[2018] JMSC Civ. 56

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2016 HCV 00725

BETWEEN	**NEIL SHAW**	**CLAIMANT/RESPONDENT**
AND	**JAMAICA NORTH COAST LIMITED**	**DEFENDANT**

IN CHAMBERS

Mr. Jerome Spencer, Ms. Vanessa Young instructed by Patterson, Mair, Hamilton for the Applicant.

Mrs. Marjorie Shaw instructed by Brown and Shaw for the Claimant/Respondent.

Mr. Stuart Stimpson, Ms. Kimberly Williams instructed by Hart, Muirhead and Fatta for the Defendant.

HEARD: July 19, 2017 and November 23, 2017 and May 4, 2018

Addition and Substitution of Parties – Whether party by virtue of his registered interest in a property as a mortgagee has a right to be added as party to a Claim – Rules 19.3 and 19.4 of the Civil Procedure Rules considered – Significance of relevant Limitation period in the context of Rule 19.4 and the Limitation Act – Consolidation

PALMER HAMILTON, J (AG.)

[1] The matter concerns an application by **Pelican Securities Limited** filed on November 28th, 2016 to be added as a party to the Claim.

[2] On June 30 1965, Jamaica North Coast Limited, hereinafter referred to as JNC Ltd, was endorsed as the Registered Proprietor of those parcels of land registered at Volume 1022 Folio 175 (hereinafter referred to as Property #1) and Volume 1022 Folio 176 of the Register Book of Titles (hereinafter referred to as Property #2).

[3] The substantive Caim was initiated by Mr. Neil Shaw, by way of a Fixed Date Claim Form on or around February 23rd, 2016 seeking a declaration that he has adversely possessed part of all those parcels of land registered at Volume 1022 Folio 175 and Volume 1022 Folio 176 and by so doing extinguished JNC Ltd. title to the land.

[4] Mr. Shaw alleges that his father also lived in undisturbed possession of the land before his death and he has been so living for over twelve (12) years. On July 24th, 1998, Mr. Shaw's father, Valentine Shaw, commenced proceedings by way of Suit No. E 326/96 against the said JNC Ltd to be declared the registered proprietor of both properties by way of adverse possession. Mr. Valentine Shaw alleged that he had disposed of JNC Ltd. from as far back as1969.

[5] The proceedings were never determined and it is alleged that JNC Ltd did not challenge the Claim. Notwithstanding this, an interim order was granted on July 30, 1996, restraining JNC Ltd from interfering with Mr. Valentine Shaw's quiet enjoyment of property # 1 and property # 2. Another interim order was granted on February 4th, 1997 restraining the Registrar of Titles from registering mortgage numbered 959821 to the Applicant, Pelican Securities Limited against property # 1. The interim order was only in place for 7 days and subsequent to this, the said mortgage was registered to the Applicant against property # 1 on February 26th, 1997.

[6] The Applicant therefore had a registered interest in property # 1 as up to the date of the proceedings, JNC Ltd has not fully paid and discharged said mortgage.
The mortgage instrument dated October 17th, 1996 outlines at Clauses 3(l) and (p) that the Applicant has the powers to sell, foreclose and enter into possession of the mortgaged property. In essence, the Applicant is seeking to be joined as a defendant in the claim.

ISSUES

[7] The primary issue before the Court is:
Whether the Applicant, by virtue of his registered interest in property # 1 as a mortgagee of JNC Ltd, has a right to be added as a party to the Claim.

THE APPLICANT'S CASE

[8] Pelican Securities Limited's application is supported by an uncontested affidavit.

[9] The Applicant contends that JNC Ltd. owes approximately US $173,000.00 arising from the loan made in October 1996 and the interest of 12% per annum that has accrued since then.

[10] The Applicant grounds its application in Rule 19.3(1) and (2) of the Civil Procedure Rules, which empowers the Court with or without an application to add a party to a Claim.

[11] The Applicant contends that by virtue of Section 109 of the Registration of Titles Act and Clause 3(l) and (p) of the Instrument of Mortgage, it has powers to sell, foreclose and enter into possession of the mortgaged property. The Applicant also contends that by virtue of **Dagor Limited v MSB Limited and National Commercial Bank Jamaica Limited** [2015] JMSC Civ. 242 , the Claimant should have named it as a defendant from the outset.

[12] The Applicant maintains that the issue of whether Mr. Shaw's claim by way of adverse possession can defeat the rights conferred on Pelican under the mortgage cannot be properly ventilated without it being added as a party. The Applicant noted that the cases of **Fullwood v Curchar** and **Mazelie v Prescott**, relied on by the Defendant, are of no assistance to the Court as neither dealt with the issue of adding parties to the claim.

[13] The Applicant contends that the evidence before the Court is that the last payment made by JNC Ltd was in 2012 and as such its rights, by virtue of the Limitation of Actions Act, would not be extinguished until 2024. The Applicant also maintains that no letters of administration were granted to Mr. Neil Shaw in respect to his father's estate and as such he cannot claim as administrator of the estate of Valentine Shaw.

[14] The Applicant submits that by virtue of Batts, J's pronouncements in **Dagor Ltd**, the mortgagee would still have remedies available to him, even if it is subsequently found that its rights have been extinguished by virtue of the Limitation of Actions Act. The

Applicant also contends that JNC Ltd has not objected to the application and as such would suffer no prejudice from the joinder.

THE RESPONDENT'S CASE

[15] The gravamen of the Respondent's case is that the Claim for possessory title preempted the execution of the Mortgage Deed by JNC Ltd. The Respondent maintains that almost 20 years after the filing of his father's claim, Mr. Neil Shaw filed the Claim seeking in his own right, or as the Administrator of the Estate of Valentine Shaw, a declaration that he had acquired possessory title with respect to both properties. The Defendant also asserts that the affidavit evidence of Mr. Shaw has been unchallenged and that JNC Ltd has not defended the Claim.

[16] The Respondent maintains that by virtue of Rule 19.2(3) of the Civil Procedure Rules, adding the applicant to the Claim is neither desirable to resolve the matters in dispute nor is there an issue involving the Applicant that is materially connected to the matters in dispute. The Defendant maintains that the interest of the Applicant is confined solely to Property #1 and that the issue before the Court is whether or not Mr. Shaw and/or his late father dispossessed JNC Ltd. or its legal interest in Property #1 and Property #2. The addition of the applicant cannot assist the Court or advance the Court's determination of the substantive issue.

[17] The Respondent relied on Rule 19.4 of the CPR which state that the Court may add or substitute a party after the end of the relevant limitation period if:

(i) The relevant limitation period was current when the proceedings were started and;

(ii) The addition of the party is necessary.

[18] The Defendant maintains that in the case of both claims by Valentine Shaw and Neil Shaw, the limitation period had expired and JNC Ltd.'s title had been extinguished. Pelican, by extension, has no interest in the matter at hand. Section 7 of the Limitation of Actions Act indicates that any person claiming under any mortgage has a period of

twelve (12) years next after the last payment of any part of the principal money or interest secured by such mortgage.

[19] The thrust of the Respondent's application is that JNC Ltd's title to the property had been extinguished before the registration of the mortgage, and as such, was unable to pass good title to the Applicant. The relevant limitation period had passed prior to the endorsement of the mortgage. The Defendant asserts that the case can be distinguished from the **Dagor** case as **Dagor** concerned the passage of time subsequent to the registration of the mortgage which was in issue while in the instant case the limitation period passed prior to the registration of the mortgage.

[20] The Respondent submits that even if the consideration of the Limitation Act was disregarded, as between the parties, the Limitation period within which the Applicant could enforce the terms of the Mortgage Deed had expired in or about February 2009. The Defendant also asserts that the right to exercise power of sale runs concurrent with the right to file a claim, and given that the Applicant's right and title have been extinguished, the Power of Sale cannot survive.

THE LAW AND ANALYSIS

RULE 19.4

[21] Rules 19.4(1) and (2) of the CPR, which the Respondent placed much reliance on, outlines that a party can only be added or substituted after the relevant limitation period, if the Court is satisfied that-

(a) The relevant limitation period was current when the proceedings started; and

(b) The addition or substitution is necessary

Rule 19.4(3) states that:

> The addition or substitution of a party is necessary only if the court is satisfied that-
>
> (a) The new party is to be substituted for a party who was named in the claim form in mistake for the new party
>
> (b) The interest or liability of the former party has passed to the new party; or

(c) The claim cannot properly be carried on by or against an existing party unless the new party is added or substituted as Claimant or Defendant.

[22] In **Caribbean Development Consultants v Gibson** (May 25, 2004) Supreme Court of Jamaica no. CL 323 of 1996 (unreported), Sykes J opined that:

> *"I am convinced therefore that paragraphs (a), (b) and (c) of Rule 19.4 (3) are to be read disjunctively. A person may satisfy all three or any one."*

The Respondent asserts that the factors outlined in Rule 19.4 should be considered in determining whether the Applicant should be added as a party.

Upon reading the authorities, I am not convinced that Rules 19.4(1) and (2) are applicable to the instant case and furthermore, the issue turns squarely on the proper interpretation of Rule 19.4(3) and its proper application to the facts of the instant case.

[23] In the case of **Administrator General v Metropolitan Parks and Market Ltd** Claim No. A 100 of 2000, delivered March 31, 2009, the claim arose out of a motor vehicle accident that occurred in September 1997. The deceased was a passenger in a vehicle owned by the first defendant and driven by the second defendant. The first defendant filed its defense, denying that the second defendant was its servant and or agent and that the second defendant was instead an agent of one Carlton Mais who was contracted by the first defendant for the provision of sanitary and garbage disposal services. The Claimant did nothing with this information and waited until the Case management Conference, when the limitation period had passed, to apply for the third defendant, Carlton Mais to be added as a party to the Claim. The application was granted and the applicant, Carlton Mais, by way of notice of application for court orders, sought that the previous order that he be added as a party, be set aside. He asserted that that he was improperly added as a defendant after the expiration of the limitation period.

[24] Straw J noted that the central issue for determination was whether the addition of Mr. Mais was necessary for the claim to be properly carried on against the existing parties.

[25] Straw J cited the English case of **Martin v Kaisary** [2005] EWCA Civ 594 where the decision of the Court was based on the application of the facts of the English CPR rule 19.5(2) and (3) (b), which are of equivalent provisions in relation to Rule 19.4(3), she stated:

> *"In relation to these provisions, Smiths LJ stated as follows (page 5): They allow a party to be brought into an action but deprive him of an accrued limitation defence. The potential for injustice must be borne in mind when interpreting the rule itself and when exercising the discretion to allow addition or substitution."*

Straw J noted that the Court had to consider whether there was any good reason that the applicant (Mr. Mais) should continue to be deprived of his limitation defence.

[26] The Court, in determining the issue of whether joining the third defendant was necessary, cited Blackstone's Civil Practice 2008, (edited by Stuart Sime & Derek French), where the authors discussed CPR r 19.5 (3) (b) at paragraph 14.10. The authors noted that the operation of the equivalent provision in the old rules CRSC, ord. 15 r 6(6) and its operation was limited to five categories of cases in which, for technical reasons, claims were liable to be defeated for want of the correct parties. These are listed as follows:

1. The claim concerned property vested in the new party at law or in equity and the claimant had an equitable interest in the property.
2. The claim was vested in the claimant and new party jointly but not severally.
3. The new party was the Attorney General and the proceedings should have been brought as realtor proceedings in his name.
4. The new party was a company in which the claimant was a shareholder whose claim was liable to be defeated by the rule in **Foss v Harbottle** (1843) 2 Hare 461.
5. The claim should have been brought against the new party and the existing Defendant jointly.

[27] Straw J noted that in **Kaisary** (supra), Brooke L J discussed the rationale behind these categories. He said they were established by the 21st report of the Law Reform Committee (Final Report on Limitation of Actions) (1977) (mnd 6923). He states as follows (para. 26, pg. 7):

> *"The first four of these examples were cases where the plaintiff's mistake relates to his position as plaintiff. It was only in the last situation that the committee felt that the rules ought to permit the joinder of a new person as a defendant. It felt that in the case of joint obligations, a plaintiff who started proceedings against some, though not all, of the persons jointly liable had in fact enabled those on the 'other side' to know that the proceedings were aimed at them. "*

[28] Straw J explained that the power to make an order under rule 19.5 (3)(b) of the CPR was found in Section 35 (4), (5)(b) and (6) of the UK Limitation Act of 1980 and flowed out of the Law Reform Committee (Final Report on Limitation of Actions). Straw J noted that although there was no such law in Jamaica, there was no basis for allowing a wider interpretation to the effect of CPR (JA) r 19.4 (3) (c). Straw J held that the addition of Mr. Mais was not necessary in order to continue or prove the action against either the First or Second Defendant.

[29] Similarly, in the case of Shawna **Williams v Garry Gizlene et al** [2012] JMSC Civ 72, the case arose from a motor vehicle accident on November 27th, 2003. The Claimant, who was a passenger in the motor vehicle, filed an action against the First and Second Defendants on August 4th, 2005. The Court granted the Claimant permission to join the Third and Fourth Defendants to the claim. The Third Defendant filed an application seeking inter alia that the order joining the Third and Fourth Defendants be set aside on the ground that the application to amend the particulars was done after the expiry of the limitation period.

[30] Simmons J referred to the case of **Mabro v Eagle Star and British Dominions Co**. **Ltd.** [1932] All E.R. 411 at 412 where Scrutton, L.J. said:

> *"in my experience the Court has always refused to allow a party or a cause of action to be added where, if it were allowed, the defence of the Statute of Limitations would be defeated. The court has never treated it as just to deprive a defendant of a legal defence".*

Simmons J also cited the case of **Lucy v. Henley's Telegraph Works Co** [1970] 1 Q.B. 393, where Megaw, L.J. stated clearly that *"provisions as to limitation of actions are for the benefit of defendants*".

[31] The authorities clearly suggest that the main objective of Rule 19.4 is to protect against the injustice that may arise if an application is made after the limitation period which effectively results in depriving the prospective defendant of his limitation defence. Rule 19.4 clearly imposes a higher threshold than that of Rule 19.3 in light of this important consideration.

[32] In my judgment, upon the ordinary reading of Rule 19.4(2)(a), particularly the requirement that the '**limitation period must have been current when the proceedings were initiated'**, Rule 19.4(3) could at no point in time apply to a situation as this one, where the substantive claim is one of adverse possession. The thrust of Mr. Neil Shaw's case is that JNC Ltd's right to the properties has been extinguished by virtue of the operation of the Limitation Act and could at no point in time have been current when Mr. Shaw initiated the claim. From the Respondent's submissions, it can be surmised that the Respondent believes that the use of the word 'relevant limitation period' in Rule 19.4(3) means that any 'limitation period' that is applicable to the case at hand must be considered and as such, sections 3 and 30 of the Limitations Act would be the applicable limitation periods.

[33] In my view, the drafters of this provision did not intend for this Rule to apply to a situation such as this. No factor outlined in Rule19.4 (2) would be applicable to a claim of adverse possession and a party could at no point in time apply to the Court to be added to the substantive claim; even if the application was made early in the stage of the proceedings.

[34] In my judgment, such an interpretation would result in persons who may be the rightful parties in a claim for adverse possession not being able to be added to the claim, simply by virtue of the nature of the cause of action.

[35] If the interpretation suggested by the Respondent were to be entertained, this would effectively oust the Court's inherent power to add a party to a claim in adverse possession proceedings, even if it would further the overriding objective and there is no material injustice in making an addition or substitution. The only injustice such an addition or substitution would give rise to, is to delay proceedings to enable the Court to hear the application; an injustice contemplated by any application for a party to be added or substituted.

[36] In **Preble v Xtabi Resorts Club & Cottages Ltd** Suit No. C.L.F 013 of 1997, Sykes J explained at paragraph 24 of the judgment that *"Rules 19.2 and 19.3 cover change of parties before the limitation period has ended. Rule 19.4 is the part that addresses change of parties after the end of a relevant limitation period has ended."* If the interpretation suggested by the Respondent were to be adopted, this would in effect mean that none of the Rules relating to addition or substitution of parties would be applicable to cases of adverse possession. This could not have been the intention of Parliament.

[37] Also, in determining if the limitation period was current when the proceedings were initiated by the Claimant, as per Rule 19.4(2)(a), the court would be required to determine, at this point in the proceedings, if JNC Ltd's right was extinguished by virtue of section 3 of the Limitation of Actions Act or if the Applicant's right to enforce the mortgage has been extinguished by Section 7 of the Act. This would require both parties to provide cogent evidence, in the manner of a full trial, to determine if the limitation period had in fact expired. Also if the Court determines that the limitation period has or has not expired, this would put an end to the Respondent's case.

I therefore find that Rule 19.3 should be considered in determining whether the Applicant should be joined as a defendant.

RULE 19.3

[38] By virtue of Rule 19. 3(2) (b) of the CPR, Pelican Securities may make an application to this Court to be added as a party to the substantive claim.

Rule 19.2(3) notes that in the Court's decision whether to add a party to the claim without an application, regard must be had to:

i) Whether it is desirable to add the new party to the proceeding so that the court can resolve all the matters in dispute; and

ii) Whether there is an issue involving the new party which is connected to the matters in dispute and adding the party may allow the Court to resolve the issue.

[39] The Rules are silent on the factors to be taken into consideration when a party makes an application to be added as a party. Conteh CJ in the Belizean case of **Prophecy Group L.C v Seabreeze Company Limited SCB** Claim No 185 of 2001, in commenting on identical Belizean provisions, explained that although there was no indication in the rules in relation to the factors to be considered in an application to join parties to the proceedings, Rule 19. 3(1) *"expressly confers discretion*" on the Court when considering such an application. Conteh CJ noted that a proper exercise of this discretion *"must be informed by the overriding objective of the Civil Procedure Rules and bear in mind the factors mentioned in either paragraph (a) or (b) of 19.2(3) (a) and (b), that is, when the Court has its own motion decides to add a new party to the proceedings without any application."*

[40] The discretion granted under the rule is designed to ensure that all matters between the parties are completely and finally determined and avoid a multiplicity of Actions/Claims. In my judgment, the ends of justice will be better served and the court's resources more efficiently utilised if all the parties to a dispute are brought before the court so that the decision will bind all of them. The substantive issue being whether, by virtue of its position as a mortgagee with a registered interest in property #1, the Applicant is entitled to be added as a party to the claim.

[41] At this juncture, the question of whether the applicant is entitled to be added as a party to the Claim by virtue of his position as mortgagee, is answered by reference to some authorities from the region which may offer assistance on the matter. I will examine some of them briefly.

[42] In **Dagor Ltd v MSB Ltd**. **and National Commercial Bank Jamaica Ltd**, a mortgage was advanced by Mutual Security Limited in 1995, which changed its name to MSB Ltd and later came under the control of the National Commercial Bank Limited. Consequent on disputes as to the amount owing, a suit was filed in 2000 against the mortgagees. The Claimant was of the view that the debt had been written off.

[43] The Claimant sought a declaration that the mortgage advanced by the Defendant was invalid and unenforceable against the Claimant by virtue of Sections 7 and 30 of the Limitation of Actions Act. The Defendant contended that the Claimant had acknowledged the mortgage within the relevant period, and as such, time had not yet started to run. Batts J did not accept that the letter of 19th May 2014 amounted to an acknowledgement of the debt and held that the letter was one of enquiry as to the balance alleged to be outstanding.

[44] Batts J noted that a mortgagee seeking possession is in law in no better possession than for example one joint owner claiming possession against another. A mortgagor in possession for the requisite twelve (12) year period, in circumstances where the mortgagee's right to possession has accrued, is entitled to rely on sections 3 and 7 of the Limitation of Actions Act.

[45] At paragraph 12 of the **Dagor** judgment, Batts J noted that:

> "*Actions to recover possession whether by the mortgagee or purchasers from the mortgagee may be met with any applicable limitation defence. In this regard the mortgagee seeking possession is in law in no better possession than for example one joint owner claiming possession against another. The limitation bar it has been held, applies in such circumstances see Wills v Wills [2003] UKPC 84. A mortgagor in possession for the*

> *requisite 12-year period, in circumstances where the mortgagee's right to possession has accrued, is entitled to rely on sections 3 and 7 of the Limitation of Actions Act. It therefore behoves purchasers of land to enquire as to the status of those in possession, and it matters not whether the land is purchased from a mortgagee.* ***The possessory title can defeat the title of the registered owner and hence his ability to give a valid title.*** *In the matter at bar however the registered owner is in possession. He cannot defeat his own title. The Registration of Titles Act allows the mortgagee to transfer that title by way of sale. The sale is only one of several methods to enforce his security. The others are: (a) an action on the debt (b) appointment of a receiver (c) re-entry and possession (d) foreclosure. The Limitation of Actions Act applies to the making of an entry and the bringing of actions, see generally Fisher & Lightwood's Law of Mortgage (2nd Australian edition) pages 384, 392 et seq."* (Defendant's emphasis)***.***

[46] Batts J also noted that the Registration of Titles Act did not contemplate a time limit on the exercise of the statutory power of sale. Batts J further explained that at any time at which property is sold, the mortgagee is entitled to be discharged in priority to all others, even the mortgagor and that it would be odd for a mortgagee to lose its right to be paid merely because he elected to rely on the security of a registered interest rather than force a sale of the premises. The defendant contended that the credit to the mortgage account, consequent on the sale of the guarantor's property is a 'payment' within the meaning of the limitations statute. The Court noted that this was not an act of the mortgagor and such could not bar his reliance on the limitation provisions. Notwithstanding this, the Limitation of Actions Act did not apply to the exercise of the mortgagee's statutory power of sale and as such the claim was dismissed with costs to the Defendant.

[47] In **Fritz v Collins** [2016] JMCC Comm 24, The Claimant and Defendant were in business for a number of years involving the purchase and sale of goods. The Claimant was an informal commercial importer or 'higgler'. Initially the Defendant was a freight

forwarder and over a period of became a purchasing agent on the Claimant's behalf. As purchasing agent he would extend credit, grant loans or make advances on behalf of the Claimant. In or about March 2003, the Defendant granted to the Claimant a credit facility of US $40,000 which was secured by way of a mortgage over her Meadowland Drive property. Goods valued at US$40,000 were shipped to the Claimant. The Claimant and the Defendant opened a running account in respect of their business transactions. In the period February 2008 to October 2010, the Defendant paid for a number of shipments of goods on behalf of the Claimant totalling US$138,974.00. It was agreed between both the Claimant and Defendant that the Claimant's total liability would be settled at US$128,000 and that a further mortgage of US $88,000 over the same Meadowland premises would be granted in order to secure the sums due and owing. The Claimant failed to pay all the sums due and owing and as of April 2016 was indebted to the Defendant in the amount of US$159,805 being principal interest and late fees.

[48] The Claimant claimed, inter alia, fraud on the part of the Defendant and that she was entitled to a permanent injunction to restrain the exercise of the mortgagee's power of sale. The Defendant counterclaimed for the sum of US $159, 805.00 being amounts allegedly owed to the Defendant. The Claimant, by way of notice of application for court orders, applied for her statement of case to be amended. The Claimant wished to include an alternative plea that the mortgage is unenforceable pursuant to Section 3 and 30 of the Limitation of Actions Act. Batts J allowed the application insofar as the Defence to Counterclaim was concerned but refused permission for the Claim to be amended.

The Court noted that it was a question of mixed law and fact whether the right accrued and when and whether there had been an acknowledgment.

[49] Batts J also noted at paragraph 10 that:

> *"Section 33 of the Act bars "an action suit or other proceeding to recover any sum of money secured by any mortgage, judgment or lien…" . The ejusdem generis rule precludes 'other proceeding' being interpreted to*

> *include a statutory power of sale. So too does the literal meaning of the word. 'Proceeding' is to be distinguished from 'Procedure.' The exercise of the statutory power of sale does not require an entry or the bringing of a suit action or other proceeding."*

The application to amend the claim was therefore refused.

[50] Batts J, was satisfied that the Claimant or her agent had acknowledged the debt in writing within the meaning of Section 33 of the Limitation of Actions Act. The execution of the second mortgage was an acknowledgement of the pre-existing debt. Batts J explained that by agreeing a total balance as at that date, and that the second mortgage was to secure the amount over and above secured by the first mortgage, the Claimant acknowledged the validity in 2010 of the first mortgage. The letters written by the Claimant's attorneys and the emails by her son, all acting as agents on her behalf, 'separately and/or cumulatively' were an acknowledgment in writing of her liability to the Defendant.

[51] In **Mazelie v Prescott** [1959] 1 WIR 358, the case concerned an appeal against the judgment of the lower court, for an order against the appellant for the delivery of possession to the respondent of two parcels of land forming part of the Belle Vue Estate. The Appellant's brother mortgaged land he owned to the Roman Catholic Archbishop for Port of Spain. His last mortgage payment was made in 1933. In 1955, the Archbishop conveyed land to the Respondent who sued the Appellant to recover possession. An order was made for recovery of possession at trial but was subsequently appealed.

[52] The Respondent (a transferee from the mortgagee) sought possession of the mortgaged premises. Gomes CJ noted that the sole question for determination is whether the respondent, who is a person claiming through the mortgagee, is barred from making an entry or bringing the action. It was held that the mortgagee's right and title had been extinguished by virtue of the Limitation of Action Statute and therefore he had no interest to convey.

[53] The cases do not assist the court in determining if it is appropriate to add the Applicant as a party to the claim. The cases however highlight that even if it was determined that twelve (12) years had passed before the Applicant sought to enforce its right, the limitation period would not be applicable to its power of sale.

Analysis of Cases relied on by the Parties

[54] The Court must be satisfied by virtue of Rule 19.3, that it is either desirable to add the Applicant to the proceedings so that the court can resolve all the matters in dispute or there is an issue involving the Applicant which is connected to the matters in dispute and adding the Applicant would allow the Court to resolve the issue.

[55] There is doubt as to whether the Applicant's presence in the proceedings will assist this Court in resolving all the matters in dispute.

[56] In my judgment, JNC Ltd did not act in breach of the Court's orders in registering the mortgage as the registration took place after the expiry of the interim order.

[57] I am also guided by the case of **Amon v Raphael Tuck & Sons Ltd** [1956] 1 All ER 273 in which the Plaintiff alleged in his statement of claim that he was the inventor of a new design of adhesive dispenser in the shape of a pen, known as the Fastik pen. He alleged that he disclosed the 'know-how' of the pen to the defendants during negotiations for an agreement and the defendants were to market the pen. In February 1954, negotiations broke down between the parties and on the plaintiff's case, there was an implied contract that defendants would treat as confidential the information given to them during the negotiations; and that the defendants were in breach of that contract in that they had made use of the information by manufacturing an adhesive dispenser called the Stixit pen which contained three distinctive features of the Fastik pen. The Plaintiff claimed damages against the defendants and an injunction to restrain the defendants from disclosing to other persons or making use of the information disclosed by the plaintiff without his consent. The defendants, before filing a defence, applied by way of summons under Order XVI rule 11, for leave to join as a defendant one of the defendants who by affidavit alleged, among other things, that he was the

inventor of the Stixit pen. Subsequently the defendant filed another affidavit alleging, among other allegations, that the defendants were under contractual obligation to him to manufacture and distribute the Stixit pen in certain territories.

[58] Devlin J noted that the appropriate test to determine if the intervener was a party "who ought to have been joined, or whose presence before the court may be necessary" was whether his presence would enable the court completely and effectually to adjudicate upon and settle all the questions involved in the cause or matter within Ord. 16, r. 11. The Court noted that it was important whether the order for which the plaintiff was asking directly affected the intervener, not in his commercial interests, but in the enjoyment of his legal rights. The Court highlighted that notwithstanding the fact that the defendant was entitled to a royalty or commission which gave only a commercial interest in the continued manufacture, if he could show that the defendants were by contract obliged to manufacture a reasonable quantity of "Stixit" pens he would have a right of action against them if they did not do so, and might ask in a subsequent action for specific performance of an agreement which the Court had ordered not to be performed. The Court, in applying that test held that the Defendant should be added as a defendant in the present case because the defendants were shown primâ facie to be bound to him in contract to manufacture the Stixit pen, which obligation constituted a legal right of the defendant's enjoyment of which might be curtailed by the injunction sought by the plaintiff.

[59] In **Brondum A/S v Caribbean Financial Services Corporation and another** (2007) 72 WIR 26, the Appellant contractor entered into a subcontract with the subcontractor to perform air-conditioning work at the Grantley Adams International Airport. He agreed to advance a substantial loan to the subcontractor on condition that the loan was secured by guarantee on demand. The subcontractor duly executed a guarantee with the Respondent finance corporation. The subcontractor failed to repay the loan and the Appellant, in the first action, sought to enforce the guarantee against the finance corporation. Pursuant to a second agreement with the appellant to supply and install certain air-conditioning equipment, the subcontractor executed a bond with the finance corporation which provided for payment by the finance corporation to the Appellant in

the event that the subcontractor was in breach of his obligations under the contract. In the second action, the Appellant sought payment from the finance corporation under the bond on the basis that the subcontractor had performed defective work or failed to complete the works. The subcontractor was not a party to either of the actions and applied by summons to be added as a defendant under the provisions of RSC Ord 15, Rule 6(2)(b). The judge allowed the application and the appellant appealed, contending that the actions were on performance bonds and were entirely autonomous and independent of any ancillary matters in dispute between the contractor and the subcontractor.

[60] In relation to the issue of joinder, the Court allowed the appeal and held that the finance corporation was a real and substantial party to the actions brought by the appellant. Simmons CJ explained that the performance bonds created autonomous contracts and the actions were independent of disputes between the contractor and the subcontractor. Further, joinder was not necessary to ensure that all matters in dispute in the two actions might be effectually and completely determined and adjudicated upon. All matters in dispute between the parties under the subcontract were the subject of advanced arbitration proceedings to which the finance corporation was not a party. Moreover, the matters in dispute could be effectually and completely determined and adjudicated simply by the finance corporation's calling the subcontractor as its witness. It was unnecessary to add the subcontractor as a party and to do so would unnecessarily increase costs and delay trial of the actions. Accordingly, the trial judge had erred in ordering joinder of the subcontractor to the High Court actions.

[61] Also, in **Gurtner** v **Circuit** [1968] 2 QB 587, in June 1961, the plaintiff was severely injured when he was run down by the defendant while riding on a motor cycle. In June 1964, the plaintiff issued a writ against the defendant. No steps were taken to serve the writ until June 1965, when it was discovered that the defendant had gone to Canada about three years previously. The writ was renewed on a number of actions, the last being in June 1967 until a date in September 1967 because of the inability of the defendant to be located. In June 1967, the plaintiff obtained an order for substituted service on the defendant in care of the insurance company which the Bureau had asked

to investigate the matter. In July 1967, the Bureau applied to be added as defendants. On appeal from an order reversing a decision that the Bureau should be added as second defendants under RSC 1965 Order 15 rule 6(2)(b), the Court held that the Bureau should be added as defendants, on their undertaking to pay any damages that might be awarded to the plaintiff.

[62] Diplock LJ explained that under RSC 1965 Order 15 rule 6(2)(b), the Court had a discretion to add a party to an action if he would be affected in his legal rights or his pocket by the determination of the dispute and in the case, the Bureau would be directly affected in both these ways. The Court also highlighted that a matter was not effectively 'adjudicated upon' within RSC 1965 Order 15 rule 6(2)(b) unless all those who would be liable to satisfy the judgment were given an opportunity to be heard. In the **Gurtner** case, the Bureau were so liable, though they were liable to the Minister of Transport rather than to the plaintiff, and accordingly the court had the discretion to add the Bureau as parties and such discretion should be exercised in their favour.

[63] In **Jamaica Citizens Bank Ltd v Dyoll Insurance Co Ltd** (1991) 28 JLR 415, the appellant sought to appeal the decision of Master Hazel Harris (Ag) refusing permission for the appellant to be joined as defendants in the claim. The appellant was the mortgagee of premises which was the subject of a suit in which an injunction and damages were being sought by the respondent Dyoll Insurance against the defendant/respondent Leon Reid. The claim was that the defendant was in breach of a restrictive covenant which prevented him from building an apartment complex on land designated for private dwelling homes. The applicant/appellant applied for leave to be added as a defendant on the ground that his right and interest in the premises would be adversely affected.

[64] Carey P (Ag) ordered that the intervener be added as a defendant. He explained that the modern cases under the equivalent English rule had established that the Court should give a wide interpretation to the power to allow intervention. In particular, the Court should be mindful that "*one of the purposes of the joinder of parties is to ensure that there is not a multiplicity of actions,"* and although it had been held in **Vandervell**

Trustees Ltd v White [1970] 3 All E.R 16 that a mere commercial interest in the outcome of the action, such as that of a creditor, was not sufficient to entitle such a person to intervene, in the present case,

> *"….the mortgagee ha[d] a far more substantial interest in the outcome of the action. Indeed if the action is to succeed, the mortgagee would be obliged to foreclose the mortgage and file suit. The value of the mortgaged property would plainly depreciate. This…suggests that not only are the financial interests of the mortgagee affected, but so would its legal rights."*

[65] In **Mutual Security Merchant Bank Trust Ltd v Marley** (1991) 28 JLR 670, the applicants/respondents Aston Barrett et al sought an order to be joined as a defendant in a suit between the plaintiffs Mutual Security Merchant Bank and the defendants Rita Marley and others. In the substantive action, the plaintiff sought the directions of the court as to the price and sale of the assets including real estate and royalties and administration of the estate of the deceased Robert Nesta Marley. The trial judge found that the applicants had an interest in the outcome of what could be determined in that action and were entitled to assist in determining what the royalties would be. The plaintiffs appealed the judgment on the ground that the intervention of the applicants to protect their limited interest would not put an end to their claim and could be futile if in the result, their claim for declarations were dismissed. The respondents contended that their intervention was necessary because they could provide assistance in relation to the question of price of the assets, which was a material consideration and if they were absent they could later argue that the sale was undervalued.

[66] Carey P (Ag) noted that the real question was whether the applicants' presence was necessary as to enable the court to "effectually and completely" adjudicating upon all the questions involved in the case. Carey P (Ag) agreed with the appellant's submissions that the applicant's intervention would be futile as it would not put an end to their claim.

[67] Carey P (Ag) highlighted that the purpose of the Respondent's application to be joined was to protect their 50% share in the assets which they alleged was theirs by virtue of a partnership agreement and their presence was quite unnecessary to enable the Court "effectually and completely" to settle all the questions involved in the cause. Carey P (Ag) noted that his decision in **Jamaica Citizens Bank Ltd v Dyoll Insurance Co Ltd** was distinguishable from the instant case as the facts and nature of the proceedings were entirely different.

[68] In allowing the appeal, Carey P (Ag) held that the trial judge had exercised his discretion on the wrong principles, in that:

> *"He failed to appreciate the nature of the proceedings in which joinder was sought and focused entirely on the applicants' alleged interest i.e. the best price, which could not settle the very important question of their entitlement to the assets, the best price for which, was the sole question before the Court. With respect to that question, the learned judge did not bear in mind that the joinder must enable the Court* ***effectually*** *and* ***completely*** *to adjudicate and settle all questions in the originating summons for directions by the appellants." (My emphasis)*

[69] In **National Commecial Bank Ja Ltd v International Asset Services Ltd** [2015] JMCA Civ 7, the appellant appealed the decision of F Williams J who refused an application by the appellant to be removed from the claim in the court below and to strike out certain sentences from the affidavit.

[70] Phillips JA cited with approval, Stuart Sime, A Practical Approach to Civil Procedure, 15th edition, in Chapter 17, on Parties and Joinder, at page 224 where the author, referring to joinder of parties commented that:

> *"Apart from the operation of the overriding objective, the only restriction against joinder of parties appears to be that there must be a cause of action against each of the parties joined. There is no jurisdiction under the*

*rule to join people purely for the purpose of obtaining disclosure against them.(**Douihech v Findlay [1990] 1 WLR 269**)"*

[71] Phillips JA also cited the earlier mentioned decisions of **Jamaica Citizens Bank Ltd v Dyoll Insurance Co Ltd** and **Mutual Security Merchant Bank Trust Ltd v Marley** and noted that the conclusion that could be drawn from both judgments is that the interpretation to be given to the rules relating to the addition or substitution is not a narrow or literal one, but the court *"must be careful to ensure that all the parties concerned in the dispute before the court, are before the court, as that serves the ends of justice."* Phillips JA opined that although the court frowns on a multiplicity of actions, the intervener must have some substantial interest in the outcome of the litigation and there must be some basis justifying joining the party to the claim.

[72] The Court held that there was no indication that the presence of the appellant as a party was required to assist the court in its deliberation so as to effectively adjudicate on the issues before it. The Court held that there was no issue involving the appellant which was materially connected to the disputes in the proceedings, and in keeping with the overriding objective in dealing with cases justly, it would seem unjust and unfair to force the appellants to remain as a party to the claim.

APPLICATION OF LAW TO FACTS

[73] Having analysed all the cases cited, it remains that the seminal question is whether adding Pelican Securities Limited will assist the court in determining the issue of whether Mr. Shaw has adversely possessed properties # 1 and # 2 of which JNC Ltd is the registered proprietor. The local decisions of **Jamaica Citizens Bank Ltd v Dyoll Insurance Co Ltd** and **Mutual Security Merchant Bank Trust Ltd v Marley**, and the UK cases mentioned earlier are instructive although decided before the advent of the Civil Procedure Rules. All the cases underscore that the important question is whether the added party's presence is necessary to assist the court in effectually and completely adjudicating matters in dispute which is in line with Rule 19. 3. Phillips JA in **National Commecial Bank Ja Ltd v International Asset Services Ltd**, where the current Rule 19.3 was adjudicated on, underscored that this was the appropriate test.

[74] I am doubtful as to whether the Applicant's presence can in any way assist the court in determining whether Mr. Shaw has adversely possessed both properties for the requisite limitation period. The Privy Council decisions of **Recreational Holdings v Lazarus** [2016] UKPC 22 and **Chisholm v Hall** [1959] A.C 719 underscore that it is possible for registered property to be adversely possessed. In my judgment, the Applicant cannot adduce evidence disputing whether the Respondent has lived in open, continuous and undisturbed possession of both properties. Applying **Brondum A/S v Caribbean Financial Services Corporation and another**, although the Applicant has some interest in the outcome of the litigation, JNC Ltd is the *'real and substantial party to the action'* brought by the Respondent/Claimant.

[75] In **Mutual Security Merchant Bank Trust Ltd v Marley**, Carey P (Ag) underscored the point that the nature of the proceedings must be properly considered before an order of joinder is made. This Court therefore should not focus its attention entirely on the applicant's alleged interest but on the main issue, i.e whether Mr. Shaw has adversely possessed properties registered to JNC Ltd.

[76] An important point that distinguishes the instant case from that of the **Jamaica Citizens Bank Ltd**. **v Dyoll Insurance Co. Ltd** is that the mortgaged property was the only property under the Court's scrutiny. In the instant case, the Respondent, Mr. Shaw is alleging that he has adversely possessed two properties; one of which the applicant has no connection to. The Applicant's presence in the proceedings can in no way assist the Court in resolving the matters in dispute. In fact, the Respondent is alleging that JNC Ltd's rights were extinguished before the mortgage was even registered.

[77] The Applicant has sought to be joined as defendants in the matter in an effort to protect their registered interest. This is the true purpose of the application. From the submissions made by both the Applicant and the Respondent, there is some argument that the Applicant's right to enforce its security against JNC Ltd may be extinguished by virtue of Section 7 of the Limitations of Actions Act. This may lead to a contentious suit if the matter is pursued by the Applicant. As per Carey P (Ag) in **Mutual Security**, *"the applicant's intervention would be futile as it would not put an end to their claim*."

Similarly the outcome of the present proceedings will in no way put an end to the Applicant's prospective Claim.

[78] While I accept that a finding of adverse possession would indirectly affect the Applicant as JNC Ltd would no longer have rights to the mortgaged property, the mortgage deed is primarily a contract between the parties and JNC Ltd would still be bound to settle its outstanding debts. On the face of it, the facts of the instant case bear some similarity to that of **Jamaica Citizens Bank Ltd v Dyoll Insurance Co Ltd**. However an important distinction is the nature of the proceedings of both cases. In **Jamaica Citizens Bank**, the Court's finding that the Respondent was in breach of the restrictive covenant would objectively depreciate the value of the mortgaged premises.

[79] Also in **Gurtner v Circuit,** the Court allowed a third party which could not substantially assist the court in determining the issues to be added because it made an undertaking to pay damages. It was directly bound by the outcome of the litigation and liable to satisfy the judgment. The Applicants are not so bound.

CONCLUSION AND DISPOSITION

[80] The joinder is not necessary to ensure that all matters in dispute might be effectually and completely determined and adjudicated upon. For this reason, the application for joinder will not be granted.

CONSOLIDATION

[81] Counsel for the Respondent suggested that instead of adding the applicant as a party to the claim, an order should be made for consolidation of the claims.
Flowing from this suggestion is the requirement that Pelican Securities Limited institute a claim against JNC Ltd for recovery of the debt.

[82] In the case of **Williams-Phillips v University Hospital Board Management** [2014] JMSC Civ. 117, Anderson K. J noted that as part of the Court's overall case management conference powers, an order can be made for consolidating claims. Rule

8.3 of the CPR enables a claimant to use a single claim to include all or any of those claims which can be conveniently disposed of in the same proceedings. Anderson K.J also noted *"that this rule cannot be relied on before a claim has been filed"*.

[83] It would not be in the interest of justice and in keeping with the overriding objective that an order be made for consolidation when Pelican Securities Ltd has not yet filed suit against JNC Ltd. The current proceeding is now at the stage of case management conference, and it would not be an economical use of the Court's resources to entertain such an application for consolidation at this time.

ORDERS

[84] The time for filing and serving this application has been abridged. Permission sought by the Applicant to be added as party to this claim, that is to be joined as a Defendant in the Claim, is not granted.

[85] Costs of the application to the Respondent to be taxed if not agreed.

[86] Leave to appeal is granted.