JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 11/2013

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA (AG)

BETWEEN	**NATIONAL COMMERCIAL BANK JAMAICA LIMITED**	**APPELLANT**
AND	**INTERNATIONAL ASSET SERVICES LIMITED**	**RESPONDENT**

Written submissions filed by Jerome Spencer and Hadrian R Christie instructed by Patterson Mair Hamilton for the appellant

No written submissions filed on behalf of the respondent

22 September 2014 and 23 January 2015

PROCEDURAL APPEAL

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

PHILLIPS JA

[1] This is an appeal from the decision of F Williams J who on 18 January 2013 refused an application by the appellant to be removed from the claim in the court below and to strike out certain sentences from the affidavit of Mark Jones filed on 20

January 2011 in support of the fixed date claim form. The court ordered costs in the claim and granted the appellant leave to appeal.

[2] Based on the draft reasons for judgment submitted to the court, as none other appeared to be available, the learned judge, having made the order to join the appellant on an ex parte application of the respondent, on the application of the appellant to be removed from the claim, expressed his serious concerns about retaining the appellant in the claim, but indicated that as there were certain allegations relating to transactions involving the appellant, input from the appellant would assist the court in determining what the issues were, and ultimately in resolving them. The learned judge made it clear that the appellant had not been added as a claimant or defendant, as it was not intended that the appellant was seeking any relief from any of the parties, nor were any of the parties seeking any relief from the appellant. However, the learned judge was of the view that the joinder of the appellant could provide some assistance to the court. He stated specifically that although the application to remove the appellant from the claim had not been successful, the application had not been an unmeritorious one, and commented that it was likely that the appellant would ultimately be compensated by the unsuccessful party in the claim. As a consequence, the judge did not order costs against the appellant but ordered that the costs of the application would be costs in the claim.

[3] The appellant filed six grounds of appeal, as set out below:

> "(a) The Learned Judge, having erroneously added the Appellant 'NCB' to the claim in the court below as a Defendant, refused to release NCB from this claim after

explicitly accepted [sic] that there was no claim being made by or against NCB.

(b) The Learned Judge failed to find that NCB was not a necessary, proper or desirable party to this claim.

(c) The Learned Judge erred in finding that NCB could assist the court below with the issues that have surfaced in this claim and in detaining NCB in that basis.

(d) Even if NCB could assist the court, the Learned Judge failed to have regard to the overriding objective and consider more cost-effective methods of doing so ---- such as for example summoning NCB's employees.

(e) The Learned Judge erred in not giving reasons for refusing to strike out any of the sentences in paragraph 23 (iii) of the Affidavit of Mark Jones in Support of Fixed Date Claim Form filed on January 20, 2011 in the Claim 2011 HCV 00251.

(f) In exercising his discretion not to strike out the second, third and fourth sentences of paragraph 23 (iii) of the Affidavit of Mark Jones in Support of Fixed Date Claim Form filed on January 20 2011, the Learned Judge failed to take into consideration the fact that [sic] evidence of Mr Jones was irrelevant and unnecessary to any issue that was before the court."

The appellant requested that the appeal be allowed, and that this court direct that the orders of Williams J in the court below be set aside, and that the costs both in this court and in the court below, be paid by the respondent to the appellant.

[4] In my view there are two questions that need to be asked to dispose of this appeal, namely:

(i) Is it desirable and necessary that the appellant be added as a party to the claim? and

(ii) Ought the three allegedly offensive sentences in paragraph 23 (iii) of the affidavit in support of the fixed date claim form be struck out?

To answer these questions it would be helpful to review the background facts of the amended claim filed by the respondent on 27 April 2011, namely Claim No 2011 HCV 00251.

Background to the claim

[5] The claim was initially filed by the respondent against three defendants: Patrick Decarish, Zoreena Johnson and Dale Johnson. The respondent asked for declarations that as at 10 March 2003 it had an equitable interest in property located at Carlton Woodhouse in the parish of Saint Mary registered at Volume 1405 Folio 797 (the property); that the agreement for sale dated 25 June 2007 between the appellant and Ms Johnson was null, void and of no effect; and that the Register Book of Titles be rectified to show Howard Baugh as the true registered owner of the property.

[6] The grounds stated in the fixed date claim form were that based on an agreement for sale executed between the respondent and Jamaica Redevelopment Foundation Inc (JRF), the respondent became the owner of a portfolio of debts, some of which had originally been owned by the appellant. Mr Baugh was one of the original debtors of the appellant, and the appellant was secured by way of a first charge over the property. The respondent pleaded that Mr Decarish had fraudulently caused a transfer of the said property to Ms Johnson, his former wife. The respondent therefore claimed that both of them had acted fraudulently against the interests of the respondent.

[7] How did this come about? The respondent filed an affidavit of Mark Jones sworn to on 6 January 2011, in support of its fixed date claim form. In that affidavit, he deposed that he was a director of the respondent, a limited liability company engaged in the business of debt collection and asset management which it had been doing since 2003. Mr Decarish was first employed to the respondent as a collector and then later as its general manager entrusted with running the day-to-day operations of the respondent. Although he managed the respondent's collection litigation and was responsible for the reports to directors on collection results and forecasts, he was not authorised to dispose of the respondent's assets, as Mr Jones stated that any such documentation had to be signed by a director and Mr Decarish was, in any event subject to "oversight" by the respondent's directors.

[8] Mr Jones further deposed that as a result of the financial meltdown in the 1990s the Government of Jamaica through the Financial Sector Adjustment Company (FINSAC) had bought non-performing loan portfolios of several financial institutions including the appellant's, which it eventually sold to various debt collecting agencies, including JRF. That latter entity in turn, by an agreement dated 10 March 2003, had sold a portfolio of debts to the respondent. Mr Baugh, who had originally borrowed monies from the appellant, through that agreement between JRF and the respondent, became a debtor of the respondent.

[9] Mr Jones stated that he had been informed by Mr Decarish that Mr Baugh having died, his niece, Ms Beulah Baugh, had proposed that she would make payments to settle his debts at an agreed figure of J$6,000,000.00. These payments were to be

made through attorney-at-law, Conrad Powell, by way of monthly installments ending in December 2007.

[10] Mr Jones stated further that he had no reason to doubt the information received from Mr Decarish as he had trusted him. He indicated that certain payments had been received by the respondent amounting to J$5,438,000.00, which Mr Decarish represented had been paid by Ms Baugh and Jere Curtis, Mr Baugh's grandniece.

[11] This arrangement, as set out in paragraphs [9] and [10] above, was later shown, he said to be entirely false. Upon inquiry and on the request for information and documentation, Mr Jones said, Mr Powell admitted to him that a fraud had been perpetrated on the respondent by Mr Decarish and himself. Mr Powell, he said, explained that the property had been sold to Ms Johnson and that Ms Baugh had signed an "indemnity agreement" and had been paid a sum of J$1,000,000.00 (funded from the respondent's account) as "compensation for her right to redeem the lost property by paying off the Debts".

[12] Several items of documentation were handed over to Mr Jones by Mr Powell, all of which, he said, showed that no monies had been paid by Ms Baugh or Ms Curtis pursuant to the settlement of debts. Mr Jones stated that the sum of J$5,438,000.00, which had purportedly been paid by Ms Baugh, had in fact come from the respondent's escrow account funds and from his personal investment funds which had been held by Mr Powell. He referred to the "Release Agreement" allegedly signed by Ms Baugh, Ms Curtis and the respondent, and deposed that he had never been aware of the same, nor had he been aware of the agreement for sale of the property, between the

appellant and Ms Johnson, or the transfer of the property from the appellant to her. The respondent, he stated, had not authorised, consented to, or approved any of the documents.

[13] The matter, Mr Jones, said was referred to the Organized Crime Investigation Division, and a criminal investigation had been conducted which resulted in Mr Decarish being charged with several criminal offences connected with the Baugh account. Ms Baugh, he said, had signed a statement indicating that she had not signed, nor was she aware of any purported settlement agreement in connection with the Baugh debts and also that she had no knowledge of the sale of the property to Ms Johnson. Mr Jones also stated that he later discovered that Ms Johnson is the former wife of Mr Decarish.

[14] In paragraph 23 of his affidavit, Mr Jones set out in detail how he perceived the fraudulent scheme had been perpetrated on the respondent, which, I think for clarity, I will set out in its entirety as it encompasses the impugned sentences which the appellant states are irrelevant and inadmissible and ought to have been struck out.

> "23. Accordingly, the 1st Defendant [Mr DeCarish] dishonestly put into effect the following scheme to cheat the company [the respondent] of its security in the Property:
>
> (i) The 1st Defendant led me to believe Ms Beulah Baugh was willing to buy out our security interest by paying off the Debts in an agreed sum, and getting my agreement;
> (ii) Instead of doing what he said in (i) above, the 1st Defendant merely made it appear that he had done what he said he was going to do by arranging for payments to be made to the Company purporting to come from Ms Baugh;

(iii) In fact, the 1st Defendant arranged dishonestly for the Company to be deprived of its security by obtaining (somehow) a purported transfer of the whole property to his ex-wife. He was able to do this as although the Company had taken an assignment of the mortgage, NCB was still registered as the proprietor of the mortgage. So, the 1st Defendant was able to effect the purported transfer by filing a transfer by NCB purportedly selling as mortgagee under power of sale. Of course, NCB no longer had the right to sell under the powers of sale that it had assigned to the Company, nearly 10 years before, and so the purported sale is liable to be set aside." (underlining mine relating to the impugned sentences in the application)

[15] Mr Jones stated that the respondent had therefore, in an effort to protect its interest in the property, lodged a caveat against any further dealings with the same, particularly as the respondent was aware that Ms Johnson had taken steps to transfer the property to herself and one Dale Johnson. He indicated, however, that a Notice to Caveator had been served on the respondent's attorneys-at-law warning that within 14 days of the service of the notice the caveat would lapse.

[16] On 9 November 2011, the appellant filed a notice of application for court orders asking the court to strike out the second, third and fourth sentences of paragraph 23(iii) of the affidavit of Mark Jones as set out in paragraph [14] above, (and underlined for ease of reference) and for an order that the appellant cease to be a party to the claim, on the grounds that the matters contained in that paragraph were scandalous, irrelevant and unsubstantiated, and that the appellant was not a necessary party for the resolution of matters which arise in the claim. The appellant relied on the overriding objective and the CPR.

[17] Mr Errol Campbell, then general manager of FINSAC, swore to an affidavit on 9 November 2011, which was filed on behalf of the appellant in support of the above application. He deposed that by the Master Agreement for Sale and Purchase of Credit Receivables, dated 1 February 1998, the appellant agreed to sell certain credit receivables to Recon Trust Limited (Recon Trust) and to give Recon Trust the option to acquire other credit receivables. Once the credit receivables vested in Recon Trust under the agreement, any associated credit and security rights applicable to such credit receivables automatically vested in Recon Trust, and if for whatever reason the associated credit and security rights failed to so vest, then the appellant would hold them on trust for Recon Trust. The agreement, he stated, also required the appellant to execute a Power of Attorney appointing Recon Trust its agent for "specified purposes." This Power of Attorney was executed on 1 February 1998 and was attached to the Master Agreement as "schedule IV" and, therefore, was exhibited in the proceedings.

[18] Mr Campbell also confirmed that among the debts that Recon Trust acquired were the Baugh debts, which had been secured by a mortgage to the appellant granted on 30 June 1995 over the property, although not registered until 14 March 2007. The instrument of mortgage was exhibited to the affidavit. In January 2002, the credit receivable portfolio and attendant security rights, including the Baugh debts, were sold to JRF. The mortgage, he stated, which had been granted to the appellant, was delivered to JRF, so that JRF or it or any other subsequent assignee could effect registration of the same as they saw fit. The mortgage granted to the appellant, and sold to JRF, was then later sold by JRF, to the respondent.

[19] Mr Campbell explained that a practice had developed that the respondent would send letters to Recon Trust with agreements for sale and instruments of transfer to be executed by Recon Trust. Recon Trust was asked to execute the documents under and by virtue of the power of attorney granted by the appellant to Recon Trust. Mr Campbell said that he would execute the documents with another representative of Recon Trust, namely Mr Martin Gooden. This, he said, was done solely as agent for the appellant in its capacity as mortgagee. No money was ever received, he said, by Recon Trust for and on behalf of the appellant, as the transfers were effected pursuant to, and in the exercise of the powers of sale, and on his understanding, to the benefit of the respondent.

[20] He indicated further, that in or around May or June 2007, he had received a letter from the respondent with an agreement for sale and an instrument of transfer in relation to the property, requesting that Recon Trust execute the documents in its capacity as agent of the appellant, which he duly did, along with Mr Gooden. The said documents were attached to the affidavit. He stated that it was his further understanding that on advice from his attorneys, Patterson Mair Hamilton, the appellant was the only entity which could exercise the power of sale in respect of the property as the appellant was the registered mortgagee on the certificate of title in respect of the same.

[21] The appellant also filed and relied on an affidavit of Trica-Gaye Watson, legal counsel employed to the appellant. She deposed that the appellant had no direct dealings with the respondent in relation to the debts of Mr Baugh, or in relation to the

mortgage over the property, and with particular reference to paragraph 23 of the affidavit of Mark Jones, she denied that the appellant had assigned anything to the respondent "nearly 10 years ago". She denied any wrongdoing on behalf of the appellant and stated her understanding that the only reason that Recon Trust executed the agreement for sale and instrument of transfer of the property in the name of the appellant, was that the appellant was still the registered legal mortgagee of the property, and thus the only entity entitled to exercise the powers of sale in relation thereto.

The exhibits

[22] Attached to the affidavit of Mr Jones were the following exhibits:

(i) the agreement for sale and purchase of rights, title and interest in receivables, overdrafts, and accounts, dated 10 March 2003, between JRF and the respondent. Exhibit "A" attached to that document comprised the credit cards, overdraft, accounts and other receivables collectively described as "the receivables" and the Baugh debts were listed as the 24th and 25th items on page 1, and the 15th item on page 2 therein.

(ii) the certificate of title for the property registered at Volume 1405 Folio 797 of the Register Book of Titles, containing the endorsement of mortgage no 1461541 in the name of the appellant; and transfer no 1506709 on 29 November

2007 from "Howard Owen Baugh" to "Zoreena D Johnson"; and caveat No 1520951 lodged by the respondent on 25 February 2008.

(iii) letters dated 25 and 27 June 2007 on the letterhead of the respondent signed by Mr DeCarish, as managing director, to Mr Baugh and Ms Baugh respectively referring to: their debts and agreeing to accept US$1,000,000.00 (J$5,187,921.91) in full and final payment of the debts; the manner in which the sum was to be paid and the consequence of the failure to adhere to the stipulated framework of payment.

(iv) the release agreement dated 28 June 2007 between Ms Baugh and the respondent whereby the former on the receipt of J$1,000,000.00 released the respondent from all claims and or liabilities in respect of the property.

(v) the agreement for sale dated 25 June 2007 between the appellant and Ms Johnson in respect of the property for the price of J$6,250,000.00. The deposit of $937,500.00 was payable to the vendor's attorney-at-law, Mr Conrad Powell, and the balance was payable on completion. It was signed by Ms Johnson in the presence of Mr Powell and executed on behalf of the appellant by Recon Trust, under

seal, by Mr Campbell and Mr Gooden as directors, and stated to be by virtue of the Power of Attorney dated 1 June 1999 and entered at the office of titles on 1 July 1999 numbered 1067903 in the presence of attorney-at-law, Nicola Sykes.

(vi) the instrument of transfer of the property with the price stated therein as J$5,250,000.00 between the appellant and Ms Johnson, dated 25 September 2007, the execution of which was similar to that in respect of the agreement for sale.

(vii) particulars of claim in Claim No 2009 HCV 05338 between Ms Johnson (claimant) and the appellant (defendant) which was filed on 13 October 2009. The claimant pleaded that she had entered into an agreement with the appellant for the purchase of the property for the sum of J$6,154,000.00 (the US$ equivalent being US$90,500.00, using the rate of J$68.00 to US$1.00) and that all the relevant sums had been paid. The agreement for sale and the instrument of transfer had been duly stamped at the Taxpayer Audit and Assessment Department and the stamped documents had been lodged at the Office of Titles, yet the appellant in spite of having been served with a notice to complete the

transaction had not produced the duplicate certificate of title in respect of the property so that the transaction could be completed. Specific performance and damages for breach of contract were claimed. A receipt, on the letterhead of the respondent, dated 3 July 2007 indicating payment of the amount of US$90,500.00 in cash, in respect of the purchase of the property and signed by Mr Decarish, as managing director of the respondent, was annexed to the particulars of claim.

(viii) Notice to Caveator dated 21 December 2010 indicating that Ms Johnson was the registered proprietor of the property and had applied to register a transfer to herself and Dale Johnson, warning the respondent that the caveat lodged by it would lapse within 14 days and that the registrar would proceed to register the abovementioned transfer, unless an order of the court was received by her forbidding her to do so.

[23] The following exhibits were attached to the affidavit of Mr Campbell:

(i) Master Agreement for Sale and Purchase of Credit Receivables dated 1 February 1998 between the appellant and Recon Trust, which had annexed to it as Schedule II a Deed of

Assignment between the two parties (the appellant and Recon Trust), whereby the appellant assigned to Recon Trust "all its right, title, and interest in and to all the Credit Receivables described in the List of Credit Receivables attached hereto and all interest and other monies (if any) now due and subsequently to become due in respect of such Credit Receivables TO HOLD same unto the purchaser (Recon Trust) absolutely". The Power of Attorney between the appellant and Recon Trust dated 1 February 1998 was attached as Schedule IV, and showed that the appellant

> "irrevocably and for value, nominates, constitutes and appoints the Attorney to be the true and lawful attorney of the company and in the company's name to do all the following acts, deeds and things or any of them in relation only to Credit Receivables which have been sold or will be sold to the Attorney ..."

(ii) The instrument of mortgage in respect of the property between the appellant and Mr Baugh dated 10 June 1995 securing the same for the original amount of $700,000.00, with the certificate of title for the property;

(iii) The agreement for sale and instrument of transfer between the appellant and Ms Johnson in respect of the property.

Submissions of the appellant

Grounds of appeal (a) - (d)

[24] Counsel referred to the fact that the learned judge had ordered that the appellant, Mr Powell, Ms Baugh and Ms Curtis be joined to the claim in the ex parte application made by the respondent, and submitted that he had erred in refusing to remove the appellant from the claim. He referred to the Civil Procedure Rules 2002 (CPR) and in particular, rules 2.4, 19.2(3) and 26.2(2). Counsel submitted that it was not desirable nor was the appellant a necessary or proper person to be added to the claim, and he referred to and relied on the English Court of Appeal case of **United Film Distribution Ltd and Another v Chhabria and Others** [2002] 2 All ER (Comm) 865. He relied on **G Boothe and C Clarke v C Cooke** (1982) 19 JLR 278 for the principle that to defeat the interest of the registered proprietor and to have the Register Book of Titles rectified, the proper party to the claim is the registered proprietor and no one else. He referred to **Assets Co Ltd v Mere Roihi** [1905] AC 176 to support the submission that to invalidate the title of a registered proprietor there must be a claim of actual fraud against the registered proprietor. Counsel, therefore, submitted that the proper defendant to the claim was Ms Johnson, the registered proprietor whose registered interest the respondent was seeking to impugn. Counsel also referred to a case out of this court, **Jamaica Citizens Bank Ltd v Dyoll Insurance Co Ltd & Another** (1991) 28 JLR 415, for the principle that a person

could be necessary to a claim if he could be affected either legally or financially by any order which the court may make in the claim.

[25] Counsel also referred to **Norwich Pharmacal v Customs and Excise Commissioner** [1973] 2 All ER 943 for the contention that if a person gets innocently mixed up in the tortious acts of others so as to facilitate their wrongdoing he is then under a duty to assist the person who has been wronged. He must give full information and disclosure, identify the wrongdoers, but once the information has been disclosed he should be released from the claim. To support this latter argument, counsel relied on **Australia and New Zealand Banking Group Ltd v National Westminster Bank plc** [2002] All ER (D) 72 (Feb).

[26] Referring to rule 26.2 of the CPR, counsel submitted that the learned judge erred in failing to give the appellant an opportunity to be heard before making the order to join the appellant to the claim (CPR 26.2(2)), particularly as there was no evidence to justify joining the appellant as all the nefarious acts pleaded related to Mr DeCarish and Ms Johnson. The appellant was not involved in the fraudulent scheme. The claim by the respondent was based solely on the dishonesty of Mr DeCarish and Ms Johnson.

[27] Counsel submitted that as the respondent, in order to succeed on the claim, must prove that Ms Johnson fraudulently caused her name to be entered on the register of titles, in that effort, the appellant could not be a necessary party as there was no allegation implicating the appellant in the fraudulent scheme. What is clear from the documentation is that the appellant was only a nominal party to the transactions. The appellant received no monies on the transaction and had no interest whatsoever in

the transaction and/or the claim. The appellant, counsel said, will not be affected legally and/or financially in the outcome of the litigation. Additionally, counsel submitted, the appellant did not wish to be a party to the claim and it should not be forced to take part in the proceedings, bearing in mind the onerous obligations on a party to a claim, as pursuant to the CPR, there are many procedural matters which have attendant costs, which the appellant does not wish to be a part of. As a result, it could neither be necessary, proper or desirable, counsel maintained, for the appellant to be a party in the claim.

[28] Counsel also submitted that the only duty that the appellant owed, was not to assist the court, but to provide all the information at its disposal to the respondent, which it had already done. The role of the appellant could only be a mere witness to the fraudulent transactions, and all the information in its possession had already been submitted through the affidavit of Mr Campbell. Counsel also contended that if there was any further assistance to be given to the court, that could be achieved by a far less costly method than adding the appellant to the claim. He contended that that could be achieved through part 33 of the CPR, by summoning the appellant's employees to give evidence at the trial of the claim. To proceed by any other route, counsel submitted, did not provide the appellant with any guarantees that all the costs and expenses being incurred in that process would be paid.

Grounds of appeal (e) and (f)

[29] Counsel referred to rule 30.3 of the CPR where the power to strike out parts of an affidavit are clearly set out. According to this provision, the court may order that

any scandalous, irrelevant or otherwise oppressive matter be struck from any affidavit. Evidence is scandalous, he submitted, if it is irrelevant to an issue raised in the proceedings. Counsel relied on **Thomas v Wilkins**, Claim No HCV 2007/0530, decided 18 December 2008 in support of this submission. Counsel submitted further that if irrelevant, the evidence is inadmissible, and that if the issue is one of relevance, the question for the court is whether the impugned paragraphs are material to resolving the matters in dispute before the court (**JIPFA v Minister of Physical Planning and Others**, Claim NO BVIHCV 2011/0040 (decided October 31 2011)).

[30] Counsel argued that there was a duty on the court to provide reasons for its decision regardless of how bare those reasons are. Counsel drew the court's attention to the English Court of Appeal's decision of **Flannery v Halifax Estate Agencies Ltd** [2000] 1 WLR 377. It is important, counsel stated, relying on the dictum of Henry LJ, for the judge to "enter into the issues canvassed before him and explain why he prefers one case over the other". The principles set out in **Flannery v Halifax Estate Agencies Ltd**, counsel pointed out, were endorsed and applied in **Orrett Bruce Golding and Another v Portia Simpson Miller** SCCA No 3/2008, delivered 11 April 2008.

[31] Counsel referred to the allegedly offending sentences in paragraph 23 (iii) of the affidavit of Mr Jones quoted in paragraph [14] herein, and pointed out that counsel for the respondent had conceded in the court below that there was no legal or factual basis for the fourth sentence. In relation to the second and third sentences he submitted that: the appellant would receive no monies in the transaction, and therefore had no

accounting to give to anyone; also, there was no evidence of fraud on its part; and there was no evidence that it had transferred and/or assigned any debts or associated security to the respondent, neither 10 years before or at all (indeed, counsel submitted, "the only person who could have assigned the Baugh Debt and its attendant security interest to International Assets could only [sic] have been JRF"). Counsel contended that in the light of all these factors, the sentences in paragraph 23 (iii) of the affidavit were irrelevant, unnecessary, inadmissible and ought to have been struck out.

Costs

[32] Counsel submitted that although the order to join the appellant in the claim was made by the judge, the respondent had opposed the application for the appellant to be removed as a party to the claim. The respondent did so, he insisted, in circumstances where it ought to have had no reason whatsoever in keeping the appellant in the claim, as all the allegations of fraudulent conduct made by the respondent in the claim, were as indicated previously, against Mr DeCarish and Ms Johnson. The respondent, he stated, could have agreed to vary the order of the judge, but had not done so. Therefore, he submitted, this court should order, if the appeal is successful, that the respondent pay the costs of the appeal, and of the application in the court below, on an indemnity basis.

[33] The respondent filed no submissions in response.

Analysis

Grounds (a) – (d)

[34] The author Stuart Sime in his text, A Practical Approach to Civil Procedure, 15th edition, in Chapter 17, on Parties and Joinder, at page 224, para 17.49, states that:

> "Generally it is for the claimant to decide which causes of action to pursue in a claim and which parties to claim against. A claim is sufficiently constituted if it asserts a single cause of action by a single claimant against a single defendant."

Referring to joinder of parties, specifically, he comments that:

> "Apart from the operation of the overriding objective, the only restriction against joinder of parties appears to be that there must be a cause of action against each of the parties joined. There is no jurisdiction under the rule to join people purely for the purpose of obtaining disclosure against them (**Douihech v Findlay** [1990] 1 WLR 269)."

The authors Gilbert and Vanessa Kodilinye in their text, 3rd edition, "The Commonwealth Caribbean Civil Procedure, in Chapter 5 dealing with joinder of parties make this statement:

> "The broad policy of the law is that where there are multiple claims there should be as few actions and as few parties as possible; the ends of justice will be better served and the court's resources more efficiently utilised if all the parties to a dispute are before the court so that its decision will bind all of them. Accordingly the CPR contain a broad provision for a new party to be added to proceedings *without the need for an application to the court* where this is 'desirable', so that the court can 'resolve all the matters in dispute in the proceedings'. Preferably, of course, a claimant should at the outset, when he prepares his claim form, decide which persons to join as defendants, as there are no restrictions in

> the CPR on the number of claimants or defendants who can be joined as parties; there will, however, be occasions where the need to join an additional party only surfaces after the proceedings have commenced, in which case the provisions of the CPR allowing joinder of parties can be relied upon."

[35] The views expressed by these learned authors must be read and understood within the context of the relevant rules of the CPR, which for convenience are set out below. Firstly the CPR defines "defendant" thus:

> "2.4 "'defendant' means a person against whom a claim is made and, in relation to proceedings commenced before these Rules came into force, includes a respondent to any petition, originating summons or motion."

Part 19 of the CPR deals with the addition or substitution of parties after proceedings have been commenced.

> 19.2 "(1) A claimant may add a new defendant to proceedings without permission at any time before the case management conferen.
>
> (2)…….
>
> (3) The court may add a new party to proceedings without an application, if –
>
> (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
>
> (b) there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue.

(4) The court may order any person to cease to be a party if it considers that it is not desirable for that person to be a party to the proceedings."…

19.3 (1) The court may add, and substitute or remove a party on or without an application

(2) An application for permission to add, substitute or remove a party may be made by—

(a) an existing party; or

(b) a person who wishes to become a party…"

[36] On a perusal of these provisions, it is not clear whether the test under CPR 19.2(3) which allows the court to make the order without an application is the same to be applied when the application is being made by a party or an existing party under rule 19.3(2). In **Prophecy Group LC v Seabreeze Co Ltd**, SCB Claim No 185, decided 6 April 2006, Conteh CJ, in the Supreme Court of Belize, stated that regardless of which of the provisions is applicable the matter was one of discretion which had been expressly conferred on the court, and which discretion must be informed by the overriding objective always, bearing in mind the factors set out in rule 19.2(3)(a) or (b). In any event, in the instant case, the order was made by the court without an application by the claimant, and is therefore governed by the exercise of the court's discretion under rule 19.2(3)(a) or (b).

[37] Part 26.2 of the CPR deals with the Court's power to make orders on its own initiative.

26.2 "(1) Except where a rule or other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative.

(2) Where the court proposes to make an order of its own initiative it must give any party likely to be affected a reasonable opportunity to make representations."

In this case, the court appeared to make the order to join the appellant, on its own initiative without any representations from the appellant, but permitted the application inter partes to have the appellant removed as a party in the claim. Because of the order we intend to make, we will not dwell on that particular procedure adopted by the court, but suggest that in future situations, the rule be given its true and proper interpretation and applied accordingly.

[38] There are two cases decided in this court namely, **Jamaica Citizens Bank Ltd v Dyoll Insurance Co Ltd** and **Mutual Security Merchant Bank and Trust Company Limited v Rita Marley and Others and Aston Barrett and Others** (1991) 28 JLR 670 (the former already referred to and relied on by counsel for the appellant), which have addressed the issue of adding parties after the commencement of the claim. These cases were decided pre-CPR but the then applicable provision, section 100 of the Civil Procedure Code (CPC) is not very dissimilar to rule 19.2(3)(a) or (b), which is why I find the cases instructive. Section 100 of the CPC (as far as is material), reads as follows:

"The Court or a Judge may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a Judge to be

> just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties whether plaintiffs or defendants who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added."

[39] In **Jamaica Citzens Bank Ltd v Dyoll Insurance Co Ltd** the applicant the mortgagee of certain lands, made an application to the court to intervene in the suit in an effort to prevent the defendant from building an apartment complex on the property bound by a restrictive covenant for the construction of dwelling houses only. The judge at first instance refused the application. The applicant appealed. This court held that once a third party was going to be affected legally or financially, the court in its discretion should permit the party to be added. The court made the point that there was authority to say that there need be no cause of action between the intervener and one of the parties, and that a mere commercial interest was not enough for a party to be joined. However, in this particular case the mortgagee had a far more substantial interest in the outcome of the action, than a mere commercial interest, and the ruling of the judge was overturned. The conclusion one draws from the judgment is that the interpretation to be given to the rules relating to the addition of parties is not a narrow and literal one, but that the court must be careful to ensure that all parties concerned in the dispute before the court, are before the court, as that serves the ends of justice.

[40] Although the author Sime states that the only restriction against joinder appeared to be that a cause of action must exist against each of the parties to be joined, this court has said that there does not have to be a cause of action between the person to be added and one of the parties in the action. However, in my view, the intervener, should have some substantial interest in the outcome of the litigation.

[41] In **Mutual Security Merchant Bank and Trust Company Limited v Marley** the applicants were claiming an interest in the estate of Robert Nesta Marley and wished to intervene in the action where the plaintiffs sought directions as to the price and sale of assets including real estate and royalties and administration of the said estate. The trial judge found that the applicant had an interest in the outcome of what could be determined in that action and ordered that they be joined. The plaintiffs appealed on the grounds that what they were seeking in the court was approval of the sale of certain assets and the intervention of the applicants to protect their limited interest would not put an end to their claim, could be futile, would cause delay, would engender expense to the estate, and would guarantee adversarial proceedings.

[42] In allowing the appeal, the Court of Appeal held that the trial judge had exercised his discretion on the wrong principles, in that:

> "[He had] failed to appreciate the nature of the proceedings in which joinder was sought and focused entirely on the applicants' alleged interest i.e. the best price, which could not settle the very important question of their entitlement to the assets, the best price for which, was the sole question before the Court. With respect to that question, the learned judge did not bear in mind that the joinder must enable the Court effectually and completely to adjudicate and settle all

> questions in the originating summons for directions by the appellants."

The real question therefore was whether the applicants' presence was necessary so as to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause. In the instant case, was there sufficient evidence before the court to enable it properly to exercise its discretion.

[43] In the instant case, it is of some significance that the original claim was filed by the respondent against Mr DeCarish, Ms Johnson and Dale Johnson as these three persons seem to be the important players in the transaction before the court, and against whom the respondent has a claim and if successful a remedy. Additionally, Ms Johnson remains the registered proprietor of the property, as the transfer to herself and Dale Johnson appears to be incomplete, and pursuant to **Boothe and Clarke v Cooke**, she would be the proper person to be sued particularly since rectification of the register of titles is one of the reliefs claimed. That certainly could not be achieved without her being a party before the court.

[44] In the pleadings, and from what can be gleaned from the affidavit of Mr Jones in support of the fixed date claim form filed on behalf of the respondent, the Baugh debts having been purchased with all attendant securities, from the appellant, were then through various entities sold to JRF and then to the respondent. On the respondent's own case, it was Mr Decarish, its general manager who devised the fraudulent scheme to get Ms Johnson registered on the title for the property, thereby depriving the respondent of its asset, without any monies having been paid to the respondent. It

was all, on the respondent's case, an internal arrangement, claimed to be a fraud perpetrated on it.

[45] At the time of the transfer of the property, the respondent was not claiming that the appellant had any beneficial interest in the property or the security, nor had its agent Recon Trust. There is no allegation against either of the two entities with regard to any participation in the fraudulent scheme pleaded and claimed in evidence by the respondent, or of any wrongdoing whatsoever, on their part, to deprive the respondent of any of its assets.

[46] It is true that the courts frown on a multiplicity of actions and that the courts would wish all parties to a dispute to be before the court at the same time, so that the decision once given would bind all parties, and also in an effort to avoid inconsistent findings concerning related transactions. However, a claimant, in my view, must have some basis to justify joining a party to a claim, and if the court is going to make such an order it must consider the factors set out in part 19.2(3)(a) or (b) of the CPR. Based on the facts of this case, as indicated, all the matters in dispute in the proceedings relate to the respondent and its agents. There is no indication that the presence of the appellant as a party is required to assist the court in its deliberation so as to effectively adjudicate on the issues before it. There is no issue involving the appellant which is connected to the disputes in the proceedings before the court. In my view in keeping with the overriding objective in dealing with cases justly, it would seem unjust and unfair to force the appellant to remain a party in the claim.

[47] I agree with counsel for the appellant that any information required which has not been readily made available to the respondent through Recon Trust pursuant to the practice which has been adopted by the parties for some time, can be obtained through the service of witness summonses pursuant to part 33 of the CPR, and the witness may be required to produce such documentation on the date fixed for the trial as is necessary (rule 33.2 (1)-(4)). A deposition can also be taken from the witness in advance of the trial, or the witness can be forced to attend the trial. Either way, the information which the appellant has in relation to this matter can be made available to the parties and the court (rules 33.8,9 and 13).

[48] I have carefully examined the pleadings, the affidavit evidence and the submissions of the appellant placed before the court and, in my view, the learned judge fell into error in refusing the application. I do not think that in the circumstances of this case, it is at all desirable, for the appellant to be added as a party to the claim and to have to bear the associated expense, inconvenience and stress of litigation. Grounds (a)-(d) must therefore succeed.

Grounds (e) and (f)

[49] There is no question that the learned judge is under a duty to give reasons for the decision that he has arrived at. On the question of the duty of the court to give reasons, Henry LJ in **Flannery and another v Halifax Estate Agencies Ltd** commented that; "the duty is a function of due process and therefore of justice." He went on to say that fairness requires that the parties should not be left in doubt why they have won or lost. It also concentrates the mind, he said, so that the decision is

more soundly based on the evidence. If the circumstance is such that if no reasons are given, it would be impossible to tell whether the judge had gone wrong in law, that alone could be a self-standing ground of appeal. Of course, the learned judge of appeal was careful to point out, that the extent of the duty will depend on the particular facts, for instance in a negligence case, the statement of the judge that "I believe x as against y" may be sufficient as against a case involving expert evidence. But in the final analysis there is no rule for one set of cases and another for others, the rule is the same, the judge must explain why he has reached his decision.

[50] F Williams J did not do so in respect of this aspect of the application. So this ground of appeal (e) would also succeed. However, that is not the end of the matter, as the parties knew that the sentences in the affidavit had not been struck out, and could assume that the basis for that was that the court did not view them as scandalous, irrelevant and or unsubstantiated. The appellant was therefore not in doubt why it had lost on that point, and had not been prevented from drafting and arguing a ground of appeal on this issue. Nonetheless, I am still of the view that this ground succeeds.

[51] In respect of ground of appeal (f), the general rule is that an affidavit should only contain such facts as the deponent can prove from his or her own knowledge. However the affidavit can contain information and belief where any of the rules permit and if the affidavit is to be used in any procedural or interlocutory application such as an application for summary judgment. In that situation, the source of the information, if not from the deponent's own knowledge and belief should be stated. The court can also

strike out any scandalous, irrelevant or otherwise oppressive matter from any affidavit (rule 30.3 of the CPR).

[52] In the instant case, the second sentence appears to be a statement of fact and relevant to the issues in the case. The third sentence is also relevant to the issues in the case, and appears to be a comment based on the fact that the appellant remained the registered mortgagee of the property. The affiant was making the statement that any transfer of the property would have to be done by way of the power of sale of the mortgagee. The fourth sentence has been addressed in the affidavits of both Mr Campbell and Miss Watson on behalf of the appellant. In their view the appellant, as the registered mortgagee is the only proper party to exercise the power of sale. The parties clearly disagree. It is a question of law and fact so each party appeared to be giving his understanding of the situation as it obtained. The fact that the fourth sentence may be entirely inaccurate does not, in my view, make it irrelevant, scandalous or oppressive. In any event, the resolution of the dispute on these issues is one to be determined by the trial judge on the evidence which is accepted. However, in the light of the fact that counsel for the appellant has indicated in their written submissions, that counsel for the respondent had conceded in the court below that there was no factual or legal basis for the fourth sentence, there being no submissions from the respondent to say otherwise, and given that the learned judge had made no statement or comment on that, I would agree that the fourth sentence, in those circumstances, should be struck out. This ground in the main would therefore fail.

Conclusion

[53] It is clear to me in the light of all of the above that it is not desirable for the appellant to be added to the claim and the learned judge ought to have granted the application for the appellant to cease to be a party. The learned judge ought also to have provided reasons for his decision not to strike out the impugned sentences in the affidavit in support of the fixed date claim form. However, I agree in part, with the learned judge's decision not to strike out the impugned sentences. The sentences, save for the fourth sentence, should remain. As the appellant has succeeded in the bulk of the issues raised by it, I would therefore order that it be given two-thirds of its costs of the application in the court below, and on the appeal.

BROOKS JA

[54] I have read the draft reasons for judgment of my learned sister and I agree with her reasoning and conclusion. I have nothing that I can usefully add.

McDONALD-BISHOP JA (AG)

[55] I have read in draft the comprehensive reasons for judgment of my learned sister Phillips, JA. I agree with her reasoning and conclusions and I have nothing that I can usefully add.

PHILLIPS JA

ORDER

Appeal allowed in part. The appellant is removed from the claim in the court below. The second and third sentences in paragraph 23(iii) of the affidavit of Mark Jones filed on 20 January 2011 in support of the fixed date claim form are to remain. The fourth sentence of the said paragraph is struck out.

Two-thirds costs of the application in the court below and of the appeal to the appellant to be agreed or taxed.