[2020] JMCA Civ 50

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL 43/2018

BEFORE: THE HON MRS JUSTICE McDONALD-BISHOP JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE STRAW JA

BETWEEN	**CLAYTON MORGAN & COMPANY**	**APPELLANT**
AND	**THE ESTATE OF SANDRA GRAHAM-BRIGHT**	**1ST RESPONDENT**
AND	**GIFFORD THOMPSON & SHIELDS**	**2ND RESPONDENT**
AND	**LORD ANTHONY GIFFORD**	**3RD RESPONDENT**
AND	**HUGH THOMPSON**	**4TH RESPONDENT**

Miss Stephanie Williams instructed by Henlin Gibson Henlin for the appellant

Michael Hylton QC and Miss Shanique Scott instructed by Hylton Powell for the 2nd to 4th respondents

10 July 2019 and 16 October 2020

McDONALD-BISHOP JA

[1] I have read in draft the reasons for judgment of Straw JA. They reflect the reasons for the decision of the court with which I agreed and I have nothing useful to add.

P WILLIAMS JA

[2] I have read in draft the reasons for judgment of Straw JA and agree with her reasoning and conclusion.

STRAW JA

[3] On 10 July 2019, following the hearing of this appeal and counter-appeal, we made the following orders:

> "1) The appeal from the decision of Justice Wiltshire (Ag) made on 1 May 2018 granting summary judgment in favour of the 2nd, 3rd and 4th respondents is dismissed.
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> 2) The counter-notice of appeal is allowed and the decision of Justice Wiltshire (Ag) is affirmed on the additional ground that the claim against the 2nd, 3rd and 4th respondents is statute barred.
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> 3) Costs of the appeal and counter-appeal to the 2nd, 3rd and 4th respondents to be agreed or taxed."

We indicated that we would give reasons in writing for our decision. This judgment is a fulfilment of that promise.

Background

[4] This appeal arises out of an agreement to sell real property, which was never completed, and moneys paid thereunder. In August 1998, Mr Stephen Hew ("the vendor"), who is now deceased, agreed to sell a property in Ironshore, in the parish of Saint James, to Ms Sebil Romans and Mr Peter Tebart ("the purchasers").

[5] Counsel, Mrs Sandra Graham-Bright (now deceased) represented the vendor. At that time, Mrs Graham-Bright was a practising member of the law firm Gifford, Haughton, Thompson (as it was known at the time that the agreement for sale was signed). At some point in the following year, 1999, the firm became Gifford, Thompson & Bright. Mr Clayton Morgan of the appellant firm, Clayton Morgan & Company, represented the purchasers.

[6] On behalf of the purchasers, the appellant paid part of the purchase price (the initial deposit and further payments) totalling about US$70,000.00 to the vendor's attorneys-at-law. This payment was made in tranches between December 1997 and August 1999. The vendor was unable to complete the sale initially because he was involved in a case (pertaining to property including the lot that was the subject of the agreement) against his mortgagee, the National Commercial Bank of Jamaica ("NCB"), who had retained the title for the said property. By way of a letter dated 23 October 2008 to Mrs Graham-Bright, the appellant requested information in relation to the completion of the contract and the legal status of the purchasers. Mrs Graham-Bright replied by letter dated 14 November 2008 to the appellant, that the matter was finally resolved in favour of NCB. It appears that NCB subsequently transferred the property, which was the subject of the agreement for sale, to a third-party.

[7] On 4 February 2009, the appellant wrote to Mrs Graham-Bright requesting a refund of all deposits together with interest accrued on behalf of the purchasers, given the provision in the agreement for sale for the return of the deposits paid in the event

of any failure to transfer the title. Mrs Graham-Bright replied in a letter dated 24 February 2009, indicating that the deposit had been paid over to the vendor, pursuant to a "condition of this transaction" in which the purchasers were granted early possession of the property in exchange for the vendor's immediate use of the funds deposited. In that letter, she advised the appellant to contact the vendor or his heirs and/or assignees for a refund of those sums. She indicated that the only sums that would be available to be refunded were those sums paid relevant to the agreement for sale in respect of the transfer tax and stamp duty. Subsequently, several letters followed between the appellant and Mrs Graham-Bright up to July 2012.

[8] Mrs Graham-Bright died sometime in that same year and in 2015, her former partners, the 3rd and 4th respondents, formed the 2nd respondent, which was a new partnership with another attorney-at-law.

Procedural history

[9] In December 2016, the appellant filed a claim against the 2nd respondent seeking repayment of the deposit. In their submissions, the respondents stated that the causes of action asserted were breach of contract and restitution for and by reason of unjust enrichment (the original claim form was not exhibited before this court).

[10] On 2 March 2017, the 2nd respondent filed an application for summary judgment seeking an order that the claim be dismissed on the grounds that (a) the appellant had no standing to bring the claim; and/or (b) the claim was statute-barred. The appellant subsequently amended its claim on 27 October 2017 to add the 3rd and 4th respondents

as defendants to the claim, on the basis that they are partners in the 2nd respondent. The amended claim averred that the respondents were trustees for the funds received; that several requests had been made for the return of the monies and interest accrued; that, in the alternative, the respondents received the deposit as stakeholders for the purchase price of the land and were liable to repay it as money had and received. It was also averred in the alternative, that the respondents have converted the said sum to their own use, entitling the appellant to damages for conversion.

[11] On 5 April and 1 May 2018, the learned judge heard the application and granted summary judgment in favour of the 2nd, 3rd and 4th respondents (hereinafter referred to as "the respondents") and awarded costs to them. Leave to appeal was granted to the appellant, which filed its notice of appeal on 15 May 2018. The respondents filed their counter-notice of appeal on 28 May 2018.

The appeal

[12] At the outset, it is useful to note that the court did not have for its consideration the learned judge's written reasons for her judgment. Instead, pursuant to rule 2.5(2)(a) of the Court of Appeal Rules, there was an agreed summary of the judgment presented by the parties to which we had regard.

[13] The appellant advanced four grounds of appeal, these are:

> "a. The learned judge erred as a matter of fact and/or law in finding that the Claimant as agent of the Purchaser did not have capacity to sue to recover moneys had and received by the Defendants from the Claimant;

> b. The learned judge erred as a matter of law in failing to have regard to the totality of the Claim as set out in the Amended Claim Form and Particulars of Claim which show that the cause of action was not for breach of contract but for equitable remedies of account, money had and received and restitution that are separate and distinct from a claim for breach of contract;
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> c. The learned judge erred as a matter of law in failing to have regard to the fact that if it was found that payment of the money by Mrs Graham Bright was done without authority, then this would be a wrongful act which fell within the circumstances where an agent who paid the sum can sue to recover;
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> d. Alternatively, that the circumstances where an agent can sue to recover the money paid is not limited to mistake of fact, fraud or extortion."

Submissions on behalf of the appellant

Grounds a, c and d

[14] The thrust of the appellant's submission was that the learned judge was palpably wrong when she found that the appellant as agent for the principal (the purchasers) did not have the capacity to sue for an account and/or for money had and received in respect of money which it paid on behalf of its client.

[15] On the evidence, it was undisputed that the appellant acted as agent for the purchasers in the transaction that gave rise to the proceedings. It was contended that, having regard to the Halsbury's Laws of England, the learned judge applied a limited construction of the circumstances where an agent can claim for the return of money paid on behalf of its principal. She submitted, therefore, that the learned judge erred in determining that an agent can only sue to recover money paid on behalf of the principal where the examples, as cited in Halsbury's, were fraud, extortion and mistakes of fact

and that the circumstances of the present case fell in none of these categories. It was contended that the principle is not limited to these three categories and that the issue was whether a wrongful act had taken place.

[16] Counsel for the appellant, Ms Stephanie Williams, contended that in the instant case, a wrongful act had taken place and as such the appellant's principal was entitled to a refund of the monies paid where the agreement for sale was not completed. The agreement being cancelled, the 2nd respondent had a duty to return the moneys to the appellant for onward payment to its client, the purchaser.

[17] Further, it was submitted that there was no evidence before the learned judge to support the contention that the monies were paid to the vendor or that Mrs Graham-Bright had the authority to pay the monies to the vendor. In these circumstances, this wrongful act would entitle the appellant (as agent) to sue for the monies paid. Reference was made to **Ex parte Edwards In re Chapman** (1884) 13 QBD 747 in support of this contention. Counsel contended that whether a wrongful act took place would have to be determined by whether there was an agreement for early possession. This would have been an issue of variation of the contract which would not be suitable to a determination by summary judgment.

[18] Counsel submitted that it was undisputed before the learned judge that where it is found that a partner, such as Mrs Graham-Bright, acted improperly, then all the partners would be held jointly and severally liable for the wrongful act committed during the course of the partnership. Further, Mrs Graham-Bright's death would not

affect the liability of the partners for acts committed during the course of the partnership.

Ground b

[19] Counsel submitted that the learned judge erred in finding that the amendment did not assist the appellant as the cause of action remained breach of contract. This finding was demonstrative of the failure to have regard to the totality of the claim as the equitable remedy of money had and received was pleaded. The distinction between these two causes of action has been recognised by the court and, even if a party failed to establish a claim for breach of contract, a claim could still be maintained for money had and received. Reference was made to the cases of **Woolwich Equitable Building Society v Inland Revenue Commissioners** [1993] AC 70 and **Westdeutsche Landesbank Girozentrale v Islington London Borough Council** [1996] AC 669.

[20] Finally, counsel asked the court to consider that the principal, Mr Peter Tebart, swore to an affidavit filed on 27 October 2017 in response to the application for summary judgment, which referred to his retainer of the appellant to act on his behalf. He also deposed that he paid various sums over to the appellant in fulfilment of his obligations as purchaser under the agreement for sale. She asked that the court take into consideration that the principal had not opposed the claim filed on his behalf by his agent and that there was, therefore, implied consent. Counsel maintained that this is a fact that ought to be considered, although the point was never raised before the learned judge on the pleadings. According to her, it is certainly a question of law that the court should not ignore.

Submissions on behalf of the respondents

Grounds a, b, c and d

[21] Counsel for the respondents submitted that the learned judge was correct to find that the appellant did not have standing to bring the claim as it is trite law that a person who is not a party to a contract cannot receive any rights or sue under the contract. Reference was made to the following statement of the principle from Halsbury's Law of England, Volume 22 (2012), paragraph 327:

> "The doctrine of privity of contract is that, as a general rule, a contract cannot confer rights or impose obligations on strangers to it, that is, persons who are not parties to it. The parties to a contract are those persons who reach agreement…"

[22] It was accepted that the appellant acted as an agent for the purchasers under the contract, however, it was submitted that this would not entitle it to bring a claim in its own name. The case of **Brady & Chen Limited v Devon House Development Limited** [2010] JMCA Civ 35 was referred to the court and in particular Smith JA's statement of the principle that:

> "[16] The general rule is that where the agent has authority and is known to be an agent, the contract is the contract of the principal, not that of the agent, and prima facie at common law the only person who can sue and can be sued is the principal…"

[23] Counsel contended that the appellant in its capacity as the purchasers' attorneys-at-law, and on their behalf, paid the deposit to Mrs Graham-Bright's firm in their capacity as the vendor's attorneys-at-law, on his behalf. Accordingly, any claim for its recovery must relate to the agreement and must be made by a party to the agreement.

[24] It was submitted that the authorities relied on by counsel for the appellant did not support the position that an agent can sue to recover money paid on behalf of its principal in situations where a wrongful act has been committed by a defendant. In his oral submissions, Mr Hylton QC, while agreeing in principle that claims for money had and received were quasi-contractual for restitution and, therefore, do not require a contract, stated that the claim must be brought by the person entitled to the money in any event. Queen's Counsel did concede, however, that the learned judge ought not to have used the term, privity of contract, when considering the issue of money had and received. As it related to unjust enrichment, Queen's Counsel submitted that the appellant must establish that the respondents had been unjustly enriched at the expense of the appellant and there must be proof that the respondents took the appellant's money. In the circumstances, the learned judge was correct to have granted summary judgment and the appeal should be dismissed on this basis.

[25] In relation to the issue of whether the court should have regard to the implied consent of Mr Tebart, Queen's Counsel submitted that the claim did not purport to be brought on behalf of the principal; that the effect of Mr Tebart's participation could not cure any defect as submitted by Ms Williams; that B does not get status by A consenting; this could be achieved in various ways such as an assignment or novation, et cetera, but none of these methods was applicable to the present case.

Discussion and analysis

Grounds a, b, c and d

[26] Counsel for the appellant helpfully referred to some of the cases which are often referred to for their concise statement of this court's approach when determining an appeal from the exercise of a judge's discretion. These are the **Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, paragraph [20] and **ASE Metals NV v Exclusive Holiday of Elegance Limited** [2013] JMCA Civ 37, paragraphs [22] and [23], which are reproduced below:

> "[20] 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'." **(Attorney General of Jamaica v MacKay**)

> "[22] The decision to grant or to refuse an application for summary judgment is an exercise of a judge's discretion. An appellate court is always reluctant to interfere with such an exercise, but may do so where the circumstances so warrant. That view was concisely expressed by Lord Diplock in **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042 at page 1046. Lord Diplock said, in part:
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> > 'On an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the

> appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. **It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist**… (Emphasis supplied)'
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> [23] The learned law lord went on to state another basis on which the appellate court may set aside a decision of a judge at first instance. He said:
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> > 'Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the [application] **is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it**. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own.... (Emphasis supplied)'" (**ASE Metals NV v Exclusive Holiday of Elegance Limited**)

[27] Counsel for the appellant submitted that the cause of action is for money had and received, restitution and an account. She contended that there are circumstances under which an agent can sue to recover monies paid on behalf of a principal.

[28] The issue for determination in relation to the grounds a, c and d, therefore, would have been whether the learned judge erred in her conclusion that the appellant had no *locus standi* to bring the claim for recovery of the funds paid by the purchasers by virtue of a claim for money had and receive. In other words, was there any basis in the law of equitable remedies of account, for money had and received and/or unjust

enrichment, on which the appellant, as agent for the purchasers of the property, would be entitled to bring this action?

[29] What is impatient of any debate is that the appellant would have no basis to bring an action for breach of contract against the respondents. This was not disputed before this court by the appellant. As the learned judge found, there would have been no privity of contract (see Halsbury's Laws of England Volume 22 (2012), paragraph 327). Also, the appellant, as agent for the principal (Mr Peter Tebart), was not entitled to sue on the contract as the general rule is that the principal would be the only person entitled to sue even where the agent has the authority and is known to be an agent (see **Brady & Chen Limited**).

[30] In relation to a claim for money had and received, which is based on quasi-contractual principles, a contract between the parties would not be required. I found, however, that there was merit in Mr Hylton's submission that the action would have had to be brought by the person entitled to the money that is the principal, in any event. There was also no basis for the court to consider that the principal gave implicit consent to the appellant to bring the claim, by virtue of the affidavit filed by him on 27 October 2017, in response to the application for summary judgment. This was never argued in the court below and so this court refused to entertain any such argument, not forming part of any ground of appeal. There must be a legal basis in law to establish the capacity of the appellant to initiate the claim and there is none.

[31] The appellant relied on **Ex parte Edwards** in seeking to establish its right to bring the claim for the return of the money. However, that authority was ultimately not helpful to its case. In that case, a solicitor received money from a debtor in bankruptcy proceedings. The petition for bankruptcy had been brought by the solicitor's client. The solicitor paid the sums over to his client, but the petition for bankruptcy was still pending as it had not been withdrawn. The court found that the solicitor had committed a wrongful act in paying over the monies to his client as it should have been paid over to the trustee in bankruptcy. The court held that the solicitor was liable to repay the money to the trustee in bankruptcy.

[32] Cotton LJ at page 751 expressed thus:

> "...A number of cases have been cited to shew that, in the absence of fraud or some other wrongful act, an agent who has accounted to his principal cannot be made liable to the true owner of the money for which he has so accounted, but very little argument has been addressed to the question whether the payment by the agent in the present case was not a wrongful act. In my opinion it was."

[33] The decision in that case, as submitted by Mr Hylton, only goes as far as determining that the agent is liable under certain circumstances to be sued as he is liable to the true owner of the money. It does not, however, determine that an agent could actually bring the claim for the refund of the money (as under the present circumstances). As demonstrated in the case, the trustee in bankruptcy was in the position of the true owner of the money, as he was the person legally entitled to receive any funds collected in order to make the applicable payment to all the creditors

rateably. The appellant, in this case, is clearly not in any such position to be considered as the true owner of the money.

[34] In further deliberation of this issue, I considered the following excerpt from Halsbury's Laws of England, Volume 88 (2019) at paragraph 405, where it is stated under the heading, "money had and received":

> "An action for money had and received was a form of action used by claimants who were, for example, seeking to recover from the defendant money which had been paid to the defendant: (1) by mistake; (2) upon a consideration which had totally failed; (3) as a result of imposition, extortion or oppression; or (4) as the result of an undue advantage which had been taken of the claimant's situation, contrary to the laws made for the protection of persons under those circumstances. Money had and received proved to be perhaps the most influential of all the restitutionary claims, being the most flexible and the most commonly used. As framed, it only applies to claims to recover money paid by the claimant to the defendant**.** The scope of the law of unjust enrichment and restitution is not, however, defined by the action for money had and received; there are restitutionary claims which do not fall within the province of the action and, equally, there are claims which do fall within the scope of the action which are not restitutionary in nature. It is only those claims which fall within the scope of the action for money had and received and which are founded upon the principle of unjust enrichment which fall within the scope of the law of unjust enrichment."

[35] Also, I had regard to the following excerpt taken from Halsbury's Laws of England, Volume 1 (2017) paragraph 170 regarding "[a]gent's claim for money had and received":

> "An agent who has paid money on behalf of his principal to a third person **under such circumstances** that the principal, if the payment had been made by him, would have been entitled to recover the money, may bring a claim in his own name for money had and received against the third person." (Emphasis supplied)

[36] The circumstances referred to in Halsbury's include, as examples, mistake of fact (see **Colonial Bank v Exchange Bank of Yarmouth, Nova Scotia** (1885) 11 App Cas 84, PC), mistake of law (see **Kleinwort Benson Ltd v Lincoln City Council** [1999] 2 AC 349), fraud (see **Holt v Ely** (1853) 1 E & B 795) or extortion (**Stevenson v Mortimer** (1778) 2 Cowp 805). Ms Williams contended that the learned judge merely considered those circumstances as set out in Halsbury's Laws of England and concluded that the case before her did not fall into any of those examples.

[37] At paragraph 12 of the Agreed Summary of Judgment, the learned judge reportedly expressed as follows:

> "Some reliance was placed on an excerpt from Halsbury. The circumstances would not assist on moneys paid on behalf of third party and so are not relevant to the case before me. The issue of funds under this agreement of sale were not his funds or paid over for his benefit. Even with the amendment to the claim removing breach of contract it does not assist the claimant when the court considers privity of contract."

[38] It was not made clear in the Agreed Summary of Judgment, what specific excerpt in Halsbury the learned judge was referring to, but the parties were not in dispute that the learned judge concluded that the capacity of the agent to sue would only be established where there was a mistake of fact, fraud or extortion. Based on the relevant excerpt from Halsbury's, as summarized at paragraphs [35] and [36] above, I

was only able to identify the circumstances of mistake of fact, mistake of law, fraud and extortion as examples of some situations in which the agent may have the capacity to sue. Ms Williams contended that the principle is not limited to these examples, but cited no authority in support of this contention except for what could be described, generically, as situations involving a wrongful act. As stated previously, however, I formed the view that her reliance on **Ex parte Edwards** could not move this appeal forward.

[39] This position as to whether the appellant would have the capacity to sue remained the same, even though I found that there was a live issue as to whether Mrs Graham-Bright may have committed a wrongful act.

[40] In relation to a strict claim for money had and received, it would have had to be considered at a trial, whether Mrs Graham-Bright had wrongfully released the deposit of US$70,000.00 to the vendor. There is no written agreement to the effect that early possession was to take place, as reflected in her letter of 24 February 2009; nor is it one of the special conditions contained in the agreement for sale. This would, therefore, be an issue of fact that could not be determined at the hearing for summary judgment. However, even though this may have been a live issue on the facts, I had to consider whether the appellant (as agent) could properly bring this claim for money had and received. As I determined previously, there were no existing circumstances that would warrant the appellant bringing the claim.

[41] The reliance on any claim based on unjust enrichment, similarly, was without merit. In relation to "an unjust enrichment claim" at paragraph 525, the learned authors of Halsbury's Laws of England, Volume 88, states:

> "Where work has been done and it is necessary to ascertain the rights and obligations of the parties, the party who has done the work may be able to bring an unjust enrichment claim against the recipient. In order to do so, the claimant must show that the defendant was enriched at the claimant's expense as a result of the work which has been done. The unjust factor in anticipated contract cases will usually be failure of consideration but may also be mistake. To show that the work was done for a consideration that failed, the courts will have regard to the basis on which the work was done to ascertain whether the work was performed on the shared basis that it would be remunerated under an anticipated contract which failed to materialise."

[42] As far as unjust enrichment is concerned, the circumstances of this case did not reveal facts relevant to such a claim. The evidence that was before the learned judge was that the money was paid over to the vendor. There is no evidence, therefore, that the respondents retained this money for their own benefit. In a claim for unjust enrichment, there must be proof that the respondents were enriched at the expense of the other party. In any event, the claim would have suffered from the same deficit, which is that the appellant was unable to bring the action as an agent for the principal.

[43] In relation to grounds a, c and d, I found, therefore, that the appellant failed to establish any merit. In relation to ground b, although the learned judge did err in giving regard to the principle of privity of contract in regards to the claim for money had and received (as reflected at paragraph 12 of the Agreed Summary of Judgment), she was

ultimately correct in her conclusions that the appellant had no capacity to sue. The appeal on all grounds could not be sustained.

The counter-notice of appeal

[44] The respondents (counter-appellants) filed a counter-notice of appeal on 28 May 2018. Although it would be more precise to refer to the respondents as the counter-appellants and the appellant as the respondent, for convenience, the same reference to the parties will remain. In fact, this is in keeping with how the parties referred to themselves in the pleadings and submissions. No confusion is intended.

[45] The essence of the respondents' contention is that the learned judge's decision to grant summary judgment should be affirmed on the additional ground that the claim was statute-barred. The grounds of appeal were as follows:

> "(a) The Learned Judge erred when she found that the Appellant had pleaded in paragraph 10 of its Reply that there was an acknowledgement of debt.
>
> (b) The Learned Judge erred when she found that the question as to whether there was an acknowledgement of debt should be properly determined by a trial Judge."

Submissions in support of the counter-notice of appeal

[46] It is common ground that the applicable limitation period is six years. The agreement was executed on 1 August 1998. Clause 11 of the agreement provided that the deposit would be refunded if the vendor did not transfer title to the purchasers within 24 months from the execution of the agreement. Mr Hylton, submitted on behalf

of the respondents, that if the purchasers were entitled to a refund, then, this entitlement arose at the end of July 2000 and as such their cause of action would have accrued at that time and expired in 2006.

[47] Alternatively, learned Queen's Counsel submitted that, at the very latest, any cause of action for the refund would have accrued in November 2008, when Mrs Graham-Bright told the appellant that she would not be refunding the deposit. The six-year limitation period would have expired in 2014.

[48] Queen's Counsel also submitted that there was no acknowledgement of the debt, and in any event, the appellant could not rely on any alleged acknowledgement because it was not pleaded. In that vein, it was contended that the learned judge erred in finding that the acknowledgement had been pleaded in paragraph 10 of the reply, and that the question of whether the correspondence amounted to an acknowledgement should be determined by a trial judge and not on a summary judgment application.

[49] In relation to the requirements that must be satisfied for a claimant to successfully rely on a plea of acknowledgement of debt, counsel referred to the dictum of McCalla JA (as she then was) in **Ricco Gartmann v Peter Hargitay** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 116/2005, judgment delivered 15 March 2007, wherein the following excerpt from Halsbury's Laws of England Volume 24 (3rd Edition) at page 208 was quoted with approval (at page 39 of the judgment):

> "Where there is an acknowledgment in writing or part payment, a fresh cause of action accrues. Where the title would be extinguished but for such an acknowledgment of part payment, it seems that the acknowledgment or payment should be alleged in the statement of claim as part of the cause of action. That course would also seem desirable where only the remedy is barred; but in such a case an alternative course, which would not, it is thought, be wrong; would be to plead the acknowledgment or part payment in reply."

[50] Further, at page 43 of **Ricco Gartmann**, reference was made to the following statement from page 884 of Bullen and Leake Precedent of Pleading (11th Edition):

> "The facts as to acknowledgment or part payment should be expressly pleaded in the statement of claim or reply."

[51] It was submitted that, although paragraph 10 of the reply referred to Mrs Graham-Bright's letter dated 31 July 2012 ("the July letter"), it did not state or even suggest that the said letter constituted an acknowledgement of the debt, thereby reviving or extending the cause of action. Instead, the pleading asserted that the cause of action "did not arise in the matter" until the July letter. As such, the respondents and the court would not have been aware that the appellant would be arguing that the July letter constituted an acknowledgement of debt.

[52] Queen's Counsel acknowledged that the court will not usually grant summary judgment where there are significant issues in dispute between the parties. However, the court will grant summary judgment when the decision will turn only on an interpretation of documents. In the instant case, there was no dispute between the parties as to whether the July letter and all the other correspondence between Mrs Graham-Bright and the appellant were authentic and whether the contents were

accurate. Accordingly, the learned judge only had to determine whether the letters amounted to an acknowledgement of the debt. Therefore, the learned judge needed only to consider the legal requirements for establishing an acknowledgement by applying the law to the undisputed facts.

[53] It was against this background that it was submitted that the learned judge erred in finding that this legal issue could not be resolved on a summary judgment application. It was contended that this court has repeatedly emphasised the importance of invoking this rule (relating to summary judgment) in appropriate cases and reference was made to the recent decision of the Privy Council in **Sagicor Bank Jamaica Limited v Taylor-Wright** [2018] UKPC 12. In that case, Lord Briggs delivered the Board's opinion and he explained:

> "16. Part 15 of the CPR provides, in Jamaica as in England and Wales, a valuable opportunity (if invoked by one or other of the parties) for the court to decide whether the determination of the question whether the claimant is entitled to the relief sought requires a trial. Those parts of the overriding objective (set out in Part 1) which encourage the saving of expense, the dealing with a case in a proportionate manner, expeditiously and fairly, and allotting to it an appropriate share of the court's resources, all militate in favour of summary determination if a trial is unnecessary.
>
> 17. There will in almost all cases be disputes about the underlying facts, some of which may only be capable of resolution at trial, by the forensic processes of the examination and cross-examination of witnesses, and oral argument thereon. But a trial of those issues is only necessary if their outcome affects the claimant's entitlement to the relief sought. If it does not, then a trial of those issues will generally be nothing more than an unnecessary waste of time and expense."

[54] On this point, reference was made to the following dictum of Lord Hope in **Three Rivers District Council and others v Bank of England (No 3)** [2001] UKHL 16:

> "[95] … For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases, it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based …"

[55] Reference was also made to the appellant's argument that the July letter demonstrated that Mrs Graham-Bright acknowledged liability for the deposit; it was submitted that an examination of the said letter and all the other correspondence showed that this assertion was unfounded. Rather, according to counsel, the evidence that was before the learned judge was that Mrs Graham-Bright had advised the appellant more than three years prior, by letter dated 24 February 2009, that she had already paid the monies directly to the vendor and the suggestion was made that the appellant should "contact the vendor or his heirs and/or assignees for a refund of those sums paid over directly to him".

[56] It was submitted that Mrs Graham-Bright did not promise or even suggest that she would repay the deposit to the appellant in any of the correspondence that was before the learned judge. Instead of an acknowledgement of liability to repay the deposit, Mrs Graham-Bright made it clear that the purchasers should look to the

vendor's estate rather than to her. In support of this contention, the court was referred to the case of **Surrendra Overseas Ltd v Government of Sri Lanka** [1977] 2 All ER 481, wherein it was held that a debtor can only be held to acknowledge the claim if he has in effect admitted his legal liability to pay the debt the claimant seeks to recover. Reference was also made to the dictum of Kerr J (at page 489) wherein a number of authorities in relation to an acknowledgement of debt plea was considered:

> "In *Dungate v Dungate* ([1965] 3 All ER 818 at 820, [1965] 1 WLR 1477 at 1487) Diplock LJ said that the question was whether the document under consideration in that case amounted to 'an acknowledgment … of … indebtedness to the plaintiff'. Russell LJ ([1965] 3 All ER 818 at 821, [1965] 1 WLR 1477 at 1488) agreed that it was an acknowledgment, because in his view it was equivalent to an acknowledgment to the plaintiff: 'I owe you money.'
>
> Finally, in *Re Flynn (No 2), Flynn v Flynn* Buckley J had to consider whether the written defence in an American action to a claim on a promissory note constituted an acknowledgment. He held, first, that the document alleged to contain the acknowledgment must be read as a whole, and this is important. It consisted of a confession and an avoidance, ie it admitted the note and the fact that it had not been paid, but disputed the maker's liability to pay on a number of grounds. He held that it did not constitute an acknowledgment and said ([1969] 2 All ER 557 at 562, [1969] 2 Ch 403 at 412):
>
> > '… in my judgment, the authorities do establish the principle that the acknowledgment properly interpreted must be an acknowledgment of liability on the part of the person making the acknowledgment and not merely an acknowledgment of certain facts which, taken in isolation, would give rise to a liability, but which are alleged by the person who is said to have given an acknowledgment not to give rise to a liability by reason of other surrounding circumstances.'

> What I draw from these authorities, and from the ordinary meaning of 'acknowledges the claim', is that the debtor must acknowledge his indebtedness and legal liability to pay the claim in question..."

Submissions in response to the counter-notice of appeal

[57] Counsel for the appellant submitted that the learned judge did not err in finding that the issue of the limitation period was a question of fact for a trial judge to decide. Reliance was placed on **Ricco Gartmann** and in particular the following statement of Harrison JA at paragraph 12:

> "It is abundantly clear therefore that so long as there is a sufficient acknowledgement in relation to the plaintiff's claim, time under the Limitation of Actions Act would run afresh from the date of the acknowledgement. See ***Dungate v Dungate*** [1965] 3 All ER 818; ***Spickernell v Hotham*** 69 ER 285."

[58] It was submitted that in **Dungate v Dungate,** it was held that an acknowledgement for the purposes of section 23(4) of the Limitation Act, 1939 need not identify the amount of the debt, and that it was sufficient if the general indebtedness was acknowledged, provided that the amount of the debt could be ascertained by extrinsic evidence.

[59] Counsel argued that when Mrs Graham-Bright sent a cheque on 2 August 2012 in the sum of $442,010.00, refunding the stamp duty and the transfer tax, this was an act of acknowledgement of the debt owed to the appellant and thus a fresh cause of action accrued at that point. Consequently, counsel submitted that the claim would not

be statute-barred since six years had not elapsed from August 2012 to the time of filing the submissions in March 2019.

[60] It was observed by counsel for the appellant that the respondents took a different view, namely, that Mrs Graham-Bright's constant assertion that she did not have the funds in her possession did not amount to an acknowledgement of the debt. Counsel contended that in the circumstances, the learned judge was correct in finding that the competing interpretations of the July letter would require a detailed consideration of all the evidence and that would be more appropriate for a trial judge.

Discussion and analysis

[61] Although counsel had submitted in written submissions that the limitation period would not have ended up to the time of the filing of her submissions (March 2019), this would clearly be an error on her part. This is so, because, even if she were found to be correct that the July letter (of 2012) would have been an acknowledgement of the debt, the limitation period would have expired from August 2018. It is likely that counsel intended to refer to the date of the filing of the claim on 15 December 2016 as the relevant date for the determination of whether the limitation period had expired.

[62] There is no dispute as to the limitation period, however, a consideration of section 46 of the Limitation of Actions Act provides a useful starting point. It is not necessary to set out this provision in full, instead, it is convenient to adopt from paragraphs 6 and 7 of the dictum of Cooke JA in **Ricco Gartmann**:

> "6. By section 46 of the Limitation of Actions Act, the Limitation Act 1623 of England:
>
> > 'has been recognised and is now esteemed, used accepted and received as one of the statutes of this island.'
>
> By that Act of 1623 the appellant had to bring his claim.
>
> > 'within sixe yeares next after the cause of such actions or suit, and not after.'
>
> …
>
> 7. However, the Limitation Act does not provide for an absolute bar against the initiation of a suit after the expiry of 6 years from the date when the cause of action for a debt arose. If there is an acknowledgment by the debtor time begins to run afresh from such acknowledgment…"

[63] The issue is, therefore, whether the learned judge was correct when she found that the issue of the limitation period was a question of fact to be considered at a trial. In the agreed summary of the judgment of the learned judge indicated at paragraphs 6, 7 and 8:

> "6. In the instant case at Paragraph 10 it refers to the letter refunding and referred to cancellation of the agreement. The Claimant relied on that as acknowledgement and hence claimed that the claim would not be statute barred. The Defendants submitted that there was no acknowledgment and the thread of correspondence show that the money was paid over to the vendor facilitating early possession.
>
> 7. I am satisfied that paragraph 10 of Reply [sic] made reference to letter dated July 2012 and is in fact satisfactory of what is required in terms of pleading as set out in Ricco Gartmann v Peter Hargitay.
>
> 8. The question of whether it is indeed an acknowledgment which can be relied on, Mr. Hylton argued that it should be clear. However, I am of the view that the determination of that question is to be properly determined by a trial judge.

> Therefore, I am of the view that the submissions of the Defendants that summary judgment be granted on the basis that the claim is statute barred would fail on that arm."

[64] I found that there was merit in the submissions of Mr Hylton as to the effect of the July letter. The relevant aspects of the letter are set out for expediency:

> "Please find enclosed a Bank of Nova Scotia Jamaica Limited cheque dated July 31, 2012 in the sum of Four hundred and forty two thousand and ten dollars (JA$442,010.00) made payable to Clayton Morgan & Company Attorneys-at-Law in respect of the refund for Stamp Duty and Transfer Tax in this matter."

[65] It is clear that the money refunded was in respect of the stamp duty and transfer tax, which would have been returned by the Tax Payers Audit and Assessment Department as a result of the cancellation of the agreement for sale. This is also verified by the letter to that department, written by Mrs Graham-Bright on 21 January 2011. This second letter enclosed the original cancelled agreement for sale and the receipts that were obtained on the payments of stamp duty and transfer tax.

[66] There is also the letter of Mrs Graham-Bright dated 24 February 2009. In that letter written to the appellant, she indicated (at paragraph 2) that the sum of USD$70,000.00 had been paid over to the vendor for his immediate use on the condition that the purchasers were granted early possession. At paragraph 4 of that said letter, she also indicated that the only sums that the firm would have at hand would be the sums impressed on the relevant sales agreement by way of transfer tax and stamp duty payments. As indicated by counsel for the respondents, she had also

referred the appellant to the vendor or his heirs and assignees for a refund of those sums paid over directly to him.

[67] The July letter relied on by the appellant was clearly intended to facilitate the refund of taxes and fees paid in regard to the relevant legal documents. There is no basis on which to conclude or even to infer that the contents could be evidence of an acknowledgement of the debt of US$70,000.00. It is not an acknowledgement of the debt or the liability to repay such a debt (see **Surrendra Overseas Ltd v Government of Sri Lanka** [1977] 2 All ER 481). It would, therefore, have been apparent from the evidence that was before the learned judge, that the claim would be statute-barred based on the application of the Limitation of Actions Act. Prima facie, for the purpose of establishing the limitation period, time would have started to run from 1 August 2000 (per special condition 11 of the agreement for sale, which entitled the purchasers to a refund if the vendor was unable to transfer title within 24 months of the execution date, – 1 August 1998) and ended on or by 1 August 2006.

[68] I concluded, therefore, that there was merit in the counter-appeal and that the learned judge ought to have acceded to the application for summary judgment on the additional basis that the claim was statute-barred.

[69] It is for these reasons that I agreed with this court making the orders which have been set out at paragraph [3] above.