JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE STRAW JA
THE HON MISS JUSTICE EDWARDS JA

APPLICATION NO COA 2019APP00245

BETWEEN	**JOHN RUPERT JAMES BLACKWOOD (Executor of the Estate of James Whittle Blackwood, Deceased)**	**APPLICANT**
AND	**KINGSLEY LYEW**	**1ST RESPONDENT**
AND	**INA ISABELLA SKYERS (Executor of the Estate of James Whittle Blackwood, Deceased)**	**2ND RESPONDENT**

Lemar Neale instructed by Neal Lex for the applicant

Mrs Trudy-Ann Dixon Frith and Ms Danielle Reid instructed by Dunn Cox for the 1st respondent

24, 25 February, 10, 18 March 2020 and 13 May 2022

F WILLIAMS JA

[1] I have read the draft reasons for judgment written by Edwards JA and I agree with her reasoning and conclusions.

STRAW JA

[2] I too have read the draft reasons for judgment prepared by Edwards JA. I agree and have nothing further to add.

EDWARDS JA

Introduction

[3] This matter came to us, initially, as an application for extension of time within which to apply for permission to appeal and for permission to appeal against the orders of Pusey J (Ag) (as she then was) ('the judge') made 23 November 2018, as well as for a stay of those orders pending the outcome of the application. Permission to appeal the orders of the judge was first refused by Wolfe-Reece J in the Supreme Court on 15 November 2019. The application for extension of time and for permission to appeal, made to this court, was filed 29 November 2019. After the second day of hearing, the applicant Mr Blackwood, made an application, filed 6 March 2020, to tender fresh evidence. After a full hearing on the application for fresh evidence, for reasons which were given orally at that time, the application was refused.

[4] Having then heard the applications for extension of time, for permission to appeal and for a stay over the course of three days, we made the following orders:

> "Applications refused with costs to the respondent, to be agreed or taxed.

[5] At the time we promised to put our reasons in writing and we do so now.

Background to the dispute

[6] The 1st respondent Mr Kingsley Lyew ('Mr Lyew') claimed to have entered into an agreement with Mr John Rupert Blackwood ('Mr Blackwood') for the sale of land which is part of lands comprised in certificate of title registered at Volume 1119 Folio 182 of the Register Book of Titles. Mr Lyew's claim, in summary, was that by agreement for sale dated 4 October 2007, Mr Blackwood had agreed to sell land described in the agreement of sale as "all those parcels of land shown as Sections A & B situate in the parish of Portland part of Elmwood as shown on the plan annexed and marked 'A' prepared by T.N.L. Shirley, Commissioned Land Surveyor and being the remainder of land comprised in certificate of title registered at Volume 1119 Folio 182 of the Register Book of Titles".

The piece of land which was claimed to have been purchased contained, by actual survey, "Forty Acres, Three Roods, and Thirty-Eight point Two Four Perches". A copy of the said surveyor's plan was exhibited.

[7] At the time of the execution of the agreement for sale, Mr Lyew was in possession of the land, and the registered owner of the said land was Mr James Whittle Blackwood, who is deceased. Mr Blackwood and the 2nd respondent, as executors of the estate of James Whittle Blackwood ("the deceased"), obtained Grant of Probate of the Last Will and Testament of the deceased dated 1st March 1976 from the Supreme Court on 28 October 2011. Mr Blackwood and the 2nd respondent were also alleged to be beneficiaries of the said estate and were the children of the deceased. The sale was never completed by Mr Blackwood. The purchase price of the said land was stated in the agreement to be $444,442.64. Mr Lyew paid $406,442.64 leaving a balance of $38,000.00 which was to be paid on completion as agreed, but despite repeated requests, Mr Blackwood refused to complete the sale.

[8] By transmission number 1809117 endorsed on the certificate of title on 18 November 2013, all the said land of the deceased was vested in Mr Blackwood and the 2nd respondent. It was alleged by Mr Lyew that, subsequently, on 5 November 2014, by Transfer No. 1809118 registered on the said Certificate of Title, Mr Blackwood and the 2nd respondent caused the Registrar of Title to record them as the registered proprietors of the entire land contained in Volume 1119 Folio 182 of the Register Book of Titles, including the portion of land alleged to have been purchased by Mr Lyew from Mr Blackwood. The latter transfer is not reflected on any documentation placed before this court.

[9] Mr Lyew commenced proceedings in the Supreme Court against Mr Blackwood and the 2nd respondent, in their capacity as executors of the estate of the deceased, as well as in their personal capacity, seeking declaratory relief, specific performance and damages for fraud and breach of contract.

[10] On 30 June 2017, Graham-Allen J made case management orders in the claim extending time for Mr Blackwood and the 2nd respondent to file and serve their defence and for witness statements to be filed. These orders were not complied with by Mr Blackwood and the 2nd respondent. On 31 July 2017, Mr Blackwood filed a defence which was a bare denial of the claim. An amended defence to Mr Lyew's claim was filed by Mr Blackwood on 18 September 2017, which again amounted to nothing more than a bare denial of the claim. The 2nd respondent filed a notice of application for court orders on 4 December 2017 seeking orders for a survey to be done and, amongst other things, for the maker of the sale agreement to be called at trial to give evidence. The affidavit of Raun Barret, filed on 4 December 2017 in support of that application, claimed that Mr Lyew had occupied 22 acres of land belonging to James Blackwood, deceased, ('Joyles land') which was unregistered and which was "somehow" transferred to the title of the deceased. It was claimed that a proper survey was required to properly identify the land. The 2nd respondent's application was amended on 25 January 2018, to seek an order for Mr Lyew's claim to be struck out as being statute barred. The affidavit of Raun Barret, filed 25 January 2018, in support of the amended application for court orders to strike out Mr Lyew's claim, also attested that the claim was statute barred, as time would have started to run from 4 September 2007, nine years prior to the date the action was initially filed.

[11] Mr Lyew filed an application for court orders, which was amended on 22 January 2018, to strike out Mr Blackwood's statement of case for failure to comply with the case management orders and for summary judgment against Mr Blackwood and the 2nd respondent. The orders sought in the claim were also sought in the application. Mr Lyew, in support of the amended application, relied on rules 15.2 and 26.3(1)(a) of the Civil Procedure Rules ('CPR'). The basis of the application to strike out Mr Blackwood's statement of case was that he had failed to comply with the case management conference orders made on 30 June 2017, which had been extended to 29 December 2017. The basis of the application for summary judgment was that Mr Blackwood and the 2nd respondent

had no real prospect of successfully defending the claim, and that Mr Blackwood had filed an amended defence on 18 September 2017 which contained bare denials.

[12] Mr Blackwood filed an affidavit on 25 January 2018, in response to the application, in which he raised several issues. In summary, he claimed that Mr Lyew paid no deposit for the purchase of the property in question and that Mr Lyew was yet to exhibit any receipts indicating that any sums had been paid to him. He also asserted that Mr Lyew was aware that, at all material times, the property was owned jointly with the 2nd respondent, and that he would not have been able to complete the sale of the property without her input.

[13] He also maintained that the agreement for sale exhibited by Mr Lyew was originally in relation to an adjacent unregistered property which had belonged to a Mr Joyles, and that the said agreement for sale, which was prepared by Mr Lyew's attorney, was different from the one exhibited by Mr Lyew to the court. He asserted that he had not seen a copy of that agreement for sale until nine years after it was executed. He said that when he had signed that agreement, it was only three pages long and his signature had not been witnessed. Mr Lyew, he said, had taken the agreement away and did not return.

[14] Mr Blackwood further deponed that the 'plan/drawing', prepared by Mr T N L Shirley and exhibited by Mr Lyew, was wholly inaccurate as it did not properly identify the property which formed the subject matter of the claim. He said he believed that the agreement for sale was fraudulently amended after he had signed it, so as to reflect that Mr Lyew had purchased the property described in the certificate of title registered at Volume 1119 Folio 182, instead of the unregistered property which had belonged to Mr Joyles.

[15] He went on to depone that the agreement for sale that he had signed was predicated on a letter sent to him by Mr Lyew, requesting that Mr Blackwood sell the property formerly owned by Mr Joyles and on the fact that Mr Lyew said that the property

was vetted by his attorney and shown to be a part of the property owned by him and the 2nd respondent.

[16] On 29 January 2018, Mr Lyew's amended application to strike out Mr Blackwood's statement of case and for summary judgment came on for hearing before Nembhard J, who ordered that the 2nd respondent's application to strike out the claim and its supporting affidavit were permitted to stand as filed. She also adjourned the applications to 31 July 2018, vacated the existing trial date, and set a new trial date for 19-22 April 2021.

[17] Mr Lyew's amended application was heard by the judge on 31 July 2018 and 23 November 2018. Mr Blackwood relied on his affidavit filed on 25 January 2018 in opposition to the application. In giving his reason for failing to comply with the case management orders, he maintained that he had terminated the service of the attorney who had appeared on his behalf at the case management conference and had retained new counsel, and that during that period of transition, he had been unable to secure his file but had instructed his new attorney to file a defence on his behalf. He contended that his failure to comply with the case management orders was due to administrative and communication issues and did not result from any blatant disregard for the orders of the court.

[18] After hearing the application, on 23 November 2018, the judge struck out Mr Blackwood's statement of case. The judge also considered the application for summary judgment and granted summary judgment in favour of Mr Lyew against Mr Blackwood and the 2nd respondent. The orders of the judge were as follows:

> 1. "The 1st Defendant's Statement of Case hereby stands struck out.
>
> 2. Summary Judgment is hereby entered in favour of the Claimant against [the] Defendants on the claim filed herein.

3. An Order for Specific Performance of the Agreement for Sale of Land dated 4th day of October 2007 by the Defendants for the purchased land described in Agreement for Sale dated 4th day of October 2007 as ALL THOSE parcels of land shown as Sections A & B situate in the Parish of PORTLAND part of ELMWOOD as shown on the plan annexed hereon marked "A" prepared by T.N.L. Shirley, Commissioned Land Surveyor being the remainder of the land comprised in Certificate of Title registered at Volume 1119 Folio 182 of the Register Book of Titles and containing by actual survey in total Forty Acres, Three Roods and Thirty Eight point Two Four Perches and being A PORTION OF premises known as ALL THAT land situate in the Parish of PORTLAND part of ELMWOOD mentioned and described in Certificate of Title in Volume 32 Folio 58 of the Register of Titles containing by actual survey Five Hundred Acres and butting North partly on Fair Prospect Pen and partly on Hartford Plantation South on the remaining portion of Elmwood aforesaid East on the remaining portion of Elmwood aforesaid and West partly on Hartford Plantation and partly on remaining portion of Elmwood aforesaid or as same will more particularly appear by the Plan thereof shaded RED and BLUE hereunto annexed and being the land comprised in Certificate of Title formerly registered at Volume 36 Folio 38 save and except the portions transferred by Transfers numbered 45077 (Roadway), 323131/1 (22A. 2R. 19.5P.) and 323131/2 (73A. 3R. 38.3P.) and being land comprised in Volume 1119 Folio 182 of the Register Book of Titles (hereinafter called "the purchased land") is hereby granted.

4. An Order that the Defendants transfer to the Claimant ALL the legal and beneficial interest in the purchased land and thereby execute an Instrument of Transfer within sixty (60) days of the date of this Order.

5. An Order that in the event that the Defendants fail and/or refuse to transfer ALL the legal and beneficial [interest] in the purchased land to the Claimant, the Registrar of the Supreme Court is hereby empowered to sign all the necessary documents to effect the transfer to the Claimant.

6. Cost of this application and the costs of the Claim to the Claimant."

[19] On 8 August 2019, Mr Blackwood filed an application for "relief from sanctions imposed for failure to comply with case management orders made 30 June 2017", for an extension of time to comply with those orders, and for the judge's orders to be set aside, amongst other things. In that same application, he sought permission to file a further amended defence, and alternatively, an extension of time to apply for permission to appeal the order of the judge. This application was supported by an affidavit sworn to by Mr Blackwood, as well as an affidavit of urgency sworn to by his counsel, both filed 8 August 2019. The affidavit of Francine Derby was filed in response to Mr Blackwood's affidavit on 8 October 2019, and a further supplemental affidavit sworn to by Mr Blackwood was filed on 10 October 2019.

[20] That application was heard by Wolfe-Reece J on 14 October 2019. Before her were the several affidavits which were filed and which were also before the judge. In addition to the affidavit of Mr Blackwood, there were affidavits supportive of Mr Lyew's case and of the 2nd respondent's case. Mr Blackwood's applications were refused by Wolfe-Reece J on 15 November 2019.

The application before this court

[21] Mr Blackwood sought an extension of time in which to seek permission to appeal, as well as permission to appeal the orders of the judge striking out his statement of case and granting summary judgment. No application to this court has been made by the 2nd respondent.

[22] Permission to appeal was sought pursuant to section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act. By virtue of that section, where the matter involves an interlocutory judgment or order, leave either of the judge below or this court is required before an appeal can be heard. The section provides for certain exceptions. This case involved an interlocutory judgment or order and it did not fall within any of the listed exceptions in the section; permission to appeal was, therefore, required. For a general

discussion on when a matter is to be regarded as interlocutory please see the dictum of Morrison JA (as he then was) in **Ronham & Associates Ltd v Christopher Gayle and Mark Wright**; **Christopher Gayle v Ronham & Associates Ltd and Mark Wright** [2010] JMCA App 17, at paragraph [21] and **Jamaica Public Service v Samuels** [2010] JMCA App 2 as applied in **Ledgister v BNS** [2014] JMCA App 1.

[23] Rule 1.7 (2)(b) of the Court of Appeal Rules ('the CAR') empowers the court to extend or shorten the time for compliance with any rule. Rule 1.8(1) and (2) of the CAR requires that:

> "(1) Where an appeal may be made only with the permission of the court below or the court, a party wishing to appeal must apply for permission within 14 days of the order against which permission to appeal is sought.
>
> (2) Where the application for permission may be made to either court, the application must first be made to the court below."

[24] The decision of the judge for which Mr Blackwood sought leave to appeal was made on 23 November 2018. An application for leave to appeal was first made to the court below but was refused by Wolf-Reece J on 15 November 2019. It is accepted that, where permission must first be sought in the court below, the requirement that an application for permission from this court must be filed within 14 days still stands (see **Evanscourt Estate Company Limited (by Original action) v National Commercial Bank Jamaica Limited (by Original action); National Commercial Bank Jamaica Limited v Evanscourt Estate Company Limited and Design Matrix Ltd (by way of Counterclaim and Set Off)** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 109/2007 and Application No 166/2007, judgment delivered 26 September 2008). An extension of time from this court would have, therefore, been necessary, the application having been filed in this court on 29 November 2019, a little over a year after the order was made.

[25] Rule 1.8(7) of the CAR states the general rule that "permission to appeal in civil cases will only be granted if the court or the court below considers that an appeal will have a real chance of success".

[26] The case of **Leymon Strachan v The Gleaner Company Ltd and Dudley Stokes** (unreported), Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered 6 December 1999, sets out the principles which are to guide the court when considering whether to grant an extension of time within which to apply for permission to appeal. These principles were considered and applied in **Clive Banton and Another v Jamaican Redevelopment Foundation Inc** [2016] JMCA App 2 and **Price Waterhouse (A Firm) v HDX 9000 Inc** [2016] JMCA Civ 18. Before a court will grant an extension of time to apply for permission to appeal, it will usually consider whether permission to appeal ought to be granted, otherwise, it would be futile to enlarge time (see **Evanscourt Estate**, at page 9). The requirements Mr Blackwood has to satisfy, in both applications, were considered in **Garbage Disposal & Sanitations Systems Ltd v Noel Green et al** [2017] JMCA App 2, which applied **Evanscourt Estate.**

[27] The above cases indicate that the factors to be considered in an application for extension of time to apply for permission to appeal are: (a) the length of delay (b) the reason for delay, (c) whether there is an arguable case for an appeal and (d) the degree of prejudice to be caused to either party. Notwithstanding this, the overarching factor to be considered in an application for extension of time is whether is the applicant has an arguable case. For an application for permission to appeal, the question is whether Mr Blackwood has any real chance of success.

[28] Taking the approach that it would indeed be futile to consider enlarging time, if the appeal really had no chance of success, consideration was given to the latter issue first.

[29] Apart from the pleadings, the evidence before the judge when she made her decision included the following:

a) The agreement for sale dated 4 October 2007;

b) Affidavit of Andre Marriot Blake filed 9 January 2018;

c) Affidavit of Kingsley Lyew filed 24 February 2017;

d) Affidavit of Andre Marriot Blake filed 22 January 2018;

e) Affidavit of John Rupert Blackwood filed 25 January 2018;

f) Affidavit of Kingsley Lyew filed 23 July 2018;

g) Letters dated 23 November 2007 from John Blackwood to Kingsley Lyew "Re – proposed purchase of land" acknowledging an agreement to purchase but claiming that there was a breach of the signed contract.

h) Letter from DunnCox dated 7 September 2016 demanding the transfer and title.

i) Title report for Volume 1119 Folio 182 with survey of Section A and B annexed.

j) Letter dated March 10, 2008 from John Rupert Blackwood.

k) Letter dated 10 January 2018 from Messrs Dunn Cox to Mr Blackwood.

The contentions

[30] Mr Neale's submissions, on behalf of Mr Blackwood, were focused on three main points. The first, was that the judge had no jurisdiction to grant summary judgment. The second was that the judge erred in granting summary judgment where the affidavits before her raised conflicting issues that could only be resolved at trial, and the third was

that the 2nd respondent's defence joined several factual issues that could only be resolved at trial. Each will be dealt with in turn.

A. The jurisdiction issue

(1) *The submissions*

[31] Mr Neale maintained that Mr Blackwood had a reasonable chance of success, and, therefore, a good arguable case, on the basis that the judge had no jurisdiction to grant summary judgment after striking out Mr Blackwood's statement of case. Counsel maintained that on an application to strike out being granted, instead of summary judgment, a default judgment ought to have been entered. On the question of the requisite procedure, counsel argued that, based on rule 12.5, the judge ought to have entered a default judgment after striking out which could then be set aside under Part 13 of the CPR. Therefore, he said, summary judgment was procedurally incorrect. He submitted, that as a result, the judge's decision could not stand on two bases: (a) it was procedurally incorrect, and (b) there were too many disputes as to fact for summary judgment to be entered.

[32] Mrs Frith, on behalf of Mr Lyew, argued otherwise. She pointed out that two separate applications were before the judge. Both applications, she said, were supported by affidavit evidence. Counsel pointed out that the decision to strike out was based on the fact of non-compliance with the case management orders, even after time had been extended on more than one occasion. The summary judgment order was granted, she said, based on the fact that Mr Blackwood's affidavits showed no real defence to the claim, and the defence he filed was a bare denial.

(2) *Disposal*

[33] Part 26 of the CPR deals with the case management powers of the court. Rule 26.3 sets out the different circumstances under which a statement of case, or part thereof, may be struck out. One such circumstance is where 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" (see rule 26.3 (1)(a)).

[34] Rule 26.3 does not specifically state what is to occur if the statement of case is struck out for any of the reasons set out therein. However, it is clear that if it is the statement of case for the defendant that is struck out, then the claimant may apply for judgment to be entered on suitable terms, or the court may enter judgment after striking out, if it is possible to do so. I do not agree with Mr Neale that it is necessary to apply for default judgment under Part 12 and to have it set aside under Part 13, if the statement of case of the defendant is struck out. In any event, that notion was dispelled by the Privy Council in **The Attorney General v Universal Projects Limited** [2011] UKPC 37 which dealt with a judgment entered after an unless order was not complied with.

[35] That case involved an application to set aside a judgment entered following non-compliance with an order for an extension of time to file a defence that had imposed a term permitting the claimant to enter judgment in default of the filing of the defence. The Privy Council considered the question of whether that application to set aside the judgment ought to be considered as an application to set aside a default judgment under Part 13 of the CPR of Trinidad & Tobago (which is *Pari passu* with our CPR Part 13), or whether it ought to be considered as an application for relief from sanctions under Part 26. It was held that, on a true construction of the CPR, an application to set aside a judgment entered in those circumstances is an application for relief from sanctions pursuant to rule 26.7 of their CPR (the equivalent of our rule 26.8), the sanction being "the judgment that was entered pursuant to the permission" (see paragraph 13). The Board explained that both rules dealt with different situations and opined on the importance of that distinction. At paragraph 14, it said:

> "14. Rule 13.3 and rule 26.7 are dealing with different situations. Rule 13.3 is dealing with the setting aside of a default judgment where it has been entered in the circumstances specified in Part 12 ie where there has been a failure to enter an appearance or file a defence as required by the rules. Rule 26.7 is dealing with applications for relief from

> any sanction, including any sanction for non-compliance with a rule, direction or court order where the sanction has been imposed by the rule or court order. The distinction is important: see the judgment of the Board in **The Attorney General v Keron Matthews** [2011] UKPC 38."

[36] In this case, no default judgment was entered pursuant to the circumstances specified in Part 12 and, as such, Part 13 would not apply. The question that arises, therefore, is, what is a court to do when faced with an application to strike out for non-compliance and/ or summary judgment. Rule 26.5 deals with cases where a party has failed to comply with an unless order, in which case, any other party may ask for judgment to be entered with costs. In such a case, a request for judgment must be filed, and it must be proved that the right to enter judgment has arisen. No such provision appears in rule 26.3 which sets out the basis on which a statement of case may be struck out. Rule 26.3(1)(a) provides as follows:

> "26.3(1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case 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."

[37] Mr Neale maintained that summary judgment could not be granted on an application to strike out. There is, however, no such rule. Summary judgment may be applied for in addition to or as an alternative to a striking out order. It is clear, from rule 15.2(b), that if an application is made to strike out a statement of case on the basis that it discloses no reasonable grounds for defending a claim, it is possible for the court to grant summary judgment on striking out for that very same reason. Rule 15.2(b) specifically refers, in parenthesis, to rule 26.3 (2). This approach was taken in the English case of **Clancy Consulting Ltd v Derwent Holdings Ltd and others** [2010] EWHC 762 (TCC), where the court struck out certain paragraphs of the defence which were mere denials and provided no arguable basis for defending the claim, and granted summary judgment on those issues that were struck out on the same basis.

[38] Where a court strikes out a statement of case, it may enter judgment as it appears the successful party is so entitled. The court has the power to treat an application to strike out as one for summary judgment to dispose of claims that do not deserve full investigation at trial (see **Three Rivers District Council and Others v Governor and Company of the Bank of England (No 3)** [2003] 2 AC 1 at page 260, paragraph 91). The case of **Three Rivers** involved an appeal against the striking out of a re-amended statement of case under the RSC Ord 18, r19 on two bases. The one relevant to this matter was that the action disclosed no reasonable cause of action, and that it would constitute an abuse of the process of the court if it were allowed to continue, even with the further amendments being sought. By the time the case reached the House of Lords, it was generally agreed, by all involved, that the question whether the claim ought to be struck out had to be reconsidered by the House and determined under the new English Civil Procedure Rules of 1998 under its transitional arrangements. In doing so, the House considered Part 3 of those rules, and in particular rule 3.4(2), which, in substance, is the same as our rule 26.3 (except for 26.3(d)). At page 260, the House of Lords considered that it had the power to treat an application to strike out as an application for summary judgment under rule 24.2, and that the only question was whether that power ought to be exercised in the particular case.

[39] However, as in this case, where the application was for striking out for non-compliance with a rule, order or direction of the court, summary judgment ought not be granted on the basis of that application alone, and a request for judgment to be entered after striking out would be the most apt procedure. This is because relief from sanctions may be applied for promptly, and the setting aside of a judgment entered after striking out is a form of relief from sanctions.

[40] In this case, the judge was faced not only with an application to strike out for non-compliance, but also one for summary judgment. The judge struck out the defence for non-compliance but also granted summary judgment on the basis that the defence had no reasonable prospect of success. Although these could be viewed as alternative

procedures and orders, it is important to state that summary judgment was not granted on the basis of the application to strike out the defence for non-compliance, but rather, it was granted on the basis that there was no reasonable prospect of successfully defending the claim. Whilst it may strictly, as a matter of procedure, not have been necessary to do both, since judgment could have been entered in favour of the claimant after striking out, there was nothing to prevent the judge from hearing and determining the summary judgment application at the same time as the striking out application. The result of doing so is that Mr Blackwood would be forced to apply for relief from sanctions on the striking out orders and to appeal the order for summary judgment. He did both.

[41] The position, therefore, is that summary judgment may be granted where the purported defence can be shown to have no real prospect of success. Where an application is made for a statement of case to be struck out because it shows no basis for defending the claim, summary judgment may be granted. Where there is an application to strike out for failure to comply with an order of the court, it is possible to properly grant summary judgment in the alternative, if it is shown that, in any event, summary judgment ought to be granted. However, whilst the criteria for achieving both orders differ, both orders may well be deserved as the defendant may have not complied with the orders of the court and, additionally, may very well not have a defence to the claim with any real prospect of success. In that case it would not be wrong to make both orders.

[42] In this case, both parties filed affidavit evidence in support of their contentions and the application for summary judgment was otherwise heard on its merits. On that premise, we did not agree that the procedure adopted by the judge, in granting both orders, was so defective as to warrant this court to set aside her decision.

[43] It is important to note that no complaint was raised before this court regarding the judge's decision to strike out Mr Blackwood's statement of case for non-compliance with the case management orders and that decision by the judge was not appealed as at the date of the hearing of this application. It is also important to note, that although the

2nd respondent's statement of case was not struck out, summary judgment was also granted against her, as the judge found that her defence also had no real prospect of success.

B. The grant of summary judgment issue

(1) *Submissions*

[44] Counsel for the applicant also contended that, on the affidavit evidence before the judge, numerous issues were joined between the parties that could only have been resolved at trial. This, he said, included the question of whether there was fraud, the identity of the land in question, the enforceability of the agreement for sale, mistake and *non-est-factum*. These issues, he claimed, could not have been resolved without a mini-trial.

[45] Counsel pointed to the fact that the sale was subject to subdivision approval and there was no affidavit evidence showing that any such approval had been given. He also pointed to the fact that the land described in the sale agreement was different from that for which the judge ordered specific performance. Counsel argued that the sale agreement was invalid and that, even if it was valid, there was still no subdivision approval. He also maintained that the plan was unsigned, and therefore, its validity was still in dispute.

[46] Counsel argued too, that the sale agreement spoke to the remainder of land, but the order for specific performance was for 40 acres of land. He submitted that there was no evidence that the remainder was 40 acres, and, in any event, if the information came from the plan, it was inadmissible because the plan was not valid. He also claimed that Mr Blackwood signed a three-page document prepared by the law firm of Dunn Cox, which he said, Mr Blackwood only saw nine years later.

[47] Counsel maintained that the question of mistake arose because the buyer was buying land A and B, whilst the seller was selling the unregistered land referred to as "Joyles land". The parties, he said, were, therefore, contracting at cross-purposes.

[48] Mrs Frith, for the 1st respondent, pointed out that even if leave to appeal were to be granted, Mr Blackwood's statement of case would still stand struck out as no application for permission to appeal the refusal for relief from sanctions had been made. She pointed out that Mr Blackwood's witness statement, not having been filed in the time allowed in the case management orders, relief from sanctions was required for him to be able to do so.

[49] Counsel also argued that, the evidence before the judge, in terms of admissions made in emails, the agreement for sale, admissions in correspondence between the parties, all of which, as a matter of law, would satisfy the statute of frauds, would have fortified the order of the judge. Counsel relied on the cases of **Marvalyn Taylor Wright v Sagicor Bank Jamaica Limited** [2018] 93 WIR 573, **Jamaica Public Service Company Limited v Charles Vernon Francis and Another** [2017] JMCA Civ 2 and **Three Rivers**. She said that all Mr Blackwood's factual assertions were contradicted by contemporaneous documents.

[50] In response, Mr Neale claimed that the case of **Jamaica Public Service Company v Francis and Another** was not applicable because Mr Blackwood could always seek permission to appeal the decision to refuse relief from sanctions, and that an application had actually been made in the court below and was being renewed in this court. Note may properly be made here of the fact that, on 6 March 2020, Mr Neale filed an application for permission to appeal the orders of Wolfe-Reece J refusing relief from sanctions. That application was not heard by this court, as it was not properly before us at the time of the hearing of this application.

(2) *The applicable principles*

[51] The jurisdiction to grant summary judgment is contained in Part 15 of the CPR. Rule 15.2 states as follows:

> "15.2 The court may give summary judgment on the claim or on a particular issue if it considers that-

(a) the claimant has no real prospect of succeeding on the claim or the issue; or

(b) the defendant has no real prospect of successfully defending the claim or the issue.

(Rule 26.3 gives the court power to strike out the whole or part of [a] statement of case if it discloses no reasonable ground for bringing or defending the claim.)"

[52] Rule 15.3 provides that the court may grant summary judgment in any type of proceedings, with a number of listed exceptions, of which this case is not one. Rule 15.4 lists the procedure to be followed in an application for summary judgment. Except in the case of a counterclaim, the application by a claimant must be made after the acknowledgment of service has been filed by the defendant. If the application is made before the defence has been filed, then the time for filing the defence is extended until 14 days after the hearing of the application. The notice of the application must be served not less than 14 days before the date fixed for the hearing of the application.

[53] Rule 15.5 indicates that evidence is required in support of a summary judgment application. The application must be supported by affidavit evidence, and the respondent may also file affidavit evidence on which he intends to rely. Rule 15.6 sets out the powers of the court on an application for summary judgment. It states as follows:

"15.6 (1) On hearing an application for summary judgment the court may-

(a) give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end;

(b) strike out or dismiss the claim in whole or in part;

(c) dismiss the application;

(d) make a conditional order; or

(e) make such order as may seem fit.

(2)…

(3)…"

[54] In this case, the burden rested on Mr Lyew (the applicant for summary judgment in the court below), to show that Mr Blackwood (the 1st respondent to the application for summary judgment) had no real prospect of successfully defending the claim (see **ED & F Man Liquid Products Ltd v Patel and another** [2003] EWCA Civ 472, at paragraph 9). The case of **ED & F Man** was a decision dealing with an appeal from a refusal to set aside a judgment entered in default of defence against the appellant. The court in that case considered the issue of whether, in refusing to set aside the judgment, the judge in the court below had erred in considering whether the defence had a real prospect of success based on the test for summary judgment in the English CPR. The court noted that the only difference between the provisions in rule 24.2 (summary judgment provisions) and rule 13.3(1) (default judgment provisions) of the CPR, with regard to the terminology "real prospect of success", was that, under rule 24.2, the claimant had the burden of proof, whilst under rule 13.3, it was the defendant who had to show that the default judgment should be set aside (see paragraphs 7 to 9).

[55] For a defence to have a real prospect of success, it must be more than merely arguable, and must show that it has a real and not a fanciful prospect of succeeding at trial. This means that, in the light of Part 15 of the CPR and the overriding objective of dealing with cases justly, the court should examine the case which will ultimately go to trial, and if a case is so weak that it has no reasonable prospect of success "it should be stopped before great expense is incurred" (see **Three Rivers** at page 260, paragraphs 91 to 93, and 95).

(3) *The evidential material and disposal*

[56] Mr Blackwood's response to Mr Lyew's application was contained in his various affidavits, and may be summarised as follows:

i) The sale could not have been completed without the 2nd respondent's input;

ii) He was not paid for the land;

iii) The agreement for sale he had signed was in respect of unregistered land belonging to a Mr Joyles and he had relied on Mr Lyew's statement that the property had been shown to be part of the property owned by him (Mr Blackwood) and the 2nd respondent;

iv) The agreement for sale presented to the court was not the one he had signed and after signing it he was only now seeing it again after nine years; and

v) The survey plan presented by Mr Lyew was unsigned and inaccurate.

vi) The issue is whether the judge was correct to find that Mr Blackwood had no real prospect of successfully defending the claim. It did not matter whether the defence, which was a mere denial, was struck out first or after the summary judgment application was heard. On a summary judgment application, the court is not confined to hearing the application based only on the statement of case. The rules provide for a summary judgment application to be heard even before a defence is filed. More importantly, the rules provide for the parties to file evidence in the form of affidavits for the hearing. It is common ground that the judge heard the application for summary judgment on affidavit evidence filed by all the parties.

[57] In this case, the compilation plan prepared by commissioned land surveyor Mr T N L Shirley, entitled "Compilation Plan of Part of Elmwood Estate, Vol. 1119 Fol. 182, Vol. 1229 Fol. 277, Vol. 1119 Fol. 181, Vol. 1209 Fol. 909 and Vol. 1119 Fol. 180, Portland" dated 21 June 2007, that was before the judge, shows that land registered at Volume 1229 Folio 277 of the Register Book of Titles, belonging to Mr Lyew of approximately 100 acres, does adjoin the said portions of disputed land, sections A and B registered at Volume 1119 Folio 182, now belonging to Mr Blackwood and the second respondent. This 'gives the lie' to Mr Blackwood's assertion that Mr Lyew does not own land adjoining to the disputed property.

[58] The agreement for sale between the parties identified the land being sold as "all those parcels of land shown as sections A and B" on the plan prepared by Mr Shirley, and as "being the remainder of the land comprised in Certificate of Title registered at Volume 1119 Folio 182 of the Register Book of Titles". Section A and Section B of the said land together amounted to approximately 40 acres. The sale agreement identified the vendor as John Rupert James Blackwood, businessman and executor of the estate of James Whittle Blackwood, deceased.

[59] The contemporaneous documents before the judge included letters and email correspondence between Mr Blackwood and Mr Lyew, as well as Mr Lyew's attorneys.

[60] An email from Mr Blackwood to Mr Lyew's attorney, dated 24 October 2007, stated as follows:

> "Kingsley Lyew asked me [sic] to provide you with information pertaining to the subject matter. Nunus [sic] Scholfield [sic] Deleon has been handling the probate for a long time. For a number of reasons it was discontinued, then resumed a few months ago. Mrs [sic] Busby-Earle is the attorney handling it but she is not aware of this transaction which is [sic] separate matter…"

[61] This, therefore, admits that there was a transaction between Mr Lyew and Mr Blackwood that involved the estate of a deceased person.

[62] An email was then sent, on 23 November 2007, from Mr Blackwood to Mr Lyew, with the subject "sale of land", as follows:

> "RE; PROPOSED PURCHASE OF LAND
>
> This letter is to inform you that you have forfeited your request to purchase my land at Elmwood in Portland as you are in breach of the contract we both signed.
>
> The contract clearly states that payment is to be made thirty (30) days after signing, which you have not done. Although you did not put a date on the contract, we both know that thirty days passed a long time ago and no payment has been

> made. One of my employees who was present the day we signed the contract and who overheard our conversation will [sic] attest to this. The deposit will not be refunded.
>
> …
>
> At this point, I consider the matter closed. However, if you wish to pursue it through the courts, please advise me in writing and I will ask my attorney to contact you."

[63] Again, here is an admission from Mr Blackwood, before the judge, that the parties had a signed contract for the sale of land belonging to Mr Blackwood at Elmwood in Portland and referencing some of the terms contained in the sale of agreement put forward by the claimant, Mr Lyew.

[64] On 7 September 2016, Mr Lyew's attorney wrote to Mr Blackwood reminding him of the sale agreement and giving him notice that legal proceedings would be commenced if he did not take steps to complete the sale in seven days. Mr Blackwood responded, on 17 September 2016, acknowledging receipt of that letter and indicating that his attorney would respond shortly.

[65] On 10 January 2018, Mr Lyew's attorney wrote to Mr Blackwood denying that Mr Lyew was in breach of the agreement and reminding him of the terms of the agreement, including that completion involved the exchange of title registered at Volume 1119 Folio 182, duly endorsed in Mr Lyew's name. On 10 March 2008, Mr Blackwood wrote to Mr Lyew's attorney as follows:

> "RE: PROPOSED SALE OF LAND TO KINGSLEY LYEW"
>
> **…I am fully aware of the content of the Agreement. My issue is not the technical accuracy of the contract which is very clear**. I am concerned, instead about the following:
>
> 1. With due respect to the terms of the contract, your client promised (within hearing of a witness) to pay the remaining amount within thirty (30) days. We

talked about the fact that the contract was undated. [sic] which. [sic] I realize is a technique attorneys use in this country (quite legitimately) and he was very clear that the balance would be paid within thirty days regardless of the wording of the undated contract. If he later decided against making the payment, I would have expected him to at least have communicated this to me. Instead, he refused to take or return my calls, and on the two occasions when I did talk to him briefly, he informed me that he was being pressured by the Income Tax Department and he did not have the money to pay me at that time. He did not at any point tell me that he did not intend to pay me because of the constraints outlined in your letter. Had he given me that information at the time, I would have accepted it. Since he consistently led me to believe that he would honor his word. [sic] I fully expect your client to pay as promised.

2. I do not purport to cancel the Agreement. I have cancelled it because your client has violated the understanding we both had. I did not charge your client $416,442.64 he paid the additional costs at his own volition. Your client was fully aware of the legal status of the land prior to signing the Agreement and he signed it and made the oral commitment with full knowledge of its implications. In fact, we discussed it on many occasions and he chose to sign the contract and pay the amount in full.

3. As is clearly inferred in your letter, your client your client [sic] does not own the land until he has the title in his name: I would therefore ask that you advise him to discontinue trespassing on my land (both himself and his employees) and to stop immediately the planting of lumber trees and any other crops on my land. He has no authority to use my land.

4. For purposes of clarification please be aware that I have no interest in preventing your client from purchasing the land, my contention is that he has violated both the spirit and terms of the Agreement

> as we understood it. As a result, I consider the Agreement for Sale to be no longer valid and I will not sell the land to your client under the present conditions. If your client is still interested in buying the land, he may enter into a new agreement similar in nature to the previous one. If he chooses not to do so, he may wish to pursue the matter in court. I am advised that due to your clients [sic] non-compliance with the agreement, he has forfeited his deposit.
>
> Finally, I want to make it clear that my purpose is not to renegotiate with your client and charge him more for the land, that would be an unprincipled thing to do. My purpose is to alert your client to the importance of honouring the agreement we had. Your client may have the land for the same price, but it will require a new contract and payment must be made in full." (Emphasis added)

[66] In this letter, Mr Blackwood admitted to being in a contract for the sale of land under the terms of the agreement as put forward in the claim, which he referred to and claimed to be familiar with. He also referred to the deposit price paid on the land. Therefore, his counsel's assertions as to mistake and *non-est-factum* are unsustainable.

[67] As for the claim that the contract could not be carried out because there was no sub-division and because the 2nd respondent was not a party to it, these too, on principle were not sustainable arguments. Mr Blackwood admitted in documentation before the judge, to being; an executor of the estate of the deceased; in a contract for sale of specific lands to Mr Lyew; and in receipt of payment for the land, with a balance due on completion. Completion, according to the contract was payment of the closing balance in exchange for the title. He also admitted, in correspondence, and in his affidavit evidence, that Mr Lyew was in part performance of that contract, having gone into possession and having planted trees on the property. Nowhere, in any of his correspondence, did Mr Blackwood allege that the agreement was fraudulently altered or that it was in respect of any unregistered land owned by Mr Joyles. Neither did he indicate that he was unable to pass title because of the 2nd respondent's unwillingness to sell.

[68] Mr Blackwood, therefore, unilaterally attempted to repudiate the contract. However, Mr Lyew had the option to accept the repudiation of the contract, treat it as being at an end and sue for damages, or treat it as subsisting and sue for specific performance. He did the latter. The judge agreed that he was entitled to specific performance. In the face of Mr Blackwood's admissions, it was clear from the contemporary documents before the judge that there were no triable issues and that Mr Blackwood had no real prospect of successfully defending the claim. Summary judgment was irresistible. See **Sagicor Bank v Taylor-Wright**, at paragraph 21, where the Board opined that:

> "The Board considers it axiomatic that, if a pleaded claim is met with a defence (whether pleaded or deployed in evidence) on a summary judgment application which, if true, would still entitle the claimant to the relief sought, then generally there cannot be a need for trial. If the pleaded claim justifies granting the relief sought then, if the claimant proves that claim, it will succeed. If the alleged defence also justifies the relief sought, then the claimant will succeed even though the defendant proves the facts alleged in her defence. In either case, the defendant will have no real prospect of successfully defending the claim, within the meaning of Pt 15.2(b)."

[69] In order to have a real prospect of success, a defence must be more than merely fanciful or arguable. If the defendant's case taken at its highest shows a distinctly improbable defence, it will be right to enter summary judgment. On an application for summary judgment, a defendant may seek to show a substantive defence in law, a point of law which destroys the cause of action, a denial of the facts on which the claimant relies to set up the cause of action, or further facts which answer the claimant's cause of action. Where a statement of case is contradicted by contemporaneous documents or materials on which it is based, summary judgment is appropriate (see **Three Rivers** at paragraph 95). In the case of **ED & F Man,** as well as in **Sagicor Bank v Taylor-Wright**, a defence which otherwise may have had some success was destroyed by clear written admissions by the defendants.

[70] Here was an agreement for sale of identifiable land at a fixed price, on which a deposit had been made with part performance. The contents of the plan of the property were incorporated into the agreement. The vendor was properly identified in his capacity. The 2nd respondent had no defence to the claim apart from the limitation point that she raised in her own application to strike out the claim, and that point was not taken before us. It is unclear whether it was raised before the judge. Mr Blackwood did not raise any defence of limitation.

[71] Finally, before leaving the issue, I think it is important to note that there was no appeal filed by the 2nd respondent and she took no part in the hearings before this court.

Application for permission to extend time

[72] Based on the foregoing conclusion, there is no necessity to consider the issue of an extension of time to apply for permission to appeal as there would be no arguable case, in any event. For these reasons we granted the orders in favour of the 1st respondent set out at paragraph [4] above.