV**[9]).

[23] Further, in **Barbican Heights Limited v Seafood and Ting International Limited**[10], a recent decision of this court, the principles relevant to summary judgment originally from **S v Gloucestershire County Council; L v Tower Hamlets London Borough Council and another**[11] were adopted by Sinclair Haynes JA at paragraph [78]:

> "…[On] an application for summary judgment the claimant must satisfy the court of the following:
>
> > '(a) All substantial facts relevant to the claimant's case, which are reasonably capable of being before the court, must be before the court.
> >
> > (b) Those facts must be undisputed or there must be no reasonable prospect of successfully disputing them.
> >
> > (c) There must be no real prospect of oral evidence affecting the court's assessment of the facts."

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[7] [2003] EWCA Civ 472, paragraph 9
[8] Ibid at paragraph 8
[9] At paragraphs [14] and [15]
[10] [2019] JMCA Civ 1
[11] [2000] 3 All ER 346

Grounds 1, 2 and 3

Issues: (1) whether the learned judge failed to appreciate that the evidence in relation to the period of notice given by the appellant was unchallenged, appropriate or otherwise lawful

(2) whether the learned judge had sufficient facts before her to make any assessment that EW Abrahams had breached any statutory and internal policy obligations towards Mr Brodber

[24] Grounds one to three are condensed into the above issues and can be conveniently dealt with together as the complaints in relation to these grounds are intertwined.

Submissions of counsel for the appellant

[25] It is counsel's contention that Mr Brodber gave unchallenged affidavit evidence that he gave oral and written notice of his intention to leave his employment sometime between April 2015 and early May 2015. Counsel submitted also that EW Abrahams had no internal policy treating with a required stated notice period to be given by either side in order to properly terminate the employment contract. The minimum notice required would therefore be that set out in the Employment (Termination and Redundancy Payments) Act (the 'ETRPA') at section 3(2), which would be two weeks.

[26] Counsel submits therefore that the learned judge had a duty to analyse the effect of these statutory provisions and apply them to the pleaded case and evidence to determine if there was any triable issue on the question of notice. Counsel contends that Mr Brodber gave evidence of giving over two weeks' notice and there was no objection given to that notice period. In the alternative, if the judge had found the

notice wanting, she ought to have reviewed the applicable law and treated with it as EW Abrahams had no arguable position on the matter.

[27] Counsel contends that if there had been a proper assessment of the above, the learned judge would have found that there was no reasonable prospect of defending Mr Brodber's claim for his lawful entitlements and pension refund including entitlements without any deductions. Counsel also submits that EW Abrahams had no right to make deductions such as fees for wrecker, police fees and legal fees unrelated to the issue of adequate notice.

Submissions of counsel for the respondents

[28] It is counsel's submission that the judge found a divergence of facts between the case for both parties as Mr Brodber said he gave due notice and EW Abrahams pleaded insufficient notice. Counsel made reference also to the fact that the judge noted that Mr Brodber failed to provide her with evidence as to the notice in writing referred to in his affidavit and that therefore the issue of notice ought to be determined by a tribunal of fact.

[29] In relation to the sums due to Mr Brodber under the contract of employment, counsel contends that the issue of his entitlement to a return of his pension contributions upon terminating his employment without due notice would require a court to examine the employment relationship and determine the obligations of both.

Discussion and analysis

[30] In the defence filed on behalf of the respondents, issue is taken with whether the notice given by Mr Brodber was proper, but there is no allegation of fact made as to why it was improper. It is merely described as "inappropriate". In the affidavit of Mr Michael Abrahams filed on behalf of the respondents, no reference is made to the period of notice or why it was deemed to be inappropriate. In that same affidavit, it is stated that Mr Brodber was indebted to EW Abrahams and that deductions were made from his pension refund as shown in a statement of account exhibited to Mr Brodber's affidavit (RB4) and that Mr Brodber only had his pension from which to benefit. An examination of this statement of account reveals that salary, pension and savings were owed to Mr Brodber. It also reflects a statement of funds owed by Mr Brodber to EW Abrahams. These sums stated to be owing were disputed by Mr Brodber's attorney in a letter dated 24 November 2015 to EW Abrahams.

[31] The learned judge stated at paragraph [59] of her judgment that Mr Brodber was contending he gave the requisite notice and that he would be entitled to salary owed to him and/or unused vacation and/or lawful entitlements and savings. She stated however at paragraph [60] that EW Abrahams did not agree with that contention and alleged that all Mr Brodber was entitled to was his pension benefits. She stated furher,

that the issue of his entitlement, upon the cessation of his employment, would therefore be a question of fact for the court.[12]

[32] The learned judge therefore linked the determination of the issue of proper notice with a determination of Mr Brodber's entitlement. She did not as such, make a finding as to whether proper notice was proved.

[33] The amended particulars of claim filed by Mr Brodber sets out the categories of funds owed to him as follows:

> "**PARTICULARS OF PAYMENTS DUE TO THE CLAIMANT**
>
> a) Final week's salary as at May 29, 2015;
>
> b) Unused vacation leave;
>
> c) Pension refund entitlement;
>
> d) Savings refund entitlement;
>
> e) Any other payment lawfully due and payable to the Claimant by the 1st Defendant."

[34] In his affidavit evidence, Mr Brodber refers to the said statement of account dated 31 August 2015 sent by EW Abrahams to his attorneys which sets out entitlement and monies owed to him. The statement of account reads:

> "**ROBERT BRODBER**
>
> **STATEMENT AS AT 31/08/15**
>
> SALARY – WEEK 23 - $ 89,438.17

[12] See paragraph [61] of the judgment

PENSION REFUND	-	$336,447.09
ADDITIONAL REFUND	-	1,271.11
		$337,718.20
SAVINGS	-	$ 22,000.00
	-	**$449,156.37**

OWING TO E.W. ABRAHAMS & SONS	-	$199,226.22
OWING TO E.W. ABRAHAMS & SONS	-	$ 25,000.00
		$224,226.22
WRECKER FEE	-	$ 7,000.00
WRECKER FEE	-	$ 5,000.00
POLICE	-	$ 4,000.00
I360 JAMAICA	-	$ 116,500.00
LAWYER MR L. GREEN	-	$ 30,000.00
		$386,726.22
CHEQUE IN THE AMOUNT OF	-	**$62,430.15**
REFUND OF DEPOSIT ON M/VEHICLE	-	**$39,000.00**"

[35] Mr Brodber stated he received the sum of $98,430.15 (which appears to reflect the total of the last two figures shown), but claimed that $386,726.22 was wrongly withheld from him. In the defence filed by EW Abrahams, it avers that it is not required to pay an employee notice pay or any other money save and except that to which he is statutorily entitled by virtue of the contract of employment and that it stands ready and willing to do so provided the proper arrangements for termination are met. It is also averred that it was the conduct of Mr Brodber that caused it "to settle the severance arrangements" and they stand by the offer made to settle with him.

[36] It is not clear to this court exactly what EW Abrahams is saying as it does appear that it is agreeing that monies may yet be owed to Mr Brodber while disputing the issue of the separation notice and the effect on his entitlements. However, in Mr Abraham's affidavit, he explains that Mr Brodber only had his pension from which to benefit and that this money was used to set off debts as shown in the said statement of account.

[37] Is there any basis to suggest that the judge misunderstood the evidence, or misapplied the law or erred based on an assessment of the pleadings and affidavit evidence? In relation to the issue of notice, it would appear that both parties did not adequately deal with the factual assertions which would be the basis for a proper assessment as to whether notice was appropriate and sufficient. EW Abrahams, as submitted by counsel for Mr Brodber, gave no evidence as to the notice period that would have been appropriate. However, Mr Brodber failed to give evidence of two weeks' notice which would be the minimum period required by virtue of section 3(2) of the ETRPA. He does not specifically indicate the actual date in April when the notice was given. He merely indicated that it was between April and early May 2015. The learned judge could not surmise as to whether this was at the beginning, middle or near the end of April. The learned judge would therefore have had no basis, without more, to conclude that two weeks' notice was clearly proved in order to grant summary judgment on this issue.

[38] Similarly, there was no evidence before the court which would indicate whether or not the issue of insufficient notice would affect any entitlements that would be due to Mr Brodber on his separation.

[39] The amended claim form requested damages for breach of contract by the wrongful withholding of sums due by EW Abrahams to Mr Brodber upon the cessation of his employment with EW Abrahams as at 29 May 2015. Based on the above evidence, there is a dispute as to what Mr Brodber is actually entitled.

[40] He did not plead how much was due to him under each of the five categories set out in his statement of claim. It appears that he is not disputing the amounts as set out in the statement of account for salary, pension and savings, albeit he has not set out any computation for unused vacation leave or any other lawful entitlement referred to in the statement of claim. It could be concluded that he is asking for judgment in the sum of $386,762.22 as asserted in his affidavit, however there is a dispute that is yet unresolved as to what are his entitlements.

[41] Given that Mr Brodber was asking the court to grant summary judgment to the effect that EW Abrahams was in breach of an employment contract that was not in writing, he would have had to present unchallenged facts/evidence in relation to an appropriate notice period and an explanation as to the relevance of the notice period to any entitlements. He would also have had to present unchallenged facts in relation to his entitlements. It cannot be said that all the substantial facts relevant to his case were before the court, which is one of the criteria recognised in **Barbican Heights Limited**

for summary judgment to be granted. It is noted that the learned judge made reference to this criterion at paragraphs [52] and [53] of her judgment. It is clear also that the dispute of fact was not resolved by the affidavit evidence.

[42] As noted previously, the learned judge indicated at paragraph [61] of her judgment that in light of the above circumstances, the question of Mr Brodber's entitlement upon the cessation of employment would be a question of fact for the court.

[43] Mr Brodber had the duty to satisfy the court that the defence had no realistic prospect of success. Apart from the internal policy document exhibited, which covers matters generally including, probation, vacation leave, dress code, sick leave, vacation leave, and an optional pension plan, there are no stated terms of a contract of employment nor any reference to any specific term of the said internal policy breached by EW Abrahams. It is difficult therefore to contend that the learned judge failed to assess whether EW Abrahams complied with its statutory and internal policy obligations.

[44] Grounds one to three must therefore fail.

Ground 4

Issue: whether the learned judge erred by failing to consider that EW Abrahams was in breach of the Pensions (Superannuation Funds and Retirement Schemes) Act (the 'Pensions Act') by deducting funds from monies allocated as pension on Mr Brodber's behalf.

Submissions of counsel for the appellant

[45] Counsel submitted that a person's pension is non-deductible. As such any deduction from Mr Brodber's pension by EW Abrahams for debt which was not identified, proved to be lawfully due or for any reason, was impermissible and in breach of the Pensions Act.

[46] In relation to the said Act, counsel made reference to section 13(2)(k) and submitted that the learned judge erred by not properly treating with the law and coming to the conclusion that EW Abrahams had no arguable position with a reasonable prospect of success.

Submissions of counsel for the respondents

[47] In relation to the alleged breach of the Pensions Act, counsel submitted that Mr Brodber had failed to show that the Act provides for the protection of a limited class of persons or that Parliament intended to confer a private right of action for breach of the duty on that class of persons. In essence, it is his contention that the Act does not provide a cause of action for Mr Brodber. Further, the judge could not therefore determine this issue without conducting a "mini trial" on the issue.

[48] Counsel referred the court to Lord Browne-Wilkinson's distillation of the principles in regard to whether a statutory cause of action can be gleaned from a

statute that does not explicitly provide for a cause of action or remedy for breach in **X (Minors) v Bedfordshire County Council.**[13]

[49] Counsel also referred the court to section 93(1) of the Income Tax Act, 1955 which gives the Minister the power to make rules and the Income Tax (Superannuation Fund) Rules, 1955, paragraph 11 of the schedule, which provides:

> "Upon the termination of the service of an employee in circumstances in which he is not entitled to a pension or an annuity the contributions paid by him may be refunded to him with or without interest but the contributions paid by the employer shall not be paid to the employee."

[50] Counsel further submitted that the sums statutorily due to Mr Brodber under his employment contract have to be determined.

Discussion and analysis

[51] Although there is a heading in the judgment of the learned judge which reads "BREACH OF EMPLOYMENT CONTRACT AND PENSIONS ACT" (just preceding paragraph [56]), an examination of the judgment reveals no specific consideration of the issue in relation to that Act.

[52] Section 13(2)(k) of the Act, which has been relied on by counsel for Mr Brodber, reads as follows:

> "13(2) The conditions for approval of a superannuation fund are as follows –

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[13] [1995] 2 AC 633

> (k) subject to paragraphs (p) and (q) the pension rights shall not be commuted or surrendered and shall be non-assignable but a member may allocate a portion of his pension to his spouse or a dependant;
>
> (p) a lump-sum payment may be payable as follows –
>
> > (i) on death, …
> >
> > (ii) on termination of employment, other than death or retirement, a refund of the member's voluntary and compulsory contributions accumulated with interest together with an amount equivalent to the appreciation in value of investment units (if any) allocated to the contributions;
> >
> > (iii) on retirement, …
>
> (q) pensions less than the prescribed amount may be commuted in full;"

[53] This section has been advanced to support Mr Brodber's contention that pensions are non-deductible and as such it was unlawful for EW Abrahams to make deductions for debts it alleged Mr Brodber owed.

[54] Sections 13(2)(k), (p) and (q) contain some of the conditions for approval of a superannuation fund by the Financial Services Commission, which is responsible for the administration of the Pensions Act. More specifically they are conditions which must be contained in the superannuation fund's Trust Deed and Plan Rules.

[55] In **X (Minors) v Bedfordshire County Council**[14], a decision of the House of Lords, the defendants had applied to strike out the claims on the ground that they

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[14] [1995] 2 AC 633

disclosed no cause of action. The Bedfordshire appeals related to allegations that public authorities negligently carried out, or failed to carry out, statutory duties imposed on them for the purpose of protecting children from child abuse. In considering the issue, Lord Browne-Wilkinson made the point that the breach of a public law right by itself gives rise to no claim of damages and that such a claim must be based on a private law cause of action (see the dicta of Sykes J (as he then was) in **Jennifer Mamby-Alexander et al v Jamaica Public Service Company Limited**[15] at paragraph [38]).

[56] Lord Browne-Wilkinson identified the categories of private law claims for damages. In considering the breach of statutory duty simpliciter, he stated the following:

> "The principles applicable in determining whether such statutory cause of action exists are now well established, although the application of those principles in any particular case remains difficult. The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some

[15] [2018] JMSC Civ 75

> other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action: Cutler v. Wandsworth Stadium Ltd. [1949] A.C. 398; Lonrho Ltd. v. Shell Petroleum Co. Ltd. (No. 2) [1982] A.C. 173. However, the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy."[16]

[57] There is merit therefore in counsel for the respondents' submission in relation to this Act. There are issues that would have to be determined by a trial court, namely: is there a duty of care created by the Act and did Parliament intend to grant a private law remedy.

[58] In all the circumstances, it would have been inappropriate and wrong in law for Nembhard J (Ag) to grant summary judgment against EW Abrahams on the basis that withholding and making deductions from monies attributed to Mr Brodber's pension was in breach of the Pensions Act. To summarise, (1) it is not clear that the section relied on by Mr Brodber creates a duty of care and consequently whether a private law cause of action exists pursuant to section 13(2)(k) of the Pensions Act; (2) all substantial facts relevant to the appellant's case were not before the court; and (3) a trial is necessary to resolve competing accounts.

[59] This ground also fails.

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[16] Ibid at page 731

Ground 5

Issue: whether the learned judge erred when she failed to find that the letters of 23 January and 20 February 2015 comprised the basis of a contract between both parties for the sale of the motor vehicle.

Submissions of counsel for the appellant

[60] It is counsel's contention that the two letters dated 23 January 2015 and 20 February 2015 bear the terms of a binding contract for the sale of the motor vehicle to Mr Brodber. Counsel states that they name the parties, the purchase price, repayment terms and identify the motor vehicle. The offer to sell the car was unconditional and Mr Brodber was put into lawful possession, made weekly payments as agreed and did acts inconsistent to the ownership of EW Abrahams.

[61] Counsel also submits that the letter of 20 February 2015 states that the legal title was to be transferred to Mr Brodber immediately upon being put into possession, however, because EW Abrahams had paid up the insurance for the year, the transfer of title would occur at the expiry of the insurance certificate in January 2016. Counsel submitted therefore that the act of putting Mr Brodber in possession of the motor vehicle, his payment of the monthly instalments and the fact that EW Abrahams proposed to pay him $6,000.00 weekly for the use of the motor vehicle, were all acts of acceptance of the terms.

[62] Counsel submitted also that the conditionality argued by EW Abrahams, that it was communicated orally to Mr Brodber that the contract was conditional upon him remaining in the employment is not one that should be entertained by the court as EW Abrahams is precluded from adducing any evidence of the alleged oral communication

to vary the terms of the contract. Counsel referred the court to **Communtel Broadband Ltd and Starcom Cablevision v Alfred Mckay**[17] and **Herbert Smikle v Patrick Nunes and others**.[18]

[63] Counsel therefore submits that the learned judge was wrong to have made the finding that the letters as described above did not "per se" form the basis of a contract as they did reflect the entire agreement of the parties.

Submissions of counsel for the respondents

[64] Counsel submitted that the learned judge properly exercised her discretion in finding that the above-mentioned letters merely contained the terms of the offer and did not form a contract in its entirety. He referred the court to the principles enunciated in **Investors Compensation Scheme Ltd v West Bromwich Building Society**[19] which has been applied and accepted in this court in **Lynne Clacken and another v Michael Causwell and another**[20]; and **Goblin Hill Hotels Ltd v John and Janet Thompson**.[21] He submitted that the context within which the parties formed the contract is relevant to determine the terms of the contract and it is this context that ought to be considered by the court at trial.

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[17] [2012] JMSC Civil 10
[18] (unreported), Supreme Court, Jamaica, Suit No CLS 178 of 2002, judgment delivered 9 March 2007
[19] [1988] 1 All ER 98
[20] (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 111/2008, judgment delivered 2 October 2009
[21] (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 57/2007, judgment delivered 19 December 2008

Discussion and analysis

[65] The learned judge dealt with this subject extensively in her reasons for judgment at paragraphs [62] to [81]. She referred to the definition of "contract" in section 2 of the Sale of Goods Act as well as section 4 dealing with "Formalities of the Contract". These sections are set out below:

> "2(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part owner and another.
>
> (2) A contract of sale may be absolute or conditional.
>
> (3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.
>
> (4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.
>
> …
>
> 4 Subject to the provisions of this Act and of any statue in that behalf, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties:
>
> Provided that nothing in this section shall affect the law relating to corporations."

[66] It was her opinion that the letters contained the terms of an offer made by EW Abrahams to Mr Brodber, and that his subsequent conduct is the only evidence of his acceptance of the terms of offer. She therefore made the finding at paragraph [67] that

the said letters are not "contracts as is contemplated by the Law". She found also that the terms of the letters are silent in relation to whether it was EW Abrahams' intention to make "these types of offers to employees only" also whether it was intended for the contract to come to an end upon the cessation of Mr Brodber's employment. The learned judge stated as follows at paragraph [75] of her judgment:

> "[75] The Court is of the view that the construct or the interpretation to be applied to the terms of the Agreement for Sale arrived at between Robert Brodber and [EW] Abrahams & Sons is a question of fact for a tribunal of fact. These are disputes as to fact which are not suitable for resolution summarily."

[67] It is my opinion that the learned judge was correct in her assessment that this issue needed to be determined at a trial. Mr Michael Abrahams, in his affidavit, stated that it was understood that the arrangement for the sale of motor vehicles was subject to employees remaining with EW Abrahams. The motor vehicle, the subject of the contract had been assigned to Mr Brodber to facilitate the work he was undertaking on behalf of the company. EW Abrahams, based on the letter dated 23 January 2015, was seeking to reduce their expense relative to the maintenance of their vehicles. The plan was to sell the motor vehicle to Mr Brodber at a reduced valuation. Mr Brodber would pay EW Abrahams $3,000.00 per week towards the purchase price which would allow completion in approximately three years. This letter also indicated that the transfer of title would take place in January 2016 subsequent to the termination of the existing insurance contract that was being financed by EW Abrahams. The letter of 20 February

2015 spoke to the fact that the offer for the sale of the motor vehicle would come into effect on 6 March 2015.

[68] Mr Abrahams stated also that the arrangement was never unconditional and referred to the actions of EW Abrahams in returning the sum of $3,000.00 to Mr Brodber that had been paid by him after his separation from employment and that Mr Brodber had been told he could keep the car on the basis that he paid $80,000.00 "for the five-month period following the return of the funds to pay off the balance of the purchase price".

[69] On the other hand, Mr Brodber asserted in his affidavit that ownership was not transferred at the time that the contract came into existence based on the fact that EW Abrahams would still be responsible for the insurance premium until January 2016 and that the contract was never said to be subject to his continued employment. He also stated that he made several improvements to the said vehicle.

[70] The issue could not therefore be said to be clear as to whether there was a breach of contract by EW Abrahams. It was not the learned judge's duty to embark on a "mini-trial" to determine between the contentions of both parties. In **Investors Compensation Scheme Ltd**[22], Lord Hoffmann discussed the principles which a court ought to apply when construing the terms of a contract:

> "The principles may be summarised as follows:

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[22] at pages 114g - 115g

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (see Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] 2 WLR 945.

(5) The ‘rule’ that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from

> the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *The Antaios Compania Neviera S.A. v. Salen Rederierna A.B.* 19851 A.C. 191, 201:
>
> > '...if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.'
>
> If one applies these principles, it seems to me that the judge must be right and, as we are dealing with one badly drafted clause which is happily no longer in use, there is little advantage in my repeating his reasons at greater length. The only remark of his which I would respectfully question is when he said that he was "doing violence" to the natural meaning of the words. This is an over-energetic way to describe the process of interpretation. Many people, including politicians, celebrities and Mrs. Malaprop, mangle meanings and syntax but nevertheless communicate tolerably clearly what they are using the words to mean. If anyone is doing violence to natural meanings, it is they rather than their listeners."

[71] Smith JA made reference to and applied these principles in **Lynne Clacken** as well as Morrison JA (as he then was) in **Goblin Hill Hotels Ltd**[23]. EW Abrahams is essentially asserting that it would be unreasonable, bearing in mind the background of the parties, to conclude that it was intended that Mr Brodber, having left the employment of EW Abrahams, should continue to benefit from the favourable terms in the contract granted to employees of the company. This is also to be considered

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[23] The decision in this case was reversed by the Judicial Committee of the Privy Council [2011] UKPC 8, however that decision does not affect the principles relied on by Morrison JA (as he then was) from Investors Compensation Scheme Ltd.

against the background that the letters were written in January and February of 2015 and Mr Brodber would have resigned by May 2015.

[72] What is being contended by Mr Brodber would certainly require some reference to a "matrix of facts" in order to settle the issue as to whether there was a contractual breach and for some analysis to be conducted as to whether the terms or words used in the letters outside of this matrix flouted business common sense.

[73] The submissions of counsel for EW Abrahams are of great weight and summary judgment on this issue would be inappropriate.

Ground 6

Issue: whether the learned judge erred in concluding that, consequent to her finding that the breach of contract was a triable issue, the issues of trespass, detinue, conversion, breach of Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act (the Charter) rights and any damages assessable under these heads were also to be determined at a trial.

Submissions of counsel for the appellant

[74] Counsel is contending that the issue of the breach of contract is an entirely separate issue from the issues of detention, conversion, trespass and infringement of Mr Brodber's Charter right to privacy and the measure of damages to be awarded therein. It is asserted that the learned judge was wrong when she found as a matter of fact and law, that, consequent to her findings that the breach of contract was a triable issue the above described issues were also triable issues.

[75] Counsel contends also that the respondents have admitted to committing trespass by entering into Mr Brodber's property to re-take possession of the motor

vehicle which was the subject of a valid contract. This justification is not supported by the law and the defence cannot succeed. The court was referred to **Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd**[24]. The respondents would therefore also be liable for detinue as demands were made for the return of the motorcar and the respondents refused to comply. Reference was made to **Walton Richards v Woman Detective Corporal Campbell and the Attorney General**.[25]

Submissions of counsel for the respondents

[76] It is counsel's submission that the respondents had lawful justification to enter Mr Brodber's property in order to regain possession of the motor vehicle for which Mr Brodber had failed to complete payment. Counsel submitted that a finding of unlawful justification for interfering with someone's possession of chattel is a necessary element of conversion. Reference was made to the case of **Amy Bogle v The Transport Authority**.[26]

[77] He submitted therefore that whether the respondents' conduct was tantamount to trespass, detinue or conversion and worthy of an award of aggravated and/or exemplary damages, the court would have to take into account the respondents' motives, conduct and manner of committing the alleged wrong as these issues would

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[24] (1968) 121 CLR 584
[25] (unreported), Supreme Court, Jamaica, Suit No CLR 19 of 1996, judgment delivered 19 February 2009
[26] [2015] JMSC Civ 258

be relevant to the consideration of damages. In this regard, counsel referred the court to **A v Bottrill**.[27]

Discussion and analysis

[78] The learned judge stated at paragraph [83] of her judgment that the resolution of the claim for damages for alleged trespass as well as damages in detinue and conversion would flow from the interpretation to be applied to the terms of the agreement for sale and the purchase of the motor vehicle between the parties.

[79] It is difficult to take issue with the above finding. Trespass to property (land) consists of any unjustifiable intrusion by one person upon land in the possession of another.[28] It is noted that acts which would be trespasses, whether to land, goods or the person, are frequently prevented from being so by the existence of some justification provided by the law.[29] One such recognised justification includes the entry for the recaption of goods. The authors of Clerk & Lindsell on Torts have however recognised that the law in this area is regrettably unclear. It was opined[30]:

> 'A person may justify entry onto the claimant's land for the purpose of recaption of his goods if the goods were taken and put there by the wrongful act of the claimant himself. But beyond this proposition the law is regrettably unclear. In Anthony v Haney, Tindal C.J. was of the opinion obiter that entry was permissible on the land of an innocent person where … (c) the occupier refused to redeliver them…With regard to refusal to redeliver the Chief Justice thought that a

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[27] [2002] UKPC 44
[28] Clerk & Lindsell on Torts, 20th edn, paragraph 19-01
[29] Winfield and Jolowicz on Tort, 14th edn, page 392
[30] 20th edn, paragraph 19-33

> positive refusal might be considered a conversion "or at any rate the owner might in such case enter and take his property subject to the payment of any damage he might commit."…'

[80] Conversion is defined in Winfield and Jolowicz on Tort[31] as "a dealing with the goods of a person which constitutes an unjustifiable denial of his rights in them...". The claimant must establish the right of ownership, possession or the immediate right to possession. To constitute conversion, there must be an overt act of taking possession with the intention of depriving the claimant of his right of ownership or possession. Conversion would be established by the wrongful taking of goods, the wrongful disposal of goods or by the wrongful refusal to return them when demanded.

[81] In **The Commissioner of Police and the Attorney General v Vassell Lowe**[32], a decision of this court, it was opined by McIntosh JA:

> "[37] The courts have determined that in the absence of willful and wrongful interference there is no conversion even if by the negligence of the defendant the chattel is lost or destroyed (see **Ashby v Tolhurst** [1937] 2 KB 242). Further, the authorities show that every person is guilty of a conversion who without lawful justification takes a chattel out of the possession of anyone else with the intention of exercising a permanent or temporary dominion over it because the owner is entitled to the use of it at all times (see **Fouldes v Willoughby**)…"

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[31] 14th edn, page 490
[32] [2012] JMCA Civ 55

[82] In relation to both trespass and conversion, the issue of lawful justification is therefore relevant. Detinue is a common law form of action for recovery of goods. In **Alicia Hosiery Ltd v Brown, Shipley**[33] Donaldson J stated:

> "A claim in detinue lies at the suit of a person who has an immediate right to the possession of the goods against a person who is in possession of the goods and who, upon proper demand, fails or refuses to deliver them up without lawful excuse."

[83] The issue of lawful excuse would be a relevant issue therefore in consideration of this tort.

[84] The facts before the learned judge were essentially that both parties were making a claim to the right of ownership or possession. As to who should have rightful possession, this could only be properly determined after findings of fact are made during a trial as to: (a) whether there was an existing contract between the parties, (b) whether any terms were breached and by whom, (c) whether there was any lawful justification to enter onto Mr Brodber's property to remove the motor vehicle and (d) whether there was any lawful excuse by EW Abrahams to refuse delivery of the said vehicle to Mr Brodber upon demand. Once these issues are determined, then a trial court could consider whether there is any breach of Mr Brodber's Charter rights, whether damages and what type of damages are to be awarded to Mr Brodber. The learned judge did not err therefore in her findings that the above described issues had to await a full ventilation at a trial. This ground of appeal therefore fails.

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[33] [1970] 1 QB 195, 207

Grounds 7 and 8

Issues: (1) whether the learned judge fell into error by concluding that a court cannot give summary judgment on a claim which seeks aggravated/vindicatory and/or exemplary damages.

(2) whether the learned judge erred when she stated that the claim for damages for breach of the appellant's Charter rights as guaranteed by section 13(3)(j) of the Charter, amounted to a claim for 'proceedings for redress under the constitution' for which summary judgment is not available pursuant to rule 15.3 of the CPR.

Submissions of counsel for the appellant

[85] Counsel has submitted that the learned judge was determining issues of liability at a hearing for summary judgment. The question of whether an award of aggravated, exemplary and vindicatory damages is to be made is for the assessment court. Counsel submitted further that the learned judge is not precluded from making a pronouncement on the issue of damages for breach of the Charter rights because the claim is not a constitutional proceeding commenced under Part 56 of the CPR. The learned judge was therefore in error when she stated that the claim for breach of Charter rights amounted to such a proceeding for which summary judgment is not available pursuant to rule 15.3(a) of the CPR.

Submissions of counsel for the respondents

[86] Counsel made no submissions in relation to the first issue. In relation to the second issue, it was submitted that vindicatory damages relate to an award for a breach of Charter rights. Counsel referred the court to rule 15.3 of the CPR and stated that summary judgment may not be given in proceedings for redress under the Constitution. It was submitted that the learned judge was therefore correct in her

assessment that it would be inappropriate to grant summary judgment in a proceeding seeking constitutional redress.

Discussion and analysis

[87] The issues pertaining to the award of damages have been partially considered under the previous ground of appeal. The amended particulars of claim aver that damages and aggravated and/ or exemplary damages were being sought for trespass, detinue and conversion. Any award of damages in general, including aggravated and exemplary damages for these torts would depend on whether the court found that the respondents were in breach of contract and whether there was any lawful justification for their subsequent conduct. The learned judge made these findings at paragraphs [83], and [85] to [86] of her written judgment. At paragraph [87] she stated that it is after such an examination that the wrongdoer may be ordered to make a further payment by way of condemnation and punishment. It is clear that an examination of the above findings in the written judgment do not accord with the submission of counsel for Mr Brodber in relation to the first issue. Her findings on the point are made within the context of the particular state of circumstances that were before her for consideration.

[88] In relation to issue two, it is averred that damages and vindicatory damages were being sought for the breach of the claimant's fundamental right to privacy of the dwelling and to property guaranteed under section 13(3)(j) of the Charter, which provides:

> "(3) The rights and freedoms referred to in subsection (2) are as follows –
>
> (j)the right of everyone to -
>
> (i) protection from search of the person and property;
>
> (ii) respect for and protection of private and family life, and privacy of the home; and
>
> (iii) protection of privacy of other property and of communication;"

[89] The claim for breach of the Charter rights is a proceeding/application for constitutional redress. Section 19(1) of the Charter provides:

> "19 (1) If any person alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress."

[90] In relation to the issue of constitutional redress, rule 15.3 of the CPR provides as follows:

> "15.3 The court may give summary judgment in any type of proceedings except –
>
> (a) proceedings for redress under the Constitution;"

[91] Typically a claim for constitutional redress is commenced by way of fixed date claim form (rule 56.9) which is not amenable to summary judgment (rule 15.3(c)). At this stage of the proceedings before the learned judge, Mr Brodber was seeking summary judgment on the entire claim (which was not brought by way of fixed date

claim form) and included damages and vindicatory damages for breach of his Charter rights. However, applicants are not precluded from joining claims for other relief with a claim for an administrative order which includes an application for relief under the Constitution (per rules 56.1(1)(b) and 56.10 of the CPR).

[92] The learned judge referred to rule 15.3(a) of the CPR at paragraph [40] of her judgment. She also stated at paragraph [84] that "Vindicative [sic]/ Exemplary damages are constitutional redress that are not suitable for Summary Judgment". It would appear that the learned judge meant that she could not award damages for breach of Charter rights in an application for summary judgment based on the above rule.

[93] The claim is against a private company and a private individual. It does not involve the Government or a public authority. The new Charter introduced the horizontality of certain constitutional rights, meaning that, unlike in the past when a claim for the breach of constitutional rights could only be pursued against the State (on a vertical basis), there are certain constitutional rights in relation to which private citizens can sue each other. This is reflected in section 13(5) of the Charter which provides:

> "A provision of this Chapter binds natural or juristic persons if, and to the extent that, it is applicable, taking account of the nature of the right and the nature of any duty imposed by the right."

The question of horizontality and the award of vindicatory damages would therefore require some exploration in a trial of the matter (see dicta of Sykes J (as he then was)

in **Maurice Arnold Tomlinson v Television Jamaica Ltd and others**[34] at paragraphs [202] and [203]).

[94] Furthermore, the evidence being relied on to establish breach of the Charter rights is the same evidence that has been put forward to ground trespass, conversion and detinue. The learned judge had already determined that the other aspects of the claim could not be granted summarily but had to be advanced at a trial. The issues that would affect summary judgment in relation to the abovementioned torts would therefore be of continuing relevance to assess whether Mr Brodber has established any such breach of these Charter rights. The learned judge could not be said, therefore,to have erred in her analysis that an award for vindicatory/exemplary damages arising from a breach of constitutional rights, would not be suitable for summary judgment bearing in mind the relevant provisions of the Charter, the CPR and that the issues were all intertwined and would require ventilation at a trial.

[95] Both these grounds of appeal also fail.

Conclusion

[96] Mr Brodber has not succeeded in any of the grounds advanced. This appeal must therefore be dismissed. It is noted that a case management conference had been held on 21 September 2017, at which time case management orders had been made and trial dates of 4, 5 and 6 May 2020 set down. Some of these orders may have to be

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[34] [2013] JMFC Full 5; See also **Brendan Courtney Bain v The University of the West Indies** [2017] JMFC Full 3 at paragraph [94]

varied but the parties are urged to move with expedition towards the disposal of this matter on those trial dates.

FOSTER-PUSEY JA

[97] I too have read the draft judgment of my sister Straw JA and agree with her reasoning and conclusion. I have nothing to add.

F WILLIAMS JA

ORDER

1) The appeal is dismissed.

2) The orders of Nembhard J (Ag) are affirmed.

3) Costs to the respondents to be agreed or taxed.