EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2015/0034

IN THE MATTER of the Registered Land Act Cap 374 Of the Revised Laws of Antigua 1992

and

IN THE MATTER of an Application by MYRNA NORDE for the Registration of Voluntary Memoranda of Transfer Pursuant to Section 83 of The Registered Act Cap 374 of The Revised Laws of Antigua, 1992

and

IN THE MATTER of Voluntary Memoranda Of Transfer dated 14th July, 1977 and 1st June, 1978

and

IN THE MATTER of the Transfer of Title by Registration Section: Potters and Belmont Block613 1891D; Parcels 70 AND 131

BETWEEN:

MYRNA NORDE

Appellant

and

JACQUELINE MANNIX
(As personal representative of Henry Alford Mannix)

Respondent

2016: October 28;
2017: February 16

Before:

The Hon. Mr. Mario Michel — Justice of Appeal
The Hon. Mde. Justice Gertel Thom — Justice of Appeal
The Hon. Mr. John Carrington, QC — Justice of Appeal [Ag.]

Appearances:

Mr. Ralph Francis for the Appellant
Mr. Hugh Marshall Jr. for the Respondent

Interlocutory appeal – Limitation Act 1997 – Whether claim is statute barred – Whether claim is an abuse of process – Onus on Claimant on application to strike out – Whether discretion of learned judge was wrongly exercised

The appellant filed a claim against the respondent for title to two parcels of land to be transferred to the appellant. It was the appellant's case that her father had executed two memoranda of transfer of the lands that now form these parcels in 1977 and 1978. The appellant pleaded that although her father had intended to transfer the properties to her, the transfers could not be perfected because of an existing mortgage over the property of which these lands formed part. The appellant paid off the balance of this mortgage in 1982 and paid stamp duty on the transfers. The appellant expressly pleaded that she was under the impression that the titles had been perfected and were used as security by the Central Housing and Planning Authority. She further pleaded that at the time of her father's death, the 1.3 acres of land (the subject of the memoranda of transfer) did not form a part of his estate as he had already disposed of it by way of transfer to the appellant. In 2003, as administrator of her father's estate, she became aware that the memoranda had not been registered. She was subsequently removed as administrator and succeeded by the respondent in 2005. The claim was commenced in 2011.

The respondent alleged inter alia that the claim was an abuse of process as the appellant sat on her rights for an extensive period during which she had the opportunity to give effect to the memoranda of transfer but chose not to do so and so must be barred from seeking to proceed on these documents; and (ii) the claim is for the recovery of property or an equitable interest in property and so is statute barred under section 17 or 20 of the Limitation Act 1997.

The learned trial judge agreed with the respondent and held that the claim was statute barred. He struck out the appellant's claim. The appellant has appealed.

Held: allowing the appeal; setting aside the order of the learned judge; awarding costs of the appeal to the appellant; and directing that the proceedings brought by the appellant be resumed in the High Court and proceed in accordance with the CPR, that:

1. The claim made by the appellant was that the lands in question did not form part of her father's estate at the time of his death as he had already disposed of it by transfer to her. In light of this pleading, the appellant's case was arguably not for recovery of land since she does not claim that she had been dispossessed of the lands in question, especially parcel 70 on which the appellant's home is situated. The claim was arguably for an injunction to compel the respondent to complete the gift from the appellant's father by the transfer of the title to the property that was the subject of the gift. The **Limitation Act 1997** therefore does not apply to a claim for such purely equitable relief.

Ronex Properties Ltd v John Laing Construction Ltd [1983] QB 398 distinguished; Sections 17 and 20 of the **Limitation Act 1997** distinguished.

2. Further, the claim being made approximately 8 years after the appellant alleged that she discovered the error, if mistake was operative in the circumstances and the claim was for recovery of land, the claim would have been commenced within the limitation period. These are all matters which are suitable to be dealt with at trial rather than merely by reference to the pleadings. The threshold that the appellant has to meet at this stage is to show that she has a real prospect of countering the limitation defence and not that she is bound to overcome it. Accordingly, the learned judge exercised his discretion wrongly in coming to the conclusion that the claim is statute barred on its face in that he failed to consider matters pleaded by the appellant which have a real prospect of outflanking or delaying the limitation period under the statute.

JUDGMENT

[1] **CARRINGTON JA [AG.]**: The issue on this appeal is whether this Court should interfere with the exercise of the learned judge's discretion[1] to strike out the appellant's claim on the grounds that the claim is statute barred and its prosecution would be an abuse of the process of the court.

[2] Rule 26.3(1) of the **Civil Procedure Rules 2000** ("CPR") states as alternative grounds on which the court may strike out a statement of claim, (i) that the statement of case does not disclose any reasonable ground for bringing the claim and (ii) that the claim is an abuse of the process of the court.

[3] Although the defendant (the respondent in this Court) had alternatively sought reverse summary judgment on the claim, the learned judge did not address this part of the application in his judgment and the respondent did not cross appeal against the failure to so do. I therefore propose to say nothing further on the issue of summary judgment.

[4] In **Didier et al v Royal Caribbean Cruises Ltd**,[2] at paragraph 24 this Court stated that to strike out on the basis that there is no reasonable ground for

[1] The basis for such interference is well established: see Dufour and Others v Helenair Corporation Ltd and Other (1996) 52 WIR 188.
[2] SLUHCVAP 2014/0024 (delivered 6th June 2016, unreported).

bringing the claim is appropriate if "a party to an action is faced with a statement of case which is plainly just bad in law". On the other hand, at paragraph 25, the Court cited instances where striking out would not be appropriate, for example where the argument involves a substantial point of law which does not admit of a plain and obvious answer or where facts need to be investigated before conclusions can be drawn about the law. At paragraphs 29 and 30, the Court gave a useful analysis of the difference between the applications for summary judgment and striking out noting that summary judgment should only apply where a claim or defence is properly constituted which necessarily ruled out the striking out of such statement of case for not disclosing any reasonable ground for bring such claim or defence.

[5] In **Citco Global Custody NV v Y2K Finance Inc**,[3] this Court emphasised that the jurisdiction to strike out should be used sparingly and in **Tawney Assets v East Pine Management Limited et al**[4] striking out was described as a drastic step which is only to be taken in exceptional cases. This is moreso where the ground for striking out is that the claim is an abuse of the process of the Court, which is an extremely serious allegation in light of the general right to access to justice. In **Hunter v Chief Constable of the West Midland Police**,[5] Lord Diplock described the power to strike out on this ground, which existed prior to the implementation of CPR, as part of the inherent jurisdiction of the court and under the Rules of the Supreme Court as a power "which any court of justice must possess to prevent misuse of its procedure in a way in which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people".[6] In **Attorney General v Paul Evan John Barker**,[7] Lord Bingham described an abuse of the court's process as "a use of the court process for a

[3] BVIHCVAP2008/0022 at para. 14.
[4] BVIHCVAP2012/0007 at para. 22.
[5] [1982] AC 529.
[6] At p. 536.
[7] [2000] EWHC 453.

purpose or in a way which is significantly different from the ordinary and proper use of the court process".[8]

[6] The question here to be determined applying a broad merits based approach[9] is whether the impugned party's conduct in bringing the claim or prosecuting it amounts to an abuse of process. This is an issue to be determined on evidence unlike the alternative ground for striking out that there is no reasonable ground for bringing the claim which is determined by reference to the impugned statement of claim only. Well recognised examples of abuse of process are where a party seeks to re-litigate a matter that is res judicata[10] or where he seeks to mount a collateral attack on a previous decision of the court[11] or where two or more proceedings are brought in respect of the same subject matter which can amount to harassment of the defendant[12] or the claim is one which no reasonable person could properly treat as bona fide and contend that he had a grievance which he was entitled to bring before the court[13] or where there is a clear limitation defence to the claim.[14] This is not an exhaustive list.

[7] I can now turn to the averments made in the statement of claim as the first ground of the application before the learned judge below was that this did not disclose any reasonable ground for bringing the claim.

[8] The claim is made by the appellant (the claimant below) against the personal representative of the estate of Henry Alford Mannix, the late father of the appellant, for title to two parcels of land; parcels 70 and 131 Block 613 1891D, located in the parish of Saint John in Antigua, to be transferred to the appellant.

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[8] At para. 19.
[9] See Davidson Ferguson v Sarah Anita Ferguson, SLUHCV2012/0387 (delivered 22nd October 2015, unreported) at para. 10.
[10] Davidson Ferguson v Sarah Anita Ferguson, SLUHCV2012/0387 (delivered 22nd October 2015, unreported).
[11] Dion Friedland v Charles Hickox, AXAHCV2012/0039 (delivered 29th April 2016, unreported).
[12] English Haven Limited v Registrar of Lands, ANUHCV2007/0227 (delivered 23rd June 2008, unreported) at para. 84.
[13] Norman v Matthews [1916] 85 LJKB 857, 859.
[14] Ronex Properties Ltd v John Laing Construction Ltd [1983] QB 398, 405.

[9] The appellant pleads that her father executed two memoranda of transfer of the lands that now form these parcels in 1977 and 1978. In 1982 she secured a loan from Central Housing and Planning Authority ("the Authority") to construct a new house on one of these properties and had her father's permission to use one of the properties as security. She further pleads that although her father had intended to transfer the properties to her, the transfers could not be perfected because of an existing mortgage over the property of which these lands formed part. The appellant paid off the balance of this mortgage in 1982 and paid stamp duty on the transfers. Her attorney retained the memoranda of transfer giving the undertaking to the Authority that he would perfect the titles to both properties, which were to be used as security for their loan to the appellant.

[10] The appellant expressly pleads that she was under the impression that the titles had been perfected and were used as security by the Authority. She further pleads that at the time of her father's death, the 1.3 acres of land (the subject of the memoranda of transfer) did not form a part of his estate as he had already disposed of it (sic) by way of transfer to the appellant. She became aware that the memoranda had not been registered in 2003. This was while she was administrator of her father's estate. She was removed as administrator and succeeded by the respondent in 2005. The claim was commenced in 2011.

[11] As the second ground of the application to the court below was that the claim was an abuse of process, I should also examine the grounds of the application and the affidavit filed in support of the application by the respondent (the defendant below and current administrator of the estate of Henry Alford Mannix) to determine the basis on which the claim is said to be an abuse of process.

[12] The grounds relating to abuse of process are that: (i) the appellant seeks to invoke equity without having regard to her delay and in spite of her own actions in failing to effect conveyance of the lands; and (ii) as a result of

actions taken by the appellant it is impossible to convey the lands, as the lands no longer exist. The material statements by the respondent to this appeal in her affidavit in support of the application to the court below were that (i) the appellant sat on her rights for an extensive period during which she had the opportunity to give effect to the memoranda of transfer but chose not to do so and so must be barred from seeking to proceed on these documents; (ii) the claim is for the recovery of property or an equitable interest in property and so is statute barred under section 17 or 20 of the **Limitation Act 1997**[15]; and (iii) section 23 of the **Limitation Act 1997** does not apply as the appellant has not brought the claim as a beneficiary under a trust and does not allege that the lands are in the possession of the respondent.

[13] The learned judge acceded to the application by the respondent in the court below holding at paragraph 10 of his ruling that the claim is statute barred on its face. There is authority to support a conclusion that to bring a claim where there is a clear limitation defence would be an abuse of process. In **Ronex Properties Ltd v John Laing Construction Ltd**,[16] Lord Donaldson MR stated, "Where it is thought to be clear that there is a defence under the Limitation Acts, the defendant can either plead that defence and seek the trial of a preliminary issue or, in a very clear case, he can seek to strike out the claim on the ground that it is … an abuse of the process of the court …".[17] The learned judge further held that the delay and circumstances of the claim would mean that its prosecution would be an abuse of the process of this court.

[14] The question therefore is whether in the instant case there is a clear limitation defence to the claim. This requires more than a real prospect of success on this defence as a high threshold should be met to keep a claimant out of court on her claim. On the other hand, the threshold that the appellant has to meet to keep her claim in court is relatively low as she only needs to show at this

[15] No. 8 of 1997.
[16] [1983] QB 398.
[17] At p. 405.

stage that she has a real prospect of countering the limitation defence and not that she is bound to overcome it.

[15] The limitation defence advanced by the respondent is that the claim is for recovery of land and therefore subject to the limitation periods under sections 17 and 20 of the **Limitation Act 1997**. The learned judge agreed. In my opinion, the learned judge in the court below fell into error in so doing as he did not consider fully the claim being made by the appellant, in particular paragraph 11 of her statement of claim in which she pleaded that the lands in question did not form part of her father's estate at the time of his death as he had already disposed of it by transfer to her.

[16] In light of this pleading, the appellant's case was arguably not for recovery of land since she does not claim that she had been dispossessed of the lands in question, especially parcel 70 on which the appellant's home is situated. The claim is arguably for an injunction to compel the respondent to complete the gift from the appellant's father by the transfer of the title to the property that was the subject of the gift. This interpretation of the claim is consistent with the pleading at paragraph 11 and the relief sought in the amended statement of claim. The **Limitation Act 1997** does not apply to a claim for such purely equitable relief.

[17] The appellant also raises at paragraph 12 of her statement of claim an allegation that she had been under the mistaken belief until 2003 that the title had been transferred into her name presumably pursuant to the undertaking by her solicitor to which she referred in paragraph 8. The effect of mistake may be to postpone the commencement of the limitation period by virtue of section 32 of the **Limitation Act 1997**. The claim was made approximately 8 years after the appellant alleges that she discovered the error so that if mistake was operative in the circumstances and the claim was for recovery of land, the claim would have been commenced within the limitation period. These are all matters which are suitable to be dealt with at trial rather than merely by reference to the pleadings.

[18] I have therefore come to the conclusion that the learned judge exercised his discretion wrongly in coming to the conclusion that the claim is statute barred on its face in that he failed to consider matters pleaded by the appellant which have a real prospect of outflanking or delaying the limitation period under the statute.

[19] The learned judge further found that "[t]he delay and circumstances of this claim also in my view would mean that the prosecution of this claim would be an abuse of the process of this court".[18] It is regrettable that he did not develop his reasoning here more fully. So far as he can be understood as referring here to the submission from the respondent that he recorded at paragraph 9 concerning laches, he also erred in principle as laches concerns not merely delay but also prejudice to the party against whom enforcement is sought.[19] The affidavit of the respondent in support of the strike out application does not show how the estate was prejudiced by the appellant's delay in bringing this claim. In the absence of such evidence, there was no basis on which the learned judge could reasonably come to a conclusion at this stage that laches would apply.

[20] As I am satisfied that the learned judge's exercise of discretion should be set aside, I am of the view that this Court can proceed to exercise its own discretion on the strike out application. For the reasons already referred to, namely that there is no clear limitation defence and the evidence of the respondent does not clearly establish laches, I refuse to strike out the claim as prayed for by the respondent in her application.

[21] I would therefore allow the appeal and set aside the order of the learned judge below striking out the appellant's statement of claim, refuse in the exercise of my own discretion to strike out the claim and award costs of the appeal to the appellant. I further direct that the proceedings brought by the appellant should

[18] At para. 14 of his judgment.
[19] Tottenham Hotspur Football and Athletic Co Ltd v Princegrove Publishers Ltd [1974] 1 WLR 113, 122C.

be resumed in the High Court and should proceed in the High Court in accordance with the CPR.

I concur
Mario Michel
Justice of Appeal

I concur
Gertel Thom
Justice of Appeal

By the Court

Registrar