

**EASTERN CARIBBEAN SUPREME COURT
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV 2016/0160

BETWEEN:

PIRATES' NEST LIMITED

Applicant/Defendant

and

HILTON LAKE

Respondent/Claimant

Appearances:

Mr. Jonel Powell for the Applicant/Defendant

Ms. Sharina Laws for the Respondent/Claimant

Considered on the written submissions of:

Ms. Kimloy Walker of Grant, Powell and Co for Applicant

Ms. Sharina Laws of Hamilton & Co for Respondent

.....
2017: April 3rd

2018: January 24
.....

DECISION IN CHAMBERS

Introductory

- [1] **LANNS, J. [AG]:** By an amended application filed on the 20th December 2016, the defendant, Pirates' Nest Limited ('Pirate's Nest' or 'the claimant') seeks an order that the statement of claim filed by the claimant Hilton Lake ('Mr. Lake' or 'the defendant') on the 23rd May 2016, be struck out under CPR 26.3 (1) (b) as: (a) it does not disclose any reasonable ground for bringing the claim; and or (b) that the provisions pursuant to section 4 of the Conveyancing Act and the Law of Property Act Cap 10.04 have not been satisfied; or (c) further or in the alternative that the claim is statute barred by virtue of sections 4 and 6 of the Limitation Act of 2002.

[2] Curiously, having set out the bases on which the claim should be struck out, the defendant went on to state in a separate paragraph; “The grounds of the application are:

- (1) The applicant /defendant operates a luxury real estate development entity situate at Port Zante, and it is the registered proprietor of a lot piece or parcel land situate at Frigate Bay described in a Certificate of Title in its favour dated 17th August 2010.
- (2) The property has never formed part of the claimant’s estate;
- (3) There is no written agreement of sale of the property in question in the statement of claim;
- (4) The receipts annexed to the statement of claim do not constitute a sufficient memorandum of any agreement for sale;
- [5] The agreement as alleged runs contrary to Section 4 of the Conveyancing and Law of Property Act Cap 10.04 as there is no written agreement or sufficient memorandum of any agreement for sale;
- (6) The agreement as alleged occurred in 1988 and as such any claim is barred pursuant to sections 4 and 6 of the Limitation Act Cap 5.08.”

[3] The application is supported by the affidavits of Jason Kelsick filed on the 18th July 2016 and on the 20th December 2016, in which the grounds of the application are restated.

[4] At a hearing before Ward J. QC on the 13th January 2017, it was ordered that the applicant/defendant do file and serve submissions and supporting authorities on or before the 27th January 2017. The respondent/claimant was to file his response on or before the 10th February 2017; and the matter was adjourned to the 7th April 2017 for further oral arguments, suggesting that there had already been oral arguments on the application before Ward J. QC.

[5] Further hearing of oral arguments was subsequently rescheduled to 3rd April 2017, at which time the matter came before me for continuation. By that time, the parties had filed written submissions¹ and were content to rely on those submissions without any further oral arguments. Accordingly, the court made an order that the application to strike will be considered on the written representations submitted by the parties. The decision was reserved.

Relevant Background

[6] As gleaned from the statement of case, and other documents on record, Pirates' Nest Limited is said to be a luxury residential property entity engaged as a developer of condominium units for sale. It is also said to be a duly incorporated company registered and operating within St Kitts and Nevis. In or around July 1988, Pirates' Nest entered into an 'arrangement' with Mr. Lake for the purchase of a condominium unit known as Unit 1E, Pirates Nest, Frigate Bay, at a purchase price of USD\$80,000.00. Mr. Lake completed payment in December 1988. Part of the 'arrangement' was that Pirates' Nest would effect the transfer of Unit1E, and be responsible for rental of the Unit to tenants on his behalf when he was not using it. Mr. Lake paid Pirates' Nest the sum of US\$4,462.50 for Government Stamp Duty and legal fees to effect title. Mr. Lake moved into the Unit from 1990 to 1995. He then migrated overseas. At the time of leaving the Federation, the Unit had not been transferred to Mr. Lake, but he had been given every assurance that it would soon be done.

[7] By the 23rd May 2016, the Unit still had not been transferred, and Mr. Lake was told that the Unit had been rented in his absence and rents collected.²

[8] On the 23rd May 2016, Mr. Lake filed a fixed date claim along with supporting affidavit against Pirates Nest seeking the following reliefs:

- (a) A declaration that he (Mr Lake) is entitled to all rents and profits accrued from the Unit and received by Pirates' Nest from January 1996 to present;

¹ Submissions for Mr. Lake were prepared by Sharina Laws; while submissions for Pirate's Nest were prepared by Kimloy Walker.

² Source of information not disclosed

- (b) An account of all rents and profits received by Pirates' Nest or any agent acting on its behalf, and an account of what is due from Pirates' Nest to Mr. Lake in respect of such rent and profits;
- (c) An order for the payment by Pirates' Nest of any sum found due to Mr. Lake upon taking such accounts.

[9] Mr. Lake identified and exhibited documents (copies of cheques and receipts) which he considered necessary to his case. He did not exhibit any agreement.

[10] Pirate's nest filed a lengthy defence in which it denied and admitted parts of the claim; neither denied or admitted parts, and put the claimant to strict proof on other parts. Mr. Lake, (by virtue of the defence filed and served on 18th July 2016) became aware that by an agreement for sale, Unit 1E was 'resold' on the 24th September 2012 to one, Dr. Ravi Chinnaswamy.

[11] Concurrently with the filing of the defence, Pirates' Nest, through its legal practitioners filed an application to strike out Mr. Lake's statement of claim under CPR 26.3 (b); and/or as having been statute barred. Mr. Lake filed an affidavit in answer, opposing Pirates' Nest's application to strike out his statement of claim, whereupon, Pirates' Nest filed an amended application to strike out the statement of claim, accompanied by the supplemental affidavit of Jason Kelsick. It is this amended application that is being considered by the court.

Issue

[12] The main issue which falls for determination on the application is whether, in view of the matters alleged in the claim form, the affidavit in support of the fixed date claim, the statement of claim should be struck out as disclosing no reasonable ground for bringing or defending the claim; or for abuse of process of the court by reason that it is statutorily barred.

[13] A corollary issue is whether, in view of the date of the alleged agreement, the claim is statute barred by virtue of sections 4 and 6 of the Limitation Act.

[14] For the reasons which follow, I conclude that the application must be denied.

The Applicable Rules

- [15] The relevant rules to be considered are CPR 8.6, CPR 8.7 (1); CPR10.5 (1), and CPR 26.3 (1) (b) and (c);
- [16] There is an obligation on both a claimant and a defendant to set out all the facts on which they wish to rely.
- [17] In relation to a claimant, the claimant must include in the claim form or in the statement of claim a statement of all the facts on which the claimant relies (CPR 8.7 (1)). In relation to a defendant, the comparable provision states: the defendant must set out all the facts on which it relies to dispute the claim (CPR10.5 (1)).
- [18] Neither a claimant nor a defendant may rely on any allegation or factual argument which is not set out in their statement of case, but which could have been set out there unless the court gives permission or the parties agree (CPR 8.7A and 10.7).
- [19] A statement of claim is required to contain a cause of action or grounds against a defendant. If it does not, it is liable to be struck out.
- [20] A claim form must, among other things include a short description of the nature of the claim, specifying any remedy sought (CPR 8.6). And CPR 8.7 provides that a claimant must, include in the claim form or statement of claim, a statement of all the facts on which the claimant relies. The statement must be as short as possible, but must identify any document that the claimant considers to be necessary to his or her case.
- [21] Rule 26.3 (1) (b) enables the court to strike out a statement of case or part thereof if it does not disclose any reasonable ground for bringing or defending the claim. Rule 26.3 (1) (c) gives the court the same power where the statement of case or part thereof is an abuse of the process of the court, or likely to obstruct the just disposal of the proceedings.

Applicable Principles

- [22] It is well recognized in the OECS cases, and further afield, that an application to strike under the CPR 2000 is a summary procedure which is limited to plain and obvious cases, where there is no point in having a trial: "This summary procedure should only be used in clear and obvious cases, when it can be seen on the face

of it, that the claim is obviously unsustainable, cannot succeed, or in some other way is an abuse of the process of the court.”³

[23] The reason for proceeding cautiously is that the exercise of this jurisdiction deprives a party of his right to a trial, and of his ability to strengthen his case through the process of disclosure, and other procedures such as requests for further information⁴

[24] The principles in the cases cited above were approved, reiterated and extended by Edwards, J.A. in **Citco Global Custody NV v Y2K Finance**, BVI Civil Appeal No 22 of 2009:

[13] On hearing an application made pursuant to CPR 26.3 (1) (b) the trial judge should assume that the facts alleged in the statement of case are true. Despite this general approach, however, care should be taken to distinguish between primary facts and conclusions or inferences from those facts. Such conclusions or inferences may require to be subjected to closer scrutiny.”

[14] Among the governing principles stated in **Blackstone’s Civil Practice 2009**, the following circumstances are identified as providing reasons for not striking out a statement of case: where the argument involves a substantial point of law which does not admit of plain and obvious answer; or the law is in a state of development; or where the strength of the case may not be clear because it has not been fully investigated. It is also well settled that the jurisdiction to strike out is to be used sparingly since the exercise of the jurisdiction deprives a party of its rights to a fair trial, and the ability to strengthen its case through the process of disclosure and other court procedures such as requests for information, and the cross-examination of witnesses, often change the complexion of a case. Also, before using CPR 26.3 (1) to dispose of ‘side issues’, care should be taken to ensure that a party is not deprived of the right to trial on issues essential to its case. Finally, in deciding to strike out, the judge should consider the effect of the order on any parallel proceedings and the power of the court in every application, must be exercised in accordance with the overriding objective in dealing with cases justly.”

[25] Notwithstanding the applicable principles as stated above, there is also authority for the view that there are those cases which, as pleaded, do not stand any chance of success, and that it would work a similar

³ (Per Sir Dennis Byron in **Baldwin Spencer v The Attorney General of Antigua and Barbuda et al** (Civil Appeal No. 20A of 1997)

⁴ (Per Saunders JA in **Hector v. Joseph** - Dominica Civil Appeal No 6 of 2003).

injustice and an abuse of the court's processes to have the party opposite expend resources to defend the action when it is plain and obvious the claim cannot succeed.

[26] The court must therefore be persuaded that a party is unable to prove allegations made against a party, or that the statement of case is incurably bad; that it discloses no reasonable ground for bringing or defending a case, and has no real prospects of succeeding at trial.

Discussion and Decision

(a) Is the Claimant's Statement of Case Deficient in Any Way?

[27] It is to be noted that the affidavit in support of the fixed date claim is treated as the statement of case of Mr. Lake. Learned counsel for Mr. Lake submits that the fixed date claim and supporting affidavit properly sets out the cause of action against the defendant, and the court should not exercise its jurisdiction and strike out the claim without allowing the claimant to exhaust his right to trial, as this would be a draconian and unwarranted step. It is the further submission of counsel, that the defendant has not indicated the areas where and how the claimant's case is unsustainable, cannot succeed or in some other way an abuse of the process of the court.

[28] Learned counsel for Pirates' Nest on the other hand, contends that the claim should be struck out as it does not disclose any reasonable ground for bringing the claim by reason that the claimant has not pleaded the existence of any written contract or sufficient memorandum of transaction as alleged by him. Further, Pirates' Nest submits that the alleged acts of part performance, even if true are insufficient, as they are not unequivocally referable to an agreement for sale of land to him. Additionally, Pirates' Nest submits that Mr. Lake has not pleaded any particulars concerning facts of assurance, detriment, or reliance upon which to ground an action for proprietary estoppel.

(b) Mr. Lake's Pleaded Case

[29] A perusal of the fixed claim form and supporting affidavit shows that a claim is made by Mr. Lake in his capacity as 'equitable owner' of Unit 1E, against Pirates Nest for certain declarations and orders.

[30] In his affidavit, Mr. Lake deposed in relevant parts:

- “3. In or around the month of July 1988, I entered into an arrangement with the Defendant Company to purchase a condominium unit known as Unit 1E ... at a purchase price of \$80,000.00 United States Currency.”
- “4. Between the 29th July 1988 and 16th December 1988, I completed the payment of USD \$80,000.00 by three instalments. The instalments were paid by cheques drawn on Barclay’s Bank as follows:
- (a) Cheque in the name of Pirate’s Nest dated 27th July 1988 in the sum of USD\$30,000.00
 - (b) Cheque in the name of Pirate’s Nest dated 19th August 1988 in the sum of USD\$30,000.00.
 - (c) Cheque in the name of Dwyer Astaphan dated the 16th December 1988 in the sum of EC\$55,000.00.”
- “5. I understood Dwyer Astaphan to be one of the two directors of the Defendant Company. The other was his brother Jamie Astaphan, deceased.”
- “6. On the 9th May 1989, I paid the sum of USD\$4,462.50 to the Defendant Company as payment for Government Stamp Duties and Legal Fees to effect title to the unit in my name. The payment was made by cheque drawn on The Chase Manhattan Bank, N.A. ...”
- “7. On the 13th November 2001, the Inland Revenue Department ... issued a bill to me for arrears of Land and House Tax for the years 1999 to 2001 for the aforementioned unit.
- “8. I paid the Land and House Tax in full on 22nd November 2001 in the sum of EC\$2,692.80. ...”
- “9. In 1990, my son and I moved into the unit and stayed until the latter part of 1995 before migrating overseas.”

- “10. I have never received title to the said unit although I have completed the payment thereof and have paid the unit’s relevant taxes.”
- “11. I have been informed and verily believe that the Defendant Company has rented the unit to tenants since the year 1995 to present on my behalf.”
- “12. The Defendant Company has never rendered to me any account of the monies received in respect of rental of the unit or otherwise.’
- “13. I am unable to ascertain the amount that has been received on my behalf for the unit, or particulars of any leases or other dealings with the said unit.”
- “14. To date, I have not received any monies or profits for the rental of the unit on my behalf from the Defendant Company.”
- “15. I therefore bring this claim seeking an order that the Defendant Company shall produce an account of all rents and profits accrued on my behalf in respect to the unit and to pay any sum found due to me upon taking such account.”

Pirates’ Nest Pleaded Defence

[31] In summary, Pirates’ Nest defence is as follows:

- (a) a denial that any such agreement as is alleged in paragraph 3 of the affidavit in support of the fixed date claim; or any other agreement relating to the property therein mentioned was ever made between Mr. Lake and Pirates’ Nest on or about July 1988 or any other date as alleged in the supporting affidavit of Mr. Lake.
- (b) states that the Defendant will rely on the provisions of Section 4 of the Conveyancing and Law of Property Act, and avers that the alleged agreement set out in paragraph 3 of the affidavit in support was not made in writing or did not incorporate all the terms expressly agreed between the claimant and defendant, or was not signed on behalf of the defendant company;

- (c) a denial that in 1999 Mr. Lake and his son moved into Unit 1E and stayed there until the latter part of 1995 before migrating overseas; states that Pirates Nest was at all material times owner of Unit 1E. States further that Pirates' Nest has no knowledge of occupancy of Mr. Lake or any other person besides those authorised by Pirates' Nest;
- (d) admits that Mr. Lake never received certificate of title, but neither admit nor deny that the Mr. Lake paid full price for Unit 1E;
- (e) asserts that Pirates' Nest claims purchaser for value without notice to Dr. Ravi Chinnaswamy pursuant to an agreement for sale of Unit 1E as exhibited;
- (f) states that all parties claiming ownership of units of the Pirates' Nest Limited Condominiums were issued the prescribed certificate of title, and or reimbursed accordingly upon the presentation of sufficient information and documentary proof;
- (g) admits that Dwyer Astaphan and Jamie Astaphan were Directors of the defendant company;.
- (g) denies that Pirates' Nest has rented Unit 1E to tenants since 1995 to present on behalf of Mr Lake; and has never accounted to him; and puts Mr. Lake to strict proof of such allegation;
- (h) states that Pirates' Nest can neither confirm nor deny whether Mr. Lake is unable to ascertain what amounts had been received on his behalf as Pirates' Nest has no knowledge of any completed transaction on behalf of Mr. Lake for the purchase of Unit 1E.
- (i) states in the alternative that (a) the alleged agreement (which is denied) spanned July 1988 to December 1988, 28 years ago; as such, all claims by Mr. Lake are barred pursuant to sections 4 and 6 of the Limitation Act Cap 5.08; (b) If Pirates Nest is found to have acted to the benefit of Mr. Lake in relation to the sale or occupancy at the time, any fiduciary position in relation to Mr. Lake is barred by Mr. Lakes's own laches and acquiescence, from maintaining any claim that the sale now be set aside, or that Pirates' Nest Limited account to the claimant further or at all;

(ii) a denial that the claimant is entitled to any of the reliefs claimed or at all

[32] With regard to the particulars, Pirates' Nest pleads as follows:

"4.1 The Defendant Company states that it has seen exhibit "HL 1" referred to in paragraph 4 of the affidavit in support of the fixed date claim; however, this exhibit displays insufficient memorandum in writing as the following particulars are omitted:

- i. the sale price of the Unit 1E, Frigate Bay, Pirates' Nest Condominiums;
- ii. the description;
- iii. the date for commencement of the sale;
- iv. completion date;
- v. the signature of the person to be charged, in this instance, Pirates' Nest Limited and or its agents, Dwyer Astaphan et al;
- vi. the deposit amount."

[33] Curiously, at paragraphs 18.1; 18.2 and 18.3 headed ""PARTICULARS" Pirates' Nest asserts as follows:

"18.1 The Respondent/Claimant Hamilton & Co wrote to the Directors of Pirates' Nest Limited on July 11, 2011 demanding memorandum of transfer be prepared in his name. No reply was provided by the new Directors of Pirates' Nest Limited nor its agents, because, at the time of the letter, said Directorship had changed, the business was reorganised and same were unaware of any such transaction. Enquiries were made, and said Directors were unable to obtain any documentation in support of mentioned transaction, and there was the destruction of old records and closure of accounts during the reorganization of the business on or about 2008.

"18.2. No claims were made prior to the letter of 2011 and nothing further was heard from the Respondent/Claimant for 5 years until the service of the Claim in June 2016;

"18.3 The Agreement alleged occurred in 1998 whereby no Certificate of Title was issued to the Claimant and or his agent at that time or after the receipt of the letter in 2011.

- [34] On the facts, as contained in the affidavit in support of the fixed date claim, (which I have to accept are true) one would have expected the claimant to make a claim for the equitable remedy of specific performance (which has no limitation), or breach of an agreement with Pirates' Nest for the sale/purchase of Unit 1E, in as much as the claimant pleads an arrangement for the purchase of Unit 1 E, and has allegedly paid the purchase price, and has not received title to the Unit.
- [35] No doubt the claimant is/was aware that a person coming to the court for an equitable remedy such as specific performance would not be in a position to claim same without there being a subsisting enforceable contract - in this case "a memorandum or note in writing" of the agreement for the sale of Unit 1E, as is required by Section 4 of the Conveyancing and Law of Property Act Cap 10.04.
- [36] Aside from that, the CPR 8.7 (3) requires that the claim form or statement of claim⁵ must identify⁶ any document on which the claimant considers to be necessary to his or her claim. The claimant may have run afoul of this rule to the extent that he has not identified any 'agreement' per se between him and Pirates Nest for the purchase of the Unit. What the claimant has pleaded is an 'arrangement' but this 'arrangement' says the defendant, is not sufficiently particularised to allow the defendant to know the case it has to meet. Whether or not it can be assumed that 'arrangement' means an oral 'agreement' in the context of this case, it must be properly pleaded to mark out the parameters of the case that is being advanced to enable Pirates' Nest to properly reply to it. That is the basic purpose of pleadings.⁷
- [37] Having said that, it is clear that Pirates Nest is aware of the case it has to meet, having provided a fulsome defence to the claim and have raised substantial points of law. It is also apparent that although the claimant has not expressly used the word "agreement" that Pirates' Nest has treated/ interpreted the words 'an arrangement' to mean 'an agreement', albeit which agreement it has denied.
- [38] Curiously, a perusal of the statement of claim further reveals that Mr. Lake has also claimed an account. It is doubtful whether this is a viable claim against the defendant having regard to the provisions of section 4 (2) of the Limitation Act which reads: "An action for an account shall not be brought in respect of any matter which arose more than six years before commencement of the

⁵ In this case, the statement of claim is the affidavit in support of the fixed date claim

⁶ To Identify does not necessarily mean 'to annex'.. Reference can be made of the relevant document. It is the defendant who is required to annex the document on which he relies to dispute the claim

⁷ (See **East Caribbean Flour Mills Limited v Ormiston Ken Boyea, Saint Vincent and the Grenadines Civil Appeal No 12 of 2006.**

action..” In **Reeves v Butcher** [1891] 2 QB 509 Lord Justice Lindley held that the right to bring an action may arise on various events, but it has always been held that the statute runs from the earliest time which an action could be brought.

[39] In this case, the cause of action for an account of rents and profits seems to have accrued in 1996 - at least one year after 1995, when the claimant migrated ‘overseas’ Following **Reeves v Butcher**, and based on the pleadings, and the submissions, it would appear prima facie, that time under the Act began to run from 1996 the earliest time which an action could be brought for an account. If I am correct, the claimant failed to comply with section 4 of the Act and did not bring his action against the defendant for an accounting six years after the cause of action accrued as required by the Act. If in fact the cause of action for an accounting accrued in 1996, the claimant was required to issue his claim against the defendant for an account within six years from the date on which the cause of action accrued, that is to say by the ‘latter part’ of 2002. He brought his action on 23rd May 2016 – about 15 years later, and thus, it appears on that basis, the claim for an account is statutorily prescribed, and if statutorily prescribed, the claim for accounting is an abuse of the process of the court by reason that it is statutorily barred by virtue of section 4 (2) of the Limitation Act. If the claim for an account is statutorily prescribed, it cannot be said there is reasonable ground for bringing or defending the claim for an account of all rents and profits received by Pirates’ Nest or any agent acting on its behalf, and of what is due from Pirates Nest to Mr Lake in respect of such rent and profits; or an order for the payment by Pirates Nest of any sum found due to Mr Lake upon taking such accounts.

[40] Notwithstanding my observations mentioned above, account must be taken of the fact that the claim for an account and for payments of amounts found to be due to the claimant are inextricably linked to the claimant’s case that he is the ‘equitable owner’ of Unit 1E by virtue of some ‘arrangement’ or ‘agreement’ with Pirates’ Nest through its then Directors, one of whom subsequently passed. It is doubtful therefore whether the claim for an accounting should be considered separately from the issue as to whether the claimant has an equitable interest in Unit 1E.

[41] The issue before the court will also revolve around whether there was an oral agreement or arrangement between the parties in relation to sale of Unit 1E, and if so whether the cheques

allegedly paid out, and the alleged possession of the Unit between 1990 and 1995 were in fact acts done in part performance of that oral arrangement or agreement, which in turn calls for an assessment of the facts as pleaded both in the affidavit in support and in the application to strike. It also calls for an examination as to whether the claim is indeed statutorily barred. In this regard, the court will need to assess whether the statute began to run in 1988 - the date of the 'arrangement' or 'agreement' or from 2012, the date of the sale of the Unit. It may very well found to be arguable that if there was in fact an agreement, breach of it would have occurred not in 1988, but in 2012 when the sale of the unit took place. The starting point then of the twelve year limitation period in this case, would not be from the date of the agreement, but from the breach of that agreement/arrangement.

[42] The effect of the sale of Unit 1E to Dr. Ravi Chinnaswamy would have given rise to a cause of action from 2012; so it would have become statute barred at the latest 2024. Up until 2012, Pirates' Nest remained in a position to carry out its alleged obligation to Mr. Lake under the alleged agreement. There seemed to have been nothing left for Mr. Lake to do. He had completed his end of the 'arrangement' or 'agreement'; so it was for Pirates' Nest to complete its end. However, on the date of sale of the Unit, the performance of the alleged agreement /obligation by Pirate's Nest became impossible.

[43] If ever there was a case that cries out for justice it is this. I am not of the view that the justice of the case will be to strike it out at this stage of its infancy.

[44] I am of the considered opinion that the questions before the court are questions which should be ventilated at trial and not matters of preliminary points, as the court is called upon to weigh all the facts of the case to ascertain the terms of the 'arrangement' or 'agreement' as asserted by Mr Lake and the issues raised in the defence

[45] It is difficult not to observe that the pleadings are inelegantly drafted. However, it must be remembered that it was only after service of the defence that the claimant became aware that the Unit had been sold, and was not afforded an opportunity to amend his pleadings if he so desired. Still, the court is not of the view that the claim is incurably bad or that it is one which should be struck out at this stage of the proceedings. There are genuine issues to be determined as to whether there was an oral agreement between the parties; if so, whether there were acts of part

performance; if so, whether the agreement was breached; whether the action is statutorily prescribed under the Conveyancing and Property Act; or under the Limitation Act;

- [46] Where there are factual issues to be determined, that goes to the heart of the matter and the matter must proceed to trial to be determined by the trier of fact. The factual issues in dispute between the parties are to be determined by the trial judge after a full consideration of the evidence. After a full consideration of the evidence, presented by the claimant only, the court would be in a position to decide whether the action is statute barred or otherwise incapable of succeeding.⁸

Conclusion

- [47] I have seen and examined the claimant's pleadings, and I have considered the submissions of counsel for the parties. What is disclosed in the pleadings, fortifies my opinion that the claimant's claim though inelegantly drafted and insufficiently particularized contain sufficient facts to enable the defendant to know the case it has to meet. But all the facts are not before the court.
- [48] I find there are substantial areas of dispute to be resolved at trial between Mr Lake and Pirate's Nest. A trial is required to determine whether the cheques were indeed paid on the sale/purchase of Unit 1E, and can be properly regarded as acts of part performance of the purchase of the said Unit. This in my view can only be determined by a trial with full benefit prior to trial, of Mr Lake availing himself of the opportunity of the process of disclosure and other court procedures such as request for further information, as to enable him to flesh out his case thereafter by witness statements and during trial, the opportunity for examination and cross examination of witnesses.
- [49] There are no witness statements, so all the facts on which the claimant intends to rely have not been disclosed. Witness statements usually amplify the pleadings. In this case therefore, the question is not the quality of the pleadings, but whether all the facts on which the claimant intends to base his claim are before the court. The answer is no. The question then arises as to whether it is fair for this court to rule at this early stage prior to disclosure and other court process, (which

⁸ This was the approach taken by Michel J in the case of James Ruan vs Pagette Carter, Claim No AXAHCV2006/0068, para 11 I adopt that approach.

may allow the claimant to flesh out and bolster his case prior to the service of witness statements)⁹, and during examination and cross examination of witnesses, that there is no prospect of the claimant successfully proving that he had an arrangement or agreement in respect to the sale/purchase and management of Unit 1E, or that the claimant's case is incurably bad, or is statutorily prescribed.

[50] It is my view that to do so would be premature and would work an injustice on the claimant and would not advance the overriding objective of the Rules to deal with cases justly. Additionally, given the stage at which the proceedings had reached, (pleadings were not closed, and case management had not begun or completed), it is likely that Mr. Lake might be able (with the permission of the court under CPR 20) to avail himself of the opportunity to amend his statement of case, if he so desires, since new information about the sale of Unit 1E seemed to have come to his attention after he filed his claim, and after the defence was served. I come to that conclusion fully cognizant that at a hearing of an application to strike, the court is not required to conduct a mini trial of the case without discovery, oral examination and cross examination. I am only required to look at the pleadings including the particulars. And I am not required to consider evidence.

[51] For all the reasons above stated, Pirates' Nest's application to strike out the statement of claim is denied and the case is remitted to the court office to be set down before the judge in Chambers on a date in February 2018 for case management.

The Order

[52] It is ordered that

- (1) The application of the defendant to strike out the claimant's statement of case be and the same is hereby denied.
2. The matter is to be fixed for case management conference before the judge in chambers on a date in February 2018.

⁹ See *Ian Peters v Robert George Spencer*, HCVAP2009/016 (Per George-Creque, J.A.)

3. The claimant is awarded costs of the application assessed summarily in the sum of \$1000.00

[53] Counsel have favoured me with helpful and comprehensive submissions¹⁰ I am grateful for their assistance.

Pearletta E. Lanns
High Court Judge [Ag]

By the Court

Registrar

¹⁰ The submissions of the parties seem not only to address the issues arising on the application, but the issues pertaining to the entire case.