IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2007HCV01995

BETWEEN	**MAXINE MARSH**	**CLAIMANT**
AND	**PAN CARIBBEAN MERCHANT BANK LIMITED**	**DEFENDANT**

IN CHAMBERS

Miss Georgia Buckley instructed by Kathryn Phipps & Co appeared for the Claimant.

Miss Carlene Larmond K.C., Mr. Jerome Spencer and Miss Giselle Campbell instructed by Patterson Mair Hamilton appeared for the Defendant.

Heard: 15th October 2019, 24th and 28th June, 31st July and 18th October 2024

Civil Procedure – Notice of Applications for Court Orders – Summary Judgment – Striking Out of Statement of Case – Claim for Recovery of a Specified Sum – The Effect of Unless Orders – Whether an Attorney can rely on their own affidavit – Defence of Limitation – Whether the Claimant has a realistic prospect of successfully bringing the Claim – Court Making Orders On Its Own Initiative to Strike Out Statement of Case – Whether statements of case discloses reasonable grounds to bring or defend the claim – Costs – Limitations of Actions Act, section 46 – The Legal Profession (Canons of Professional Ethics) Rules, Canon V, rule (p) – Civil Procedure Rules, 2002, 8.9, 11.9, 15.2, 15.4, 15.5, 26.2 and 26.3

L. PUSEY, J

INTRODUCTION

[1] The Applications for Summary Judgment came on for hearing before me on the 15th day of October 2019 and judgment was reserved to the 6th day of December 2019. Unfortunately, the judgment was not delivered owing to the COVID-19 pandemic and other issues such as the theft of my personal laptop. The delay is regrettable and was unintentional and I apologise for the unfortunate delay.

[2] The hearing of the matter on the 24th and 28th day of June 2024 were necessary to ensure that no new issues arose and no new submissions were being proffered. Having heard the Parties, the Court now delivers its judgment in relation to the Applications which were before it on the 15th day of October 2019.

[3] This claim has a very interesting and unusual background which has informed the Court's decision in this matter. Therefore, it is necessary to put the claim and the relevant Applications into context.

BACKGROUND

[4] The claim before this Court is one which has its origins in the year 1992. The Claimant, Miss Maxine Marsh, was a joint holder of a certificate of deposit ("CD") issued on the 7th day of December 1992 to her and her mother, Miss Ruby Wallace, by the Defendant, Pan Caribbean Merchant Bank, in the amount of Eighteen Thousand Eight Hundred and Eighteen United Stated Dollars and Ten Cents (US $18,818.10). The joint holder, Miss Ruby Wallace, unfortunately died prior to the institution of proceedings against the Defendant.

[5] The Defendant is a Bank that had its operations at 60 Knutsford Boulevard, Kingston 5 in the parish of Saint Andrew. However, since the filing of this claim, the Defendant has merged with Sagicor Bank.

[6] The CD was to accrue interest at 5% per annum, but not after the maturity date. The date of maturity was the 6th day of January 1993, thirty (30) days after the issued date. The Claimant asserts that she has not been paid the matured amount despite numerous requests spanning from 2004 to have same paid. As a result, the Claimant has approached the court for recovery of the deposit with interest of 5% per annum for the years that the said deposit was not paid out to her. This was her position in the Claim Form filed on the 10th day of May 2007 and the Amended Particulars of Claim filed on the 29th day of May 2007.

[7] The Defendant, however, contends in their Defence filed on the 25th day of July 2007, that having checked their records, there is no account which exists for either the Claimant or Miss Ruby Wallace and that pursuant to their policies this means that the matured amount was paid out to the Claimant and/or Miss Ruby Wallace at the request of both or either of them. The Defendant further contends that they also rely on the defence of limitation as the time for bring the claim would have expired in 1999.

[8] Subsequent to the filing of the Claim, there was slew of interlocutory applications which have been plagued by several adjournments. The Court will not provide a detailed history or background of each application, but will mention those that are necessary to the disposal of the applications before the Court.

[9] The first interlocutory application which has been adjourned on numerous occasions is the Notice of Application for Court Orders filed on the 9th day of May 2008 by the Defendant ("May 2008 Application"). The May 2008 Application was filed for the striking out the Claimant's Statement of Case on the grounds that it does not disclose any reasonable cause of action and further, or in the alternative, that the Claimant's conduct with regards to the Orders of the Court for mediation was likely to obstruct the just disposal of the proceedings and is an abuse of process of the Court. This was supported by the Affidavit of Lynda Mair also filed on the 9th day of May 2008.

[10] The second interlocutory application which has been the subject of various adjournments, is the Defendant's Notice of Application for Entry of Summary Judgment Against the Claimant filed on the 12th day of March 2009 ("March 2009 Application") which asked the court to consider the issue that the claim was statute barred at the time of its filing.

[11] The third interlocutory application which has been the subject of numerous adjournments is the Claimant's Notice of Application for Court Orders filed on the 26th day of February 2010 to further amend the Claimant's Particulars of Claim.

[12] The fourth, and final, interlocutory application affected by various adjournments is the Claimant's Notice of Application for Summary Judgment against the Defendant on the basis that there is no real prospect of defending the claim ("June 2014 Application"). This was filed on the 11th day of June 2014.

[13] These applications were jointly heard by L. Palmer-Hamilton J, on the 24th day of February 2017 and were adjourned to the 13th day of October 2017. On the 13th day of October 2017, it appears that Y. Brown J Ag. (as she then was) only heard the interlocutory applications for striking out and summary judgment. She made the following orders:

> *1. Defendant to file and serve a statement of the Bank's Policy regarding the time frame for redeeming CDs; this is to be done on or before December 29, 2017.*
>
> *2. Matter is adjourned to February 2, 2018…*

[14] The Defendant, on the 12th day of October 2017, filed a notice of Preliminary Objection to the Claimant's Application for Summary Judgment on the basis that the application was not supported by an affidavit and did not identify the rules it would like the court to deal with as is required by the Civil Procedure Rules (CPR).

[15] The Defendant had not complied with Order 1 of the Orders of Y. Brown J (ag) and as such on the 2nd day of February 2018, N. Simmons J extended the time for compliance until the 16th day of February 2018. The May 2008 Application, the March 2009 Application and the June 2014 Application were once again adjourned to the 11th day of July 2018.

[16] The Defendant had not complied by the extension date. The reasons for which were laid out in the Affidavit of Kimberly Deidrick filed on the 10th day of July 2018 in support of a Notice of Application for Court Orders by the Defendant seeking an extension of time for compliance with the Order. On the 11th day of July 2018, A. Thomas J (ag) (as she then was) made various orders which included a further extension of the compliance date to the 31st day of August 2018 and an order that unless the order is complied with, the May 2008 Application is struck out. The May 2008 Application, the

March 2009 Application and the June 2014 Application were adjourned to the 15th day of January 2019.

[17] The Defendant had not complied with the orders of Y. Brown J (ag) by the extension date granted by A. Thomas J (ag). On the 3rd day of September 2018, the Defendant filed a Notice of Application for Court Orders seeking a further extension and, in the alternative, relief from sanctions. This was supported by the Affidavit of Kimberly Deidrick filed on the same date which disclosed the reason(s) for non-compliance.

[18] On the 15th day of January 2019, the May 2008 Application, the March 2009 Application and the June 2014 Application were once again before Y. Brown J (ag) who further adjourned the matters to the 21st day of May 2019 and ordered the Parties to file further submissions regarding the statute of limitations.

[19] On the 21st day of May 2019, the matters were once again adjourned to the 15th day of October 2019. That was the date on which the matters came before me and was heard. A decision was reserved to be handed down on the 6th day of December 2019. However, such decision was not rendered. The Court once again apologizes for this delay in the delivery of the judgment.

SUBMISSIONS

[20] There were several written submissions before the Court and which the Court considered in making its decision. This was in conjunction with oral submissions made by Miss Buckley, for the Claimant, and Mr. Spencer, for the Defendant, on the 15th day of October 2019. The Court does not endeavour to reduce these submissions here, and may mention them if necessary.

PRELIMINARY ISSUES

Whether the May 2008 Application is Before the Court for Determination

[21] Before the Court can consider the merits of the Applications before it, it must first deal with certain preliminary issues. The first is whether the May 2008 Application by the Defendant is properly before this Court. This can be briefly dealt with.

[22] The Court is of the view that the May 2008 Application was not properly before the Court for determination on the date of the hearing. This is so because this Application was the subject of the unless order of A. Thomas J (ag) (as she then was) made on the 13th day of October 2017. The effect of this order is that it would strike out the Application if the order of Y. Brown J (ag) (as she then was), which demanded that the Defendant produce their policy regarding CDs, was not complied with. The Defendant has, to date, not complied with this order.

[23] The Court notes that there is a filed Notice of Application for Relief from Sanctions by the Defendant which has not yet been heard. However, the filing of this Application would not stay the effect of the unless order unless the Application was heard and granted. In light of this, the May 2008 Application is struck out as the unless order is automatically effective as at the date of non-compliance (see: **Dale Austin v Public Service Commission & Anor** [2016] JMCA Civ 46 at para [88]).

[24] Accordingly, the May 2008 Application stands as being struck out and is therefore not before the Court for determination.

Whether the Court Can Hear the June 2014 Application?

[25] On the 12th day of October 2017, the Defendant filed a Notice of Preliminary Objection to the June 2014 Application. The Defendant objects to the hearing of the June 2014 Application on the basis that it does not comply with two (2) mandatory rules under the CPR. Those are Rules 15.4(4) and 15.5(1).

[26] The Court will deal firstly with the objection regarding Rule 15.4(4). Rule 15.4(4) indicates that the Notice of Application for Summary Judgment **must** identify the issues which it proposes that the Court deal with.

[27] Unlike the Defendant, the Claimant has not delineated a section of her Notice of Application labelled "*issue which the Applicant proposes that the Court deals with at the hearing of this Application."* This is not what the Rule 15.4(4) requires, it requires that the issues be identified. Therefore, once the Court can ascertain the issues which

should be dealt with at the hearing, it should be satisfied that the Applicant has complied with the Rule.

[28] Upon perusal of the June 2014 Application, the Court is satisfied that the Claimant has complied with Rule 15.4(4). The Claimant has indicated in her Application that the Defendant has no real prospect of defending the Claim as required by Rule 15.2(b) of the CPR. The Court accepts this as the issue which the Claimant is proposing it deals with at the hearing.

[29] The Court now deals with the objection in relation to the noncompliance with Rule 15.5(1). This Rule indicates that the Applicant **must** file Affidavit evidence in support of the Application for Summary Judgment.

[30] Rule 11.9(1) of the CPR indicates that an Applicant does not have to give evidence in support of Application unless it requires by a rule, practice direction or court order. The use of the word “must” in Rule 15.5(1) means that it is mandatory for an Affidavit to be filed in support of the Application. Therefore, in the absence of Affidavit evidence, an Application for Summary Judgment should not be heard.

[31] The well founded legal principle, “he who asserts must prove”, also rings true in summary judgment applications. The Claimant has asserted that the Defendant cannot successfully defend the Claim, therefore the Claimant has the burden to prove this. Hence, the Claimant would need to bring evidence before the Court which indicates an inability by the Defendant to successfully defend the Claim. In these applications, this evidence is brought through an Affidavit. Therefore, without the Affidavit in support of application, the Claimant would be unable to discharge the legal and evidentiary burden required of her for the Application to be considered.

[32] An Affidavit was filed for this Application, a day after the Preliminary Objections were filed, on the 13th day of October 2017 sworn to by the Attorney of the Claimant, Kathryn Phipps. However, as the Court understands it an attorney-at-law is precluded from

testifying on their client's behalf pursuant to Canon V of the **Legal Profession (Canons of Professional Ethics) Rules**. Rule (p) of Canon V provides:

> *"While appearing on behalf of his client, an Attorney shall avoid testifying on behalf of his client, except as to merely formal matters, or when essential to the ends of justice, and if his testimony is material to the cause, he shall, wherever possible, leave the conduct of the case to another Attorney"*

[33] An Application for Summary Judgment is not a "merely formal matter," it is an Application that can potentially bring the claim to an end. Therefore, in these Applications, an Affidavit by the Attorney for the Applicant cannot be relied upon or permitted. The Court notes the other exception to this rule and is of the view that it does not exist in this matter. This is so because the Attorney who swore on the Affidavit is the instructing Attorney for this Application which means that the Attorney maintains direct oversight of the case, even though she may not appear in court. Therefore, the Court will not permit this Affidavit to stand for the purposes of this Application.

[34] Accordingly, the hearing of the Notice of Application for Summary Judgment filed by the Claimant on the 11th day of June 2014 cannot proceed and is therefore dismissed.

ISSUE

[35] Having disposed of the preliminary issues, and upon a determination that only the March 2009 Application is before the Court, the sole issue which exists is whether the Claimant's Claim is statute barred.

LAW AND ANALYSIS

[36] The gravamen of the March 2009 Application, the Affidavit in Support and the submissions of Counsel for the Defendant is that the claim is being brought outside of the time required by the **Limitations of Actions Act**.

[37] Further, it is against this issue that the Application, the Affidavit in Support and the submission of Counsel for the Defendant contends that the Claimant has no real

prospect of succeeding on the claim or the issue per Rule 15.2 of the CPR. This is what grounds the March 2009 Application.

[38] To reiterate, the case for the Claimant is one for recovery of a specified sum with interest thereon arising out of a failure or refusal by the Defendant in 2004 to pay out said sums due to her on a matured CD held jointly by her and her deceased mother, Miss Ruby Wallace.

[39] This Application is being brought pursuant to Rule 15.2(a) of the CPR which indicates that the Court may give summary judgment on a particular claim or issue if it considers that the Claimant has no real prospect of succeeding on the claim or issue. The Court has various powers in granting summary judgment and this is outlined at Rule 15.6 of the CPR which states:

> *"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 other order as may seem fit."*

[40] The decision whether or not to grant a summary judgment application is discretionary and this was established in the case of **Three Rivers District Council v Bank of England (No. 3)** [2003] 2 AC 1 where Lord Hutton stated:

> *"The important words are 'no real prospect of succeeding'. It requires the judge to undertake an exercise of judgment. He must decide whether to exercise the power to decide the case without a trial and give Summary Judgment. It is a 'discretionary' power; that is, one where the choice whether to exercise the power lies within the jurisdiction of the judge. Secondly, he must carry out the necessary exercise of assessing the prospects of success of the relevant party. If he concludes that there is no 'real prospect' he may decide the case accordingly."*

[41] To determine whether or not there is a real prospect of success, the Court cannot approach the matter by applying the usual balance of probabilities standard of proof (see: **Royal Brompton Hospital NHS Trust v Hammond** [2001] BLR 297). A real prospect of success means that the case is more than "fanciful" or "merely arguable" (see: **Celandor Productions Ltd v Melville** [2004] EWHC 2362 CH at paras 6 and 7).

[42] It is also well established that in considering an application for summary judgment the Court must have regard to the overriding objective of the dealing justly with each case.

[43] It is the Court's view that, for the purposes of this March 2009 Application, a determination as to whether the Claimant has a realistic prospect of succeeding on the claim is contingent upon the Court's finding regarding the limitation period. The Court understands, and in fact various authorities remind it, that its duty at this stage is not to engage itself in a mini trial of the issues. However, to determine this Application before it, the Court can preliminarily examine the issue as to the limitation period.

[44] To determine the limitation period applicable in this matter, the relationship of the Parties is important. The Claimant and the Defendant have both acknowledged that their relationship is contractual.

[45] In relation to the limitation period regarding debts and contracts, section 46 of the **Limitation of Actions Act** states:

> *"In actions of debt, or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence in any of the Courts of this Island, of a new or continuing contract, whereby to take any case out of the operation of the United Kingdom Statute 21 James I. Cap. 16, which has been recognized and is now esteemed, used, accepted and received as one of the statutes of this Island, or to deprive any party of any benefit thereof unless such acknowledgment or promise shall be made or contained by or in some writing …"*

The English **Statute of Limitation**, Statute 21 James 1, Cap 16 of 1623, section 3, in so far as is relevant reads:

> *"… all actions of debt grounded upon any lending or contract without specialty … which shall be sued or brought at any time after the end of this present session of parliament, shall be commenced and sued within the time and limitation hereafter expressed, and not after; (that is to say;) … within three years next after the end of this present session of parliament, or within six years next after the cause of such actions or suit, and not after …"*

[46] A contract of specialty is one made by deed, whereas a contract made 'without specialty' is a simple contract. Though the Parties have agreed that their relationship is contractual, it remains to be determined whether the debt is owed under a simple contract or one of specialty. The contractual relationship between banker and bank is usually a simple one. Therefore, the Court is not of the view that this contract between the Parties was anything more than a simple contract and the evidence supports it. In view of this, the applicable limitation period in this matter is six (6) years (see: **International Asset Services Limited v Edgar Watson** [2014] JMCA Civ 42 paras [19] and [24] and **Bartholomew Brown and Bridgette Brown v Jamaica National Building Society** [2010] JMCA Civ 7 at para. [40]).

[47] This means that the limitation period expires six (6) years after the date on which the cause of action arose. It is this date, the date of the cause of action, which is the genesis of the dispute surrounding the expiry of the limitation period. The resolution of this discourse is one which will determine the Application one way or another.

[48] Counsel for the Claimant submits that the language of the CD contemplates that a demand must be made for the CD to be cashed. Therefore, it was also their submission that the cause of action arose upon the first refusal or failure by the Defendant to cash the CD. On the Claimant's case the demand was first made and refused in 2004 and therefore the limitation period would expire in 2010.

[49] Counsel for the Defendant submits that the submissions made by Counsel for the Claimant would only be correct in respect of current and savings account. Counsel for

the Defendant noted that the CD was an investment and in those cases the cause of action arose at the earliest time when a claim could have been made for the recovery of the money. Following the argument of Counsel for the Defendant, the earliest time the money could be recovered was in 1993 when the amount on the CD matured. Accordingly, the limitation period would have expired in 1999.

[50] It is understood that once the limitation period of six (6) years has expired then a claim has been extinguished as there is no likelihood of success once this defence is raised. In **Donovan v Gwentoys** [1990] 1 WLR, Lord Griffiths at page 479 opined:

> *"The primary purpose of the limitation period is to protect a defendant from the injustice of having to face a stale claim, that is, a claim with which he never expected to have to deal."*

[51] In **Attorney General of Jamaica v Arlene Martin** [2017] JMCA Civ 24, at paragraph 39, P. Williams JA relied on **Blackstone's Civil Practice 2012** paragraph 10.13 to indicate the correct approach to be taken in calculating the limitation period. Paragraph 10.13 states:

> *"The rules on accrual fix the date from which time begins to run for limitation purposes. Lindley LJ in Reeves v Butcher [1891] 2 QB 509 said: 'it has always been held that the statute runs from the earliest time at which an action would be brought.' In Read v Brown (1888) 22 QBD 128 Lord Esher MR defined 'cause of action as encompassing every fact which it would be necessary for the [claimant] to prove, if traversed, in order to support his right to the judgment of the court.* ***In other words, time runs from the point when facts exist establishing all the essential elements of the cause of action****."* (emphasis mine)

[52] P. Williams JA further opined at paragraph [36] of the judgment:

> *"Although the defence that a limitation period has expired is a procedural defence, it is one that usually has to be raised as such and be resolved at trial. However, it is permissible for the defendant to apply to have the claim, or the relevant parts of it struck out as being an abuse of process. This however will only be allowed in a case where the expiry of the limitation period is clearly established and unanswerable."*

The Court understands the learned judge of appeal to be saying that a defence that the limitation period has expired is one which usually has to be ventilated at trial. However, where it is obvious that such period has expired and would be a waste of

time and money for the Claimant to continue with the action, the Court can strike out the Claimant's claim (see also: **Ronnex Properties Limited v John Lain Construction Limited** [1982] 3 All ER 961)

[53] It is strongly encouraged that the Court, in considering an application for summary judgment, must not engage itself in a mini trial of the issues in the case (see: **Swain v Hillman** [2001] 1 All ER 91). However, the Court does not have to accept everything placed before it as established at paragraph 10 of **ED & F Man Liquid Products Ltd v Patel and Another** [2003] EWCA Civ 472 which states:

> *"However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court.* ***In some cases, it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents****. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable..."* (emphasis mine)

[54] The authorities therefore indicate, that while a mini trial of the issues in the case are discouraged the Court must at least examine the issues to see if on the face of it there is no real substance.

[55] The Court repeats that it is he who asserts has the burden of proving. The Defendant has put this Application before the Court and they have the burden to prove that the limitation period has expired. The Court does not believe, that the Defendant has placed sufficient material before it for a decision to be made of the case, on this Application, summarily.

[56] The Affidavit in Support of the Application consists of bare assertions with nary any documents to provide even an iota of proof that the averments may be true. The Court is of the view that the failure of the Defendant to provide its policy regarding CDs was fatal to not just the May 2008 Application but also this Application before the Court. The non-production of this document meant that the Court did not have material before it which would verify the assertions by the Defendant regarding their treatment of CDs.

[57] The facts of the case are what determines when the cause of action arose and when the limitation period would be. Based on what is before the Court, the facts support the Claimant case regarding the limitation period. The Claimant indicated that in 2004 she requested the sums due on the CD and the Defendant failed to deliver. It is important to note that the Defendant has not denied that the sums were requested by the Claimant in 2004, nor have they denied that they did not pay the sums out as per the Claimant's request. The Court accepts these facts as being true. Therefore, the Court is of the view that the cause of action arose in 2004 when the Claimant first requested to redeem the funds hence the limitation period expired in 2010.

[58] Consequently, the Court finds that the Claimant's claim was made within the limitation period and the Defendant's Application for Summary Judgment filed on the 12th day of March 2009 is refused.

COSTS

[59] The general rule is that costs must follow the event. This means that where a cost order will be made, the unsuccessful party should be ordered to pay the costs of the successful party (see: Rule 64.6 of the CPR).

[60] In the case of **Straker v Tudor Rose (a firm)** [2007] EWCA Civ 368, Waller LJ opined:

> *11. ...The court must first decide whether it is case where it should make an order as to costs, and have at the forefront of its mind that the general rule is that the unsuccessful party will pay the costs of the successful party. In deciding what order to make it must take into account all the circumstances including (a) the parties' conduct, (b) whether a party has succeeded on part even if not the whole, and (c) any payment into court.*
>
> *12. Having regard to the general rule, the first task must be to decide who is the successful party. The court should then apply the general rule unless there are circumstances which lead to a different result. The circumstances which may lead to a different result include (a) a failure to follow a pre-action protocol; (b) whether a party has unreasonably pursued or contested an allegation or an issue; (c) the manner in which someone has pursued an allegation or an issue; and (d) whether a successful party has exaggerated his claim in whole or in part.*

> *13. Where, particularly in a commercial context, the claim is for money, in deciding who is the successful party, I agree with Longmore LJ when he said in Barnes v Time Talk (UK) Ltd. [2003] EWCA Civ 402 para 28 that "the most important thing is to identify the party who is to pay money to the other". In considering whether factors militate against the general rule applying, clear findings are necessary of factors which led to a disapplication of the general rule, e.g. if it is to be said that a successful party "unreasonably" pursued an allegation so as to deprive that party of what would normally be his order costs, there must be a clear finding of which allegation was unreasonably pursued.*

[61] The Court also has the discretion to deviate from the general position to create a more tailored approach to costs allocation. In doing so the Court must consider the specific circumstances of each case, including the parties' conduct, the relative success and failure on individual issues and the broader interest of justice.

[62] There are three (3) Applications for which costs were sought although only one (1) such Application was considered as being properly before the Court. These Applications were all made at separate points in time until they were ultimately merged into one hearing and travelled with each other. This Court is of the view that an order for costs should be made for each Application.

[63] The May 2008 and June 2014 Applications could not proceed for a determination to be made on them due to the actions and/or inactions of the respective Applicants in those matters. When the necessary factors are considered the Court is not of the view that it should deviate from the general rule. The Court is of the opinion that a party's costs should be recovered where the other party has failed to fulfill an obligation which results in the matter being dismissed without full consideration of the issue(s).

[64] In the May 2008 Application, it is the Defendant who failed to produce an essential document which resulted in the case being deemed as struck out and could not proceed. In light of this, the Court orders cost of the May 2008 Application to the Claimant to be taxed if not agreed.

[65] In the June 2014 Application, the Claimant's failure to file a valid affidavit in support resulted in the Application being dismissed preliminarily upon the Defendant's

objections. In view of this, the Court finds it appropriate in these circumstances to award costs of the June 2014 Application to the Defendant to be taxed if not agreed.

[66] Similarly, in relation to the March 2009 Application, the Court does not form the view that the circumstances exist which would permit it to deviate from the general rule. The Defendant's brought an Application for Summary Judgment on the basis that the Claimant could not be successful on the claim on the basis that the limitation period has expired. The Court has ruled that this is not so with regard to the material before it. Subsequently, the Court orders costs on this Application to the Claimant to be taxed if not agreed.

COURT'S POWER TO MAKE ORDERS OF ITS INITIATIVE

[67] Though the Court has refused the Summary Judgment Application of the Defendant, it has a duty to ensure that all matters proceed in a way that justly advances the case. Having gone over the statements of case for the Parties to make a determination on the Applications before it, the Court has formed a view of the case in its entirety. This view may warrant certain orders being made that disposes of the claim entirely.

[68] Rule 26.2 of the CPR empowers the Court to make orders on its own initiative and imposes a duty on the Court to manage a case at every stage. This requires the Court to utilize its powers of Case Management at each stage of the case to move the matter towards a just resolution either by trial or any other order by the Court.

[69] Rule 26.3(1) of CPR empowers the Court to strike out a statement of case or any part thereof where it appears to the Court that it does not disclose any reasonable grounds for bringing or defending a claim (see: Rule 26.3(1)(c)).

[70] This is in keeping with the principles elucidated by Lord Briggs in **Sagicor Bank v Marvalyn Taylor Wright** [2018] UKPC 12 that only those matters which raises triable issues will proceed to trial. It is against this background that the Court is minded to make certain orders having examined the statements of case of both the Claimant and the Defendant.

[71] A statement of case, simply put, are the materials or information put before the Court by the Parties to make out their case. These materials are also referred to as the pleadings. Pleadings are important as they set out the parameters of each Party's case and inform the Parties of the real issues between them that should be ventilated at trial (see: **Grace Kennedy Remittance Services Limited v Paymaster (Jamaica) Limited and Paul Lowe** (unreported) Court of Appeal of Jamaica, SCCA No. 5/2009 judgment delivered 2 July 2009 at paragraphs 28 to 31 and **Bullen and Leake and Jacob's Precedents of Pleadings**, 12th edition, at page 3).

[72] In the case of **McPhilemy v Times Newspapers Ltd and others** [1993] 3 All ER 775, Lord Woolf MR, at page 778, opined that –

> *The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular, they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules. The Practice Direction CPR 16, paragraph 9.3 requires, in defamation proceedings, the facts on which a defendant relies to be given. No more than a concise statement of those facts is required.*

In essence, the fundamental objective of pleadings is to disclose all allegations and factual arguments upon which a party relies to either present their case or formulate their defense.

[73] Rule 8.9 of the CPR indicates that the Claimant **must** include in the claim form or its particulars, all the facts on which the Claimant relies and further it must annex or disclose any documents necessary to their case.

[74] The Claimant filed her Claim Form on the 10th day of May 2007. She filed an Amended Particulars of Claim on the 29th day of May 2007 and annexed the CD. There is an outstanding application for permission to be given for the Further Amended Particulars of Claim filed the 26th day of February 2010 (but which incorrectly bore the date February 26, 2009) to stand – which the Court looked at in the context of whether the pending amendments, if allowed, would be indicative that there is a real prospect of success.

[75] This Claimant, like all Claimants in civil proceedings, has a legal burden to prove her assertions or allegations against the Defendant, not the inverse (see: **Winnifred Fullwood v Paulette Curchar** [2015] JMCA Civ 37 at para [47]). Therefore, it is Claimant who must prove that the Defendant did not pay the monies out to either herself or Miss Ruby Wallace, not the other way around.

[76] The facts as the Court has discerned them are that the Claimant and her mother, Miss Ruby Wallace, were joint holders of the CD. This means that either of them could request the matured money on the CD from the Defendant. The Claimant has indicated that she found the CD after her mother's death and was of the view that it was never redeemed. Sometime in 2004, the Claimant demanded that the Defendant release the matured sum on the CD and the Defendant indicated to her by way of letter that based on their checks the said sum was likely to have been paid out. Both the Claimant and the Defendant has provided copies of the CD. Whereas only the Defendant provided the letter wherein they indicated that the sums were likely to have been paid out.

[77] The Court accepts that the deposit existed. The Court also acknowledges that the Claimant's assertion that she did not redeem the CD is provable in the circumstances. However, the Claimant has not demonstrated how she could prove an assertion that her mother did not redeem the CD as contemplated in the proposed Further Amended Particulars of Claim. The Claimant's and her mother's relationship with the Defendant, being joint holders on the CD, is an important ingredient to this claim as it presents

another person who could have potentially redeemed the CD without the knowledge of the Claimant. Indeed, this is what the Defendant has also subtly indicated. There is no evidence provided by the Claimant which discredits this line of argument. In the result, the Claimant has failed to provide any proof, that a court could act on, that her mother did not redeem the CD.

[78] The successful outcome of the claim hinges on whether the CD was not redeemed by the Claimant or her mother before (or even after) the demand that triggered the cause of action. This issue cannot be settled solely on the credibility of the Parties.

[79] At present, the claim is merely speculative and does not meet the threshold necessary for the Claimant to discharge her legal and evidential burden in the matter. In other words, there is no material before the Court which has substantiated the Claimant's assertion that the sum was never paid over to her mother by the Defendant.

[80] The Court notes that the matter commenced some fifteen (15) years ago and standard disclosure has not yet occurred. The passage of time is not advantageous to either Party's case. The Defendant has since been subsumed into Sagicor Bank and their failure to provide their policy regarding the CD suggests that they are not likely to present any documentary evidence that would substantively advance their case. In fact, the Court gleaned as much from several affidavits filed seeking an extension time to comply with the unless order. Certainly, the same may be true of the Claimant. It is likely that she too may not be in a position to provide documentary evidence to advance her case. This means that the Parties are at a stalemate and it is not likely that any orders can be made which would progress the case further or result in a disposition by way of a trial.

[81] The Court is mindful that even on making orders of its own initiative it should not engage itself in a mini trial of the issues and indeed it has not done so. What is apparent to the Court on the face of the evidence and the material before it, at this stage, is that the Claimant's statement of case does not disclose any triable issues.

Therefore, the Court is of the considered opinion that there are no reasonable grounds for bringing the claim.

[82] However, in the same vein, the Court is also of the view that the Defendant's statement case does not disclose any reasonable grounds for defending the Claim. The Defendant having failed to prove, at this stage, that the limitation period has expired, has no other standing for a Defence.

[83] The Court is confronted with the mere conjecture of the Defendant that the CD may have been redeemed prior by Miss Ruby Wallace or the even the Claimant herself, but no actual proof that it was (or was not). The Court relies on facts, evidence and the application of law to make decisions. Therefore, speculation alone is not sufficient to mount a defence.

[84] There is also an assertion that the account is closed and that this is indicative that the sums were paid out. However, the Court takes note that there was no evidence provided in support of this assertion which makes it a bare one. Further, the Defendant has also asserted that they do not keep documents beyond seven (7) years for unclaimed deposits. This infers that even if the deposit is unclaimed they may not have records relating to such. The Court once again notes how the absence of the Defendant's policy regarding CDs is damning. It further highlights the importance of such a document, and documentary evidence generally, in the just disposal of the substantive claim.

[85] Subsequently, the effect of the deficiencies in both Parties' statements of case is that no tribunal could safely determine the matter one way or the other. The examination of the Parties' statements of case is a mountain of speculation which leaves much to be discharged by them legally and evidentially.

[86] In light of the foregoing, the Court is minded to make orders to strike out the Claimant's and the Defendant's statements of case on the basis that they do not disclose any reasonable grounds for bringing or defending the claim. The Court is also of the view

that this is a unique situation which would permit the Court to make no orders as to costs.

[87] While the Court is minded to make these orders, it of course must give credence to Rule 26.2(2) of the CPR and the principles of natural justice which indicates that any Party likely to be affected by the proposed order(s) to be made on the Court's own initiative should be given a reasonable time to be heard. In view of this, the Court invites Counsel in the matter to make submissions in relation to these findings.

ORDERS

[88] Having regard to the foregoing the Court makes the following orders:

1. The Notice of Application for Strike Out of the Claimant's Statement of Case filed May 9, 2008 is struck out in accordance with the unless order of A. Thomas (ag) (as she then was) dated the 11th day of July 2018.

2. Costs of the Notice of Application for Strike Out of the Claimant's Statement of Case filed May 9, 2008 is awarded to the Claimant to be taxed if not agreed.

3. The Claimant's Notice of Application for Summary Judgment filed June 11, 2014 is dismissed.

4. Costs of the Claimant's Notice of Application for Summary Judgment filed June 11, 2014 is awarded to the Defendant to be taxed if not agreed.

5. The Defendant's Notice of Application for Summary Judgment filed March 10, 2009 is refused.

6. Costs of the Defendant's Notice of Application for Summary Judgment filed March 10, 2009 is awarded to the Claimant to be taxed if not agreed.

7. The Parties are invited to file and exchange written submissions in relation to the findings of the Court at paragraphs [67] – [87] on or before the 19th day of November 2024 at 4:00 p.m.

8. The submissions on the findings will be considered on paper and judgment is reserved to the 19th day of December 2024.

9. The Defendant's Attorneys-at-Law is to prepare, file and serve the Formal Orders herein.