[2023] JMSC Civ 77

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2021CV01869

BETWEEN	**AKEEM MORGAN**	**CLAIMANT**
AND	**TAVIA DUNN**	**DEFENDANTS**
	LOWELL MORGAN	
	M.MAURICE MANNING Q.C	
	PATRICK W FOSTER Q C	
	LOWELL MORGAN (Administrator Ad Litem for the Estate of DONOVAN JACKSON)	
	ALEXANDER COOLS-LARTIGUE	
	CAMILLE K. BUSBY-EARLE	
	SHERRY ANN MCGREGOR	
	CAMILLE R WIGNALL-DAVIS	
	PAUL TAI	
	CATHERINE MINTO	
	RUSSLYN COMBIE SYKES	
	AYANA L THOMAS	
	LICEA-ANN S SMITH	
	GRACE LINDO	

Mr. Richard Reitzin, instructed by Messrs Reitzin & Hernandez for the claimant.

Mr Charles Piper KC and Mr Immanuel P.O. Williams instructed by Charles Piper & Associates for the defendants.

Heard February 24, 2023, and May 15, 2023

The supervisory jurisdiction of the court over its officers - whether the jurisdiction is limited to undertakings given by attorneys-at-law - whether it is compensatory or punitive – whether the fixed date claim form discloses reasonable grounds for bringing the claim - whether defendants waived their right to make the preliminary objection by filing an affidavit in answer- whether a cause of action needed for declaratory relief- whether undertaking given to the court merged into the final judgment

IN CHAMBERS

CORAM: JARRETT, J

Introduction

[1] The defendants are partners in the law firm Nunes Scholefield Deleon & Co. By way of fixed date claim form, the claimant seeks a declaration that they have been complicit in the breach of an undertaking given to the court by their client. He also seeks orders pursuant to the supreme court's inherent jurisdiction to discipline attorneys-at-law in their capacities as officers of the court. The defendants filed a notice of preliminary objection to the claim asking that it be struck out on several bases, including that there is no cause of action known as "being complicit in the breach of an undertaking" and, that the claim discloses no reasonable grounds for bringing it. This is my decision on the preliminary objection.

[2] By the time this matter came before me, Mr Donovan Jackson, one of the named defendants in the claim, had died. Before the start of the hearing of the preliminary objection, I granted an application by Mr. Lowell Morgan, another named defendant, to be appointed administrator ad litem for Mr Jackson's estate and for him, in that capacity, to be substituted for Mr Jackson as a party to the claim.

[3] An outline of the claim will put the preliminary objection in perspective.

The claim

[4] The following are the remedies sought by the claimant in his fixed date claim form filed on April 16, 2021: -

1. A declaration that the defendants acting in their capacities as Attorneys-at-law and partners in the law firm Messrs Nunes Scholefield Deleon & Co., were complicit in the breach, in or about August 2019 by their client, Owen George Porter, of his undertaking to the court dated November 16, 2009 and filed on December 9, 2009 not to sell his property at Lot 121 Darien Drive, Marine Park, Portmore in the parish of St Catherine.

And Orders that -

2. The court exercises its inherent supervisory jurisdiction over the defendants.
3. The defendants, and each of them be sanctioned for their complicity in the breach of the undertaking.
4. The defendants compensate the claimant for the losses incurred by the claimant resulting from –
    i. the sale of Owen George Porter's property, including but not limited to the difference between the sale price and the best price which was reasonably obtainable.
    ii. the claimant being deprived of the opportunity to sell the property on his own terms in accordance with his pending application to the court for an order for sale;

iii. the claimant being deprived of the opportunity to manage the property for his benefit pending sale and completion; and/or

iv. the claimant's legal cost thrown away in his having sought orders from the Supreme Court for the sale of Owen Porter's property.

5. The defendants pay the costs of, occasioned by and thrown away by reason of the claimant's application for orders for the sale of Owen Porter's property.
6. Damages
7. Interest pursuant to s.3 of the Law Reform (Miscellaneous Provisions) Act.
8. Costs
9. Such further or other order or orders as this Honourable Court deems fit.

The evidence in support of the claim

[5] In support of the claim, the claimant relies on his affidavit filed on April 16, 2021. He says that in 2009 when he was 12 years old, he was in a shop on Lakes Pen Road in St Catherine where he was injured when a motor vehicle driven by Constable Owen Porter, crashed into the shop. He suffered serious injuries which included post-traumatic stress disorder, the amputation of his entire ring finger and the partial amputation of the right middle and index fingers. By his mother and next friend, he commenced **Claim No 2009 HCV04301** against Constable Owen Porter and obtained an *exparte* freezing order in relation to his assets which included property at Lot 121 Darien Drive, Marine Park, Portmore in the parish of St Catherine. That order was not extended at the *interpartes* hearing. Constable Owen Porter was represented throughout the proceedings by the law firm of Nunes Scholefield Deleon & Co., with Miss Tavia Dunn, one of the defendants in the matter before me, being counsel with principal conduct. At the i*nterpartes* hearing, after Miss Dunn told the court that her client was willing to give an undertaking to

the court that he would not sell his property pending the determination of the proceedings, the court ordered that he put this undertaking in writing. The claimant exhibited a copy of the written undertaking dated November 16, 2009, and filed on December 9, 2009.

[6] On December 7, 2012, D. Fraser J (as he then was) awarded the claimant damages in the amounts of J$20,722,329.42 (inclusive of interest to that date), and US$ 5,720.00. Thereafter, the claimant said that his attorneys-at-law filed several applications for the sale of Constable Owen Porter's Portmore property. The filing dates of these applications are March 14, 2011, October 22, 2012, November 15, 2012, January 23, 2013, June 3, 2016, and September 11, 2018. According to the claimant, on each occasion that these applications came on for hearing, they were resisted by Miss Dunn.

[7] On April 3, 2019, the claimant's attorneys-at-law received letter dated April 3, 2019, from the defendants under the hand of Miss Dunn. In that letter, reference was made to their client's undertaking, and an indication was given that he was desirous of selling his property. The letter also stated that the defendants undertook to pay over the net proceeds of sale; to make an application to the Supreme Court for their client to be released from his undertaking; and to serve that application upon receipt of a hearing date. This was followed by another letter from the defendants, written by Miss Dunn and dated October 23, 2019, in which his attorneys-at-law were asked for their banking details so that the proceeds of sale of Owen Porter's property could be transferred to them. According to the claimant, it was by this letter that the defendants intimated that their client's property had been sold.

[8] By letter dated November 15, 2019, the claimant's attorneys-at-law wrote to the defendants, observing that searches had revealed that Owen Porter's property was sold in breach of the undertaking he gave to the court, which undertaking, the letter said, was in force in August 2019 when the property was sold. The claimant

exhibited a copy of this letter as well as a copy of the title search results. Miss Dunn responded in a letter dated November 25, 2019, alleging that the undertaking was interim in nature and had merged into the judgment. His attorneys-at-law in a reply dated December 2, 2019, said that the undertaking had no temporal nature; was an unqualified unconditional undertaking not to sell the property; and there was no prior discussion that the undertaking would be discharged upon judgment being delivered. Besides, the letter continued, such an undertaking would have defeated its purpose which was to secure the enforcement of judgment which was expected to take a very long time. It was also stated that the defendants were complicit in their client's breach of his undertaking.

[9] According to the claimant, the defendants did not respond to his attorneys-at-law's letter of December 2, 2019. After a further letter dated December 10, 2019, which enquired of the defendants why the funds they undertook to remit in theirs of April 3, 2019, were not forthcoming, the defendants explained their reasons for failing to forward the funds, in a letter of the same date. This letter, which was exhibited by the claimant was written by Miss Dunn, and in it she explains that the failure to remit the funds was because she was out of office on account of ill health and had not seen the letter dated December 2, 2019, from the claimant's attorneys-at-law, until after she returned to office. She advised that instructions were given to the defendants' financial institution to remit the sum of $5,629,611.10, inclusive of interest, to the claimant's attorneys-at-law. It is the claimant's further evidence, that by letters dated January 21, 2021, and March 25, 2021, the defendants sent the sum of $60,000.00 and $20,000.00 respectively, on account of the judgment to his attorneys-at-law.

The defendants' affidavit in response to the claim

[10] The defendants' response to the claim is in an Affidavit of Tavia Dunn filed on July 19, 2021. Miss Dunn says that at all material times she was the attorney-at-law and partner in the firm of Nunes Scholefield Deleon & Co., with conduct of **Claim No 2009 HCV 04301 Akeem Morgan v Owen Porter.** On October 20, 2009, the

court granted an *exparte* freezing order for a 28-day period. At the *interpartes* hearing, on her client's instructions she informed the court that he was willing to give an undertaking not to sell his property at Portmore pending the determination of the proceedings. According to her, the undertaking was prepared by the claimant's attorneys-at-law and signed by her client and the claimant's next friend.

[11] Miss Dunn goes on to say that on October 22, 2012, Nunes Scholefield Deleon & Co. were served with an Affidavit in Support of Application for Court Order for Sale of Land filed on March 14, 2011, and Notice of Application for Order for Sale of Land filed on October 22, 2012. The hearing date for this Notice of Application was purported to be November 12, 2012, but the application was not heard on that date or any other date. The filing of the Affidavit in Support of Application for Court Order on March 14, 2011 had preceded the Assessment of Damages which was held on May 18, 2011, as well as the entry of final judgment which was on December 7, 2012. On November 15, 2012, Nunes Scholefield Deleon & Co. were served with another Notice of Application for Court Order for Sale of Land and Affidavits in support, filed on November 15, 2012. The scheduled hearing date for this application was November 27, 2012. After three adjournments, the application ultimately came on for hearing on December 7, 2012. Miss Dunn said that at the hearing she opposed the application as the date of filing, predated the entry of final judgment, therefore, at filing, there was no judgment to enforce.

[12] The claimant refiled the Notice of Application for Order for Sale of Land on January 23, 2013, and this refiled application came on for hearing on March 8 and 13, 2013 and on April 5, 2013. The application was refused by D Fraser J (as he then was). At an Oral Examination of her client held on June 29, 2016, the claimant's attorneys-at-law indicated that the Claimant would be renewing his application for the sale of land. Nunes Scholefield Deleon & Co. was not served with the Notice of Application for Court Order for Sale of Land filed on June 3, 2016, and, according to Miss Dunn, neither she nor anyone from the firm attended the hearing of that application. On September 11, 2018, the claimant filed a Notice of Application for

Sale of Land and Affidavit in Support as well as an Affidavit of Urgency. On October 5, 2018, Nunes Scholefield Deleon & Co. were served with an Affidavit in Support of Application for Sale of Land with a valuation report prepared by D.C. Tavares & Finson Reality Limited dated October 1, 2018, exhibited to it. That report stated that the value of her client's property was $8,700,000.00.

[13] The September 11, 2018, Notice of Application for Court Order for Sale of Land came on for hearing on October 10, 2018, and was adjourned to February 8, 2019. On February 8, 2019, it was further adjourned to March 13, 2019, and on March 13, 2019, it was adjourned for a date to be fixed by the Registrar. According to Miss Dunn, Nunes Scholefield Deleon & Co., were not served with either a Notice of Adjourned Hearing indicating a new hearing date for this application, or with a Notice to relist it.

[14] Miss Dunn refers to the claimant's affidavit in which he states that Owen Porter's undertaking to the court was pending the determination of the proceedings. She says that it is her belief that subject to enforcement proceedings, the proceedings were determined when final judgment was entered on December 7, 2012. She further says that at an oral examination of her client before then Master Betram Linton, counsel for the claimant asked her client if he would be willing to give an undertaking in relation to his property to which he answered that he would be willing to give an undertaking not to make any financial changes to his circumstances until further order of the court. However, no such undertaking was given to the court.

[15] Her client's undertaking given on November 11, 2009, was to the court and not to the claimant and therefore the alleged breach of the undertaking, if any, or the allegation that the defendants were complicit in any such breach, are not actionable by the claimant as a cause of action against all or any of the defendants. The claimant's allegations are tantamount to an allegation of fraud, which much be supported by particulars and such a claim ought not to be commenced by fixed date claim form. Accordingly, she believes that there is no cause of action being

asserted by the claimant, and therefore the action is not maintainable. She further says that her client's property was sold for $13,000,000.00 which is more than the amount of D.C. Tavares & Finson Realty Limited's valuation and that the net proceeds of sale of $5,600,477.33, was remitted to the claimant's attorneys-at law According to Miss Dunn, the claimant has not set out the damages he claims to have lost due to the defendants' alleged complicity in the breach of undertaking.

The preliminary objection

[16] The defendants' Notice of Preliminary Objection was filed on September 20, 2021. They seek the striking out of the claim on the following grounds: -

1. The fixed date claim form does not disclose a cause of action or any reasonable grounds for bringing the claim and/or is a claim for relief only.
2. The action, in so far as it purports to be a claim, is not one which is permitted by rule 8.1(4) of the CPR 2002, as amended.
3. The use of the fixed date claim form in the circumstances of this case is for the purpose of effecting enforcement proceedings and is therefore an abuse of the process of the court in that it is being pursued against defendants who were not parties to the order being sought to be enforced.

The defendants' submissions

[17] King's Counsel Mr Charles Piper argued in his submissions on behalf of the defendants, that before the court can exercise its inherent supervisory jurisdiction over attorneys-at-law, it must be satisfied that the undertaking was given by the attorney-at-law not as an individual but in his or her professional capacity as an attorney-at-law. For this proposition he relied on an extract from **Halsbury's Laws of England Volume 66(2020).** He posited that the jurisdiction is discretionary and must be exercised only in clear cases. The decision in **Udall v Capri Lighting Ltd [1987] 3 All E.R. 262,** was cited and reliance placed on the seven factors which summarise the court's inherent jurisdiction to supervise attorneys-at-law, which

were adopted from the decision in **Myers v Elman [1939]4 All E R 484.** King's Counsel emphasised that the jurisdiction is compensatory and not punitive. He argued that Miss Dunn gave no undertaking to the court, and she was the only attorney-at-law who had conduct of the matter in which the undertaking was given. None of the defendants gave an undertaking. The undertaking was given by Owen Porter who was the defendant in **Claim No 2009 HCV04301 Akeem Morgan (by next friend Karry Ann Harrison) v Owen Porter.**

[18] When the undertaking was being given, argued Mr Piper, the claimant knew that it was pending the determination of **Claim No 2009 HCV04301 Akeem Morgan (by next friend Karry Ann Harrison) v Owen Porter.** Final judgment in that matter was on December 7, 2012, and it was entered in the Judgment Book on or after March 25, 2013. The claimant filed several applications for the sale of Owen Porter's land and in the affidavit in support of the application filed on September 11, 2018, the claimant relied on a valuation of the said property which gave it a market value of $8,700,000.00. King's Counsel then chronicled the correspondences between counsel for the claimant and Miss Dunn (to which I have earlier referred in this judgment) and pointed to the fact that the funds remitted to the claimant's counsel, as payment on account of the judgment debt, have not been returned by Owen Porter or to his attorneys-at-law. He submitted that there is no evidence that the defendants did anything to undermine Owen Porter's obligations in relation to the undertaking he gave to the court.

[19] According to Mr Piper, the claimant would have to demonstrate that each of the defendants knew of the undertaking and the steps being taken by Owen Porter to sell his property and accepted and agreed to the sale. He said that complicity involves a deliberate act to circumvent an undertaking and there is nothing in the record to indicate that Miss Dunn's actions were anything other than to assist her client in reducing his liability under the judgment debt. It was submitted that the undertaking was given prior to the entering of judgment, and judgment having been entered, it is part of the function of the court, to see to its execution. Several steps

were taken to execute the judgment by way of applications for an order for sale. The property was in fact sold for a sum which is greater that the best value obtained by the claimant in his efforts to execute the judgment. The disbursement of the net proceeds of sale of the property, was better than that which the claimant could have secured had the property been sold on his application for sale.

[20] In his written submissions, Mr Piper argued that there is no cause of action known to law as "being complicit in the breach of an undertaking" and for this reason the claim ought to be struck out. Furthermore, the use of a fixed date claim form in this case does not satisfy the requirements of CPR 8.1(4) and for this reason it should likewise be struck out. It was also argued that the way to enforce undertakings is by committal proceedings under CPR 53. In concluding, it was submitted that the claim ought to be dismissed with costs to the defendants, for the following reasons:-

a) None of the defendants gave the undertaking in question to the court and therefore the application to invoke the summary jurisdiction of the court ought to fail.
b) There is no cause of action known as "*being complicit in the breach of an undertaking"* and therefore the 1st declaration sought in the fixed date claim form is unfounded in fact and law. In any event, there is no evidence that the defendants were complicit in any such breach.
c) There is no evidence that the claimant suffered any loss. On the evidence the property was sold for a greater value than was indicated in the valuation report the claimant relied on in his attempts to have the property sold.
d) The claimant is improperly using this claim to obtain execution of a judgment.

The claimant's submissions

[21] Mr Reitzin, counsel for the claimant, urged me to dismiss the preliminary objection and to award his client costs. He challenged the preliminary objection on six bases. Firstly, that the filing of the Affidavit of Tavia Dunn amount to a waiver by the defendants of any right to object to the manner in which the claimant's claim was instituted. Secondly, the claimant need not possess a cause of action to seek a declaration. Thirdly, the claimant is invoking the inherent jurisdiction of the court over its officers and the claim discloses reasonable grounds for bringing it. Fourthly, the claim is not one involving a substantial dispute of fact and therefore CPR 8.1(4)(d) requires that a fixed date claim form be used. Fifthly, the claim is not for the enforcement of any judgment but rather for sanctions against the defendants and compensation for losses they contributed to. Sixthly, the defendant's submission that the claim having been previously determined between the parties, is an abuse of process, is self-evidently false.

[22] In relation to waiver, counsel argued that a party waives an objection when it takes some step which is only necessary or useful if the objection has been waived or if the party has never entertained the objection. He sought support for this proposition from the decisions of **Rein v Stein (1892) 66LT 469**, **Williams and Glyn's Bank PLC v Astro Dinamico Compania Naviera SA (1984) 1 W.L.R 438** and **DYC Fishing Limited v Perla Del Caribe Inc [2014] JMCA Civ 26**. Counsel further argued that steps taken with a view to defending a claim with the knowledge of an irregularity, amount to a waiver of an irregularity in the institution of proceedings, since the steps taken could only be useful on the basis that the proceedings were valid. For this latter submission, Mr Reitzin relied on the decisions of **Boyle v Sackar (1889) 39 ChD 249,** and **Fry v Moore (1889) 23 QBD 395 CA**. According to him, the existence of a waiver is not dependent upon the subjective intention of the person entitled to the right in question but is judged objectively. He cited **Abdel Hakim Belhaj & Anor v Director of Public Prosecutions & Anor [2018] EWHC 513** in support of this point**.** In filing the

Affidavit of Tavia Dunn, he said that the defendants have waived any rights they may otherwise have had to rely on their preliminary objection.

[23] On the question of the need for a cause of action, Mr Reitzin argued that where a claimant seeks declaratory relief, it is not necessary, to have a cause of action. He cited several authorities for his submission that declarations can be made pertaining to whether a proposed course of conduct will not be unlawful, and that the court's jurisdiction includes declaring whether conduct which has not yet taken place will amount to a breach of contract or of a law. In his view therefore, the claimant's contention that the claim does not disclose a cause of action is a "non-issue and is immaterial".

[24] A cornucopia of decided cases dealing with the court's inherent supervisory jurisdiction over its officers was cited. I thank counsel for his admirable industry but will only refer to some of those authorities in this judgment. Counsel began, in his written submissions, with the Australian decision **of D'Orta-Ekenaike v Victoria Legal Aid [2005]HCV12,** in which the court stated that the paramount duty of a barrister is to the court and thus a barrister can do nothing that will obstruct the administration of justice by a) deceiving the court, b) withholding information or documents which ought to be disclosed, c) abusing the court's process, d) wasting the court's time with prolix or irrelevant arguments and ; e) coaching clients or their witnesses. Counsel cited the decision of Sir Lancelot Shadwell VC in **Davies v Clough [1837] EngR 360** for the proposition that all courts may exercise an authority over their own officers as to the propriety of their behaviour. He also relied on the recent decision in **Harcus Sinclair LLP and another v Your Lawyers Limited [2021] UKSC 32,** where it was said that the court's supervisory jurisdiction to enforce solicitors' undertakings is an aspect of its inherent jurisdiction over solicitors as officers of the court. It was submitted that this supervisory jurisdiction "exists for the maintenance of officers' character and integrity" and that "the court may visit penalties on officers whose conduct tends to defeat justice in the cause in which they are engaged".

[25] Mr Reitzin characterised as "incorrect", the defendants' submission that the court's inherent jurisdiction is limited to cases where attorneys-at-law give undertakings to the court. He said any conduct on the part of an attorney-at-law which is unbecoming of an attorney-at-law, can lead to the court invoking its supervisory jurisdiction. To reinforce his point, he cited the Privy Council decision of **Harley v McDonald [2001] UKPC 18**, and the House of Lords' decision in **Myers v Elman [1940]AC 282.** As to the liability of the defendants other than Miss Dunn, Mr Reitzin submitted that all of them as partners of the law firm are jointly and severally liable by virtue of the legal status of a partnership and there is no question that the firm acted on the sale of Owen Porter's property. Counsel vehemently argued that Miss Dunn did not act alone and that this case "gets very close to a conspiracy between the partners and their client Mr Porter, to pervert the course of justice." The undertaking was not discharged by the judgment, the reasonable inference is that defendants were aware of this as several years after the judgment, they indicated that they would be seeking to have the undertaking discharged by the court, but they did not do so.

[26] On the defendants' argument that the use of a fixed date claim form to commence these proceedings was improper, Mr Reitzin said that this is not a case of substantial disputed facts and therefore the type of claim form used is permissible under the CPR. As to the argument that the claimant is seeking relief by way of the enforcement of a judgment in a prior claim, Mr Reitzin countered that the compensation here being sought is not enforcement, but rather, it concerns the defendants' complicity in the breach of an undertaking given to the court. This claim has not previously been determined, and therefore it is self-evident that it is not an abuse of process.

Analysis and discussion

[27] In determining the preliminary objection, I must decide the following five issues: -

a) By filing the Affidavit of Tavia Dunn, have the defendants waived their right to make the preliminary objection.
b) Is the court's supervisory jurisdiction over its officers limited to undertakings given by them and is the jurisdiction compensatory rather than punitive.
c) Is there a cause of action disclosed by the claim or are there reasonable grounds to invoke the court's supervisory jurisdiction.
d) Is the use of the fixed date claim form appropriate on the facts of this case.
e) Is the claim seeking to enforce a judgment in a previously decided matter and therefore an abuse of process.

By filing the Affidavit of Tavia Dunn, have the defendants waived their right to make the preliminary objection.

[28] I have carefully reviewed the authorities relied on by Mr Reitzin in support of his argument that the Affidavit of Tavia Dunn amounts to a waiver of the defendants' right to make the preliminary objection. I find that these authorities are in the main, cases where the court had to consider whether a defendant had submitted to the jurisdiction of a foreign court by virtue of steps taken in proceedings and whether that submission amounted to a waiver of any challenge to the court's jurisdiction. In **Williams v Glyn's Bank PLC** (one of the authorities relied on by counsel), the question was whether the court's power to stay proceedings was wide enough to include the power to grant a stay in proceedings in which its jurisdiction is being challenged. In that case, Glyn's Bank PLC lent money to a borrower secured by guarantees given by companies owned and operated in Greece. The borrower defaulted on the loan and the bank sought to enforce the security by way of proceedings commenced in England. The defendants challenged the validity of the guarantees and began their own proceedings in Greece. They also sought to set aside the proceedings in England on the ground, among other things, that the English court had no jurisdiction to hear the claim. A stay of the proceedings in

England, pending the determination of the proceedings in Greece, was also sought. The House of Lords found that the court's discretion was wide enough to stay proceedings in an action in which its own jurisdiction was being challenged and that the application for a stay did not constitute a waiver of the defendant's objection to the court's jurisdiction.

[29] In coming to its decision, the House of Lords had regard to the often-quoted dictum of Cave J in **Rein v Stein**. In that case, the court considered whether a writ of summons issued outside the jurisdiction should stand, in circumstances where the defendants had entered a conditional appearance and then sought to challenge the jurisdiction of the English court to issue the writ. The court had to grapple with whether the entering of the conditional appearance amounted to submitting to the court's jurisdiction and thus a waiver of the defendant's jurisdictional challenge. In deciding that it did not amount to a waiver, Cave J notably said that: -

> "In order to establish a waiver, you must show that the party alleged to have waived his objection has taken some step which is only necessary or only useful if the objection has been actually waived or if the objection has never been entertained at all".

[30] Our court of appeal's decision in **DYC Fishing Ltd v Perla Del Caribe**, was one of the cases commended to me by Mr Reitzin. This was an appeal from the decision of a trial judge who had enforced a foreign judgment against a defendant. One of the issues on appeal was whether the trial judge was correct in finding that there had been voluntary submission by the defendant to the jurisdiction of the foreign court by the filing of affirmative defences in the foreign claim. In addressing the question whether the steps taken by the defendant to contest the merits of the claim amounted to a submission to the foreign jurisdiction and therefore a waiver of a jurisdictional challenge, Phillips JA, writing for the court, quoted from the decision of Scott J in **Adams v Cape Industries** in which he had cited the House of Lords decision in **Williams v Glyn's Bank PLC** and its approval of the above-

mentioned dictum of Cave J in **Rein v Stein.** On this issue, the court ultimately found that the trial judge had not erred in coming to his decision.

[31] Unlike the cases relied on by Mr Reitzin, the defendants in the instant case are not disputing the court's jurisdiction to try the claim. The defendants' objection is that there are no reasonable grounds for bringing the claim; there is no cause of action known as being complicit in the breach of an undertaking; the fixed date claim form is inappropriate for use in the claim; and the claim is being used improperly to enforce a judgment in a previously decided case in which the defendants were not parties.

[32] An examination of the Affidavit of Tavia Dunn shows that among the evidence given in that affidavit , is evidence in relation to : a) the basis on which the defendants contend that their client did not breach his undertaking to the court when he sold his property and therefore they have not been complicit in any alleged breach; b) the defendants' contention that the sale of their client's property did not result in any loss to the claimant ; c) the defendants' view that there is no cause of action known as being complicit in the breach of an undertaking; and d) their contention that the use of the fixed date claim form is improper . I consequently cannot accept that the affidavit is: "only necessary or only useful if the objection has been actually waived or if the objection has never been entertained at all" (borrowing from the language of Cave J in **Rein v Stein**). It is plain, that contained in the affidavit is evidence to support the objection. I therefore find that on any objective view, the requirements of a waiver, as articulated by Cave J in **Rein v Stein** have not been met. I accordingly reject the claimant's submission that the filing by the defendants of the Affidavit of Tavia Dunn, amounts to a waiver of their right to make the preliminary objection.

[33] I likewise do not accept Mr Reitzin's submission that the filing of the affidavit is a step taken with a view to defending a claim with the knowledge of an irregularity, and therefore amounts to waiving the irregularity. Counsel did not expand on this

point in either his written or oral submissions, but I assume that the irregularity he refers to relates to the defendants' allegation that the fixed date claim form is inappropriate for use in this case, as the claim does not fall within the bounds of CPR 8.1(4). For the reasons which will follow in this judgment, I do not find that there was any irregularity in the use of the fixed date claim form which could not have been cured by an appropriate case management order after the filing of the Affidavit of Tavia Dunn in answer to the claim.

Is the court's supervisory jurisdiction over its officers limited to undertakings given by them and is the jurisdiction compensatory rather than punitive.

[34] An examination of the nature of the court's supervisory jurisdiction over its officers is essential in dealing with the question whether the jurisdiction is limited to undertakings and whether it is compensatory and not punitive. The authorities cited by counsel, indicate that the jurisdiction is a summary one which has its genesis in the common law. They also demonstrate that at the core of the jurisdiction is the simple but significantly important principle, that officers of the court have a duty to the court, and that the court has the jurisdiction to punish for a breach of that duty. Lord Hope of Craighead, writing for the Board in **Harley v McDonald (New Zealand) [2001] UKPC 18**, said that in exercising the jurisdiction, the court's only concern is to serve the public interest in the administration of justice.

[35] Commenting on the principles on which the court's jurisdiction is to be exercised, Lord Craighead in **Harley v McDonald (New Zealand),** summarised the jurisdiction, primarily in relation to costs, at paragraph 49: -

> "A costs order against one of its officers is a sanction imposed by the court. The inherent jurisdiction enables the court to design its sanction for breach of duty in a way that will enable it to provide compensation for the disadvantaged litigant. But a costs order is also punitive. Although it may be expressed in terms which are compensatory, its purpose is to punish the offending practitioner for

> a failure to fulfil his duty to the court…The jurisdiction is compensatory in that the court directs its attention to costs that would not have been incurred but for the failure of the duty. It is punitive in that the order is directed against the practitioner personally, not the party to the litigation who would otherwise have had to pay costs.

[36] In **Myers v Elman [1940]AC 282,** Lord Wright at page 319, said in relation to the jurisdiction that: -

> **"**The underlying principle is that the court has a right and duty to supervise the conduct of its solicitors, and to visit with penalties any conduct of a solicitor which is of a nature as to tend to defeat justice in the cause in which he is engaged professionally …The matter complained of need not be criminal. It need not involve peculation or dishonesty. A mere mistake or error of judgment is not generally sufficient, but a gross neglect or inaccuracy in a matter which it is a solicitor's duty to ascertain with accuracy may suffice…It is impossible to enumerate the various contingencies which may call into operation the exercise of the jurisdiction. It need not involve personal obliquity. The term professional misconduct has often been used to describe the ground on which the court acts. It would perhaps be more accurate to describe it as conduct which involves a failure on the part of a solicitor to fulfil his duty to the court and to realize his duty to aid in promoting in his own sphere the cause of justice. This summary procedure may often be invoked to save the expense of an action…The jurisdiction is not merely punitive but compensatory. The order is for payment of costs thrown away or lost because of the conduct complained of. It is frequently, as in this case, exercised in order to compensate the opposite party in the action".

[37] The authorities leave me in no doubt, and I agree with Mr Reitzin, that the jurisdiction is not limited to undertakings given to the court by attorneys-at-law. Any

conduct of an attorney-at-law that defeats the course of justice in the matter in which he is engaged, may invoke the court's supervisory jurisdiction. But the conduct must generally be more than a mere mistake or an error of judgment. As to whether its compensatory rather than punitive, I cannot agree with King's Counsel Mr Piper, that the jurisdiction is compensatory and not punitive. The authorities in my view, plainly show that it is both. As Lord Craighead put it in **Harley v McDonald**, the jurisdiction is punitive because it targets the attorney-at-law personally, and it is compensatory as it seeks to compensate for losses caused by the breach of duty.

Is there a cause of action disclosed by the claim or are there reasonable grounds for invoking the court's supervisory jurisdiction.

[38] The first remedy sought by the claimant in the fixed date claim form is a declaration that the defendants have been complicit in their client's breach of his undertaking to the court. He thereafter seeks orders pursuant to the court's supervisory jurisdiction. Declarations are declaratory of rights. There is therefore no need for a claimant seeking a declaration to have a cause of action. Lord Diplock in **Gouriet v The Union of Post Office Workers and Others [1977] 3AER** 70 at 100 said as much. This is how he put it:

> "The early controversies as to whether a party applying for declaratory relief must have a subsisting cause of action or right to some other relief as well can now be forgotten. It is clearly established that he need not. Relief in the form of a declaration of rights is generally superfluous for a plaintiff who has a subsisting cause of action. It is when an infringement of the plaintiff's rights in the future is threatened or when unaccompanied by threats there is a dispute between parties as to what their respective rights will be if something happens in the future that the jurisdiction to make declarations of right can be most usefully invoked".

So, while I accept that there is no cause of action known to law as "being complicit in the breach of an undertaking", I will not strike out the claim on this basis because save for the reliance on the court's jurisdiction over its officers, the primary remedy sought is declaratory relief. I now must turn to consider whether the claim discloses reasonable grounds for invoking the court's supervisory jurisdiction.

[39] The defendants' alleged conduct which the claimant finds egregious is what he describes as their involvement in the breach of the undertaking given to the court by their client that he would not sell his property pending the determination of the claim. One of the issues raised in arguments is whether the undertaking was "pending the determination of the proceedings". Mr Reitzin said that it was not. But the short answer to this can be found in the affidavit of the claimant himself who in recounting what took place in court when the undertaking was given, said at paragraph 18 that: -

> "**Tavia Dunn then informed His Lordship that her client was willing (sic) give and undertaking to the court, inter alia, not to sell his property at Portmore pending the determining of the proceedings and that was done although she herself expressed reservations about it because, as she stated, her client could be imprisoned for breach of an undertaking**. His Lordship directed that the undertaking also be given in writing and that was subsequently done." [Emphasis added]

I accept this evidence.

[40] Both sides agree that Owen Porter's Portmore property was sold after D. Fraser J (as he then was) delivered his judgment. To my mind, it is settled law, that civil proceedings are determined when judgment is given. Miss Dunn in her letter dated November 25, 2019, justified her client selling his property on the basis that the undertaking had merged with the judgment. The doctrine of merger treats a cause of action as extinguished once judgment has been given on it. In essence, merger treats the judgment as superseding the cause of action. **Zavareo PLC v Tan Sri**

Syed Mohd Yusof Bin Tun Syed Nasir [2021] EWCA Civ 1217 is a very recent decision from the court of appeal in England on the doctrine. The issue on appeal in that case was whether the doctrine applies to a judgment for declaratory relief. In a judgment in which several authorities on the doctrine were discussed, Lord Justice David Richards quoted at paragraph 24, the following dictum of Arden LJ in **Clarke v In Focus Asset Management and Tax Solutions Ltd [2014] EWCA Civ 118: -**

> **"**Merger explains what happens to a cause of action when a court or tribunal gives judgment. If a court or a tribunal give judgment on a cause of action it is extinguished. **The claimant, if successful, is then able to enforce the judgment, but only the judgment". [Emphasis added]**

Lord Justice Richards then went on at paragraph 31 that: -

> **"**What does however clearly emerge from the authorities is that merger applies where an obligation under a cause of action is embodied in and replaced by a final order of the court."

[41] Applying the doctrine to the facts of this case, it is my view that the claimant's cause of action against Owen Porter in **Claim No 2009 HCV 04301 Akeem Morgan (bnf Kerry Ann Harrison) v Owen Porter**, was extinguished by the judgment of D. Fraser J and that Owen Porter's obligation to the court on the undertaking was embodied in and replaced by the final judgment. This means that the claimant is now only able to enforce the judgment and not the undertaking, which was an obligation under the cause of action. So even though Miss Dunn spoke in her correspondence to Mr Reitzin, of seeking to have the undertaking released by the court, the undertaking had already been replaced by the final judgment of D. Fraser J. Any subsequent approach to the court, would, in my view, be to formally acknowledge this fact.

[42] Even if I am wrong on the effect of the judgment on the undertaking, there is nothing in the claimant's affidavit in support of his fixed date claim form which discloses that Miss Dunn or any of the defendants had engaged in conduct that was in breach of their duty to the court. I see nothing in that affidavit evidence to suggest that Miss Dunn or any of the defendants was grossly neglectful, grossly inaccurate when they had a duty to ascertain with accuracy, or had conducted themselves in a manner tending to defeat justice in **Claim No 2009HCV04301 Akeem Morgan (bnf Kerry Ann Harrison) v Owen Porter.** As King's Counsel said, and I agree, the evidence merely discloses Miss Dunn's efforts to reduce her client's liability under the judgment debt. If she had been wrong in her views on the effect of the judgment on the undertaking, this would have been nothing more than a mistake or error on her part. I see absolutely no misconduct on her part or on the part of her fellow partners. Furthermore, the claimant's affidavit does not disclose that he suffered any loss because of the sale by Owen Porter of his Portmore property. The sale price was more than the amount for which the property had been valued when the claimant was seeking to have it sold by orders of the court. The sale proceeds were remitted to his counsel. In the circumstances I find that there are no reasonable grounds for invoking the courts supervisory jurisdiction. I therefore find that there are no reasonable grounds for bringing the claim and therefore it ought to be struck out on this basis.

Is the use of the fixed date claim form appropriate on the facts of this case.

[43] Beginning a claim by fixed date claim form rather than a claim form where there are substantial disputed facts does not ordinarily result in the fixed date claim form being struck out on the basis that the use of this originating process is inappropriate or an irregularity. The proper course for a court to take in its management of the claim at the first hearing of the fixed date claim form, after an affidavit in answer to the claim is filed which reveals that there are substantial disputed facts, is to treat the fixed date claim form as if it had begun by claim form and to order that particulars of claim and a defence be filed. Save for a reference to CPR 8.14, the defendants have not submitted any authority to persuade me that on the facts of

this case, the fixed date claim form should be struck out because of its inappropriate use.

Is the claim seeking to enforce a judgement and is it an abuse of process because the issues have already been decided in a previous case.

[44] My short comment on this issue is that I do not accept that the claim is seeking to enforce the judgment of D. Fraser J. As my foregoing analysis makes clear, this is a claim brought by the claimant under the court's inherent jurisdiction to supervise its officers.

Conclusion

[45] Having regard to the foregoing, I make the following orders: -

a) The defendants' preliminary objection that the fixed date claim form discloses no reasonable grounds for bringing the claim is sustained.

b) The fixed date claim form is struck out on the basis that it does not disclose any reasonable grounds for bringing the claim.

c) Within 14 days of today's date, the parties are to file and exchange written submissions in relation to costs.