

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS 10 & 11/2017

**BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA**

BETWEEN	NATIONAL COMMERCIAL BANK JAMAICA LIMITED	APPELLANT
AND	SURREY HOTEL MANAGEMENT LIMITED	RESPONDENT

Written submissions filed by Myers Fletcher & Gordon for the appellant

Written submissions filed by Henlin Gibson Henlin for the respondent

15 November 2018

PROCEDURAL APPEAL

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

BROOKS JA

[1] National Commercial Bank Jamaica Limited (hereinafter called "NCB") has filed procedural appeals against two decisions handed down by Sykes J (as he then was) in the Supreme Court on 25 January 2017. The appeals have been ordered, by a single judge of this court, to be heard as a consolidated procedural appeal.

[2] Sykes J, in a written decision, in respect of the first of the consolidated appeals, refused NCB's application for the court to disallow various amended statements of case, filed against it by Surrey Hotel Management Limited (hereinafter called "Surrey"). Sykes J also refused NCB's application for the court to declare, as improper, the service of the amended statements of case. The main issues raised before Sykes J, and in this first appeal, concern:

- a. the validity of an amended and further amended claim form and particulars of claim, in circumstances where the amendments were made:
 - i. without the permission of the court; and
 - ii. after the end of a relevant limitation period.
- b. the issue of whether liability in tort may be found in circumstances where parties are in a contractual relationship, especially where the contract stipulates a limited period for liability; and
- c. the issue of whether the provisions of the Consumer Protection Act apply to contracts between commercial entities, such as these.

[3] In the second appeal, NCB complains that the learned judge was wrong in granting Surrey's application for NCB to provide specific documentary disclosure. The main issue in respect of this aspect of the consolidated appeal concerns the relevance

of documentation, which is external to the contract, especially where the written contract stipulates that it constitutes the whole agreement between the parties.

[4] Surrey filed a counter-notice of appeal. The issues raised by the counter-notice largely overlap with the issues raised by NCB in its consolidated appeal.

[5] In this judgment, the factual background to the dispute between the parties will first be outlined. Thereafter, the applications that were made before the learned judge, and his decision thereon, will be set out. The grounds of appeal and the reasoning thereon will then follow. The appeals will be considered separately.

Factual background

[6] Surrey operates the Pegasus Hotel, a major hotel in New Kingston. It provides a facility to its customers and guests whereby they may pay for the hotel's goods and services by the use of credit cards. For this purpose, Surrey holds a credit card settlement account with NCB, which facilitates those credit card payments. The settlement account is governed by a written agreement (the merchant agreement), which was made between NCB and Surrey on 28 October 2011. The merchant agreement allowed Surrey to accept, among others, credit cards issued under the auspices of Visa International, a major credit card company. NCB agreed to pay Surrey, within the terms of the merchant agreement, the sums due to Surrey from Surrey's customers' transactions.

[7] The arrangements between the parties also allowed for Surrey to grant refunds to its customers. The refunds would result in a debit to Surrey's settlement account and

a corresponding credit to the customer's credit card account. The transactions would all be handled through NCB's system.

[8] Between October 2013 and 20 January 2015, Surrey's settlement account with NCB was debited on numerous occasions. The value of the debits, as calculated by Surrey, totalled US\$533,684.73. From the pleadings filed, Surrey claims that the debits were the result of a number of fraudulent transactions conducted in respect of Surrey's settlement account.

[9] The method of debiting Surrey's settlement account, according to NCB, was the use of a point of sale terminal, located at Surrey's premises. The debits were purportedly from refunds to customers, of amounts, which presumably, would have originally been paid to Surrey by way of credit cards. Surrey does not deny that the refund process originated from its terminal, but contended, there were no original transactions, to which the refunds were linked. The purported refunds were therefore, on Surrey's case, fraudulent transactions. The monies debited from Surrey's settlement account, instead of being credited back to a customer's credit card account, were credited to at least two unrelated third parties' debit card accounts. At least one of Surrey's employees was, on Surrey's complaint, arrested and charged for the allegedly fraudulent activity.

[10] Surrey blamed NCB for its loss. It accused NCB of breach of contract and negligence in failing to:

- (a) instruct Surrey in the prudent use of the point of sale terminal in order to prevent its misuse; and
- (b) monitor Surrey's settlement account so as to quickly detect, if not prevent, such fraudulent activity.

[11] On 14 December 2015, Surrey filed a claim against NCB in the Supreme Court. It did not serve the original claim form and particulars of claim on NCB, but, on 4 January 2016, it filed amended versions of both documents and served the amended documents on NCB on 6 January 2016.

[12] The original statement of case was not shown to the judge in the court below. The amended documents contain underlinings, which show that Surrey had added assertions of negligence to the original claim of conversion, restitution and unjust enrichment.

[13] NCB filed a defence to the amended claim. It denied liability on the bases that:

- (a) there was a written contract between the parties that stipulated that it represented the whole agreement between the parties and that under that contract:
 - (i) there was a limitation period of 18 months in respect of any claim concerning any transaction, and
 - (ii) NCB's liability was limited to J\$10,000.00;

- (b) it had done nothing wrong; all the transactions that Surrey alleges to be fraudulent were carried out on Surrey's point of sale terminal and NCB had no intervention in that process; and
- (c) any fraud, which caused Surrey loss, was facilitated by Surrey's negligence in failing to change the default PIN (numerical access code) for its point of sale terminal and failing to take other specified steps to protect its processes.

[14] After NCB had filed its defence, Surrey filed a reply. Surrey also filed a further amended claim form and particulars of claim specifically stating that its causes of action were in negligence, breach of contract, conversion, restitution and/or unjust enrichment. It also filed an amended reply. NCB filed an amended defence and Surrey filed a further amended reply.

The applications

[15] After Surrey had filed its reply, it filed an application for NCB to disclose documentation relating to the regulations established by Visa International concerning the operation of Visa's credit card system in Jamaica.

[16] NCB, thereafter, filed the application mentioned in paragraph [2] above. NCB asserted that the amended and further amended statements of case, filed by Surrey, were all to be disallowed as, they had been filed after the expiry of the limitation period

stipulated by the merchant agreement, but without the required permission of the court. It asserted that the service of each of the documents, comprising the amended and further amended statement of case, should also be declared as improper because the amended claim forms served on it were nullities.

[17] Each party resisted the other's application. Surrey contended, among other things, that the limitation period mentioned in the merchant agreement did not prevent it recovering on its claim. It asserted, as part of its response, that its claim in tort was not affected by the limitation period. Surrey also contended that the Consumer Protection Act prevented NCB relying on the limitation period contained in the merchant agreement. NCB contended that the documents representing Visa International's standards were immaterial to the case, as the merchant agreement was expressly said to represent the whole agreement.

The decision

[18] As was mentioned above, the applications went before Sykes J. He agreed with Surrey's position that it was not impossible that there could be a liability in tort, and that that liability would avoid the operation of the contractually established limitation period. The learned judge also found that the question of whether the contract between the parties was subject to the operation of the Consumer Protection Act, was a matter to be resolved at a trial. He therefore held that the foundation for the submission by NCB, that the filing and serving of the amended statements of case were nullities, had not been firmly established.

[19] The learned judge did not provide any written reasons for his decision on the application for specific disclosure. It is apparent, however, that he was of the view that the documents, which Surrey wished to be disclosed, were, “directly relevant to one or more matters in issue in the proceedings” (rule 28.6(5) of the Civil Procedure Rules (the CPR)).

The grounds of appeal

[20] NCB filed nine grounds of appeal in respect of the pleadings issue, and five grounds of appeal in respect of the disclosure issue. The latter grounds will be set out later in this judgment. The grounds of appeal in respect of the pleadings issue are as follows:

- “(1) The learned Judge below erred in failing to properly apply the law to the facts as they existed before him in the context of the written Agreement of October 28, 2011 governing the commercial contractual relationship between the Appellant (‘NCB’) and Respondent (‘Surrey’).
- (2) The learned Judge below erred in failing to recognize that:
 - i. the primary question before him on NCB's application was whether each of Surrey's amended statements of case was filed after expiry of a limitation period *of '18 months from the date a transaction was entered into'* (being the limitation period agreed upon by the parties in their contract);
 - ii. As Surrey's claim relates to several separate transactions entered into between October 2013 and January 20, 2015, the expiry date of the 18-month limitation period for instituting a claim in relation to the first of the disputed transactions was April 2015 (being 18 months after October 2013);

- iii. None of Surrey's amended Statements of Case was filed before April 2015 and all of them were concerned with transactions that would have been outside the agreed limitation period as at the dates the amended Statements of Case were filed.
- iv. So long as the initiation of proceedings was prohibited in relation [to] any transaction subject of Surrey's claim, it could not file an amended statement of case without first obtaining the court's permission.

(3) The learned Judge below erred in failing to realize that he was required to consider whether each of Surrey's amended Statements of Case was impacted by the parties' contractually agreed imitation period as at the date they were filed, being:

- i. Amended Claim Form - January 4, 2016
- ii. Amended Particulars of Claim - January 4, 2016
- iii. Further Amended Claim Form - October 27, 2016
- iv. Further Amended Particulars of Claim - October 27, 2016
- v. Amended Reply to Defendant's Defence - October 27, 2016
- vi. Further Amended Reply to Defendant's Amended Defence - December 14, 2016

and that all of those amended Statements of Case were so impacted.

(4) The learned Judge erred in not regarding the parties' Agreement as operative unless and until a court of law declares otherwise. Furthermore, the learned

Judge erred in failing to sufficiently appreciate that Surrey was relying on the terms of the parties' Agreement as a basis for its claim against NCB.

- (5) The learned Judge erred in not realizing that the extract of the case of **Central Trust Co v Rafuse** (1986) 31 DLR (4th) 481 cited by him in his written reasons (when applied to the facts before him) precluded the very possibility he recognized in his reasoning, namely, the admission of a concurrent or alternative liability in tort where 'its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort.'
- (6) Accordingly the learned Judge failed to appreciate that the issues for his determination on NCB's application were not:
 - i. whether the issues raised by the pleadings 'placed squarely the legality of the limitation clause as an issue for decision'; or
 - ii. whether Surrey's amended Statements of Case have been filed outside of the statutory (and not the shorter contractual) limitation period.

Rather, the issue before him was: whether there was a contractual limitation period that had expired in relation to any one or more of the transactions subject of Surrey's amended Statements of Case at the time those amended Statements of Case were filed. Further, the learned Judge failed to appreciate that, using the facts as found by him, the answer to that latter issue is 'yes'.

- (7) Accordingly, the learned Judge below at the time of adjudicating upon NCB's application was wrong in finding that NCB's submission made at that point (i.e. before any court had struck down the parties contract under the Consumer Protection Act or for any other reason) that the contractual limitation period was the applicable one, was 'not...unassailable'.
- (8) As the learned Judge accepted this honourable court's dicta that 'if permission is needed before some act is

done then any act done or actions taken before the permission is granted is of no legal effect', it follows that he erred, as a matter of law, in not exercising his power under CPR 20.2(1) to disallow Surrey's various amended Statements of Case that it filed without leave.

- (9) The learned Judge erred in failing to appreciate that, in the circumstances of this particular case where the original Claim Form was never served on NCB and its validity period of 12 months from the date of its issue had never been extended (and could no longer be extended) it is not possible for this claim to be served on NCB if, as it contends, the amended Claim Form and Further Amended Claim Form are both nullities and of no legal effect."

[21] Surrey's counter-notice of appeal consists of six grounds. The grounds are stated thus:

- "1. Permission is not required to amend the originating statements of case prior to service and before the Case Management Conference.
2. The amendments of the 4th January 2016 and the 27th October 2016 do not fall within the exception under the Civil Procedure Rules, r. 20.1(b) insofar as only remedies were added that arose on the same facts as were included in the claim as originally filed on the 14th December 2015. The amendments did not contain any new allegations of fact.
3. In any event, even if the contractual limitation clauses are valid, they do not apply, having regard to the definition of 'transaction' under the merchant agreement. The limitation applies to bona fide transactions only. It is not disputed that the transactions in question were fraudulent.
4. The Civil Procedure Rules do not empower the Court to grant a declaration of nullity in circumstances where a party amends its statement of case without

permission. The limit of the Court's power under the Rules is to disallow the amendments.

5. [NCB] accepted that only transactions prior to the 4th July 2014 would be statute-barred so that in those circumstances, it would not be open to the Court to strike out the claim.
6. The value of [Surrey's] claim exceeds the monetary jurisdiction of the Resident Magistrate's Court so that the claim was properly instituted in the Supreme Court."

The approach to an exercise of discretion

[22] Before discussing the issues raised by the respective appeals, it must be borne in mind that these are appeals from an exercise of discretion by the learned judge. This court has a particular approach to such appeals. That approach will be outlined before the issues, as identified, are discussed.

[23] It has consistently been stated that this court will not disturb a first instance judge's exercise of discretion, given to him or her, unless it is clearly satisfied that that judge wrongly exercised that discretion due to a misapplication or non-application of the proper principles. This was stated by Morrison JA (as he then was), on behalf of this court, in **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1.

The learned judge of appeal said, at paragraph [20] of the judgment:

"This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside

on the ground that no judge regardful of his duty to act judicially could have reached it'."

The limitation period set out in the merchant agreement

[24] It will have been observed that at the centre of the dispute between the parties on these issues lies the question of whether a relevant limitation period had expired. In contending that the relevant limitation period is 18 months, NCB relies on clauses 8.37 and 10.16 of the merchant agreement.

[25] Clause 8.37 stipulates that any claims queries or disputes should be made within that period. It states:

"The Merchant further agrees that it will conduct timely reconciliation of their settlement totals to their [sic] bank accounts. The Bank shall not be obliged to keep any records of statements or other records regarding the Merchant's account for more than eighteen (18) months since the date of creation. Any queries, claims or disputes against the Bank regarding any Transactions or any other elements reflected in the account or the statement regarding such account must be made within this period."

The "Merchant", in the merchant agreement, is Surrey, while the "Bank" is NCB.

[26] Clause 10.16 limits actions against NCB to matters involving transactions occurring within 18 months prior to notification of the claim. It states that Surrey warranted and agreed:

"That no claim or proceeding shall be brought by the Merchant, or by any person acting through or for the Merchant, against the Bank in respect of any Transaction entered into more than 18 months prior to the notification, institution or commencement of such claim or proceeding."

The appeal in respect of Surrey's statements of case

[27] The first of the consolidated appeals concerns the application to disallow Surrey's amended statement of case and further amended statements of case, and to declare, as improper, the service of each of them on the basis that the amended statements of case were nullities. NCB contends that the procedure that Surrey adopted was incurably flawed.

[28] NCB does not contend that Surrey was wrong in failing to serve the original claim form or particulars of claim. Nor does it contend that Surrey was obliged to serve those documents before it filed amended versions of those documents. NCB contends that the filing and service of the amended documents were ineffective, because there was no prior court approval of the amendments.

[29] NCB argues that although Surrey was entitled to amend its claim before a case management conference, it was barred from doing so, without prior court approval, if the amendment came after the end of a relevant limitation period. NCB contends that that was the situation with these amendments. The relevant limitation period in this case, it argues, is the 18 months stipulated in the merchant agreement. NCB complains that the learned judge failed to appreciate that point and was, therefore, in error. The proper step to have been taken, it contends, is to have disallowed the flawed documents and declare their service as improper.

[30] NCB relied, for those submissions, on **Leymon Strachan v The Gleaner Company Limited and Dudley Stokes** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 54/1997, judgment delivered 18 December 1998 and

Evanscourt Estate Company Limited v National Commercial Bank (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 109/207, App 166/2007, judgment delivered 26 September 2008.

[31] Surrey contends that the CPR permitted it to amend its statement of case, without permission, at any time before a case management conference. It asserts that it did nothing in breach of the CPR. In any event, it argues, the amended documents were not void, as NCB contends, but, at worst, were merely irregular. Surrey argues that the irregularity was capable of being cured by the court, or, as occurred in this case, waived by NCB. Surrey contends that in filing a defence to the amended particulars of claim and responding to all of Surrey's statements of case, "without demur", NCB waived any procedural irregularity that may have attended the filing of the amended documents.

[32] Surrey relied, for those submissions, on **James Wyllie and Others v David West and Others** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 120/2007, judgment delivered 13 August 2008. It further relied on the general power of the court, as set out in rule 26.9 of the CPR, to rectify procedural errors, and argued that such non-compliance may be corrected by an order of the court, whether on or without an application by a party.

[33] The question, at this stage, therefore, is whether Sykes J was wrong in the exercise of his discretion to refuse to disallow Surrey's amended and further amended

statements of case. The learned judge appreciated the import of NCB's position. He stated it at paragraph [46] of his judgment:

"To remind ourselves of NCB's position. It is not its case that the failure to serve the original statement of case made the proceedings a nullity but rather the amendment without permission of the court after the contractual limitation period has passed. In other words, NCB is not advancing the argument that service of the original statement of case is a necessary and mandatory step before any amendment could be made."

[34] The rule of the CPR that is central to NCB's attack on Surrey's procedure is rule

20.1. It states:

"A party may amend a statement of case at any time before the case management conference without the court's permission unless the amendment is one to which either –

- (a) rule 19.4 (special provisions about changing parties after the end of a relevant limitation period); or
- (b) rule 20.6 (amendments to statements of case after the end of a relevant limitation period), applies."

NCB contends that Surrey's documents, having been filed in breach of rule 20.1(b), were invalid and should be disallowed.

[35] Sykes J had been asked to disallow Surrey's amended and further amended statements of case in circumstances where NCB was placing reliance on the contractual limitation clauses, which were mentioned above. There are, however, a number of issues which affect the question of whether those limitation clauses applied. They are:

- a. the issue of the relevant cause of action;
- b. the issue of the Consumer Protection Act;

- c. the issue of whether fraudulent transactions are exempted from the operation of the merchant agreement; and
- d. the issue that only some of the transactions are affected by the limitation clause.

Issue (a) – The issue of the relevant cause of action

[36] The issue of whether Surrey would be entitled to claim against NCB in tort was contested by the parties before Sykes J. NCB relied heavily on dicta in **Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and Others** [1986] 1 AC 80 to support its submission that Surrey was not entitled to go outside of the boundaries of the contract into the realm of tort in order to attempt to fix NCB with liability. Lord Scarman, in that case, eschewed the concept of liability in tort where the parties held a contractual relationship.

[37] Surrey sought to show that the law had moved on from the stance taken in **Tai Hing Cotton Mill**. It relied on a statement by Lord Goff, in **Henderson and Others v Merrett Syndicates Ltd and Others** [1995] 2 AC 145, that there may be concurrent remedies in contract and tort. Surrey also relied on **Medical and Immunodiagnostic Laboratory Limited v Dorett O'Meally Johnson** [2010] JMCA Civ 42, a decision of this court. In that case, K Harrison JA opined, at paragraph [8] of the judgment, that a party “would not be barred from bringing concurrent claims in tort and contract”. Phillips JA, in giving her judgment in that case, discussed the point extensively. She expressed a similar view at paragraph [52]. She said:

“[52] Additionally, the entitlement to enforce this duty of care is not affected by the rule in ***Tai Hing Cotton Mills v Liu Chong Hing Bank*** [1985] 3 WLR 333 and the fact that there is a contractual cause of action under the Sale of Goods Act. ***Tai Hing Cotton Mills***, as I understand it, is not authority for the principle that if there is a contract, a claimant is precluded from bringing a claim in tort where the action in tort is grounded on the same set of facts. It has been pointed out by the House of Lords in ***Henderson and Others v Merrett Syndicates Ltd*** that the oft-cited words of Lord Scarman in that case should be viewed within the context of the issue in that case, which was, whether a tortious duty of care could be established which was more extensive than that which was provided for under the relevant contract....

...

So, unless inconsistent with its terms or specifically excluded, I agree with Lord Goff when he also said:

‘...the common law is not antipathetic to concurrent liability, and that there is no sound basis for a rule which automatically restricts the claimant to either a tortious or a contractual remedy.’

...”

[38] In addition to the authorities cited by the parties, it is noted that the learned editors of Halsbury’s Laws of England, 5th Edition, Volume 22 (2012), sought to explain the current position on the point. Their statement reflects the contending positions and seems to suggest that a contracting party may have options in tort, when making a claim. After referring to the view expressed by Lord Goff in ***Henderson v Merrett***, the learned editors stated, at paragraph 210:

“...Thus, if the claimant chooses to sue in the tort of negligence, he cannot escape any exclusions or limitations of liability contained in the contract itself, or seek to impose a higher standard of care than that allowed for under the

contract, but he may obtain the benefit of incidental advantages that fall outside the contract. **For example, he cannot sue in tort to escape a time limit on claims which he agreed to under the contract, but he may sue in tort to take the benefit of a longer statutory limitation period.** He may also sue in tort to obtain a potentially more advantageous test of remoteness, or to improve the prospects of obtaining leave to serve out of the jurisdiction, or the application of a preferred law." (Emphasis supplied)

[39] The English Court of Appeal, in **Robinson v PE Jones (Contractors) Ltd** [2011] EWCA Civ 9, [2012] QB 44, also considered the contending positions. Stanley Burnton LJ stated that, in some cases, a contracting party may also have a duty in tort. He said at paragraph [94] of the judgment:

"It is important to note that a person who assumes a contractual duty of care does not thereby assume an identical duty of care in tort to the other contracting party. The duty of care in contract extends to any defect in the building, goods or service supplied under the contract, as well as to loss or damage caused by such a defect to another building or goods. The duty of care in tort, although said to arise from an assumption of liability, is imposed by the law. In cases of purely financial loss, assumption of liability is used both as a means of imposing liability in tort and as a restriction on the persons to whom the duty is owed. The duty of care in tort applies to damage to other property than that supplied, or to personal injury or death, caused by a defect in the property supplied. The provider of a service, such as an accountant or solicitor, owes a duty of care in tort to his client because his negligence may cause loss of the client's assets. I do not think that a client has a cause of action in tort against his negligent accountant or solicitor simply because the accountant's or solicitor's advice is incorrect (and therefore worth less than the fee paid by the client). The client does have a cause of action in tort if the advice is relied upon by the client with the result that his assets are diminished."

[40] Sykes J came to his decision after he examined cases on both sides of the divide. NCB criticises him for failing to follow the decision in **Central Trust Co v Rafuse and Another** [1986] 2 SCR 147; [1987] LRC (Comm) 492. According to NCB, that case decides the point. In **Central Trust**, the Canadian Supreme Court stated that a concurrent liability in tort would not be permitted if it allowed a claimant to circumvent the protection of a limitation period enjoyed by a defendant.

[41] The learned judge's analysis suggests, however, that credible authority existed, which was not as definitive. It cannot be said that the law on this point has been completely settled. It, consequently, cannot be said that the learned judge was plainly wrong in his conclusion that the issue should be resolved at a trial.

Issue (b) – The statutory provision issue

[42] Surrey relied on the Consumer Protection Act 2005 for the proposition that, as NCB's customer, it was entitled to the benefit of having the contract examined to determine whether it unreasonably excluded or placed a limit on liability. NCB contended that the Consumer Protection Act had no application to a case such as this. It argued that the Act was not intended to apply to commercial entities, which had entered freely into a commercial contract.

[43] There is no decided case on the point, which has been brought to the court's attention in this case. None was provided to Sykes J. The learned judge was entitled to say, as he did, that this was an issue which should be determined at a trial. He cannot be said to have been plainly wrong.

Issue (c) – The issue of whether the transactions were fraudulent

[44] The parties hold different positions on whether the transactions were fraudulent. The issue would have affected the question as to whether the contractual limitation clause was triggered. Surrey contends that the transactions were fraudulent, and accordingly they fall outside the ambit of the merchant agreement.

[45] NCB's position is less clear. In its defence it explained the way in which the transactions occurred. The explanation suggested that the transactions involved the unauthorised use of Surrey's PIN. In its written submissions, however, NCB stated, through its counsel, that it did not know whether the refunds were fraudulent or not.

[46] The dispute on this aspect of the case involves clause 1.2(ggg) of the merchant agreement. The clause defines transactions falling within the agreement as being valid transactions. It states:

“[The term] Transaction shall refer to:

1. any bona fide transaction between the Merchant and the Cardholder (including Card-not-present Transactions) in which a Qualified Card is used in respect of the purchase of goods or services from the Merchant or a refund or other money adjustment on a Credit Card Transaction is provided to the Cardholder pursuant to a sale of goods or services by the Merchant or other permitted transaction between the Merchant and the Cardholder, as the case may be; or
2. any bona fide transaction between the Merchant and its customer for Top Up.”

[47] That definition would seem to require evidence to determine whether the impugned transactions fell within the scope of the merchant agreement. Those are matters, which would have had to be settled at a trial.

Issue (d) – The issue of whether the transactions were inseparable

[48] The parties also disagree as to whether or not the trigger of the contractual limitation clause in respect of some of the transactions tainted the entire claim. NCB argues that it did taint the entire amended claim and that it was immaterial that some transactions were still within the limitation period. Surrey argues to the contrary.

[49] The question is inextricably tied to the resolution of issue (c). Decision on this issue would depend on that resolution.

Analysis and conclusion on the various issues

[50] The above analysis shows that uncertainty accompanied the cause of action issue, the Consumer Protection Act issue, the fraudulent transaction issue and the issue of whether some or all of the transactions were affected. That uncertainty, also, importantly at this stage, casts a shadow of uncertainty as to whether a relevant limitation period had expired when Surrey filed its amended and further amended claim forms and particulars of claim. It cannot be said to be plain that rule 20.1 of the CPR applied to prevent Surrey from amending its statement of case without the permission of the court.

[51] It must also be remembered that the limitation of actions point is really a defence to a claim (see **W Gregory Dawkins v The Right Hon Baron Penrhyn**

(1878) 4 App Cas 51). As Rowe P explained in **The Jamaica Flour Mills Limited v The Administrator General for Jamaica (Administrator for the estate of Clinton Alfred Cox, deceased)** (1989) 26 JLR 154, at page 156, “[i]t is open to a defendant to waive his right to rely upon the defence founded upon the Statutory Limitations”. The point may be extended to limitations based on contract. A claimant may make a claim based on breach of contract. The claim is not automatically a nullity if it is outside of a relevant limitation period. It is for the defendant to raise the defence. If the defendant raises the limitation point it is open to the claimant to attempt to show why it does not apply. **Dawkins v Penrhyn** is also authority for that point. The reasoning in that case was approved by this court in **Martins Tours Ltd v Senta Gilmore** (1969) 11 JLR 254; (1969) 14 WIR 136.

[52] It may also be noted that in **The Jamaica Flour Mills v The Administrator General**, Rowe P, in dealing with the striking out of a claim on the basis of the application of a limitation period, also stated that it should only be done in the clearest cases. He said at page 156 I:

“We think that applying the principle that the point of law should be crystal clear and should be on the face of it unanswerable before the Writ and Statement of Claim ought to be struck out...”

The principle also applies in the regime of the CPR as may be gleaned from the judgment in **S & T Distributors Limited and another v CIBC Jamaica Limited and another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 112/2004, judgment delivered 31 July 2007. In that case, Harris JA, at page 29 of the judgment, opined that “[t]he striking out of a claim is a severe measure”, and that “the

striking out of an action should only be done in plain and obvious cases". The principle may credibly be applied to the present case. The learned judge would not have been plainly wrong to have found that a trial was required.

[53] The uncertainty mentioned above, does not obviously suggest that Surrey's amendments to its statement of case should be disallowed. It, consequently, cannot be said that service of its statement of case was improper.

[54] It, therefore, fell within the discretion of the learned judge to decide whether or not those issues were matters to be tried. He decided that they were. The learned judge cannot be said to have been plainly wrong in his decision. Indeed, the above analysis suggests that he was plainly correct. His finding on this point should not be disturbed.

The appeal in respect of the specific disclosure order

[55] There is no record of the learned judge's reasons for his order for NCB to provide specific disclosure of the Visa Operating Regulations applicable to Jamaica from 2011-2015. NCB contends that he made a finding of law that the regulations may be relevant to the Surrey's claim in negligence. NCB must be correct on that assertion. Such a finding would be essential to that order.

[56] NCB filed the following grounds of appeal in respect of this decision by Sykes J:

- "(1) The learned Judge below erred in failing to recognize that the duty to care and skill that is implied in every contract cannot be expanded by a claim in tort, whether for compensation for negligence or for any other tort.

- (2) The learned Judge below erred in failing to regard the breach of contract alleged in paragraph 8 of the Particulars of Claim as an affirmation by [Surrey] of the parties' Agreement dated October 28, 2011 ('the Agreement') referenced in paragraphs 1 & 5 of the Particulars of Claim.
- (3) The learned Judge below erred in failing to take account of the fact that the Agreement subject of the action is between [NCB] and [Surrey] only, and that VISA is not a party to the Agreement.
- (4) The learned Judge below erred in failing to take account of the fact that the parties' Agreement is not silent on the issue of refunds or the duties of the parties, and provides that it constitutes the whole agreement between [NCB] and [Surrey].
- (5) In the circumstances of the instant case where:
 - i. the VISA Operating Regulations applicable to Jamaica from 2011-2015 are not directly relevant to the parties' Agreement, and
 - ii. tort cannot be used to expand the duties owed by each party to the other under their Agreement;

the learned Judge below erred in failing to apply the law set out in the CPR 28.6(5) [as amended with the leave of the court] and in not refusing [Surrey's] request for specific disclosure of the Visa Operating Regulations."

[57] NCB argues that Surrey and NCB are the sole contracting parties to the merchant agreement. It further contends that the merchant agreement, which constitutes the whole agreement between the parties, stipulates the applicable procedure for refunds or the treatment of Surrey's settlement account. The merchant agreement, NCB contends, does not refer to the Visa's Operating Regulations, and therefore it is not

directly relevant to NCB's contractual dispute with Surrey. The point NCB makes is that there would be no need for Surrey to request, or for NCB to supply, this document.

[58] NCB further argues that rule 28.6(5) of the CPR only allows for specific disclosure of "documents which are directly relevant to one or more matters in issue in the proceedings". It was NCB's submission that the Visa Operating Regulations were not directly relevant to the issues joined between the parties. NCB therefore submitted that Sykes J wrongly exercised his discretion when he ordered it to disclose the Visa Operating Regulations applicable to Jamaica from 2011-2015.

[59] Surrey, on the other hand, argues that the learned judge correctly exercised his discretion, given that although the merchant agreement addresses the refund policy, the processing of refunds by NCB and the allocation of risks are provided for in the Visa Operating Regulations. Surrey asserts that the transactions in dispute were completed using the Visa International network and that Visa International was one of the card organizations identified in the merchant contract. Accordingly, Surrey contends, the merchant agreement does not constitute the entirety of the agreement between it and NCB and so the Visa Operating Regulations are directly relevant to do real justice between the parties, especially since the "whole agreement" clause is being challenged.

[60] Surrey argues that certain provisions of the Visa Operating Regulations were to be implied into its merchant contract with NCB, and it could not readily access it, nor were the regulations ever made available to it.

[61] The clause of the merchant agreement, on which NCB relies, states:

"Whole agreement

8.53 The terms of this Agreement form the whole agreement between the Bank and the Merchant and shall not be removed, or varied in any way, other than as provided for in the Agreement. No other express terms, written or oral, shall be incorporated into the Agreement."

[62] In analysing this issue, it must be noted that rule 28.6(5) of the CPR states:

"An order for specific disclosure may require disclosure only of documents which are directly relevant to one or more matters in issue in the proceedings."

[63] Apart from rule 28.6(5), it is also necessary to consider rule 28.7 of the CPR. That rule guides a court, when contemplating whether to grant specific disclosure. The relevant parts of the rule state:

- "(1) When deciding whether to make an order for specific disclosure, the court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs.
- (2) It must have regard to-
 - (a) the likely benefits of specific disclosure;
 - (b) the likely cost of specific disclosure; and
 - (c) whether it is satisfied that the financial resources of the party against whom the order would be made are likely to be sufficient to enable that party to comply with any such order."

[64] The various arguments, which were analysed in the cause of action discussion in the first appeal, also touch this issue. In fact, the learned judge, at paragraph [44] of

his judgment, indicated the possible relevance of the Visa International connection. He said:

“...in certain circumstances it is permissible for a claimant to pursue both remedies [of tort and contract]. Having regard to the pleadings it is by no means clear that some of the matters raised by Surrey would necessarily be covered by the contract between itself and the bank. **Surrey has raised the issue of tortious liability on the premise that NCB, as part of the Visa network, had to conduct its credit card business in accordance with the Visa rules. That fact, may be a legitimate basis for seeking compensation in tort, specifically, the tort of negligence....**” (Emphasis supplied)

Surrey’s claim that NCB is liable in tort means that, at a trial of the issue, the court would be entitled to consider matters outside of the four corners of the merchant agreement. The fact that the merchant agreement states that it is the whole agreement between the parties does not, as the cases of **Henderson v Merritt Syndicates** and **Medical and Immunodiagnostic** suggest, automatically preclude the consideration of liability outside of the terms of the contract.

[65] The issue of a liability in tort could involve an analysis of the Visa Operating Regulations. The amended particulars of claim specifically refer to Visa International’s involvement in transactions involving its credit cards. In asserting that NCB was negligent in its treatment of the refunds, Surrey’s particulars of claim include an assertion that NCB failed or neglected “as merchant acquirer and/or issuer to abide by the Visa International...standards and regulations which provide technical guidance in terms of credit card fraud and risks including apportioning risks and how to avoid them”.

[66] Disclosure would fulfil the requirements of rules 28.6(5) and 28.7 of the CPR:

- a. The documentation, which governs Visa International's standards and regulations, would, be directly relevant to the issue in dispute (rule 28.6(5)).
- b. Their disclosure would assist the parties in their respective preparations for the trial. The disclosure would also assist the trial judge in determining whether or not NCB had departed from any standards established by Visa International (28.7(1) and 28.7(2)).
- c. NCB could not properly say that the disclosure requirement was too wide or vague or that the cost of disclosure would be oppressive (28.7(2)).

On that reasoning, it was within the learned judge's discretion to allow disclosure of a document, which may be relevant to the way that NCB conducted itself in relation to Surrey. NCB's complaint on this appeal cannot succeed.

Conclusion

[67] The issues raised by NCB in these consolidated appeals all concern the exercise of the learned judge's discretion. The first of the consolidated appeals concern NCB's application for the learned judge to declare invalid, Surrey's amended and further amended statements of case. The issues involved in the claim were not plainly and obviously in favour of such an order. The learned judge was entitled to find, as he did at paragraph [45] of his judgment, that Surrey's amendment to its statement of case

was not obviously made outside of a relevant limitation period. The issues raised in the contending statements of case were such that it was necessary to have a trial to resolve them.

[68] The issue of specific disclosure, which was raised by the second of the consolidated appeals, required the learned judge to determine whether the documents, sought by Surrey, were directly relevant to a matter in issue. The documents sought were Visa International's Operating Regulations that were applicable to Jamaica. Surrey's amended statement of case specifically referred to the Visa International's standards and a possible breach of those standards by NCB. The documents sought were clearly relevant to that issue.

[69] The learned judge was therefore not wrong in the exercise of his discretion in refusing NCB's application to disallow Surrey's amended and further amended statements of case or in granting Surrey's application for specific disclosure.

[70] The grounds of appeal contained in the counter-notice of appeal did not contribute significantly to the analysis. They feature more as arguments in the appeal than separate grounds on which the decision could have been supported. The order for costs should reflect that position.

[71] It is unnecessary, in light of the above, to deal with the counter notice of appeal. It is necessary, however, to apologise for the lengthy delay in producing this judgment, and we do so.

MCDONALD-BISHOP JA

[72] I have had the benefit of reading, in draft, the judgment written by my brother Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

SINCLAIR-HAYNES JA

[73] I too have read the draft judgment of Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

BROOKS JA

ORDERS

1. The consolidated appeal is dismissed.
2. No order is made in respect of the counter-notice of appeal.
3. The decision of Sykes J made on 25 January 2017 refusing the appellant's application to disallow the respondent's amended and further amended statements of case is affirmed.
4. The decision of Sykes J made on 25 January 2017 granting the respondent's application for specific disclosure is affirmed.
5. Costs of the consolidated appeal to the respondent to be agreed or taxed.
6. There shall be no order as to costs in respect of the counter-notice of appeal.