COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2019/CLE/gen/00276

BETWEEN

ROSE ISLAND BEACH AND HARBOUR CLUB LIMITED

First Plaintiff

-AND-

ROSE ISLAND BEACH AND HARBOUR CLUB DEVELOPMENTS LIMITED

Second Plaintiff

-AND-

LRLA ROSE ISLAND LTD

First Defendant

-AND-

RC ROSE ISLAND HOTEL COMPANY LTD

Second Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mrs. Janet Lisa Bostwick-Dean for the Plaintiffs
Mr. Christopher Jenkins and Mr. Masnyk for the First Defendant

Date of Ruling: 20 December 2021

RULING

Practice and procedure – Application to strike out – Rules of the Supreme Court Order 18 rule 19 and Order 31A rule 2(1) - Striking out for want of prosecution for inordinate and inexcusable delay – Whether the delay is an abuse of process – Whether the Writ of Summons discloses no reasonable cause of action – Limitation period – Whether the Plaintiffs claim is statute barred – Section 5 of the Limitation Act

The Plaintiffs commenced an action against the Defendants, alleging that it breached certain terms of a Sales Agreement executed for the sale and development of certain lots of land on Rose Island, The Bahamas. The Writ was filed but was not served until eight months later. The Plaintiffs did nothing further. The First Defendant then filed an application to strike out the Writ on several grounds namely: (i) the Plaintiffs have been guilty of prolonged or inordinate and inexcusable delay in proceeding with the action; (ii) the Writ of Summons does not disclose a reasonable cause of action, (iii) the action is an abuse of process; (iv) non-compliance with the Rules of the Supreme Court; and (v) the claim is statute-barred.

The Plaintiffs opposed the application, asserting that although there had been delay in the prosecution of the action, the delay was excusable. They further contended that their cause of action is well-founded and is not an abuse of process nor is it statute-barred.

HELD: dismissing the First Defendant's application to strike out the Plaintiffs claim with costs to the First Defendant to be taxed if not agreed.

1. In order to successfully strike out for want of prosecution for inordinate and inexcusable delay, in addition to proving undue delay by the Plaintiff, the Defendant must demonstrate that such delay has resulted in the inability to have a fair trial – **Icebird Ltd. v Winegardner (The Bahamas)** [2009] UKPC 24; M**ajor Consulting Limited v CIBC Trust Company (Bahamas)** [2014] 2 BHS J No. 19 and **Birkett v James** [1978] AC 297 applied.

2. The power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases. **Drummond Jackson v British Medical Association** [1970] 1 WLR 688 applied. See also **Wilson and Mediterranean Shipping Company [MSC Bahamas] Ltd & Anr** [2017] 1 BHS J No 148; **Fong & Fong v Bent** (1997) 34 JLR 453.

3. The summary jurisdiction to strike out was not meant to be exercised by protracted examination of documents, especially where the issues are complex: **BE Holdings Limited v Piao Lianji** [2014/CLE/gen/01472]; **Wenlock v Moloney** [1965] 2 All ER 871 and **Hambey Limited v Hemitage Estates Limited et al** 2008 SCCivApp No 21 applied.

4. As the question of the expiration of the limitation period is a question of fact, it should be determined at trial with the benefit of evidence and cross-examination.

RULING

Charles J:

Introduction

[1] Pursuant to Order 18 rule 19 and/or Order 31A rule 20 of the Rules of the Supreme Court, 1978 ("the RSC") and/or the inherent jurisdiction of the Court, LRLA Rose Island Limited ("the First Defendant") seeks an order for dismissal of the Plaintiffs' action on the following grounds:

(i) The Plaintiffs have been guilty of prolonged or inordinate and inexcusable delay in proceeding with this action;

(ii) The action is an abuse of process on the Plaintiffs are guilty of intentional and contumelious default in the prosecution of this action; and/or

(iii) The action does not comply with the Rules of the Supreme Court; and/or

(iv) The action is statute-barred; and/or

(v) The action does not disclose a cause of action against the First Defendant.

[2] The First Defendant also seeks its costs to be taxed if not agreed.

[3] The application, filed on 16 September 2020, is supported by the Affidavit of McFalloughn Bowleg Jr. filed on the same day.

[4] The Plaintiffs opposed the application, asserting, in the main, that while they had delayed in prosecuting the action, the delay was not contumelious but was the consequence of the parties attempting a settlement of the matter. The Plaintiffs asserted that the delays were actually occasioned by the Defendants.

Some background Facts

[5] Most of the facts are agreed by the parties.

[6] By Sales Agreement entered into sometime in 2006, the First Plaintiff and the Second Defendant contracted for the Second Defendant to purchase identified lots and develop it. The purchase price was a combination of cash, performance and shares in the Second Defendant which were to be issued to the Second Plaintiff.

[7] The development was initially to be funded by Lehman Brothers though a special purpose company but after the collapse of Lehman Brothers, the project was not funded as agreed.

[8] According to the Plaintiffs, it was not until the collapse of Lehman Brothers that they realized all the consideration had not passed. As a result, the Plaintiffs commenced an action in 2009 against the Second Defendant, alleging that the Sales Agreement had not been completed.

[9] When the parties thought that everything pursuant to the contract had been done, a debenture was entered into over the properties.

[10] In 2016, the debt was assigned to the First Defendant, which is a company bought by the creditors of Lehman Brothers.

[11] On 11 March 2019, the Plaintiffs filed the Writ of Summons in these proceedings, asserting that the Sales Agreement is void ab initio and asking that the parties be put into the positions that they would have been in had the contract never occurred. Alternatively, they seek damages for breach of contract.

[12] The Writ was served on 15 November, 2019, eight months after being filed. The First Defendant entered an appearance on 28 November 2019.

[13] The Plaintiffs requested an extension of time to file the Statement of Claim. Mr. Jenkins, appearing as Counsel for the First Defendant, granted the extension. The agreed date for service of the Statement of Claim was 13 January 2020. On 14 January 2020, Mr. Jenkins requested the Statement of Claim and there was no response.

[14] On or about 17 March 2020, the Governor-General of The Bahamas declared a state of public emergency due to the confirmation of the presence of Covid-19 in The Bahamas.

[15] On 17 March 2020, the first directions were issued by the Chief Justice with notice that they were effective as of 18 March 2020.

[16] On 20 March 2020, the Chief Justice issued the second set of directions effective Monday 23 March 2020 whereby the hours of operation of the Supreme Court Registry were reduced to 1:00 p.m. to 4:00 p.m. daily.

[17] By way of section 2 of the Supreme Court (Covid 19) Rules 2020 which came into force on 1 April 2020:

> **"any period of time fixed by the Rules of the Supreme Court, any practice direction, court order or direction for filing any pleading or document or taking any procedural step in an action under such Rules or doing ant act or thing under such Rules, which would expire during the aforesaid period of emergency, shall be extended to fourteen days following the cessation of the Public Emergency.**"

[18] Supreme Court (Covid 19) (No. 3) Rules 2020 amended the previous provision and suspended any period of time fixed by the Rules of the Supreme Court or practice directions, court order or directions to 7 September 2020.

[19] As Counsel for the Plaintiffs, Mrs. Bostwick-Dean alluded to, the impact of the Covid-19 Emergency Orders and associated Supreme Court Rules and protocols between 17 March 2020 and 7 September 2020 is a factor to be considered when computing the length of delay bearing in mind that Mr. Jenkins had agreed to an extension of time to 13 January 2020 (prior to the onset of the Covid-19 emergency proclamation and directions by the Chief Justice). That said, I agree with Mrs. Bostwick-Dean that it was not too long thereafter that the Covid-19 virus shut down not only the country but the world; its spread and resulting impact led to a global

crisis of unprecedented reach and proportion, so on that basis, the period of delay is essentially 6 months and not nearly 13 months.

[20] It was not until 11 June 2020 that Mr. Jenkins heard from Mrs. Bostwick-Dean.

[21] On 16 September 2020, eighteen months after the filing of the Writ, the First Defendant filed this Summons to strike out the action.

[22] On 29 January 2021, the Plaintiffs (without leave of the Court) filed a Statement of Claim. On 1 February 2021, the Plaintiffs filed a Summons seeking leave to file the Statement of Claim.

[23] On 4 February 2021, the First Defendant filed a Summons to strike out the Statement of Claim.

[24] The Court proceeded to hear the First Defendant's application for the dismissal of the action on the basis that, if the action is dismissed, the two other extant applications will fall away.

Court's power to strike out

[25] RSC O. 18 r. 19 (1) allows a party to attack the validity of its opponent's pleadings which may result in part or the whole of the pleadings being struck out. It provides:

> **"The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-**
>
> > **(a) it discloses no reasonable cause of action or defence, as the case may be; or**
> >
> > **(b) it is scandalous, frivolous or vexatious; or**
> >
> > **(c) it may prejudice, embarrass or delay the fair trial of the action; or**
> >
> > **(d) it is otherwise an abuse of the process of the court."**

[26] In addition, O. 31A r. 20(1) provide further grounds for striking out a pleading or part of a pleading. It states:

> **21. (1) In addition to any other powers under these Rules, the Court may strike out a pleading or part of a pleading if it appears to the Court –**
>
> > **(a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the Court in the proceedings;**
> >
> > **(b) that the pleading or the part to be struck out is an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings;**
> >
> > **(c) that the pleading or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or**
> >
> > **(d) that the pleading or the part to be struck out is prolix or does not comply with the requirements of any rule."**

[27] In **B.E. Holdings Limited v Piao Lianji** [2014/CLE/gen/01472], this Court set out the powers of the court to strike out at paragraphs [7] to [11]:

> **"[7] As a general rule, the court has the power to strike out a party's case either on the application of a party or on its own initiative. Striking out is often described as a draconian step, as it usually means that either the whole or part of that party's case is at an end. Therefore, it should be taken only in exceptional cases. The reason for proceeding cautiously has frequently been explained as that the exercise of this discretion deprives a party of his right to a trial and his ability to fortify his case through the process of disclosure and other procedures such as requests for further and better particulars.**
>
> **[8] In *Walsh v Misseldine* [2000] CPLR 201, CA, Brooke LJ held that, when deciding whether or not to strike out, the court should concentrate on the intrinsic justice of the case in the light of the overriding objective, take into account all the relevant circumstances and make 'a broad judgment after considering the available possibilities.' The court must thus be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of claim is incurably bad; or that it discloses no reasonable ground for bringing or defending the claim; or that it has no real prospect of succeeding at trial.**
>
> **[9] It is also part of the court's active case management role to ascertain the issues at an early stage. However, a statement of claim is not suitable for striking out if it raises a serious live issue of fact which can only be determined by hearing oral evidence: *Ian Peters v Robert George Spencer*, ANUHCVAP2009/016 - Antigua & Barbuda Court of Appeal - per**

Pereira CJ [Ag.] - Judgment delivered on 22 December 2009. [Emphasis added]

[10] The court, when exercising the power to strike out, will have regard to the overriding objective of RSC O. 31A r. 20 and to its general powers of management. It has the power to strike out only part of the statement of claim or direct that a party shall have permission to amend. Such an approach is expressly contemplated in the RSC: see Order 18 Rule 19".

[28] It is also worthy to note that an application to strike out is essentially a summary procedure and it is not suitable for complicated cases which would require a mini-trial.

[29] Now, dismissal for want of prosecution where there had been inordinate delay, but no disobedience of a Court order, is the exercise of the Court's inherent jurisdiction. It does not come under the Court's power to strike out under RSC O. 18 r. 19. In **Birkett v James** [1978] AC 297, Lord Diplock explained the nature of dismissal for want of prosecution and how it came about at page 318:

"Although the rules of the Supreme Court contain express provision for ordering actions to be dismissed for failure by the plaintiff to comply timeously with some of the more important steps in the preparation of an action for trial, such as delivering the statement of claim, taking out a summons for directions and setting the action down for trial, dilatory tactics had been encouraged by the practice that had grown up for many years prior to 1967 of not applying to dismiss an action for want of prosecution, except on disobedience to a previous peremptory order that the action should be dismissed unless the plaintiff took within a specified additional time the step on which he had defaulted.

To remedy this High Court judges began to have recourse to the inherent jurisdiction of the court to dismiss an action for want of prosecution even where no previous peremptory order had been made, if the delay on the part of the plaintiff or his legal advisers was so prolonged that to bring the action on for hearing would involve a substantial risk that a fair trial of the issues would not be possible…"

[30] Lord Diplock explained how the Court should exercise its discretionary power to dismiss actions for want of prosecution at page 318:

"The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, eg disobedience to a peremptory order of the court or conduct

amounting to an abuse of the process of the court; or (2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party. In the instant appeal your Lordships are concerned with the application of principle (2) only. Contumelious default is not relied on by the defendant."[Emphasis added]

[31] In **Major Consulting Limited v CIBC Trust Company (Bahamas)** [2014] 2 BHS J No. 19, the Defendant sought a dismissal of the action for want of prosecution, alleging delay by the Plaintiff of almost two years. Winder J explained dismissal under the common law for want of prosecution at paragraph 16:

> **"On the question of inordinate and inexcusable delay, the state of the law also requires the defendant to demonstrate that the delay will give rise to a substantial risk that it is not possible to have a fair trial or that such delay is likely to cause, or to have caused, serious prejudice to the defendant".** [Emphasis added]

[32] Winder J set out the three types of dismissal for want of prosecution at paragraph 8:

> **"8. There are three types of dismissal for want of prosecution.**
>
> **(a) Where there has been intentional and contumelious (insolent) default of the court's order, e.g. disobedience of a preemptory order of the court, and**
>
> **(b) Where:**
>
> **(i) there has been inordinate and inexcusable delay in the prosecution action by the plaintiff or his lawyers, and**
>
> **(ii) such delay will give rise to a substantial risk that it is not possible to have a fair trial, or that the delay has caused, or is likely to cause, serious prejudice to the defendants either as between themselves and the plaintiff, or between each other, or between them and a third party.**
>
> **(c) Where the plaintiff's is (sic) conduct amounts to an abuse of the process of the court."** [Emphasis added]

[33] At paragraphs 11 and 12 of **Major**, the learned judge explained that for an application for dismissal to succeed under the heading of inordinate and inexcusable delay, the defendant must demonstrate that the delay satisfies the threshold requirements which were laid down by the Privy Council in **Birkett v James** [supra] as confirmed by the Privy Council in the Bahamian case of **Icebird Limited v Alicia Winegardner** [2009] UKPC 24.

> **"11 For an application for dismissal to succeed under the heading of inordinate and inexcusable delay, the defendant must show that the delay satisfies the requirements set down in Birkett v James [1978] AC 297 as confirmed by the privy council in Bahamian case of Icebird Limited v Alicia Winegardner, Appeal No. 72 of 2007. According to Lord Scott of Foscote, who delivered the decision of the Board in Icebird, at paragraph 8:**
>
> > **8. *Birkett v James* [1978] AC 297 remains, in their Lordships' opinion, the leading authority for the approach to be taken to an application to strike-out an action for want of prosecution. The House of Lords endorsed the principles set out in the then current Supreme Court Practice, namely, that the power to strike-out should be exercised only where the court was satisfied -**
> >
> > > **"... either (1) that the default has been intentional and contumelious e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the court, or (2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between them and a third party"(per Lord Diplock at 318).**
> >
> > **The privy council also stated:**
> >
> > > **"the present case is not one where there has been any contumelious default. It is a case where there has certainly been inordinate and inexcusable delay on the part of the appellant or its lawyers. But what else? There is no evidence of any serious prejudice to the respondent caused by the delay. Is this a case where the delay has given rise to a substantial risk that a fair trial will not be possible?"**

> **12 Dismissals for abuse of process are occasions where a party to proceedings have used the process of the court in a way significantly different from its ordinary or proper use. This may be held to be abuse of the court's process, and an aggrieved party may make an application to dismiss the matter for abuse of process. In *Grovit v Doctor* [1997] 1 WLR 640, the House of Lords held that the courts were entitled, under the inherent jurisdiction to prevent abuse of process, to strike out/stay proceedings if the inactivity of the claimant amounted to an abuse of process even if the facts of a case did not fall within the principles of *Birkett v James*. It was held that the continuation of proceedings when a claimant had no intention of bringing a case to trial could, in appropriate cases, amount to an abuse of process and as such an application could be made to strike out the claim and dismiss the action. The inactivity of a claimant could be the evidence relied upon to establish the abuse of process".** [Emphasis added]

[34] Properly distilled, those requirements are (i) inordinate delay (ii) that is inexcusable (iii) and gives rise to the inability to have a fair trial. Prejudice by the passage of time is also a weighty consideration.

[35] In **Icebird Ltd.,** a case from The Bahamas, the Privy Council found that the failure to consider the possibility or impossibility of having a fair trial was a fatal flaw of the lower courts' decisions to strike out the action for want of prosecution. The appeal was allowed on the basis that the two year delay, albeit long, had not given rise to inability to have a fair trial. The Plaintiff brought an action claiming the benefit of a right of way over a roadway running from its property, over the Defendant's land. After being granted leave to amend the Writ of Summons and Statement of Claim (the Defence already having been served), the Plaintiff did nothing further to prosecute the action for two years. Action was not taken until the Defendant filed a Summons for the Writ to be struck out for want of prosecution.

[36] Lyons J struck out the action on the basis that the delay was inordinate, that there was no satisfactory excuse for the delay, and that the Defendant was "severely prejudiced" by the delay because the existence of litigation was a blight on the Defendant's land. The Bahamian Court of Appeal upheld the decision of Lyons J

but went further, stating that the delay constituted an abuse of the court's process because "*the appellant evinced no intention of carrying the case to trial"*. The issue which the Privy Council identified with the decisions of both the Supreme Court and the Court of Appeal was the failure to consider the ability to have a fair trial. On the facts, Lord Scott, who delivered the Judgment of the Board, saw no reason why the appellant's delay in prosecuting the action would have prevented a fair trial of the issues.

[37] With respect to the Court of Appeal's finding that the delay amounted to an abuse of process, the Board drew the distinction between want of prosecution and abuse of process and also made the overlap clear. At paragraph 7, Lord Scott had this to say:

> **"As Lord Woolf noted, delay in prosecuting an action and abuse of process are separate and distinct grounds on which an application to strike-out the action may be made but may sometimes overlap. Want of prosecution for an inordinate and inexcusable period may justify a striking-out order but "if there is an abuse of process, it is not strictly necessary to establish want of prosecution." (647H). Where, however, there is nothing to justify a strike-out order other than a long delay for which the plaintiff can be held responsible, the requisite extent or quality of the delay necessary to justify the order ought not, in their Lordships' respectful opinion, to be reduced by categorising the delay as an abuse of process without support. In *Grovit v Doctor* the added factor was the judge's finding, made on the evidence, that the plaintiff had lost interest in the libel proceedings he had commenced and had no intention of prosecuting them to judgment. No comparable finding had been made by Lyons J in the present case and the evidential basis for any comparable finding is not apparent to their Lordships."**

[38] For an action to be struck out for disclosing no reasonable cause of action, the Defendant must prove that it is "plain and obvious" that the pleadings disclose no reasonable cause of action. In **Drummond Jackson v British Medical Association** [1970] 1 WLR 688, Lord Denning said that it is well established that the jurisdiction to strike out a Statement of Claim as disclosing no reasonable cause of action should only be exercised in plain and obvious cases at page 695:

> **"Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as**

disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases."

Discussion and analysis

Inordinate and inexcusable delay

[39] Learned Counsel Mr. Jenkins who appeared on behalf of the First Defendant submitted that the periods of delay by the Plaintiffs are inordinate and therefore warrant being struck out. Mrs. Bostwick-Dean admitted that there has been delay, but she submitted that in determining delay, the Court should only have regard to the period from 13 January 2020 (when the Statement of Claim ought to have been served) to 18 March 2020.

[40] Learned Counsel for the Plaintiffs Mrs. Bostwick-Dean further asserted that the delay was excusable. She said that the period of inactivity was the result of negotiations between the parties. She further asserted, as reasons for the delay, difficulties with instruction and the outbreak of the Covid-19 pandemic. She said that if there were any delay, it was caused by the First Defendant attempting to evade having the issues heard. References were made that the First Defendant through its Director, "fled" the jurisdiction" and filed an action there. That said, I agree with Mr. Jenkins that a Defendant cannot cause the Plaintiffs to delay in proceeding with an action which they brought. There are other methods to serve a defendant.

[41] Be that as it may, the period of delay ought to be calculated from the date the Writ of Summons was filed until they filed the Statement of Claim (without leave and out of time). The Plaintiffs delayed for eight months before serving the filed Writ of Summons which is within the confines of the law. Thereafter, the next action was taken by the First Defendant when it filed the Summons to strike the action on 16 September 2020. The Plaintiffs went well beyond the extension for time to serve the Statement of Claim and never, within that time, sought the Court's leave to file out of time. While Covid-19 did cause some disruption to the courts and the filing

of documents, the Plaintiffs did not file any documents until 22 months after the Writ of Summons was filed. Mrs. Bostwick-Dean urged the Court to take into account and accept as excusable delay the fact that the parties were both working hard to have the matter resolved. In **Major Consulting**, Winder J refused to strike out an action for inordinate and inexcusable delay. He determined that 15 months of delay was not offensive. In deciding not to strike out, he gave weight considerations to the fact that the parties had been corresponding. It appeared to be a mitigating factor.

[42] Even if the period of delay is classified as inordinate and inexcusable, which I think it is, the First Defendant is also required to demonstrate that the delay has caused a substantial risk that it is not possible to have a fair trial or that such delay is likely to cause, or has caused serious prejudice.

[43] Mr. Jenkins submitted that the First Defendant is prejudiced by the litigation being protracted in that they are prevented from realizing their asset since the action operates as a charge over the land. I agree with Mr. Jenkins that the Plaintiffs' delay has been unduly inexcusable and that Plaintiffs should not be allowed to delay litigation which has the effect of encumbering the land in issue, but I do not think that, on its own, warrants striking out. Further, provided the Plaintiffs have a cause of action against the Defendants, the charge over the land is justified. Henceforth, the Plaintiffs will have to proceed with the litigation in accordance with the case management directions and timeframes given by the Court.

[44] Although I agree that the delay has been egregious and that the litigation which has been unduly delayed by the Plaintiffs has caused prejudice to the First Defendant by putting a charge over the land, I do not think that the action ought to be struck out for want of prosecution for inordinate and inexcusable delay. The egregious delay must have given rise to the inability to have a fair trial. The First Defendant has not produced any evidence to suggest that the delay has compromised the fairness of a trial. Both the protracted delay and prejudice were

present in **Icebird Ltd** [supra]**,** but the Board refused the strike out application on the absence of evidence that a fair trial could not be had. Following that Ruling, I too would decline to strike out for want of prosecution for inordinate and inexcusable delay on this basis.

No reasonable cause of action

[45] Mr. Jenkins submitted that the Plaintiffs have no cause of action against the First Defendant. According to him, there is no privity of contract between the Plaintiffs and the First Defendant, as the contracts were made between the Plaintiffs and the Second Defendant, the lender. He said that there can be no privity of contract between the Plaintiffs as the predecessors in title to the borrower and the First Plaintiff as the successor in title to the lender.

[46] Mrs. Bostwick-Dean, on the other hand, challenges the First Defendant's ownership of the land and contends that although it is the documented owner, the transaction was never completed since the properties were never paid for in full; that the security held by Lehman Brothers (and now the First Defendant), is not a perfected security because the land was never bought. According to her, because the Plaintiffs have a Sales Agreement which was never completed, the security under the debenture fails. This, she said gave rise to the 2009 action.

[47] Mrs. Bostwick-Dean submitted that depending on whether the Court views the transaction as having been completed, the Plaintiffs themselves are shareholders of the Second Defendant, since it would have an interest in the property secured by the debenture, which it never assigned itself out of.

[48] The parties' contentions are in direct conflict. The First Defendant says that the action is premised on the Plaintiffs being the owners of the land while the Plaintiffs' claim is premised on the First Defendant not being the proper owner of the land as a result of what they say was their failure to complete the contract. They bring the action against the First Defendant in its capacity as lender or receiver but the First Defendant denies being a receiver. This gives rise to questions of the effect of the

assignment of the mortgage/debenture and the interests in the land, which cannot be determined summarily. This can only be determined by evidence and cross-examination. The Jamaican High Court in **Fong & Fong v Bent** (1997) 34 JLR 453 emphasised that the absence of a cause of action must be obvious in order to be struck out at the interlocutory stage. The decision was upheld by the Court of Appeal which stated:

> **"Orders dismissing or striking out a claim at the interlocutory stage ought only to be resorted to where on an examination of the claim or defence it is plain and obvious that the claim or answer is on the face of it obviously unsustainable."**

[49] Similarly, in **Wenlock v Moloney** [1965] 2 All ER 871, Danckwerts LJ warned against embarking on a trial in chambers, using the power to strike out other than in plain and obvious cases at page 874:

> **"[T]his summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power."**

[50] The Bahamian Court of Appeal in **Hambey Limited v Hemitage Estates Limited et al** 2008 SCCivApp No 21 refused to strike out the action on the ground of disclosing no reasonable cause of action on the basis that the issues raised were complex and could not, therefore, be determined on documents only. At paragraph 27, the Court stated:

> **"It seems to me that in this matter the question is whether on the assumption that all the appellant alleges can be established the appellant has an arguable case for trial. It seems to me that the issues which the appellant seeks to raise for determination are complex and cannot simply be determined on the documents only. These documents are the product of meetings, discussion and negotiations of business people. It may be that much of the parties' intention can be discovered by examining the documents but it must always be borne in mind that these commercial documents are made between**

> **business persons. While it may be that the intention of the parties can be discerned from the documents themselves, the court is normally reluctant to draw inferences without seeing and hearing the witnesses. Upon reading the documents in this case I cannot say that it is clear beyond doubt that the appellant's claim is wholly untenable on the face of it."**

[51] In my considered opinion, it cannot, at this interlocutory stage, be said that the Plaintiffs have no reasonable cause of action. Although a Statement of Claim has been filed by the Plaintiffs, it is not properly before the Court, as leave to file out of time was never granted. Further, no defence has been filed for the issues arising from the action to have been made clear. The only assertions on the parties' positions thus far have come from Counsel during submissions. Submissions are just that: submissions. There are obviously well-founded claims from the Plaintiffs and the issues are too complex to be determined on papers only. The parties should be given an opportunity to cross-examine one another and to explore all pertinent issues. These issues can only be determined when the court has the benefit of evidence at trial.

Abuse of process

[52] In **Major Consulting** [supra], Winder J did say that inactivity could be evidence of abuse of the court's process. However, it is clear from **Icebird Ltd** that inordinate delays are not *necessarily* abuses of process although they can be. Mr. Jenkins submitted that the Plaintiffs are not interested in pursuing the matter, but have commenced the proceedings purely as leverage to convince the First Defendant to settle what he says is a meritless claim. Mrs. Bostwick-Dean said that the Plaintiffs' delay in commencing the proceedings was the result of them wanting to resolve the matter but not forego their right to sue.

[53] I think that even in seeking to have the matter settled, the Plaintiffs ought to proceed with the matter if they not do wish the matter to be struck out. However, I am not convinced that the Plaintiffs lost interest in the proceedings.

[54] Mr. Jenkins also submitted that having regard to the similarity of the issues raised in the 2009 action, these proceedings are an abuse of process. He said that most of the issues raised in the Writ and draft Statement of Claim (which is not properly before the Court) were raised in the 2009 action, which is still live.

[55] However, as Mr. Jenkins himself stated, the First Defendant is not a party to the 2009 action. It is therefore difficult to see how these proceedings are an abuse when brought against a different party. Mrs. Bostwick-Dean said that although there is some overlap with the 2009 action, this action does not revolve around the fact that the Sales Agreement was not completed. She said the breaches by the lender are quite different from those alleged against the Company itself. They are parallel and similar, but not identical, especially since the Defendants are different. She said it was not until 2016 that it came to the Plaintiff's attention. I accept her submissions in response to those of Mr. Jenkins on duplicity at this stage and agree that it cannot be said, at this stage, that the commencement of this action is an abuse of process.

Whether the claim is statute-barred

[56] Mr. Jenkins argued that the Plaintiffs' breach of contract claim is statute-barred because the relevant contract was entered in about 2006, more than six years ago, which is the time limit for bringing claims for breach of contract.

[57] However, Mrs. Bostwick-Dean says that the claim is not statute-barred for two reasons. First, she argued that time never began to run against the Defendants - the Sales Agreement was not a standard one where parties walk away with no continuing obligations. According to Mrs. Bostwick-Dean, there were continuing obligations to develop the property in a certain way, which the First Defendant took on when it stepped into the shoes of the lender. Secondly, she said that the First Defendant did not step into the lender's shoes until 2016, which is the earliest point at which time can be said to run against it. It was only once they became the lender that we could name them. It was in 2016 when they took on the assignment.

[58] Accordingly, there is a real dispute about whether the Sales Agreement gave rise to continuing duties on the First Defendant's part and there is a real question about whether the First Defendant became the lender in 2016 and whether, it was at that time that time began to run against it, if at all. These are factual questions which can only be determined by evidence. If the First Defendant continues to be of the opinion that the action is statute-barred, I am positive that it will be contained in its Defence.

[59] In **Icebird Ltd**, the Defendant sought striking out the Writ on the basis that the Plaintiff's cause of action was statute-barred in addition to want of prosecution and abuse of process. Lord Scott addressed the Defendant's misconceived position with respect to the limitation period that applied based on the Plaintiff's claim. It simply stated that the 12 year limitation period is for claims for recovery of land, and did not apply to the Plaintiff's claim for an injunction to restrain interference with an easement. The Board did not determine whether the claim was in fact statute-barred. Their Lordships merely clarified the Plaintiff's cause of action and then dismissed the Defendant's misconceived application of the limitation periods in the Limitation Act and Real Property Limitation Act and stated that based on the nature of the claim, the Plaintiff can always bring a fresh action.

[60] However, in this case, there is no premise on which either party's submissions are made which is wrong. The First Defendant's assertion that the six year limitation period applies to the Plaintiffs' breach of contract cause of action is correct. The Plaintiffs' assertions that (i) the limitation period did not start to run and/or (ii) it only began once the First Defendant became the lender is 2016 seem to be reasonable contentions. Further, as the Plaintiffs' claim the right to the land in question on the basis of their assertions that the Sales Agreement was never completed, Mrs. Bostwick-Dean is correct that the twelve year limitation period would apply thereto. Here, the question of whether the cause of action is statute-barred is a question to be determined on the pleaded case and evidence.

[61] Having regard to the submissions of both parties on the issue of whether the claim is statute-barred, the determination requires producing evidence. In my considered opinion, this, too, cannot be determined at this interlocutory stage.

Costs

[62] In civil proceedings, costs are always discretionary. A good starting point is 12 Order 59, rule 3(2) of the Rules of the Supreme Court ("RSC") which states:

> **"If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."**

[63] Section 30(1) of the Supreme Court Act provides:

> **"Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge and the Court or judge shall have full power to determine by whom and to what extent the costs are to be paid."**

[64] Order 59, rule 2(2) of the RSC similarly reads:

> **"The costs of and incidental to proceedings in the Supreme Court shall be in the discretion of the Court and that Court shall have full power to determine by whom and to what extent the costs are to be paid, and such powers and discretion shall be exercised subject to and in accordance with this order."**[Emphasis added]

[65] As a general rule, the successful party is entitled to his costs. But that does not preclude a judge from departing from this normal practice. However, a judge ought to give reasons when deciding to make an unusual order as to costs: see **Eagil Trust Co Ltd v Pigott-Brown and Another** [1985] 3 All ER 119 at 122 - per Griffiths LJ.

[66] Similarly, when a court is exercising its discretion as to costs, it is useful to bear in mind the following principles as espoused by Atkin LJ in **Ritter v Godfrey** [1920] 2 KB 47 at page 48. They are as follows:

> **"In exercising his discretion over costs a judge should be guided by the following principles. In the case of a wholly successful defendant the judge must give him costs unless there is evidence (1) that the defendant brought about the litigation, or (2) has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense, or (3) has done some wrongful act in the course of the transaction of which the plaintiff complains."**

[67] Applying these principles, I am of the firm opinion that I should depart from the usual order for costs to the Plaintiffs, the successful party. I do so because the Plaintiffs had inordinately delayed in prosecuting their action. But for the First Defendant's application to strike out, the inactivity period of time on the Plaintiffs' part may have only increased with time. Plaintiffs are cautioned not to warehouse their action when they file it. Accordingly, I shall order that the Plaintiffs pay costs to the First Defendant to be taxed if not agreed.

The Order

[68] I will make the following order:

(i) The Summons filed on 16 September 2020 by the First Defendant, to strike out the Plaintiffs' claim, is dismissed;

(ii) The Plaintiffs are granted leave to file and serve their Statement of Claim out of time and any amendments thereto by 3 January 2022;

(iii) The matter will thereafter take its natural course in accordance with the RSC;

(iv) Tentative trial dates are fixed for 12-15 July 2022;

(v) The Plaintiffs shall pay costs to the First Defendant to be taxed if not agreed.

Dated this 20th day of December, 2021

Indra H. Charles
Justice