

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 50/2018

**BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE FOSTER-PUSEY JA**

**BETWEEN PELICAN SECURITIES LIMITED APPELLANT
AND NEIL SHAW RESPONDENT**

Written submissions filed by Jerome Spencer and Miss Kimberley Diedrick instructed by Patterson Mair Hamilton for the appellant

Written submissions filed by Miss Marjorie E Shaw instructed by Brown & Shaw for the respondent

2 December 2019 and 3 April 2020

PROCEDURAL APPEAL

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

MORRISON P

[1] I have read in draft the judgment of my sister Foster-Pusey JA. I agree with her reasoning and conclusion and have nothing to add.

MCDONALD-BISHOP JA

[2] I too have read in draft the judgment of my sister Foster-Pusey JA. I agree with her reasoning and conclusion and there is nothing I could usefully add.

FOSTER-PUSEY JA

Background to the appeal

[3] On 19 July and 23 November 2017, Palmer Hamilton J (Ag) (as she was then) heard an application made by the appellant, Pelican Securities Limited, seeking permission to be added as a defendant in a claim in the Supreme Court, 2016 HCV 00725, Neil Shaw v Jamaica North-Coast Limited. On 4 May 2018, the learned judge arrived at the following conclusion and made the subsequent orders:

“CONCLUSION AND DISPOSITION

[80] The joinder is not necessary to ensure that all matters in dispute might be effectually and completely determined and adjudicated upon. For this reason, the application for joinder will not be granted.

...

ORDERS

[84] The time for filing and serving this application has been abridged. Permission sought by the Applicant to be added as party to this claim, that is to be joined as a Defendant in the Claim, is not granted.

[85] Costs of the application to the Respondent to be taxed if not agreed.

[86] Leave to appeal is granted.”

[4] The appellant has, by way of an amended notice of appeal filed on 16 August 2018, challenged the orders outlined at paragraphs [84] and [85] of the judgment.

[5] The following findings of law are challenged:

“(1) I am doubtful as to whether the [appellant’s] presence can in any way assist the court in determining whether

[the respondent] has adversely possessed both properties for the requisite limitation period.

- (2) The [appellant's] presence in these proceedings can in no way assist the court in resolving the matter in dispute.
- (3) An important point that distinguishes the instant case from ***Jamaica Citizens Bank v Dyoll Insurance Co. Limited*** is that the mortgaged property was the only property under the courts [sic] scrutiny in the **Jamaica Citizens Bank** case whereas in the claim in the court below the respondent alleged that he adversely possessed two properties.
- (4) While I accept that a finding of adverse possession would indirectly affect the [appellant] as JNC Ltd would no longer have rights to the mortgaged property, the mortgage deed is primarily a contract between the parties and JNC Ltd would still be bound to settle its outstanding debts.
- (5) However an important distinction between the **Jamaica Citizens Bank** case and the claim in the court below was the nature of the proceedings of both cases. In **Jamaica Citizens Bank** case the Court's finding that the respondent was in breach of the restrictive covenant would objectively depreciate the value of the mortgaged property."

Proceedings in the court below

[6] The respondent, Mr Neil Shaw (the claimant in the court below), initiated legal proceedings against Jamaica North Coast Limited (the defendant in the court below and hereafter referred to as 'JNC Ltd'), by way of a fixed date claim form filed on 23 February 2016. The respondent seeks a declaration that he has acquired by adverse possession, lands, parts of which are registered at Volume 1022 Folio 175 and Volume 1481 Folio 208 of the Register Book of Titles.

[7] These are the orders which the respondent seeks:

- “1. A declaration that [the respondent] has been in open and undisturbed possession **of parts of land** registered at Volume 1022 Folio 175 and Volume 1481 Folio 208 of the Register Book of Titles in excess of twelve years and that [JNC Ltd.’s] title to such land has been extinguished pursuant to Section 30 of the Limitation of Actions Act.
2. A declaration that [the respondent] having dispossessed [JNC Ltd] of the said properties, has acquired an absolute title against [JNC Ltd] of the said properties.
3. An order that the Registrar of Titles endorse the certificates of titles registered at Volume 1022 Folio 175 and Volume 1481 Folio 208 of the Registrar Book of Titles so as to indicate that [the respondent] is the sole registered proprietor for the properties comprised in the said certificates of title, having acquired an absolute title against [JNC Ltd] in respect of the said properties.
4. Such further and/or other relief that this Honourable Court deems just.” (Emphasis supplied)

[8] The grounds on which the respondent seeks these declarations are:

- “a. The Court has authority to grant the above orders pursuant to section [sic] 3, 4 and 30 of the Limitations of Actions Act;
- b. [The respondent] has been in sole, undisputed and uninterrupted possession of the lands which forms **part of land** registered at Volume 1022 Folio 175 and Volume 1481 Folio 208 of the Register Book of Titles for upwards of twelve years,
- c. [The respondent’s] father, Valentine Shaw, deceased, has been in sole, undisputed and uninterrupted possession of the lands which forms **part of lands** registered at Volume 1022 Folio 175 and Volume 1481 Folio 208 of Register Book from 1969 until his death in May 2001.

d. [JNC Ltd.'s] title to the aforesaid lands has been extinguished pursuant to Section 30 of the Limitation of Actions Act." (Emphasis supplied).

The respondent's affidavit in support of fixed date claim form

[9] The fixed date claim form was supported by affidavit evidence filed on 23 February 2016 by the respondent. In the affidavit, the respondent deposed that as a child, he resided on the said premises with his family, and that prior to his father's death, his father had told him that he had been living on the property undisturbed. The property had also been cultivated by his father who would reap food products to feed his family as well as to earn a living. The respondent indicated that the said premises are situated on a part of lands registered at both Volume 1022 Folio 175 as well as on a part of lands contained in Certificate of Title registered at Volume 1481 Folio 208 of the Register Book of Titles, the registered proprietor of which is JNC Ltd.

[10] The respondent indicated that his father had initiated legal proceedings in the Supreme Court by way of a writ of summons, Suit No E 326 of 1996, against JNC Ltd, seeking a declaration that he had acquired title of parts of the relevant lands, by virtue of adverse possession. A copy of the writ of summons was exhibited. Pursuant to an ex parte summons for interim injunction, Valentine Shaw had sought and acquired, on 30 July 1996, an injunction for a period of 10 days restraining JNC Ltd from bulldozing or otherwise damaging or destroying his dwelling home or other property located on the property in question. JNC Ltd was also restrained from interfering with his quiet enjoyment of the properties.

[11] Interestingly, for the purposes of this appeal, Valentine Shaw, on 4 February 1997, again in the context of Suit E 326 of 1996, was granted an ex parte interim injunction, on this occasion against the appellant, for a period of 7 days in the following terms:

“(1) That the Registrar by herself, her servants or agents or otherwise **be restrained from registering mortgage numbered 959821** to [the appellant], in relation to lands which JAMAICA NORTH COAST LTD. is the registered proprietor, being lands part of MAMEE BAY in the parish of SAINT ANN being the lot numbered TWENTY-TWO on the Plan of part of MAMEE BAY aforesaid deposited in the Office of Titles on the 30th day of June, 1965 of the shape and dimensions and butting as appears by the said Plan and **being the lands comprised in Certificate of Title registered at Volume 1022 Folio 175** of the Register Book of Titles.”
(Emphasis supplied).

[12] The respondent also deposed that Mr Valentine Shaw had also lodged caveat number 943874 against Certificates of Title registered at Volume 1022 Folio 175 and “Volume 175” [sic] Folio 176 respectively. Mortgage No 959821 was, however, registered on 26 February 1997 in favour of the appellant in respect of lands at Volume 1022 Folio 175. Approximately four years later, in May 2001, Valentine Shaw died intestate, without a spouse, before the suit he had filed against JNC Ltd was determined on its merits.

[13] The respondent has taken steps to obtain letters of administration in the estate of Valentine Shaw. In so far as his own steps in respect of possession are concerned, he has stated that, since 1996 when he became an adult, he has been maintaining

occupation of the premises and to date continues to do so with his wife and two children. He has been paying property taxes for the premises and asserts that, like his father, he has been living on the property undisturbed for more than 12 years.

[14] Mr Shaw has acknowledged that the Certificate of Title registered at Volume 1022 Folio 176 was cancelled and replaced by Certificate of Title registered at Volume 1481 Folio 208. He claims that a person unknown to him had paid the property tax for the year 2013 to 2014 before he could pay for same. He expressed concern that JNC Ltd could take steps adverse to his interest.

Notice of application for court orders

[15] The substantive matter filed in February 2016 subsequently came to the attention of the appellant. On 28 November 2016, the appellant filed a notice of application for court orders seeking the following orders:

- “1. The time for filing and serving this application be abridged.
2. [The appellant] be granted permission to be added as party to this claim.
3. Cost of this application to be costs in the claim.
4. Such further and other relief as this Honourable Court deems fit.”

[16] The grounds upon which the appellant relied are:

- “1. [The appellant] holds a registered mortgage over all that parcel of land registered at Volume 1022 Folio 175 of the Register Book of Titles (“the property”).

The mortgage was granted to [the appellant] by [JNC Ltd] to secure a loan made by it to [JNC Ltd].

2. [JNC Ltd] is currently indebted to [the appellant] in the sum of approximately US\$170,000.00 arising from the loan made by [the appellant].
3. [The respondent] has commenced these proceedings seeking inter alia declarations that he has obtained title to the property by virtue of provisions contained in the Limitation of Actions Act.
4. It is desirable that this Honourable Court has regard to the registered interest of [the appellant] when considering whether the orders being sought by [the respondent]. In this regard, it is appropriate for [the appellant] to be added as a party.
5. Patterson Mair Hamilton was recently retained by [the appellant] hence the delay in making this application.
6. The application is made pursuant to Part 1, 11, 19 and 26 of the Civil Procedure Rules, 2002."

[17] This application was supported by the affidavit of Roumelia Pryce, attorney at law in the firm of Patterson Mair Hamilton, which was filed on 28 November 2016. At the following paragraphs she deposed that:

- "3. In October 1996, [the appellant] loaned [JNC Ltd] the sum of US\$50,000.00. This loan was secured by a mortgage granted to [the appellant] which was registered on the certificate of title for all that parcel of land registered at Volume 1022 Folio 175 of the Register Book of Titles. I exhibit hereto marked "RP 1" a copy of an instrument of Mortgage granted by JNC Ltd to [the appellant] dated October 17, 1996 and "RP 2" a copy of the certificate of title for all that parcel of land registered at Volume 1022 Folio 175 of the Register Book of Titles.
4. The loan made to [JNC Ltd] has not been repaid and we have been advised by [the appellant] and do verily

believe that the [JNC Ltd] owes it approximately US\$173,000.00 arising from the loan made in October 1996. I exhibit hereto marked "RP 3" a copy of a draft statement of account prepared by [the appellant].

5. Patterson Mair Hamilton was retained in these proceedings on November 21, 2016 and is still in the process of receiving its instructions to the [JNC Ltd.'s] indebtedness."

Provisions in the Instrument of Mortgage

[18] The mortgage instrument includes the usual obligations on JNC Ltd including that the company should not part with possession or the right to possession of the mortgaged premises without the permission of the appellant. Clause 3(i) of the instrument states:

"That the Mortgagee shall be at liberty during the continuance of this security to keep and retain the duplicate Certificate(s) of Title for the mortgaged premises subject only to production at the request and cost of the Borrower at the Office of Titles for registration thereon of instruments expressed to be made subject and subsequent hereto."

[19] It is not clear from the affidavit evidence whether the appellant has retained the Certificate of Title for the lands registered at Volume 1022 Folio 175.

The appeal

[20] In the amended notice of appeal, the appellant has based its challenge of the learned judge's decision on the following grounds:

"(1) Having found that the Appellant's [sic] was seeking to protect [sic] its registered mortgage, the Learned Judge's refusal to allow it to be joined as a party

reflected a clear misunderstanding of the law and/or was 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.

- (2) The Learned Judge fell into error in not applying the decision of **Jamaica Citizens Bank Limited v Dyoll Insurance** (1991) 28 JLR 415, a case in which the mortgagee's interest only stood to be affected (the finding of breach of restrictive covenant would depreciate the value of the mortgage premises) whereas a finding a [sic] favour of the Respondent in the claim in the court below would wholly extinguish the Appellant's registered mortgage, which the Learned Judge accepted as possibility.
- (3) The Learned Judge failed to give any, or any adequate, consideration to the fact that by refusing to add the Appellant as a party to the claim she was unnecessarily encouraging a multiplicity of claims by in effect inviting the Appellant to commence its own claim against the Respondent when any issue the Appellant could raise to challenge the Respondent's claim could be adequately resolved in the existing claim in the court below.
- (4) The Learned Judge unnecessarily took into account an irrelevant consideration, that is, the Appellant only had an interest in one of the two properties that were the subject matter of the claim when exercising her discretion."

[21] The appellant now seeks the following orders as per paragraph 4 of the amended notice of appeal:

- "(1) Appeal be allowed.
- (2) [The appellant] be added as party to Claim No. 2016HCV00725.
- (3) Costs to the Appellant in this court and the court below."

[22] On 17 August 2018, counsel for the appellant filed skeleton submissions and thereafter, written submissions dated 29 April 2019 in support of their grounds of appeal. On 24 May 2019, counsel for the respondent filed her written submissions.

[23] The various grounds of appeal are best considered together. Ultimately, the question is whether the learned judge erred in law or exercised her discretion in a manner in which no reasonable judge, bearing in mind the relevant legal principles, would have done.

Submissions for the appellant

[24] Counsel argued that the basis on which the appellant seeks to be added to the claim, is for the sole purpose of being able to make representations to preserve the mortgage over the property. In the claim before the court below, the respondent asserts that he had acquired possessory title to the property before the appellant's mortgage was registered. Counsel submitted that if this is indeed so, then the appellant's mortgage would be wholly extinguished.

[25] Counsel referred to the case of **Perry v Baugh and others** [2018] JMCA Civ 12, where this court reiterated the point that a title acquired by adverse possession was not affected by a subsequent registered dealing, including a mortgage.

[26] This point, counsel argued, was appreciated by the learned judge at paragraphs [76] to [78] of her judgment. However, she refused the appellant the opportunity to participate in the claim by adducing evidence and making submissions to show why its

registered mortgage remained extant and enforceable. This decision, counsel contended, was more aberrant, bearing in mind JNC Ltd's failure to defend the claim.

[27] Counsel then submitted that the learned judge having accepted that the appellant was seeking to preserve its mortgage by way of a joinder to the claim, the appellant had a very real and substantial interest in the proceedings which could adversely impact its mortgage. Consequently, it should properly have been made a party to such proceedings. The learned judge having failed to do so, demonstrated a clear misunderstanding of the law and/or her decision was so aberrant that it must be set aside on the ground that no judge regardful of her duty to act judicially could have reached it.

[28] In further support of the appellant's position, counsel relied on the case of **Jamaica Citizens Bank Limited v Dyoll Insurance Company Limited** (1991) 28 JLR 415. Counsel noted that in that matter the Jamaica Citizens Bank Limited ("JCB") applied to be added in a claim for breach of restrictive covenant brought by Dyoll Insurance Company Limited ("Dyoll") against a borrower from JCB. JCB's application to be added was refused and it appealed to the Court of Appeal.

[29] The appeal was allowed and the court held that JCB had a legitimate interest in the proceedings because its financial and legal interest stood to be affected by Dyoll's claim.

[30] Counsel submitted that in **Jamaica Citizens Bank v Dyoll Insurance**, the JCB's interest only stood to be depreciated if Dyoll were successful in its application,

and, nevertheless, that was enough to warrant the addition of JCB to the claim in its capacity as the mortgagee. In this case, the risk to the appellant is far greater as its security interest stands to be wholly extinguished if Mr Shaw successfully pursues his claim.

[31] Counsel also relied on the decision of the Court of Appeal of Trinidad and Tobago in **Seepersad v Republic Bank Ltd and others** (2015) 87 WIR 476. In that case a claim for adverse possession was made by a Mr Seepersad. He alleged that he acquired possessory title to registered land owned by a Mr and Mrs Chance, with the effect that their title, and a registered mortgage granted to Republic Bank Limited, were extinguished. Counsel pointed out that what is of significance about that case, for present purposes, is that Republic Bank Limited was a named defendant in the claim from the onset, which was the appropriate course as the appellant submitted in the court below.

[32] In respect of ground of appeal four, counsel contended that the learned judge unnecessarily and irrelevantly placed significance on the fact that the appellant only had interest in one of the two properties in dispute. The learned judge distinguished the instant case from that of **Jamaica Citizens Bank Ltd v Dyoll Insurance** on that basis (see paragraph [76] of the judgment). However, in doing so, she erred as it was not relevant to the issue as to whether the appellant was to be added to the claim.

[33] To the contrary, the sole consideration for the learned judge ought to have been whether joinder of the appellant was necessary to resolve all issues in dispute, and

those issues included whether Mr Shaw acquired possessory title free and clear of the appellant's mortgage.

[34] Relying on the case of **Jamaica Citizens Bank v Dyoll Insurance**, counsel noted that Carey P (Ag) said: "In my view, one of the purposes of joinder of parties, is to ensure that there is not a multiplicity of action". The learned judge, counsel submitted, underscored this at paragraphs [40] and [74] of her judgment.

[35] Counsel argued that although the learned judge correctly outlined the relevant principles, she refused to add the appellant as a party. In doing this, he said, the learned judge was, in effect, inviting the appellant to commence a fresh claim against the respondent for declaratory reliefs that he had not acquired possessory title to the relevant property prior to the registration of the mortgage.

Submissions for the respondent

[36] Counsel for the respondent emphasised that the grant of an application to be joined as a party to a claim is a discretion to be exercised by the learned judge. Counsel made the observation that the appellant did not raise any challenge to the rules, or provisions on which the learned judge exercised her discretion. The thrust of the complaint, counsel noted, lies in the learned judge's failure to "appreciate" the appellant in its capacity as registered mortgagee and excluding the appellant from participating in the proceedings.

[37] In counsel's view, the appellant has demonstrated an appreciation of the legal consequences of any ruling in favour of the respondent, and any determination that

JNC Ltd has been dispossessed of the properties and consequently its titles extinguished. However, counsel highlighted that the appellant has ignored the fact that JNC Ltd has not challenged, defended or resisted the claim made against them. In her view, there is essentially "agreement" that the company, JNC Ltd, the mortgagor, has been dispossessed, and that its title has been extinguished.

[38] Counsel drew the court's attention to sections 3 and 30 of the Limitation of Actions Act which can be relied on in support of a claim that an individual has acquired interest in a property by virtue of adverse possession.

[39] Therefore, in the face of the cases relied on by counsel for the appellant in this regard, and the absence of a defence, counsel submitted that ground of appeal one is unsustainable.

[40] It was further argued by counsel that the validity of the mortgage and the appellant's (mortgagee's) legal interest, depend and are contingent on the existence and validity of JNC Ltd's (mortgagor's) legal interest in property number one. The learned judge, counsel further submitted, concluded that by virtue of the appellant's father's claim, the uncontroverted assertion was that JNC Ltd's title had been extinguished prior to the current claim and the registration of the subject mortgage.

[41] Counsel reiterated that there is no mortgage that could be "preserved" by the appellant, when the mortgagor, JNC Ltd, from whom title derived does not refute the extinction of its legal title in the subject property. Counsel argued that, a close examination of the submissions made on the appellant's behalf does not demonstrate

how the learned judge has misapplied the law, but only that she has exercised her discretion in a manner averse to him. Hence, the learned judge cannot be faulted for exercising her discretion as she did.

[42] Counsel then provided comments in respect of **Jamaica Citizens Bank Limited v Dyoll Insurance**. She argued that the case does not confirm that a party who has a direct, or indirect interest in a property may be properly joined as a party to a claim. Instead, the case related to a mortgagee whose tenure, existence or legal validity, was not impugned and involved a claim where a defence was mounted.

[43] In further distinguishing **Jamaica Citizens Bank Limited v Dyoll Insurance** from the instant case, counsel highlighted the fact that in that case there was no issue regarding the legal interest of the mortgagor, whether at the time of the making of the mortgage, or otherwise. Consequently, there was no debate about the validity, or existence, of the appellant's legal interest. In **Jamaica Citizens Bank Limited v Dyoll Insurance**, the nature of the claim or the application to be joined did not affect, or go to the root of title for any of the parties. This was in contrast with the position in the instant case. In looking at the findings of law being challenged, counsel's view is that this position was understood by the learned judge.

[44] Furthermore, counsel contended, the instant claim related to the respondent's assertion that he has extinguished title not only for property number one but also for property number two. There is no defence and the Court is automatically obliged to

address the assertion that JNC Ltd's title is extinguished and that by virtue of the Limitation of Actions Act, it has no standing before the Court to even defend the claim.

[45] Counsel referred to the Court of Appeal decision of **Fullwood v Curchar** [2015] JMCA Civ 37, where the respondent registered proprietor, upon the death of her ex-husband, Mr Curchar, whose name was also on the title as joint tenant, initiated a claim for recovery of possession of the property. The claim was pursued against the appellant, Miss Fullwood, who claimed to be entitled to resist the order sought on the basis that the respondent had been dispossessed of the property by virtue of the provisions in the Limitation of Actions Act. The appellant claimed that she had been living with Mr Curchar at the property in question, as his common law spouse, over a period in excess of 12 years. The order of recovery of possession was granted at first instance and was thereafter challenged by the appellant on the basis that the evidence did not support the judge's conclusion and, secondly, that the judge erred in finding that the respondent was not dispossessed.

[46] Counsel further pointed out that, in that case, the respondent argued that the appellant was not entitled to rely on the extinction of the respondent's title whether through discontinuance of possession or dispossession by Mr Curchar. This was because the appellant had not been declared a spouse of Mr Curchar. The court ruled that the court below was entitled to make a pronouncement once the provisions of the Limitation of Actions Act was raised. The appellant was entitled to rely on the Limitation of Actions Act as a shield in her defence of the claim, regardless of the fact that it was

not yet decided that she had any beneficial interest in the property as the spouse, personal representative and/or beneficiary of Mr Curchar.

[47] According to counsel, in the case at bar, this assertion has been raised by the respondent through the initiation of the claim. The evidence before the learned judge is that JNC Ltd/the registered proprietor has not made any claim against the respondent within the requisite time period and further has not challenged the respondent's assertions. There is no defence to the prior or existing claim. By operation of the Limitation of Actions Act, JNC Ltd's title has therefore been extinguished.

[48] It was further submitted that the Court of Appeal in **Fullwood v Curchar**, given the evidence, had no need, based on the automatic effect of the provisions of the Limitation of Actions Act, to await a determination of any claim to be made by the appellant. The learned judge was automatically entitled to give consideration to the impact of the Limitation of Actions Act in the exercise of her discretion.

[49] Therefore, counsel argued that, the learned judge was entitled to take into consideration the evidence before her in relation to property number two as well as property number one. No property could be isolated in reviewing the application made in relation to property number one. It is an inescapable conclusion that JNC Ltd's title had been extinguished not only in respect of property number two, but also in relation to property number one, which formed part of the claim.

[50] Counsel contended that when the court addresses the assertion made under the Limitation of Actions Act, the impact of the court's decision cannot be confined to

property number two as the claim is made in relation to two properties. The impact of the Limitation of Actions Act simultaneously affects property number two and it does not affect property number one only, since the claim relates to the validity of title for both. No one property can be looked at in isolation, having regard to the nature of the claim. The application must be dealt with holistically. That, counsel submitted, was the rationale for the learned judge making a distinction between **Jamaica Citizens Bank v Dyoll** Insurance and the case at bar.

[51] In addition, counsel argued that the addition of the appellant cannot assist the court or advance the court's determination of the issue before the court, namely whether or not the respondent had possessed the subject properties, pursuant to the Limitation of Actions Act. Further, since the appellant appreciates the automatic and simultaneous impact of the extinction of JNC Ltd's title in respect of his legal interest in property number one, it is difficult to appreciate the basis on which the appellant would be able to initiate any claim against the respondent, or why the learned judge could reasonably contemplate the generation of multiplicity of claims against the respondent as foreseeable.

[52] Furthermore, counsel pointed out that it is inconceivable that if the title of JNC Ltd, from whom the appellant derives title, is extinguished as is submitted, that the appellant's legal interest could survive JNC Ltd's so as to entitle it to make any claim against the respondent. The issue raised by the claim attacks the mortgage ab initio.

There is evidence that the appellant, like JNC Ltd, was aware of the assertion that JNC Ltd's title was extinguished prior to the perfection of the mortgage.

[53] Counsel argued that it is clear in law that given the "concession" of JNC Ltd, its title and interest in the property is extinguished and does not survive the automatic operation of law. The appellant has no independent legal standing as against the respondent, in the absence of any legal standing by JNC Ltd.

[54] Reliance was also placed on the case of **Dagor Limited v MSB Limited and National Commercial Bank Limited** [2015] JMSC Civ 242, in which Batts J indicated that actions to recover possession, whether by the mortgagee or purchasers from the mortgagee, may be met with any applicable limitation defence.

[55] Counsel submitted that in applying the law, and her general case management powers, the learned judge properly exercised her decision in refusing to join the appellant as a party to the claim at bar. As such, the appeal ought to be refused with costs to the respondent in this court and the court below.

The applicable law

[56] The case of **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, provides guidance in relation to the scope of review of this court, when embarking upon a review of a decision of a lower court judge. Morrison JA (as he then was) stated:

"[19] ... It follows from this that the proposed appeal will naturally attract Lord Diplock's well-known caution in

Hadmor Productions Ltd v Hamilton [1982] 1 All ER 1042, 1046 (which although originally given in the context of an appeal from the grant of an interlocutory injunction, has since been taken to be of general application):

'[The appellate court] 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.'

[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'.**" (Emphasis supplied)

[57] It is, therefore, unequivocally clear that an appellate court must be cautious in determining whether or not to interfere with the exercise of a judge's discretion. The interference by this court is, however, warranted, if it is found that the learned judge misunderstood the law and/or facts, was plainly wrong in arriving at the decision in question or the decision is so aberrant that no judge acting judicially could have arrived at such a decision.

[58] Part 19 of the Civil Procedure Rules, 2002 (CPR), which deals with the addition and substitution of parties, is instructive. Rule 19.1 provides:

"This Part deals with the addition or substitution of parties after proceedings have commenced."

[59] Further, Part 19(2) provides, in part:

“(1) A claimant may add a new defendant to proceedings without permission at any time before the case management conference.

(2)...

(3) The court may add a new party to proceedings without an application, if –

(a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or

(b) there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue.

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

(5)...”

(Emphasis added)

[60] Rule 19.3 deals with the procedure for adding or substituting parties. It states:

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

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

(a) an existing party; or

(b) a person who wishes to become a party...”

[61] The case of **National Commercial Bank Jamaica Limited v International Asset Services Limited** [2015] JMCA Civ 7 offers useful guidance in determining the appropriate test to be used when considering whether to add or substitute a party to a claim already commenced. Phillips JA, in that judgment, after outlining the provisions of the CPR, stated:

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

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

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

...

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

‘The broad policy of the law is that where there are multiple claims there should be as few actions and as few parties as possible; the ends of justice will be better served and the court’s resources more efficiently utilised if all the parties to a dispute are before the court so that its decision will bind all of them. **Accordingly the CPR contain a broad provision for a new party to be added to proceedings without the need for an application to the court where this is ‘desirable’, so that the court can ‘resolve all the matters in dispute in the proceedings’.**

Preferably, of course, a claimant should at the outset, when he prepares his claim form, decide which persons to join as defendants, as there are no restrictions in the CPR on the number of claimants or defendants who can be joined as parties; there will, however, be occasions where the need to join an additional party only surfaces after the proceedings have commenced, in which case the provisions of the CPR allowing joinder of parties can be relied upon.'

...

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

...

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

...

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

[62] The case of **Jamaica Citizens Bank v Dyoll Insurance**, on which counsel for the appellant has placed heavy reliance, is indeed relevant and helpful. In that matter JCB, applied to be added in a claim for breach of restrictive covenant brought by Dyoll against a borrower from JCB. Dyoll was seeking to restrain JCB’s mortgagor from constructing an apartment complex on the property. JCB contended that its rights and interest stood to be affected if the relief sought by Dyoll was granted. JCB’s application to be added was refused and it appealed to the Court of Appeal.

[63] The appeal was allowed and the court held that JCB had a legitimate interest in the proceedings because its financial and legal interest stood to be affected by Dyoll’s claim. Carey P (Ag) (as he was then) said:

"... it is enough that the intervener has some direct interest in the subject matter. In the instant case, the party who wishes to be joined is the mortgagee of the premises. In my opinion, the mortgagee has a far more substantial interest in the outcome of the action. Indeed, Mr. Robinson said that if the action succeeded, the appellants would be obliged to foreclose the mortgage and file suit. The value of the mortgaged property, would plainly depreciate. This concession suggests that not only are the financial interests of the mortgagee affected, but so, would their legal rights. In the result therefore, Master Harris fell into error and applied the wrong principles to arrive at her decision."

[64] Carey P (Ag) also referred to the dictum of Lord Denning MR in **Gurtner v**

Circuit [1968] 2 QB 587, where he stated at page 595:

"... it seems to me that when two parties are in dispute in an action at law, **and the determination of that dispute will directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill, then the court in its discretion may allow him to be added as a party on such terms as it thinks fit. By so doing, the court achieves the object of the rule. It enables all matters in dispute to be 'effectually and completely determined and adjudicated upon'** between all those directly concerned in the outcome."
(Emphasis added)

[65] Sections 3 and 30 of the Limitation of Actions Act provide:

"3. No person shall make an entry, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to some person through whom he claims, or, if such right shall have not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to the person making or bringing the same.

...

30. At the determination of the period limited by this Part to any person for making an entry, or bringing any action or suit, the right and title of such person to the land or rent, for the recovery whereof such entry, action or suit respectively might have been made or brought within such period, shall be extinguished.”

[66] While counsel have referred to various authorities such as **Fullwood v Curchar**, and **Seepersad v Republic Bank Ltd**, the principles which they outline are not in dispute. As the respondent has highlighted, actions to recover possession, whether by the mortgagee or purchasers from the mortgagee or others, may be met with any applicable limitation defence.

The reasons outlined by the learned judge

[67] How did the learned judge address the issues which arose for determination?

The learned judge said:

“[38] By virtue of Rule 19.3(2)(b) of the CPR, [the appellant] may make an application to this Court to be added as a party to the substantive claim. Rule 19.2(3) notes that in the Court’s decision whether to add a party to the claim without an application, regard must be had to:

- i) Whether it is desirable to add the new party to the proceeding so that the court can resolve all the matters in dispute; and
- ii) Whether there is an issue involving the new party which is connected to the matters in dispute and adding the party may allow the Court to resolve the issue.

[40] **The discretion granted under the rule is designed to ensure that all matters between the parties are completely and finally determined and avoid a multiplicity of Actions/Claims. In my judgment, the ends of justice will be better served**

and the court's resources more efficiently utilised if all the parties to a dispute are brought before the court so that the decision will bind all of them. The substantive issue being whether, by virtue of its position as a mortgagee with a registered interest in property #1, the [appellant] is entitled to be added as a party to the claim.

...

[54] The court must be satisfied by virtue of Rule 19.3, that it is either desirable to add the [appellant] to the proceedings so that the court can resolve all matters in dispute or there is an issue involving the [appellant] which is connected to the matters in dispute and adding the [appellant] would allow the Court to resolve the issue.

[55] There is doubt as to whether the [appellant's] presence in the proceedings will assist this Court in resolving all the matters in dispute.

...

[73] **Having analysed all the cases cited, it remains that the seminal question is whether adding [the appellant] will assist the court in determining the issue of whether [the respondent] has adversely possessed properties # 1 and # 2 of which JNC Ltd is the registered proprietor.** The local decisions of **Jamaica Citizens Bank Ltd v Dyoll Insurance Co Ltd** and **Mutual Security Merchant Bank Trust Ltd v Marley**, and the UK cases mentioned earlier are instructive although decided before the advent of the Civil Procedure Rules. **All the cases underscore that the important question is whether the added party's presence is necessary to assist the court in effectually and completely adjudicating matters in dispute** which is in line with Rule 19. 3. Phillips JA in **National Commercial Bank Ja Ltd v International Asset Services Ltd**, where the current Rule 19.3 was adjudicated on, underscored that this was the appropriate test.

[74] **I am doubtful as to whether the [appellant's] presence can in any way assist the court in determining whether [the respondent] has adversely possessed both properties for the requisite limitation period.** The Privy Council decisions of **Recreational Holdings v Lazarus** [2016] UKPC 22 and **Chisholm v Hall** [1959] A.C 719 underscore that it is possible for registered property to be adversely possessed. **In my judgment, the [appellant] cannot adduce evidence disputing whether the Respondent has lived in open, continuous and undisturbed possession of both properties.** Applying **Brondum A/S v Caribbean Financial Services Corporation and another**, although the [appellant] has some interest in the outcome of the litigation, JNC Ltd is the 'real and substantial party to the action' brought by the Respondent/Claimant.

...

[76] An important point that distinguishes the instant case from that of the **Jamaica Citizens Bank Ltd. v Dyll Insurance Co. Ltd** is that the mortgaged property was the only property under the Court's scrutiny. In the instant case, the Respondent, Mr. Shaw is alleging that he has adversely possessed two properties; one of which the [appellant] has no connection to. The [appellant's] presence in the proceedings can in no way assist the Court in resolving the matters in dispute. In fact, the Respondent is alleging that JNC Ltd's rights were extinguished before the mortgage was even registered.

[77] The [appellant] has sought to be joined as defendants in the matter in an effort to protect their registered interest. This is the true purpose of the application. From the submissions made by both [the appellant] and the Respondent, there is some argument that the [appellant's] right to enforce its security against JNC Ltd may be extinguished by virtue of Section 7 of the Limitations of Actions Act. This may lead to a contentious suit if the matter is pursued by the [appellant]. As per Carey P (Ag) in **Mutual Security**, 'the applicant's intervention would be futile as it would not put an end to their claim.'

[78] **While I accept that a finding of adverse possession would indirectly affect the [appellant] as**

JNC Ltd would no longer have rights to the mortgaged property, the mortgage deed is primarily a contract between the parties and JNC Ltd would still be bound to settle its outstanding debts. On the face of it, the facts of the instant case bear some similarity to that of **Jamaica Citizens Bank Ltd v Dyoll Insurance Co Ltd**. However an important distinction is the nature of the proceedings of both cases. In **Jamaica Citizens Bank**, the Court's finding that the Respondent was in breach of the restrictive covenant would objectively depreciate the value of the mortgaged premises.

[79] Also in **Gurtner v Circuit**, the Court allowed a third party which could not substantially assist the court in determining the issues to be added because it made an undertaking to pay damages. It was directly bound by the outcome of the litigation and liable to satisfy the judgment. The [appellants] are not so bound." (Emphasis supplied)

Analysis

[68] In light of the relevant authorities and the provisions of the CPR, among the questions to be asked in considering the application to join in this matter are the following:

- i. Is there an issue affecting the appellant as mortgagee with an interest in one of the properties, and is this issue connected to the matter in dispute in the proceedings?
- ii. Is it desirable to add the appellant so that the court can resolve that issue?

[69] The learned judge correctly outlined the applicable legal principles at paragraphs [38], [40] and [54] of the judgment. The question is, therefore, whether these legal principles were correctly applied to the facts before her.

[70] In the written submissions, counsel for the respondent shows a clear appreciation for the impact that a decision in favour of the respondent is likely to have on the appellant. The learned judge also stated that the appellant wishes to be joined in the matter in an effort to protect its registered interest-see paragraph [77] of the judgment. There is, therefore, no dispute that there is an issue in the matter which affects the appellant. Furthermore, there is no dispute that this issue is connected to the question as to whether the respondent has, in fact, by virtue of adverse possession, acquired title over the properties in question or parts of them.

[71] The gravamen of the respondent's submissions, is that it is too late for the appellant to try to impact the determination of the issue in dispute. This is because, according to the respondent, JNC Ltd has not challenged, defended or resisted the claim made against it. Consequently, JNC Ltd has agreed or conceded that it has been dispossessed and its title has been extinguished. In continuing this line of argument, the respondent submitted that, since the validity of the appellant's interest is contingent on the existence and validity of JNC Ltd's interest in the relevant property, JNC Ltd's agreement or concession that its interest has been extinguished is the end of the matter. The appellant's interest will have also been extinguished.

[72] It is correct that as at November 2016, JNC Ltd had not challenged, defended or resisted the claim made against it. The claim had been filed by the respondent in February 2016 and the appellant's application to be joined as a party was made in November 2016. Nothing has, however, been outlined in the record of appeal to indicate that JNC Ltd has expressly indicated that it will not be defending the claim. There is also nothing on the record of appeal which reflects any "concession" by JNC Ltd that its title has been extinguished. Contrary to the respondent's submissions, the question as to whether JNC's title has been extinguished is, therefore, at this point, not a foregone conclusion.

[73] It is also important to note that the learned judge did not, at any time in the judgment, conclude that JNC Ltd had agreed or conceded that its title had been extinguished. The learned judge did not conclude that the respondent's claim would be inevitably successful. The learned judge expressed doubt as to whether the appellant would be able to assist the court in arriving at a conclusion as to whether the respondent acquired a possessory title of the properties in question. Later on in her judgment, the learned judge stated that the appellant cannot adduce evidence disputing whether the respondent has lived in open, continuous and undisturbed possession of the properties in question (see paragraphs [74] and [76] of the judgment). It is important to note that this is exactly the conclusion which the appellant wants to prevent.

[74] There is no evidence reflected in the record of appeal which supports the conclusion, or the inference drawn by the learned judge, that the appellant would be unable to lead evidence disputing whether the respondent and his father before him, lived in open, continuous and undisturbed possession of the property to which its interest relates. In my view, the learned judge erred in this regard. This is so especially in light of the obligations which JNC Ltd owed to the appellant, pursuant to the mortgage instrument, and the interaction which Valentine Shaw had with the appellant prior to the registration of the mortgage.

[75] As the respondent's affidavit evidence has shown, Valentine Shaw, the respondent's father, had sought to prevent the appellant from registering its mortgage on the title to the property reflected in Volume 1022 Folio 175. Although Valentine Shaw, for a period of seven days, secured an ex parte interim injunction to that effect on 4 February 1997, the mortgage was nevertheless registered on the property on 26 February 1997.

[76] The fact that Valentine Shaw, in the suit in which he was seeking a declaration that he had dispossessed JNC Ltd of its registered title, saw it necessary to seek an injunction to prevent the registration of the appellant's mortgage to JNC Ltd on the property, underlines the connectedness of the issues in question. Valentine Shaw died in 2001 and the suit which he had brought was not finally determined.

[77] Furthermore, the circumstances relating to each of the relevant properties in question, differ. One is currently subject to a mortgage, while the other is not. A

determination of the issues in respect of one of the properties does not necessarily mean that the same outcome is guaranteed in respect of the other. I agree with the appellant, that it was irrelevant that the appellant had an interest in only one of the two properties, parts of which the respondent claims to have acquired by virtue of adverse possession.

[78] The respondent has argued that there would be no need to be concerned about the possibility of the multiplicity of actions if the appellant is not added to the claim. This is because the appellant has no independent legal standing as against the respondent, given the "concession" of JNC Ltd that its title and interest is extinguished. As highlighted earlier, there is nothing on the record of appeal reflecting the concession to which the respondent has referred. Therefore, as matters stand, the concern of a multiplicity of actions is relevant and indeed applicable to the instant case.

[79] I agree with the submissions made by the appellant, that the case of **Jamaica Citizens Bank v Dyll Insurance** is not only relevant but also apposite. In my view, the appellant is in a stronger position than that of JCB in that case. While JCB's interest only stood to be potentially depreciated, in this case the appellant's interest in the relevant property could be ruled as having been extinguished in light of clear legal authority that a title acquired by adverse possession can defeat the interest of a mortgagee.

[80] The learned judge correctly outlined the applicable principles for consideration in an application of this nature. However, in my view, she erred in her application of

the principles. This is because she restricted her enquiry to the question as to whether the appellant is likely to be able to assist the court in arriving at a conclusion as to whether the respondent had lived in open, continuous and undisturbed possession of the properties or parts of the properties in question. Furthermore, she erred in concluding, without an evidentiary basis, that there is nothing that the appellant could contribute to assist the court in determining whether the respondent had acquired a possessory title to parts of the properties in question, particularly, the property over which the appellant has a registered mortgage.

[81] In light of the mortgage registered on the property at Volume 1022 Folio 175, adding the appellant, the mortgagee, to the proceedings will allow the court to resolve all matters in dispute. Furthermore, there is clearly an issue involving the appellant, that is, the enforceability of its mortgage, which is connected to the matters in dispute. Although the respondent's attorneys appear to be of the view that the respondent has already secured possessory title in respect of the properties in question, or parts of them, that issue, in my view, remains for the determination of the court.

[82] The learned judge erred in law as she did not take into account all the applicable bases in law which should have been considered in arriving at a determination of the application. For the reasons outlined above, in my view, grounds of appeal 1, 2, 3 and 4 should succeed.

Conclusion

[83] I would, therefore, propose that orders be made as follows:

- i. The appeal is allowed.
- ii. The order of Palmer-Hamilton J (Ag) made on 4 May 2018 is set aside.
- iii. The appellant, Pelican Securities Limited, is to be added as a defendant to Claim No 2016 HCV 00725, Neil Shaw v Jamaica North Coast Limited.
- iv. The respondent is to file and serve on the appellant, the fixed date claim form, supporting affidavits and any other statements of case in the matter within 28 clear days of this order.
- v. Costs to the appellant in this court and in the court below to be agreed or taxed.

MORRISON P

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