[2020] JMCA Civ 49

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 94/2016

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MR JUSTICE F WILLIAMS JA

BETWEEN	**JAMAICAN LEGEND LIMITED**	**1ST APPELLANT**
AND	**PERCIVAL HUSSEY**	**2ND APPELLANT**
AND	**PORT KAISER OIL TERMINAL SA**	**1ST RESPONDENT**
AND	**RUSAL ALPART JAMAICA (A PARTNERSHIP)**	**2ND RESPONDENT**

Dr Mario Anderson for the appellants

1st respondent not appearing and not represented

Michael Hylton QC and Miss Anna Gracie instructed by Rattray Patterson Rattray for the 2nd respondent

26, 27 July 2017 and 9 October 2020

BROOKS JA

[1] I have read in draft the clear and compelling judgment of my learned sister, McDonald-Bishop JA, and agree with her reasoning and conclusion. I have nothing that I could usefully add.

MCDONALD-BISHOP JA

Introduction

[2] This is an appeal brought by Jamaican Legend Limited ("Jamaican Legend") and Percival Hussey ("Mr Hussey"), the appellants, from the decision of Batts J ("the judge") made on 14 October 2016, in the Commercial Division of the Supreme Court.

[3] The appellants were the claimants in a claim they had initiated against the respondents, Port Kaiser Oil Terminal SA.("Port Kaiser") and Rusal Alpart Jamaica (A Partnership) ("Alpart"), seeking, among other things, damages for breach of contract and negligence. The judge, among other things, entered summary judgment on the claim in favour of Alpart on an application for summary judgment which had been brought by it. The judge also refused to grant orders sought against both respondents on a notice of application for court orders brought by the appellants. The appellants are of the view that the claim ought to have proceeded to trial against both respondents, and that the judge erred in his decision in holding otherwise.

The factual background

a. The parties

[4] Jamaican Legend, named as the 1st appellant, is a company incorporated under the laws of Jamaica and engaged in the business of importing and distributing various petroleum products.

[5] Mr Hussey, the 2nd appellant, was, at all material times, an officer of Everglades Farms Limited, a company engaged in the production of sugar in Jamaica, and also a director of Jamaican Legend.

[6] Port Kaiser, the 1st respondent, is a company incorporated under the laws of Panama with offices in Kingston and was set up for the business of importing and distributing petroleum products.

[7] Alpart is a partnership between UC RUSAL Alumina Jamaica II Limited, a company incorporated under the laws of Jamaica, and UC RUSAL Alumina Norway A S of Oslo, Norway, a company incorporated under the laws of Norway. It carried out mining operations in Spur Tree in the parish of Manchester.

b. The undisputed facts

[8] Counsel for Alpart, in their response to the written submissions filed on behalf of the appellants, indicated to the court that the appellants had made various statements in their written submissions that are not based on any evidence before the court. Those impugned aspects of the appellants' submissions are contained in paragraphs 11, 14 and 17. Dr Mario Anderson, who appeared for the appellants, did not refute the submissions made on behalf of Alpart concerning those matters, and it is also noted that the assertions in question do not form part of the evidence that was placed before the judge. Those aspects of the appellants' written submissions have been ignored in identifying the pertinent facts in issue between the parties.

[9] It should also be noted that some documents on which the appellants sought to rely, in advancing their appeal, were the subject of an application to adduce fresh evidence before this court (items 22, 23 and 24 at pages 227 to 310 of the record of appeal). That application was refused on 11 May 2017. Those documents are, therefore, not relevant to the appeal and are ignored for all intents and purposes.

[10] In the light of the foregoing, I have accepted the salient undisputed facts to be as follows: Alpart, at all material times, was the registered proprietor of lands known as Port Kaiser situated in the parish of Saint Elizabeth. It owned seven storage tanks on the land, which were used for the storage of petroleum products. Jamaican Legend and Alpart were parties to a lease agreement dated 31 August 2011, by which Jamaican Legend leased two of the storage tanks from Alpart for five years. On 4 March 2013, Jamaican Legend surrendered the 2011 lease and was granted a new lease in respect of seven storage tanks for five years ("the 2013 lease"). The second lease included the two tanks from the previous lease agreement.

[11] The 2013 lease provided that Alpart would carry out certain preparatory works on the storage tanks, including the washing of the tanks, at Jamaican Legend's sole cost. The preparatory works had to be done before the commencement of the lease.

[12] Given the prohibitive cost of the preparatory works, Jamaican Legend sought partners. New partners were found, and together with Jamaican Legend, they incorporated Port Kaiser. Jamaican Legend has asserted that it is (or is entitled to be) a 5% shareholder in Port Kaiser. On 7 June 2014, Jamaican Legend purportedly assigned

"all of its rights and obligations" under the 2013 Lease to Port Kaiser. Alpart was not a party to the assignment. On the same date, Port Kaiser retained the services of Mr Hussey under a consulting agreement. Alpart was also not a party to the consulting agreement.

[13] On 9 June 2014, Alpart entered into a new lease of the same storage tanks with Port Kaiser on new terms ("the 2014 lease"). Those terms also included a provision that Alpart would carry out certain preparatory works on the storage tanks at Port Kaiser's sole cost, but the preparatory works under this lease were significantly different in scope and cost from those that were involved in the 2013 lease. Jamaican Legend was not a party to the 2014 lease.

[14] Disputes arose between Alpart and Port Kaiser concerning various matters, including the preparatory works and the termination of the 2014 lease agreement. Those disputes resulted in litigation between them in the Supreme Court (claim nos 2015 HCV 00139 and 2015 CD 00021). Alpart and Port Kaiser entered into a settlement agreement that fully resolved all disputes between them relating to the 2014 lease. The sums payable to Port Kaiser under the settlement agreement were fully paid on 29 June 2016, and the claims were discontinued in July 2016. The 2014 lease had been terminated.

[15] It is the complaint of the appellants that Port Kaiser did not inform them about the details of the settlement and (from all indications in the claim) has not shared the proceeds with Jamaican Legend.

The proceedings in the Supreme Court

[16] On 10 August 2016, the appellants filed their claim in the Supreme Court against the respondents for, among other things, damages for breach of contract and negligence. There was also a claim against Port Kaiser for breach of the consultation agreement it had entered into with Mr Hussey and for disclosure of the settlement agreement made in the lawsuit between it and Alpart.

[17] The basis of the claim for breach of contract, against Port Kaiser, was alleged in paragraph 1 of the claim form to be, "as contained in the Agreement for Assignment of Lease and to issue Shares dated June 7 2014 of [US$100,000.00]". At paragraph 4 of the claim form, they averred that they were seeking damages against the respondents for loss of profits and expenses incurred for, "breach of contract established prior to the assignment" of the 2013 lease to Port Kaiser, "in excess of US$15 million".

[18] The basis of the negligence claim was against the respondents in relation to the 2014 lease, which was, according to the claim, for "failing to fulfil their contractual obligations as outlined in their Lease agreement dated June 7, 2014 and which was for the intended benefit of [Jamaican Legend] in excess of US$15 million".

[19] On the same date, the appellants filed an ex-parte notice of application for court orders, seeking the following orders:

> "(1) That [the respondents] disclose to the [appellants] any settlement agreements made pursuant to the claim 2015 CD 00021 between the [respondents] or made otherwise.

> (2) That [Alpart] be restrained, whether by themselves, associated companies, their servants and/or agents from paying to [Port Kaiser] any sums arising or due from any settlement agreement pursuant to claim 2015 CD 00021, between the [respondents], until this claim is determined.
>
> (3) Alternatively, that the [respondents] pay any sums arising or due, paid over and/or received from the settlement agreement pursuant to claim 2015 CD 00021 into Court, until the claim is determined.
>
> (4) Further that the [respondents] pay an additional sum of US$5 million into an escrow account at a local bank until this claim is determined.
>
> (5) The costs of this application to be costs in the claim
>
> (6) ... ."

[20] The claim was served on Alpart during the long vacation, and so, Alpart did not file a defence before the date of the hearing of the appellants' notice of application. Alpart responded to the appellants' application with its application for summary judgment, which was filed on 24 August 2016. Port Kaiser did not participate in those proceedings.

[21] The appellants relied primarily on the evidence of Mr Hussey, which was contained in three affidavits filed in support of their application for court orders and in opposition to Alpart's application for summary judgment. Alpart relied on the evidence of Mr Bevan Shirley, which was contained in three affidavits filed in opposition to the appellants' notice of application for court orders and in support of Alpart's application for summary judgment.

The judge's decision

[22] After considering the applications and submissions of the parties, the judge made these findings on Alpart's application for summary judgment:

i. The claim against Alpart has no real prospect of success (paragraph [6] of the judgment).

ii. Alpart was not a party to the assignment of the lease to Port Kaiser or to any agreement to transfer shares. There is no allegation or evidence that any consideration relative to that assignment flowed to or from Alpart (paragraph [8] of the judgment).

iii. There were differences in the terms of the lease entered into with Port Kaiser. Most notably, the scope of the preparatory works was different. This is important because it is the case for the appellants that the respondents failed to execute the preparatory works (paragraph [9] of the judgment).

iv. The appellants' counsel was unable to point to any evidence that Alpart agreed to indemnify the appellants in the event the lease agreement between the respondents ended or was not performed. There was no contract of indemnity or guarantee of performance (paragraph [10] of the judgment).

v. The appellants' counsel's contention that the court should infer that Alpart had knowledge of the obligations contained in the agreement entered into between the appellants and Port Kaiser and that that knowledge is sufficient to render Alpart liable, is untenable. Also untenable is the contention of counsel on behalf of the appellants that there was a special relationship between the appellants and Alpart because it was Alpart who had introduced the principals of Jamaican Legend to Port Kaiser (paragraph [10] of the judgment).

vi. Alpart has denied knowledge of the agreement, but even if they were aware, no duty of care arose or could arise (paragraph [11] of the judgment).

vii. There is no basis for imposing a duty or any contractual obligation on Alpart even if one discredits the privity of contract doctrine (paragraph [12] of the judgment).

viii. This case demonstrates precisely why the doctrine of privity is still relevant. It would be unfair for a court to impose a contractual duty on Alpart in favour of the appellants who are non-parties to the 2014 lease and from whom no consideration flowed (paragraph [14] of the judgment).

ix. There is similarly no reason on the evidence to import a duty of care. No fiduciary relationship exists between Alpart and the appellants, nor is any circumstance demonstrated on the evidence to give rise to a duty of care (paragraph [15] of the judgment).

x. The impossibility of the claim is made clearer when it was revealed that Mr Hussey is a director of Port Kaiser. He was, therefore, or ought to have been, aware of the terms of the agreement between Port Kaiser and Alpart. He should also have been aware of the decision to terminate (paragraph [16] of the judgment).

[23] On the appellants' application for court orders, the judge made these findings:

i. The application for an interim payment could not succeed. The rule requires that in order to obtain an interim payment, a claimant needs to demonstrate certainty of success against a defendant. In this case, it is fair to say that the appellants are almost certain to fail in their claim (paragraph [17] of the judgment).

ii. Insofar as the application for an injunction preventing payment is concerned, it is common ground between the parties that the settlement sum has already passed from Alpart to Port Kaiser. The money having been paid, there are no funds due to Port Kaiser in

the possession of Alpart. The law could not envisage a defendant paying twice, as the appellants seem to want Alpart to do (paragraph [17] of the judgment).

iii. In the absence of breach of contract or a relevant duty of care, there is no basis for an order for specific disclosure of the settlement agreement (paragraph [17] of the judgment).

iv. There is no basis in law to grant the order for Alpart to pay US$5 million into an escrow account because there is no judgment against it and there is no certainty of success at trial (paragraph [17] of the judgment).

v. As it relates to Port Kaiser, the application for the injunction could not be considered due to non-service of the claim and notice of application with the affidavits on it. Mr Hussey was placed in a position of conflicting interests by his wife serving the documents on him for Port Kaiser, and there is no evidence that he brought the matter to the attention of the other directors (paragraph [18] of the judgment).

vi. The appellants received no permission for service of the claim to be effected by registered post outside the jurisdiction as required by rule 7.2 of the Civil Procedure Rules, 2002 ("the CPR"), so the purported service by registered post to an address outside of the

jurisdiction could not be considered as being proper service (paragraph [18] of the judgment).

The grounds of appeal

[24] The appellants have challenged the judge's decision on several bases of fact and law, as contained in eight grounds of appeal that they have detailed as follows:

> "1. That the Learned Judge in Chambers erred in finding that it was not a condition of assignment of the lease by [Jamaican Legend] to [Port Kaiser], that the preparatory works be executed by the [respondents], despite the conduct of all the parties to the contrary.
>
> 2. The Learned Judge in Chambers erred in finding that there was no special relationship between the [appellants] and [Alpart].
>
> 3. The Learned Judge in Chambers erred by misconstruing the submissions of the [appellants] to assert that the doctrine of privity was all but abolished rather than that the case fell either within the well established exceptions of the doctrine of privity or should be an exception to it in all circumstances governing the relationship between the parties herein.
>
> [4.] The Learned Judge in Chambers erred in law to impute that the finding of a duty of care owed to the [appellants] could only be established if there was found to be a fiduciary relationship existing between the parties;
>
> [5.] The Learned Judge in Chambers erred in law in not ordering disclosure despite recognizing that [Mr Hussey] is a Director of [Port Kaiser] and would be entitled to same in circumstances where he was excluded from the details of the arrangements forming the settlement.
>
> [6.] The Learned Judge in Chambers failed to recognize that though the Scope of Works required to complete the preparatory works had changed from that originally agreed, that at all times, the [appellants] were party to the

> discussions and agreed to the increase in the scope of works.
>
> [7.] The Learned Judge in Chambers erred in finding that there was no special relationship between the [appellants] and [Alpart]. Even though the [appellants] engaged in activities that inured to the benefit of [Alpart] and by extension [Port Kaiser] as such activities formed a part of the consideration that determined the settlement between them.
>
> [8.] That the Learned Judge in Chambers erred in failing to take into account the fact that another Director of [Port Kaiser] acknowledged receipt of the claim, and in fact had an attorney-at-law watch proceedings at the second hearing, thereby waiving and negating the need for the Court to make an Order granting permission for service outside of the jurisdiction."

[25] The appellants now seek an order for, among other things, the setting aside of the summary judgment and that the claim against Alpart proceeds to trial.

The summary judgment decision

The relevant law

[26] The main complaint of the appellants on the appeal as it relates to Alpart is that the judge erred in granting summary judgment on the claim. Before determining whether the judge erred in that regard, it should prove useful to be reminded of the law relative to the granting of summary judgments.

[27] The application for summary judgment was brought and considered within the provisions of rule 15.2(a) of the CPR. This rule provides that the court may give summary judgment on the claim or a particular issue if it considers that the claimant has no real prospect of succeeding on the claim or issue.

[28] The dictum of Lord Woolf MR in **Swain v Hillman and another** [2001] 1 All ER 91, has been adopted as the guiding principle governing the exercise of the court's power to grant summary judgment within the procedural framework of the CPR. In treating with the equivalent provisions to our rule 15.2 in the England and Wales Civil Procedure Rules 1998 (rule 24.2), Lord Woolf MR opined:

> "Under r 24.2 the court now has a very salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, as Mr Bidder QC [counsel for the defendants] submits, they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

[29] Lord Woolf MR, in recommending the use of this power by the court, further noted:

> "It is important that a judge in appropriate cases should make use of the powers contained in Pt 24. In doing so he or she gives effect to the overriding objectives contained in Pt 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice."

[30] His Lordship later cautioned that:

> "...Useful though the power is under Pt 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. ...[T]he proper disposal of an issue under Pt 24 does not involve the judge conducting a mini-trial, that is not the object of the provisions; it is to

> enable cases, where there is no real prospect of success either way, to be disposed of summarily."

[31] The Privy Council, in **Sagicor Bank Jamaica Limited v Taylor-Wright** [2018] UKPC 12, recently provided further guidance for a court treating with an application for summary judgment. Their Lordships instructed, in so far as is immediately relevant:

> "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.
>
> 18. The criterion for deciding whether a trial is necessary is laid down in Part 15.2 in the following terms:
>
> > 'The court may give summary judgment on the claim or on a particular issue if it considers that -
> >
> > (a) The clamant has no real prospect of succeeding on the claim or the issues; or
> >
> > (b) The defendant has no real prospect of successfully defending the claim or the issues.'
>
> That phraseology does not mean that, if a defendant has no real prospect of defending the claim as a whole, that there

> should nonetheless be a trial of an issue. The purpose of the rule in making provision for summary judgment about an issue rather than only about claims is to enable the court to confine and focus a necessary trial of the claim by giving summary judgment on particular issues which are relevant to the claim, but which do not themselves require a trial.
>
> 19. The court will, of course, primarily be guided by the parties' statements of case, and its perception of what the claim is will be derived from those of the claimant. ...
>
> 20. Nonetheless the court is not, on a summary judgment application, confined to the parties' statements of case. Provision is made by Part 15.5 for both (or all) parties to file evidence, and Part 15.4(2) acknowledges that a summary judgment application may be heard and determined before a defendant has filed a defence. Further, it is common ground that the requirement for a claimant to plead facts or allegations upon which it wishes to rely may be satisfied by pleading them in a reply, not merely in particulars of claim: ..."

Analysis and findings

[32] The appellants have identified four issues as arising for consideration on the appeal as it relates to the summary judgment decision. They are as follows:

i. Whether there was a collateral contract between Jamaican Legend and Alpart to complete the preparatory works.

ii. Whether Alpart owed the appellants a duty of care or assumed one in insisting that the lease be assigned to Port Kaiser.

iii. Whether there can be recovery for pure economic loss in negligence.

iv. Whether the instant case is an appropriate one in all the circumstances to grant summary judgment given the significant disputes of facts.

[33] The critical question in assessing the merit of the appeal is whether the appellants' claim, or any particular issue contained in it, requires a trial for the appellants to secure the reliefs they are seeking. In other words, is it necessary for a trial to be conducted in respect of any issue arising for determination on the claim, thereby rendering summary judgment inappropriate? The question to be resolved does necessitate an examination of the parties' statements of case and the evidence they adduced in support of their respective contentions before the judge concerning the application for summary judgment.

[34] The claim against Alpart is founded on two discrete (albeit related) bases, namely, breach of contract and negligence. The claim form states at paragraph 3 that the appellants were seeking against the respondents, damages for "loss of profits and expenses incurred, which was caused by the negligence of both parties, failing to fulfil their contractual obligations as outlined in their Lease Agreement dated 7 June 2014, and which was for the intended benefit of [Jamaican Legend], in excess of US$15 million".

[35] At paragraph 4, the appellants further averred that, alternatively, they are seeking damages against the respondents for "loss of profits and expenses incurred for breach of contract established prior to the assignment of the Lease Agreement between

[Jamaican Legend] and [Alpart] dated March 4 2013, to [Port Kaiser] in excess of $US 15 million".

[36] The particulars of breach of contract against the respondents were stated in paragraph 18 of the particulars of claim in these terms:

> "a. By its wilful actions or neglect, [the respondents] failed to complete the preparatory works, including the necessary cleaning of the tanks."

[37] The particulars of negligence against the respondents, as stated in paragraph 18 of the particulars of claim are:

> "a. That [Port Kaiser] failed to make payments due to [Alpart] in a timely fashion.
>
> b. That [Port Kaiser] and [Alpart] failed to clean the storage tanks.
>
> c. That [Port Kaiser] and [Alpart] failed to take appropriate steps in a timely manner to clarify issues that arose with a view to resolving them.
>
> d. That [Alpart] prematurely terminated the contract between [Port Kaiser] and [Alpart]."

(i) The claim for breach of contract (grounds one, three and six)

[38] The crucial question to be ultimately determined is whether there is a realistic, rather than a fanciful, prospect of the appellants succeeding on their claim against Alpart for damages for breach of contract had the case proceeded to trial. The significant contention of the appellants is that the 2014 lease was entered into for the benefit of Jamaican Legend, and so, it has a right to seek damages against the

respondents for failure to perform that contract. Alpart, however, contended, among other things, that it was not liable to Jamaican Legend because it was not a party to the 2014 lease agreement and there was no privity of contract between the parties.

[39] The investigation of this issue relating to the relief for breach of contract requires an examination of the arguments advanced by the appellants that the privity of contract doctrine does not preclude them from recovering damages from Alpart for breach of contract. They based this argument on the proposition that it was a condition of the assignment of the lease to Port Kaiser, before the execution of the 2014 lease, that Alpart and Port Kaiser would have executed the preparatory works. It is the appellants' contention that there was a collateral contract between Jamaican Legend and Alpart before the execution of the 2014 lease.

(a) Was there a collateral contract/condition precedent?

[40] Counsel for the appellants, Dr Anderson, relied on several factual assertions in urging this court to find the existence of a collateral contract between Jamaican Legend and Alpart that relates to the 2014 lease entered into between Alpart and Port Kaiser. He pointed to the following:

i. It was recognised from the outset that in order to lease the tanks, certain preparatory works had to be completed on them, including cleaning, as different products were going to be stored and sold.

ii. Jamaican Legend paid US$100,000.00 to Alpart in November 2013, and it was its understanding that this sum would go towards the cleaning of the tanks.

iii. Alpart, to the contrary, averred that this sum was for rent, albeit that clause 3.2 of the 2013 lease does not provide for this amount of rent. The rent stated is an annual basic rent of $50,000.00 and a rent to be charged at US$0.30 per barrel of the product pumped from the vessel to the storage tanks. There was no requirement that Jamaican Legend should pay this sum for rent, and no further evidence was provided to substantiate this claim by Alpart. This is a substantial dispute on the facts that warrants further investigation at a trial.

iv. With Jamaican Legend having paid over US$100,000.00 and having failed at its attempt to raise capital by a licensing agreement, it was a condition precedent, a material condition, that the preparatory works identified, including cleaning of the tanks, be completed as a part of the consideration of the assignment of the appellants' lease to Port Kaiser.

v. There was a collateral contract between Jamaican Legend and Alpart by an oral assurance because, without this assurance,

> Jamaican Legend would have had no reason to assign its contract.

[41] Dr Anderson further submitted that there was no need for the collateral contract that the appellants are claiming to be in writing as it was clearly indicated in the lease signed by the respondents. He pointed to clause 2.1(b) of the 2014 lease agreement, which provides:

> "Subject to the obtaining of approval, and permits referred to in Article II section 2.1(a) above, this Lease shall commence upon the Completion of the Preparatory Work."

[42] Counsel maintained that the fact that this was a change from the terms of the 2013 lease corroborates the averment of the appellants that it was a condition precedent and a condition of the assignment of the 2013 lease to Port Kaiser, that the respondents complete the preparatory works.

[43] Counsel also argued that the terms of clause 13.1(a) of the 2013 lease, made it clear that the lessee should not assign the lease without the prior written approval of the lessor. It is, therefore, not credible for Alpart to state that it did not agree to the assignment of the lease to Port Kaiser and that it had no knowledge of the agreement between the appellants and Port Kaiser to assign the lease.

[44] Counsel argued that in the instant case, it is was clear that Jamaican Legend would only have assigned its lease if the assurance was given that the preparatory works would be completed. It is also clear, he said, that the appellants intended to benefit from any arrangements going forward, bearing in mind that without the

preparatory works the tanks would be unusable for storage. In support of this argument, the appellants rely on **De Lassalle v Guildford** [1901] 2 KB 215. In that case, the court held that the oral assurance of the defendant that drains of a house to be leased were in order, was a separate contract between the parties, and that the consideration to enforce this promise as a separate contract was the claimant's execution of the lease.

[45] Dr Anderson contended even further that, although it would have been ideal to have had the condition of the assignment documented for certainty, particularly in a commercial setting, that does not preclude the formation of a commercial contract by conduct. Reliance is placed on the United Kingdom's Court of Appeal case of **Reveille Independent LLC v Anotech International (UK) Ltd** [2016] EWCA Civ 443. Counsel submitted that, even though the facts of the case differ from the instant case, the principle is well accepted that acceptance and formation of a contract can be by conduct.

[46] Counsel submitted that, in all the circumstances, the judge fell into error in concluding that there was no collateral contract in the light of the evidence provided. Furthermore, he ought not to have exercised his discretion to grant summary judgment on the claim as there was a substantial dispute as to the facts concerning this issue.

[47] In response, Mr Hylton QC submitted on behalf of Alpart that, on any view of the case, the claim for breach of contract must fail. As it relates to the existence of a

collateral contract, Alpart's position is that the appellants' averment is not supported by evidence or law.

[48] Queen's Counsel submitted that a contract did exist between Jamaican Legend and Alpart, in which Alpart was to perform preparatory works, but both parties agreed that this contract (the 2013 lease) came to an end, although by different means. He noted that Jamaican Legend had provided the court with an agreement by which it purported to have assigned all its rights under the 2013 lease to Port Kaiser, while Alpart is contending that the 2013 lease was surrendered. Queen's Counsel argued that, although Mr Hussey has responded in some detail to Mr Bevan Shirley's first affidavit filed on behalf of Alpart, he has not denied the critical allegations in that affidavit that Alpart was unaware of the assignment and that the 2013 lease was surrendered.

[49] Mr Hylton further pointed out that, even on the appellants' evidence, Jamaican Legend had surrendered the 2013 lease. The appellants' witness, he argued, had not denied that Alpart leased the same storage tanks to Port Kaiser in 2014 with Jamaican Legend's knowledge and approval. Jamaican Legend must, therefore, have given up possession of the storage tanks, and so, there was a surrender of the lease. In support of this argument, Queen's Counsel cited the case of **Massander Reid v Bentley Rose and Cynthia Rose** [2011] JMCA Civ 48, a decision of this court.

[50] According to Mr Hylton, the appellants' pleadings do not refer to a collateral contract but they, presumably, are relying on the agreement to assign alleged in paragraphs 11 and 15 of the particulars of claim. He noted that there is no evidence to

support the alleged conditional agreement and that neither the agreement for assignment nor the 2014 lease reflects any such agreement. He also pointed out that none of the many emails and letters that had been produced by the parties hinted at such an agreement.

[51] Having considered the evidence and the submissions of counsel, I find that it is an indisputable fact that there is no documentary evidence of any agreement between Jamaican Legend and Alpart, concerning the assignment of the 2013 lease, and the issuance of shares in Port Kaiser.

[52] Clause 13.1 of the 2013 lease a between Alpart and Jamaican Legend provided that the "[l]essee shall not assign this lease or sublet all or any portion thereof without prior written approval of the lessor, which approval shall not be unreasonably withheld". Jamaican Legend has provided no written proof of the approval from Alpart for the lease to be assigned. Therefore, in the absence of any evidence from the appellants refuting Alpart's assertion (made through the affidavit of Mr Bevan Shirley) that there was no assignment of the lease but rather a surrender, Jamaican Legend would be hard-pressed to convince a tribunal of fact that Alpart had approved the assignment of the lease to Port Kaiser.

[53] Paragraphs 14 - 17 of the affidavit of Mr Bevan Shirley filed on 24 August 2016, revealed these facts: In or around March 2014, Alpart had discussions with two principals of QV Trading (Messrs Luis Quintero and Manuel Sanmiguel) regarding its interest in leasing the tanks. Alpart indicated to the two men that the tanks were

already leased to Jamaican Legend and that for Alpart to contract with them, Jamaican Legend would have to agree to surrender the lease or that they and Jamaican Legend would have to find a solution in which they could work together. Alpart was not inclined to lose the proposed contract with Messrs Sanmiguel and Quintero as it appeared to have better prospects of success than the Jamaican Legend's model. Alpart, not wanting to breach the contract between itself and Jamaican Legend, had a meeting with the directors of Jamaican Legend (including Mr Hussey) and Messrs Sanmiguel and Quintero. At that meeting, the directors of Jamaican Legend agreed to work with Mr Sanmiguel and Mr Quintero. They advised that separate meetings would be held with the two men to determine the extent of their involvement. Alpart was not a party to the subsequent discussions between Jamaican Legend and Messrs Sanmiguel and Quintero. Subsequently, Mr Hussey and Mr Sanmiguel approached Alpart requesting a new lease in the name of Port Kaiser. Alpart agreed to that request. Alpart inferred from all this that the 2013 lease was surrendered. At paragraph 18, Mr Bevan Shirley stated:

> "Since 2014 both [Jamaican Legend] and [Alpart] have treated the 2011 and 2013 leases as surrendered. [Jamaican Legend] has not paid or tendered rent and has not been in possession of the premises, and [Alpart] has not demanded rent."

[54] In response, Mr Hussey in his affidavit dated 2 September 2016, confirmed that Jamaican Legend became aware of the discussions between Alpart and Messrs Sanmiguel and Quintero. He, however, did not challenge the assertion of Alpart that it did not agree to any assignment and that the lease was surrendered. The appellants also exhibited an email, which showed Mr Bevan Shirley saying that "[Jamaican Legend]

will address the assignment issue". After this, there was no indication that Alpart was approached to give its written approval to the assignment or was made aware of the fact of the assignment and its terms.

[55] It is clear from Mr Hussey's evidence that Alpart had not given its approval for the assignment of the lease to Port Kaiser in the manner prescribed by the contract. There is nothing to show on the evidence presented that, even if Alpart was aware of discussions regarding the assignment of the lease and had not indicated an objection to those discussions, it had seen the assignment itself or knew and endorsed its terms. There was correspondence between Mrs Eleanor Hussey and Jamaican Legend's attorneys-at-law to which documents pertaining to the assignment were attached (exhibit "FA-7"), but there is nothing indicating that those documents were ever sent to Alpart.

[56] Mr Hylton is, therefore, correct in his submissions that there is nothing from the appellants which indicates that they have communicated to Alpart the fact of an assignment having been made to Port Kaiser. The submission of the appellants that Alpart must have known of the assignment is not enough to establish the fact of actual knowledge on its part.

[57] It should be noted, however, that even if Alpart knew that Jamaican Legend may have assigned the lease and had indicated no objection to that course of action, that, in and of itself, did not make Alpart a party to the assignment. Also, the question would remain as to whether there was a collateral agreement formed between Alpart

and Jamaican Legend before the purported assignment, which could have conferred a benefit on Jamaican Legend and corresponding obligations on Alpart in respect of the 2014 lease.

[58] This area of dispute as to whether Alpart knew of the assignment and had approved it does not require ventilation at a trial. This is so because even if the tribunal of fact were to believe that Alpart knew of the assignment and had approved it, that does not amount to Alpart being a party to the assignment itself. Also, mere knowledge on its part of the assignment would not be enough to give rise to an enforceable collateral contract between itself and Jamaican Legend.

[59] The pertinent questions which the appellants would have to answer, in seeking to establish this collateral contract, have been posited by Mr Hylton in these terms:

i. What did Alpart request or receive in agreeing to take on a contractual obligation to Jamaican Legend under this alleged collateral contract?

ii. What would be the nature of its new responsibility to Jamaican Legend?

iii. What would be the consideration for that obligation that moved from Jamaican Legend to Alpart?

[60] From a review of the appellants' statement of case, and evidence advanced in responding to the application for summary judgment, it cannot be said that the

appellants have sufficiently answered these questions for a court to conclude in their favour that there was a collateral contract which affected the rights and obligations of Alpart under the 2014 lease for the benefit of Jamaican Legend.

[61] In the first place, there is no clear evidence of any offer and acceptance to form the basis of an agreement between the parties. Also, there is no evidence of any conduct by the parties from which a tribunal of fact could infer an agreement in the terms alleged by the appellants.

[62] I have looked even more closely at whether the appellants are in a position to successfully establish at a trial that consideration had moved from Jamaican Legend to Alpart for a benefit under the 2014 lease. It is one of the fundamental principles of the common law, to which we in this jurisdiction have always subscribed, that in order for a person to be able to enforce a contract made with him that is not under seal, he must give consideration to the promisor or some other person at the promisor's request (see **Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd** [1915] AC 847 per Viscount Haldane). Simply expressed, consideration must move from the promisee to the promisor unless it is a contract under seal. In seeking to satisfy this requirement for there to be a binding agreement, the appellants placed reliance on the payment of the sum of US$100,000.00 by Jamaican Legend to Alpart in November 2013.

(b) The payment of USD$100,000.00

[63] Dr Anderson has argued that there is a substantial dispute of fact between the parties concerning the payment of US$100,000.00 to Alpart in November 2013. The appellants have posited the argument that this payment is or is part of the necessary consideration given by Jamaican Legend for the obligations of Alpart under the 2014 lease. The highest it was put by Dr Anderson, however, is that Jamaican Legend "understands" that the sum was to go towards cleaning the tanks. He has not pointed to a definitive agreement with Alpart that the sum was for that purpose.

[64] Alpart, on the other hand, has adduced evidence which shows that there was no such agreement regarding the sum in question as alleged by the appellants. In the second affidavit of Mr Bevan Shirley dated 2 September 2016, it was established at paragraphs 4 and 5 that in October 2013, the parties agreed to amend the 2013 lease to make provision for Alpart to charge a fixed price of US$100,000.00 per month, for 12 months, commencing 1 November 2013, and that any late payment would attract a further payment. Jamaican Legend made the payment for November 2013 but failed to make the payment for December 2013. As a consequence, by letter dated 10 January 2014, Alpart wrote to Jamaican Legend advising it of the default (see exhibit "BS-3"). Alpart went on to establish at paragraph 6 of the affidavit that it was further agreed between the parties that the preparatory works would have been executed at the sole cost of Jamaican Legend with Alpart receiving the full sum of US$194,625.00 (as estimated), together with the requisite permits and licenses. Paragraph 7 then went on:

> "In breach of the March 2013 lease agreement [Jamaican Legend] failed to pay the sums estimated and as a result

> [Alpart's] obligation to perform the preparatory work did not arise."

[65] Jamaican Legend, again, failed to refute the assertions of Alpart that the US$100,000.00 was the rental sum that was due and payable, according to the amendment to the 2013 lease. The affidavit of Mr Hussey dated 19 September 2016, which was filed in response to the second affidavit of Mr Bevan Shirley, steered clear of a discussion on those matters. The appellants have also not refuted the evidence of Alpart that Jamaican Legend was actually in default at the time the 2013 lease was terminated. Its reliance on the payment of the US$100,000.00 in November 2013, as consideration for any purported agreement relating to the preparatory works, could not be accepted in the light of the unchallenged evidence of Alpart that the sum was for rental, consequent on an amendment to the 2013 lease. Jamaican Legend would have an uphill task in seeking to establish at trial that consideration had moved from it to Alpart for the preparatory works to be executed in respect of the 2014 lease.

[66] It cannot be said, then, that there is a genuine dispute between the parties on this issue concerning the US$100,000.00 that is worthy of ventilation at a trial. It is highly unlikely that Jamaican Legend would be able to persuade a tribunal of fact to believe that Alpart was given that sum for the cleaning of the tanks and that it is the consideration it provided for the creation of a binding agreement with Alpart concerning the 2014 lease. This is an issue that requires no ventilation at a trial because there is no realistic prospect of the appellants succeeding in securing damages for breach of contract against Alpart in reliance on this payment.

(c) The assignment of the lease

[67] The other contention of the appellant, regarding the issue of consideration, is that the assignment of the 2013 lease to Port Kaiser was the consideration for the preparatory works to be executed by the respondents for the benefit of Jamaican Legend, under the 2014 lease. But, as already established above, there is no merit in this contention because Alpart was not a party to the purported assignment and was not privy to its terms.

[68] Furthermore, as counsel for Alpart submitted, the two leases were entirely different in several fundamental respects. The judge noted the same submissions made on behalf of Alpart that there were notable differences in the preparatory works to be executed under the two leases. He accepted that the 2014 lease was entirely different from the 2013 lease in scope, nature of the work to be undertaken as well as in the cost of the preparatory works to be done. Mr Hylton submitted that these differences between the two leases show that there was no assignment of the 2013 lease. The judge accepted those submissions and concluded that the purported assignment of the 2013 lease was not any consideration for any collateral contract or for the work to be done under the 2014 lease, as contended by the appellants.

[69] There is nothing on the pleadings or evidence presented that would warrant an investigation or ventilation of the case at trial regarding the existence of a collateral contract between Jamaican Legend and Alpart and the payment of the sum of US$100,000.00. A trial of these issues would not result in an outcome that would entitle the appellants or any of them to the relief sought on the claim for breach of contract.

The judge cannot be faulted in his conclusion that no trial was necessary to resolve the appellants' contention that there was a collateral contract which was breached.

[70] Mr Hylton also argued that, both as a matter of law and fact, there was no assignment of the 2013 lease because a party to an agreement cannot assign his obligations. He pointed out that there would have had to be a novation. He also submitted, for completeness, that it should be noted that in so far as Jamaican Legend's case is based on its claim to a shareholding in Port Kaiser, that claim is misconceived because a shareholder cannot enforce the company's contract (see **Prest v Petrodel Resources Limited and others** [2013] All ER (D) 90 (Jun)).

[71] It is noted, however, that while the submissions of Mr Hylton are well-grounded in law, there would be no need for this court to embark on a consideration of those matters because they did not form part of the reasons for the judge's decision. Furthermore, there is no counter-notice of appeal for this court to affirm the judgment on other grounds not relied on by the judge. I would, therefore, refrain from a detailed consideration of these submissions.

(d) Privity of contract

[72] In **Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd**, Viscount Haldane also recognised a second fundamental principle of the common law, which is, that only a person who is a party to a contract can sue on it. This is a well-known doctrine of the privity of contract which is recognised in our jurisdiction. There are, of course, several recognised ways to circumvent the application of the doctrine and the existence of a

collateral contract between the relevant parties is one such means. The judge at paragraph [12] of the judgment indicated that counsel for the appellants had contended before him that the doctrine "is all but abolished". Counsel, he stated, had placed reliance on dicta from Sykes J (as he was then) in, **In the matter of Dyoll Insurance Company Limited (in liquidation)** (unreported), Supreme Court, Jamaica, Claim No HCV 1267 of 2005, judgment delivered 3 August 2006. The judge noted that he would "...depart from any suggestion that there is no doctrine of privity of contract or that it has lost its relevance". He opined that there is no basis for imposing any contractual obligation on Alpart, even if one discredits the privity of contract doctrine. He, therefore, concluded that the doctrine operated to bar the appellants from the remedy they were seeking as he found no exception to it in the circumstances of the case.

[73] In their grounds of appeal, the appellants complained that, in arriving at his conclusion concerning privity of contract, the judge erred by misconstruing the submissions of counsel. The judge's error, according to Dr Anderson, is in asserting that the submission was that the doctrine of privity of contract was "all but abolished" rather than that the case fell either within the well-established exceptions to it, or should be an exception to it, in all the particular circumstances of the case.

[74] This court, however, is not in a suitable position to say whether the judge had misconstrued counsel's submission since it is not privy to the exact terms of the submissions made by counsel before the judge. What is clear from the judge's reasoning, however, is that the doctrine of privity of contract applies to this case and

that the facts of this case do not fall within any of the established exceptions to it. The question for this court is whether the judge was wrong to have arrived at that conclusion on the facts before him.

[75] As already indicated, the appellants do not stand on good ground in their reliance on the existence of a collateral contract or an alleged condition of the assignment of the 2013 lease that the respondents would complete the preparatory works. There is no evidence to support it. As counsel for Alpart correctly noted:

> "Neither the Agreement for Assignment nor the 2014 Lease reflects any such agreement. None of the many emails and letters that have been produced even hint at such an agreement."

[76] The judge cannot be faulted in concluding that there is nothing presented by the appellants, apart from their mere unsubstantiated verbal assertions, that a collateral contract existed between Jamaican Legend and Alpart regarding the completion of the preparatory works.

[77] Dr Anderson submitted that it a substantial issue of fact whether there was a collateral contract, in the light of the conduct of the parties, that should be resolved at a trial, but unfortunately, this argument cannot be accepted. There is nothing beneficial to be gained from a trial of this issue because the law relating to privity of contract is not on the side of the appellants on the facts of this case.

[78] The appellants have also complained that there was the possibility of perceived bias on the part of the judge because he "appeared as counsel in a case that dealt with

the privity of contract doctrine and he did not agree with the decision in so far as it concerned the doctrine". This submission is not connected to any of the grounds of appeal filed, and so, there is no proper basis on which this court could disturb the judge's decision based on this argument. In any event, there is no evidence of bias on the part of the judge that could render his decision regarding the doctrine of privity of contract erroneous.

[79] The appellants have failed in their effort to convince this court that the judge erred in his decision regarding the applicability of the privity of contract doctrine.

(e) Mr Hussey's claim for breach of contract

[80] With regards to Mr Hussey's claim for breach of contract, there is no evidence that there was any contract between Mr Hussey and Alpart that would entitle him to any form of relief against Alpart. The submission of Alpart is accepted that none of the affidavits filed by Mr Hussey has established that he was a party to an oral contract with Alpart or that he had given any consideration that could support a contract.

[81] This court would therefore be justified in saying that Mr Hussey's claim has raised no triable issue against Alpart on which he had a realistic prospect of success.

(f) Conclusion on the breach of contract claim

[82] There is nothing revealed in the circumstances that point to a triable issue between Jamaican Legend and Alpart on the claim for breach of contract that has a realistic prospect of success. There is also no triable issue, at all, between Alpart and Mr Hussey relative to the consultancy agreement he entered into with Port Kaiser. In the

result, it was appropriate for the judge to grant summary judgment for Alpart on the claim for breach of contract.

(ii) The negligence claim (grounds two, four and seven)

[83] The other key question that now arises for consideration in determining whether the judge erred in granting summary judgment is whether the appellants have a realistic prospect of success on their claim against Alpart for damages in negligence.

[84] According to the appellants, the negligence of Alpart emanated from its failure to carry out its obligations under the 2014 lease to complete the preparatory works. The recoverability of damages for negligence, however, depends fundamentally on whether the elements needed to establish negligence, in law and fact, are clear on the case presented by the appellants given Alpart's denial of the claim. The appellants would be obliged to prove that Alpart owed Jamaican Legend a duty of care; that there was a breach of that duty; and that the breach has resulted in the losses alleged in the claim.

[85] In determining the likelihood of success of this claim in negligence, the judge found that Alpart owed no duty of care to the appellants and that there was no fiduciary or (other) special relationship that existed between the parties that could have given rise to such a duty of care. The appellants contended in ground seven of their grounds of appeal that there was a duty of care arising from a special relationship between them and Alpart because the appellants had "engaged in activities that inured to the benefit of [Alpart] and by extension [Port Kaiser] as such activities formed a part of the consideration that determined the settlement between them".

[86] In arguing that Alpart owed a duty of care to the appellants in the contract it entered in with Port Kaiser for the execution of the preparatory works, the appellants have relied on the 'neighbour principle', enunciated by Lord Atkinson in **Donoghue v Stevenson** [1932] AC 562**,** and the 'special relationship' principle established in **Hedley Byrne and Co Limited v Heller and Partners Limited** [1964] AC 465. Counsel also cited **Henderson and others v Merrett Syndicates Ltd and others** [1995] 2 AC 145, to support the argument that recovery of pure economic loss is possible. He pointed out that this case has extended the recoverability of pure economic loss beyond liability for financial harm caused by negligent misstatements as in **Hedley Byrne v Heller** to cover a broader set of cases of economic losses brought about by negligence in the performance of a service.

[87] Counsel also noted within this context that in the case of **Reverend Dr Ralph Griffiths v Attorney General of Jamaica and others** [2015] JMSC Civ 34, K Anderson J stated at paragraph [24] that:

> "Over time though, the common law evolved and it is now at the point whereby, it is the law, which has been recognized by the Privy Council – Jamaica's highest court, that in order for pure economic loss to be recoverable, pursuant to a claim for damages for negligence, in circumstances wherein, no injury to the person or damage to property is being alleged, it must be shown that there also existed, as between the party who/which is pursuing the claim for damaged [sic] for negligence and the defendant to that claim, a 'special relationship', or in other words, sufficiently close 'proximity' between the parties, whereby the defendant (s) has/had knowledge, or, at least, the means of knowledge that a particular person and not just a member of an unascertained class of persons will rely upon them and would be likely to suffer economic loss as a consequence of

> their negligence, and possibly; (3) it must be fair, just and reasonable that the law should impose a duty of the scope contended."

[88] On the strength of the dicta from the above authorities and several Supreme Court cases cited on behalf of the appellants, Dr Anderson argued that the evidence has established that Alpart owed the appellants a duty of care as they assumed one by their actions and assurances. The action on the part of Alpart, he contended, included Alpart's insistence that the lease be assigned to Port Kaiser. He maintained that, given the close proximity between the parties, and the knowledge that the negligence of the respondents would cause the appellants' loss, it is just for the court to impose a duty of care on Alpart or assume one. Dr Anderson contended that the judge had misconstrued the evidence of the appellants and that, even if the case could not fall within the well-established principles of negligence, the court could develop the common law to create a further exception. He cited in support of this argument, for instance, **In the matter of Dyoll Insurance Company Limited (in liquidation)**.

[89] Mr Hylton, in response, pointed out that the contention that Alpart owed the appellants a duty of care or had assumed one, in insisting that the lease be assigned to Port Kaiser, is another example of an assertion in the appellants' submissions that is not based on the evidence. The appellants, he said, never pleaded or led evidence to suggest that Alpart insisted or even suggested that the lease be assigned to Port Kaiser. He noted that the only relevant evidence before the court was that Alpart did not know about the assignment. The entire premise of this "issue" he contended "is therefore false". The particulars of claim, Mr Hylton further noted, do not put forward any other

basis for contending that Alpart owed the appellants a duty of care. Paragraph 14 of that document simply assumes that there was such a duty.

[90] The claim in negligence, Mr Hylton contended, faces a further hurdle. He noted in this regard that the appellants are seeking to recover pure economic loss as they do not claim to have suffered any physical damage to person or property. This court, he argued, has held in previous authorities that a claim in negligence for pure economic loss can only succeed when the claim is based on negligent misstatement or advice. Reference was made to **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 support of this argument, where Harrison P explained at page 11:

> "Although the law is dynamic and changes with time, certainty of the law is of cardinal importance. Economic loss is more readily seen as arising in breach of contractual relationships. The tort of negligence generally envisages a breach of a duty owed causing personal or physical damage to the person to whom that duty is owed.
>
> In the instant case, the loss suffered by the appellants was pure economic loss. There was no circumstance existing to bring the case within the **Hedley Byrne** principle. No duty of care was owned [sic] by Royal to the appellants. It was merely an economic loss."

[91] Mr Hylton contended that the present appeal is not a **Hedley Byrne** type case, as the claim is not based on negligent misstatement or advice. It was submitted that this is a further reason why, as a matter of law, the negligence claim must fail.

[92] Queen's Counsel accepted, nevertheless, that there are authorities, including **Reverend Dr Ralph Griffiths v Attorney General of Jamaica and others**, cited by the appellants, which have held that a claim in negligence for pure economic loss can succeed if there is a special relationship between the parties. However, even on that basis, he submitted, this claim and appeal would fail because, as the judge pointed out, there was no special relationship and, indeed, after June 2014, no relationship at all between Alpart and the appellants.

[93] The arguments of Mr Hylton are accepted. It is, indeed, correct that there is no evidence that Alpart had insisted that the 2013 lease be assigned. Therefore, there is no evidential basis for the appellants to contend that a duty of care arises from the insistence of Alpart that the 2013 lease was to be assigned to Port Kaiser. Also, the appellants are seeking damages for purely economic loss, which would only be recoverable if there was, at base, a special relationship between them and Alpart in a sense recognised by the authorities that would give rise to a duty of care.

[94] An examination of the pleadings of the appellants, and the evidence they have presented in response to the application for summary judgment, does not reveal such a special relationship between them or any fiduciary duty owed to the appellants by Alpart. There is, therefore, nothing to fit the case within the principles enunciated by the authorities cited by Dr Anderson and no reason for the court to extend the common law to create an exception to the general rule regarding claims for pure economic loss. The judge rightly rejected the arguments advanced by the appellants before him that

Alpart owed Jamaican Legend a duty of care having entered into the 2014 lease with Port Kaiser.

Conclusion on the negligence claim

[95] The judge cannot be faulted in finding that there was no special relationship between Alpart and the appellants, or any of them, that could give rise to a duty of care on the part of Alpart. He also did not err when he found that there was no fiduciary relationship between the parties.

[96] There would be no benefit to be gained by allowing the case to proceed to trial to resolve this issue as to whether Alpart owed Jamaican Legend or any of the appellants a duty of care and is liable in negligence. The appellants were bound to fail on this aspect of the claim.

Conclusion on the summary judgment decision

[97] There is no basis for disturbing the exercise of the judge's discretion in granting summary judgment on the claim as it is not shown that he was demonstrably wrong. The appeal should be dismissed in so far as it challenges the judge's decision in respect of Alpart's application for summary judgment.

The judge's decision on the appellants' notice of application

(i) Disclosure of the settlement agreement (ground five)

[98] One aspect of the judge's decision on the appellants' application for court orders that forms the subject matter of ground of appeal five relates to the application for disclosure to the appellants of the settlement agreement entered into between Alpart

and Port Kaiser. The appellants complained that the judge was wrong to not order disclosure of the settlement agreement, especially because Mr Hussey is a director of Port Kaiser. The judge, however, opined that with there being no breach of contract or a relevant duty of care to ground the negligence claim, there was no basis for an order for specific disclosure of the settlement agreement.

[99] Rule 28.6(5) of the CPR provides that 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. Rule 28.7(1) then provides that when deciding whether to make an order for specific disclosure, the court must consider whether specific disclosure is necessary to dispose of the claim fairly or to save costs. It is evident in the circumstances that there was no benefit to be gained from the disclosure of the settlement agreement. It was not relevant to any issue in dispute between the appellants or any of them and Alpart, and it was not necessary to fairly dispose of the claim or any issue raised by the appellants against Alpart. This is so even though Mr Hussey was a director of Port Kaiser as contended by the appellants. As the judge found, any issue relating to Mr Hussey and Port Kaiser, in Mr Hussey's capacity as a director and shareholder of that company, must be between him and that company. There is no cause of action between him and Alpart concerning that settlement agreement. This is a legitimate reason for denial of the appellants' application for specific disclosure of the settlement agreement in the claim against Alpart.

[100] I would conclude that the judge did not err in refusing to grant the order for specific disclosure of the settlement agreement. This ground of appeal has no merit.

(ii) Interim payment (no ground of appeal)

[101] The appellants also applied for an interim payment, which was denied on the basis that they were not likely to succeed in their claim for breach of contract and negligence. There is no ground of appeal regarding the judge's decision on this issue of an interim payment. Counsel for the appellants, however, submitted that this court should offer guidance concerning that aspect of the appellants' application. The respondents have not advanced any argument on this issue because it was never presented as a ground of appeal. Mr Hylton has stated his objection to the court acceding to the request of Dr Anderson that the court gives guidance on the matter.

[102] I would hold that there is no proper basis in law for this court to provide guidance on this issue in respect of which there is no appeal.

(iii) Service of the claim and application on Port Kaiser (ground eight)

[103] In his reasoning, the judge stated that the appellants' application could not be considered in relation to Port Kaiser because the claim and notice of application with the affidavits were not served on it. He ruled that Mrs Hussey's service of the documents on Mr Hussey, her husband, for Port Kaiser was a conflict of interest and that there was no evidence that Mr Hussey had brought the documents to the attention of the other directors of Port Kaiser. The judge cannot be faulted for this conclusion. Mr Hussey was the claimant against Port Kaiser. Service on him by his wife, in his capacity as a director of Port Kaiser, a defendant in the claim he had brought, could not be accepted as proper service on Port Kaiser. The judge invalidated that service. He cannot be faulted for so doing.

[104] Also, there was service by registered post outside the jurisdiction on another director of Port Kaiser without any prior permission from the court as required by rule 7.2 of the CPR. Dr Anderson complained that the judge failed to take into account the fact that that director of Port Kaiser acknowledged receipt of the claim and had an attorney watching proceedings at the second hearing. This, he said, would have waived and negated the need for the court to make an order granting permission for service outside of the jurisdiction.

[105] The judge had refused to accept that proper service was effected on Port Kaiser in accordance with the rules of court. It was for the judge to satisfy himself that proper service was effected. He was not satisfied with the service of the claim and the notice of application. It was for the judge to decide whether the absence of permission for service to be effected outside the jurisdiction was such as to invalidate the claim. There is nothing placed before this court by the appellants to show that he erred in law and fact in arriving at the conclusion that the service was not valid. This court cannot reasonably interfere with the exercise of his discretion unless it is demonstrated that he was wrong in law or fact or his decision is otherwise so aberrant that it must be set aside on the basis that no judge regardful of his duty to act judicially could have reached it: see **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042. The appellants have not managed to satisfactorily establish that there is any error or failure on the part of the judge.

[106] The judge also indicated that an application for substituted service had been filed in respect of Port Kaiser and that he would have heard that application on a subsequent

date. In the absence of anything that shows that he was demonstrably wrong to have proceeded in the manner he did regarding service, this court would be slow to interfere with his decision.

[107] This ground of appeal also fails.

Disposal of the appeal

[108] There is no legitimate reason for this court to disturb the decision of the judge on Alpart's application for summary judgment. He was correct in his conclusion that the appellants have no realistic prospect of succeeding on their claim against Alpart. So, a trial of the issues raised by the appellants concerning Alpart was unnecessary. Accordingly, the judge did not err in granting summary judgment in favour of Alpart. The only thing worthy of note about this aspect of the judge's order is that once the summary judgment was entered, it was not necessary for him to have made a follow-up order dismissing the claim against Alpart. The entry of judgment on the claim in favour of Alpart, in itself, had determined the claim against Alpart.

[109] There is also no proper basis in law that would justify this court interfering with the judge's decision on the appellants' notice of application for court orders. He did not err in refusing to grant the order for specific disclosure of the settlement agreement between Alpart and Port Kaiser. The agreement was not relevant to any triable issue and was not necessary for the proper disposal of the claim.

[110] There is also nothing to show that the judge erred, in fact, or law, when he held that there was no proper service on Port Kaiser as a result of the non-compliance with rule 7.2 of the CPR.

[111] Finally, there is no appeal from the judge's decision regarding the application for interim payment and so, there is no basis for this court to provide any guidance on that issue or to disturb that aspect of the judge's decision as the appellants have invited us to do.

[112] In my view, the appeal should be dismissed and the judge's decision affirmed with costs to Alpart to be agreed or taxed.

[113] On behalf of the court, I would also extend sincerest apologies for the delay in delivering the decision of the court.

F WILLIAMS JA

[114] I too have read in draft the judgment of McDonald-Bishop JA. I agree with her reasoning and conclusion and have nothing to add.

BROOKS JA

ORDER

i. The appeal is dismissed.

ii. The decision of Batts J made on 14 October 2016 is affirmed.

iii. Costs of the appeal to the 2nd respondent to be agreed or taxed.