In The Supreme Court of Bermuda

CIVIL JURISDICTION
2024 No: 144

BETWEEN:

CLARIEN BANK LIMITED

Plaintiff

And

BARRY PATRICK CAPUANO

Defendant

RULING

Date of Hearing: Wednesday 17 June 2026
Date of Ruling: Monday 21 September 2026

Plaintiff: Jennifer Haworth and Oliver Nichols, Carey Olsen Bermuda Limited
Defendant: Craig Rothwell and Rachel Carr, Cox Hallet Wilkinson Limited

Strike Out Application-Mortgage Action (RSC O.88)- Limitation Act 1980 – Date of Accrual for Continuing Breaches – Limitation Defence of Knowledge

JUDGMENT of Shade Subair Williams J

Introduction

1. This is a mortgage action commenced by an Originating Summons dated 19 June 2024 for relief under Order 88 of the Rules of the Supreme Court ("RSC"). The Originating Summons is supported by affidavit evidence sworn on 5 June 2024 by Mr. Randy Tamlin, a Vice President, Asset Remediation of Clarien Bank Limited, the Plaintiff.

2. In accordance with my previous order of 10 April 2025 made pursuant to RSC Order 28/8 in answer to the Plaintiff's summons application of 10 April 2025, this action was converted to continue as if it had begun by writ.

3. The application with which I am presently concerned is made on the same summons of 10 April 2025 for the striking out of various parts of the Defendant's Amended Defence and Counterclaim (the "ADC") filed in these proceedings. The strike out application is made under RSC Order 18/19 and or pursuant to the Court's inherent jurisdiction. It is supported by the affidavit evidence of Ms. Angela Robertson, an associate at MJM limited, the Plaintiff's previous attorneys. Ms. Robertson's first affidavit was sworn on 30 April 2025, and her second affidavit was sworn on 6 October 2025.

4. Having received the written and oral the arguments of both parties I reserved my decision which I now deliver in this Ruling.

The Plaintiff's Pleaded Case:

5. The Plaintiff mortgagee and the Defendant mortgagor entered into a deed of mortgage (the "mortgage"), dated 3 August 1992 for an initial loan in the sum of $900,000.00, secured by the property situate at 103 Somerset Road Sandy's MA 06 (the "mortgaged property"). In 2001 the loan sum increased, correlating with a further charge on the mortgaged property. In 2005 and 2008 further loan facilities were extended to the Defendant by which point the secured sum on the mortgaged property had increased to $1,250,144.00 and a second mortgage was executed over the property situate at 5 and 7 Burnaby Street, Hamilton, HM.

6. The Plaintiff's case is that the Defendant failed to pay the requisite monthly instalment repayments, thereby entitling the Plaintiff to sell the mortgaged property to recover the sums owed.

7. On the Originating Summons filed by the Plaintiff, following relief is sought:

"*1. An order that the Defendant pay to the Plaintiff the sum of $7,423,619.73 which is comprised of a) $2,445,588.89 b) $3,434,596.29 and c) $1,543,434.55 being the amounts owing as at 27 May, 2024 (due and owing to the Plaintiff and such interest and costs as would be payable if this claim were the only relief granted).*

2. An order that the Plaintiff's security under the Loan Facilities may be enforced by sale of the Mortgaged Property.

3. A declaration that until payment shall be made to the Plaintiff by the Defendant of all outstanding monies under the Loan Facilities, together with the costs of this action, the Defendant is not entitled to redeem the Mortgaged Property.

4. An order for delivery by the Defendant to the Plaintiff of possession of the Mortgaged Property.

5. Further or other relief.

6. Costs."

The Defendant's Pleaded Case on the Amended Defence and Counterclaim ("ADC")

8. In the ADC, the Defendant denies that he is in breach of the terms of the various loan agreements and avers that he has made payments sufficient to extinguish the loans in their entirety. At paragraph [16] of the ADC it is said that the Defendant requested accounting documents from the Plaintiff in order to carry out a forensic accounting of the sums demanded of him but that the Plaintiff failed to provide the requested information in full.

The impugned portions of the ADC

Paragraph [17.17]:

9. The Plaintiff seeks to strike out paragraph 17.17 of the ADC on the basis that it is scandalous and or vexatious in that it constitutes an allegation of fraud which is not properly pleaded. Paragraph 17.17 provides:

"*The Plaintiff included an altered version of the reconciliation for loan £3310000171 in a demand letter dated March 15th, 2023, which shows there being no difference between the Plaintiff's records and Teneo's findings, when the report states there was a difference of $31,096.*"

10. Although conceding a multiplicity in the meaning of the term, the Plaintiff's concern is that the term "altered" wrongly implies fraud or dishonesty. The Plaintiff's position is that if the Court does construe the Defendant's use of the term "altered" to mean fraudulent or dishonest conduct, then it should be struck out on the basis that fraud is not properly pleaded.

11. Opposing the Plaintiff's position, the Defendant says that paragraph 17.17 does not meet the threshold of "frivolous or vexatious", the legal meaning of which is explained in my previous ruling in *David Lee Tucker* [2017] Bda LR 136.

12. At paragraphs [26]-[29] of Mr. Rothwell's written submissions he argued:

> *Paragraph 17.17 is relevant: the question of whether there is any difference between the Plaintiff's records and the findings in the Teneo report is directly relevant to these proceedings as this relates to the correct calculation of the loan.*
>
> *Paragraph 17.17 is sustainable: there is a discrepancy that the Defendant has identified on review of the documents which appears to show different versions of a loan reconciliation. If there are different versions, then that may be due to an alteration of that document for some reason for which there may be a plausible explanation. The onus is on the Plaintiff to provide that explanation in its Reply or by way of disclosure of further records or witness evidence.*
>
> *The concern of the Plaintiff appears to be on the word "alter" and the belief that the allegation is that the Teneo report has been altered. That is not what has been alleged. The allegation is that the documentation of the Plaintiff does not align with the Teneo report and the Defendant seeks an explanation of this by raising this allegation.*
>
> *The use of the word "alter" also does not inherently imply fraud or dishonesty but rather it is a neutral legal and grammatical term that simply means to change, modify or vary something.*

9. The Defendant, through his Counsel, has confirmed that no attempt is made to assert dishonest or fraudulent conduct on the part of the Plaintiff. Notably, by the reamendments made to the Defence, the Defendant removed the preceding statement in paragraph 17.17 which, prior to its deletion read: "*In fact, the Plaintiff attempted to hide the report's findings*…".

10. Aided by the Defendant's voluntary removal of that previous allegation and other similar allegations in the ADC, coupled with the Defendant's assurances to the Court that the use of the term "altered version" does not denote dishonesty, I find that dishonesty is not alleged.

Moreso, a literal construction of the wording, as it now appears in paragraph 17.17 of the ADC, does not lend to a clear allegation of fraudulent or dishonest conduct. As such, no particulars of dishonesty, pursuant to RSC Order 18/12(1), are required and I find that the passage does not qualify as scandalous or vexatious.

Paragraph [17.18]:

11. The Plaintiff seeks to strike out paragraph 17.18 of the ADC on the same grounds as it did in relation to the preceding paragraph. Paragraph 17.18, in its relevant part, provides:

"…*resulted in a gross inflation of the outstanding balance on the loan*"

12. For the same reasons that I refuse to strike out paragraph 17.17, I equally refuse to strike out paragraph 17.18.

Paragraph [22.3]:

13. The Plaintiff invites this Court to strike out paragraph 22.3 of the ADC on the basis that it is falls outside of the material facts on which the Defendant may rely for the Defence. Instead, the impugned passage is said to contain impermissible statements of fact and opinion conflating the crucial distinction between the functionality of pleadings and evidence.

14. Paragraph 22.3 is pleaded in the following way:

"*The Plaintiff did not run their old software congruently alongside the new software to allow for a period of transition. This is the practice utilised in most financial institutions which allows a transitory period to run system tests to be carried out to check for errors. Instead, the Plaintiff used its own employees to manually enter loan details into the new systems software.*"

15. Ms. Haworth submitted that these statements comprise lay evidence about banks' internal processes of which Mr. Capuano could not have any first-hand or personal knowledge. She argued that if this information was communicated to Mr. Capuano from anyone else, that evidence would be hearsay and thus inadmissible. Ms. Haworth's bottom-line objection was that this passage amounts to evidence disguised as pleadings.

16. Mr. Rothwell, however, contended that paragraph 22.3 is a purely factual statement sourced by the Defendant's personal knowledge, accepting that there is a burden on the Defendant to prove these pleaded facts later in the proceedings. Mr. Rothwell emphasised that the Defendant is not, at this stage, required to give evidence of how he obtained this knowledge;

albeit that he considered the Teneo report to be an obvious possible source of the Defendant's knowledge. Additionally, Mr. Rothwell argued that it is open to the Plaintiff to contest the Defendant's pleaded facts in the Plaintiff's Reply. That, he argued, is not a function of a strike out application. The Defendant says that the statements pleaded in paragraph 22.3 are for exploration at trial or to be dealt with through the discovery process and the exchange of witness and/or expert evidence.

17. In my judgment, Mr. Rothwell is plainly correct. The statements contained in paragraph 22.3 are statements of material fact which may to be proven, unproven or disproven at trial. It is not for the Court to opine whether the pleaded facts are capable of being proven by the Defendant at trial. That remains to be seen. Paragraph 22.3, in my judgment, is immune to strike out on the grounds asserted by the Plaintiff.

Paragraphs [23.1]-[23.2]:

18. These paragraphs are said to be objectionable on the basis that it amounts to evidence from Mr. Daniel Matthews, someone said to have over 30 years of experience in the fields of banking services and Life & Property Insurances, according to paragraph [23] of the ADC. Ms. Haworth explained that Mr. Matthews is a former employee of Clarien Bank. Paragraphs [23.1] and [23.2] are pleaded as follows:

"*It is the Defendant's position that the Plaintiff's behaviour witnessed by Mr. Matthews breached the Bermuda Banking Code of Conduct. The Defendant's position is the actions witnessed by Mr. Matthews were an abuse of power*."

"*…During Mr. Mathews' time at the bank, he witnessed multiple instances where the Bank failed to maintain accurate accounting of the loans they held, that they made errors regarding interest rates applied to accounts and erroneously repossessed property for their own benefit*."

19. Ms. Haworth argued that these passages not only offend basic pleading rules which require an iteration of only the material facts necessary to establish the cause(s) of action but also that the passages should be taken as an attempt to advance inadmissible hearsay in the absence of any statement from Mr. Matthews, himself.

20. Mr. Rothwell, in his submissions, proposed to reamend these passages to the extent that reference to Mr. Matthews' name could be removed. The Defendant proposed that paragraphs [23.1] and [23.2] could be reamended to read as follows:

"It is the Defendant's position that the Plaintiff's behaviour breached the Bermuda Banking Code of Conduct. The Defendant's position is the actions were an abuse of power."

"*It is the Defendant's position that there were multiple instances where the Bank failed to maintain accurate accounting of the loans they held, that they made errors regarding interest rates applied to accounts and erroneously repossessed property for their own benefit*."

21. The Defendant's proposal to reamend did not fuel any real controversy between the parties, notwithstanding the Plaintiff's primary position that the passages ought to be struck out. In my judgment, however, the proposed re-amendment aligns with the requirement for material facts to be stated in the pleading and does not warrant striking out.

Paragraphs [27]-[28.7]:

Counterclaim in respect of the other mortgaged properties

22. Paragraphs [27] to [28.7] of the ADC make complaint of the Defendant's mortgage relationship with the Plaintiff in respect of two other properties. Those properties (collectively the "other mortgaged properties") are situate at:

    (i) 3 Morgan's Hill, Sandy's Parish ("Seaforth Mews") (sold in 2010) and
    (ii) 5 Morgan's Hill, Sandy's Parish ("Seaforth Cottage"/"Forsythia") (sold in 2013);

23. The Defendant says that he was delinquent in making the mortgage payments on the other mortgaged properties but that the Plaintiff wrongly contributed to those delinquencies ultimately causing him financial prejudice in respect of the mortgaged property, the subject of these proceedings. The Defendant's case is that the Plaintiff unlawfully compelled him to sell the other mortgaged properties at unfavourable prices which proved to be to his economic peril. The Defendant says that he was forced by the Plaintiff to sell Seaforth Mews in 2010 to a buyer for $350,000 less than what was offered by another prospective purchaser and that he was also made to sell Seaforth Cottage/Forsyth in 2013 without obtaining an appraisal, thereby causing him to under sell that property by $388,125.00.

24. In respect of Seaforth Mews, the Defendant's pleaded case at paragraphs [27.11]- [27.13] provides:

    "*In any event, it is expressly averred that as a matter of law a lending institution has a duty to obtain the highest possible price when selling a security in the interests of the borrower. The Plaintiff wrongfully interfered with the legitimate economic rights of the Defendant to sell his property as he saw fit. The highest possible price in the present circumstances was the $1,500,000.00 that was offered by the first intending purchaser. The delay of a few weeks to allow the intending purchaser to obtain a sale of other properties that he owned was not* *detrimental to the Plaintiff. They considered only the availability of the deposit funds to ensure that their loan was kept current. Indeed once the deposit was paid to the Plaintiff there was no further delinquency in the mortgage account and they could have forestalled the sale of the property altogether. It is very likely that the payment of the $100,000.00 to the Plaintiff would have extinguished the then outstanding arrears on the relevant loan*.

However, and notwithstanding the decision of the Plaintiff to allow the Defendant to sell his property as he saw fit, they continued to insist that the mortgage secured by Seaforth Mews be redeemed in full by sale of the security. This they did into a falling market when no alternative purchasers at the appraised value could be found and the loss to the Defendant was significant. He would have had an additional $350,000.00 to apply to his existing mortgages to reduce the balance and thereby reduce the accumulating interest had the valuation price been achieved and the sale to the first intending purchaser completed.

Furthermore, it was the Plaintiffs actions as particularised in this Defence and Counter-Claim which contributed to the Defendant's mortgage at Seaforth Mews becoming delinquent."

25. As it relates to Seaforth Cottage/Forsythia, paragraphs [28]- [28.6] of the ADC state:

"*In 2013 the Plaintiff again threatened to exercise their power of sale and/or obtain possession of Seaforth Cottage"/ "Forsythia", 5 Morgan's Hill, Sandy's Parish in the Islands of Bermuda. The mortgage payments on this property had fallen into delinquency and the Plaintiff required the realisation of its security.*

The Plaintiff obtained no appraisal value for the property known as Seaforth Cottage. The failure of the Plaintiff to obtain an appraisal and attempt to reach that appraisal value was a breach of duty owed to the Defendant. The Plaintiff ought to have obtained three appraisals for the property and accepted only a bid that was over or at least at that appraisal value.

The appraised value of Seaforth Cottage was $1,350,000.00 (one million three hundred and fifty thousand dollars). This appraisal was obtained by the Defendant and not by the Plaintiff. The Plaintiff obtained no appraisal value for the property known as Seaforth Cottage. The failure of the Plaintiff to obtain an appraisal and attempt to reach that appraisal value was a breach of duty owed to the Defendant. The Plaintiff ought to have obtained three appraisals for the property and accepted only a bid that was over or at least at that appraisal value. Having failed in this duty to the Defendant the Plaintiff wrongfully and tortiously interfered with his legitimate economic right to sell his property for the maximum sum he could obtain for it. The Plaintiff failed to allow this to occur.

In fact, the property was sold to a purchaser who had offered only $961,875.00 (nine hundred and sixty one thousand, eight hundred and seventy five dollars). This represented a loss to the Defendant of $388,125.00 (three hundred and eighty eight thousand, one hundred and twenty five dollars). Had the Plaintiff obtained a proper valuation, in accordance with its duties owed to the Defendant they would not have insisted that the property be sold for such a significant undervalue. The failure of the Plaintiff to obtain proper valuations of the mortgaged property caused the Defendant loss in the amount of $388,125.00. That loss and damage was caused by the Plaintiffs insistence that the property be sold at the undervalue in breach of the Defendant's legitimate economic interest to obtain the highest possible price, prior to an order for sale or an order for possession.

Furthermore, it was the Plaintiffs actions as particularised in this Defence and Counter-Claim which contributed to the Defendant's mortgage at Seaforth Cottage becoming delinquent."

26. The Defendant also avers on the ADC that the Plaintiff acted in breach of section 12 of the Banks and Deposit Companies Code of Conduct (the "Code of Conduct") thereby depriving him of access to "*a financial picture of the account loans for as long as 11 years…*" without explanation.

Application to strike out on the grounds of reasonable cause of action disclosed

27. Ms. Haworth submitted that the Code of Conduct has no governing authority in the legal context. On that footing, she argued that it cannot be breached as a matter of law. More broadly, Ms. Haworth criticized the Defendant's pleaded case for lack of clear articulation.

28. Supposing that the Defendant's pleaded case is based on a claim for tortious wrongful interference, she relied on *OBG Ltd v Allan* [2008] 1 AC 1 at [45]-[62] and extracts from Clerk & Lindsell at [23-80] to identify the ingredients of the tort of causing loss by unlawful means. This tort, she submitted, requires a plaintiff to prove (i) an intention to cause loss to the plaintiff; (ii) the use of unlawful means against a third party; and (iii) interference with that third party's freedom to deal with the plaintiff. Ms. Haworth argued that the ADC does not allege that the Plaintiff used unlawful means as against the buyers of the other mortgaged properties or any other third parties for the purpose of procuring lower price sales. On that basis, the pleaded facts do not support such a claim.

29. Ms. Haworth described the tort of intimidation as the only other possible claim intended by the Defendant. Having referred this Court to *Rookes v Barnard* [1964] AC 1129 at [1205]-[1208] and paragraph [23-64] of Clerk & Lindsell, Ms. Haworth argued that the Defendant's case, if anchored to this cause of action, is hopeless and bound to fail on the basis that Defendant's case does not alleged any unlawful threat made by the Plaintiff.

The Limitation Grounds for Striking Out

30. The Defendant's limitation defence is pleaded in the ADC as follows at paragraph [27.14]:

"*The Defendant obtained legal representation and advice on the present matter in 2024. It was at that time that the Defendant became aware that the Plaintiff had no basis or right to have insisted upon and/or compelled the sale of the property at Seaforth Mews in 2010. Nor did the Plaintiff have any right or basis to compel and/or insist and/or influence which offer of purchase the Defendant accepted. Therefore, it was not until 2024 that the Defendant became aware of and had knowledge of his right of action against the Plaintiff for the sale of the property at Seaforth Mews. The Defendant has therefore raised his action within the limitation period pursuant to section 4 of the Limitation Act 1984, In the alternative, it is the Defendant's position that pursuant to the Limitation Act 1984 section 17 the relevant limitation period is 20 years and the proceedings were commenced within expiry of that period. Furthermore, under the principles of equity and common law, given the continuous breaches of the 2022 Code of Conduct on the part of the Plaintiff; any limitation period should only begin to run from the date of the last breach. Until the full accounting of the Defendant's loans, mortgages and savings accounts held with the Plaintiff is provided, the date of last breach cannot fully be identified*."

31. Ms. Haworth argued that these claims are time barred as the ADC was filed on 20 June 2025. She referred to section 4 of the Limitation Act 1980 (the "Limitation Act") which makes any action founded on tort time barred if it is brought after six years from the date on which the cause of action arises, meaning it accrues from the date that any damage or loss is actually suffered.

32. Ms. Haworth submitted that any damage claimed by the Defendant would be quantifiable by reference to the difference in the sale price and the price which the Defendant states were in fact attainable. Ms. Haworth argued that this places a marker on the time period that the loss was allegedly suffered, which would be in 2010 and 2013. Consequently, when the Defence and Counterclaim was first filed and served in November 2024, the claims had already been time barred by at least five years.

33. The Defendant first obtained legal advice in reference to these claims in 2024. Maintaining the hopelessness of these claims, Ms. Haworth pointed out that a tortious cause of action does not accrue when a claimant is provided legal advice. She submitted that if section 4 operated to allow a cause of action to accrue from the date when legal advice was obtained, any litigant would be able to defer their claims at will.

34. Ms. Haworth added that the Defendant is not entitled to avail himself under section 29(1) of the Limitation Act which allows the accrual point to be extended in cases involving a plaintiff under a form of disability. Likewise, Ms. Haworth argued that section 33(1) does not apply to the Defendant as that section enables the limitation period to be extended in cases involving a fraud committed by a defendant where the facts giving rise to the cause of action have been deliberately concealed from the plaintiff or where the action is relief from consequences of mistake. Ms. Haworth submitted that none of these exceptions have been pleaded or apply in this case. She argued that the same is so in respect of section 17 of the Limitation Act as it relates to a redemption against a mortgagee in possession of land for a period of 20 years.

35. Ms. Haworth pointed out that the Defendant was entirely aware of the sales of the other mortgaged properties and that he was also aware of the Plaintiff's involvement in those transactions as they occurred.

Whether it is arguable that there was a continuing breach of duty

36. In relation to continuing breaches, Mr. Rothwell referred me to the decision in *Capita (Banstead 2011) Ltd and another v RFIB Group Ltd* [2015] EWCA Civ 1310 where the English Court of Appeal held that a failure to correct previous acts of negligence is not concurrently causative of losses caused by the original acts of negligence. In Longmore LJ's judgment in the *Capita* case a material distinction was recognized between the facts underlying *Midland Bank Trust Co Ltd and another v Hett, Stubbs & Kemp (a firm)* [1978] 3 All ER 571 on the one hand and the facts underlying *Bell v Peter Browne Co* [1990] 2 QB 495 and *Nouri v Marvi* [2009] EWCA Civ 1107 on the other.

37. In the *Midland Bank* case Oliver J found that the defendant firm of solicitors was under a continuing duty to take steps to register its client's 10-year option to purchase a farm following the execution of the deed granting the option. There the instructed solicitors were not *functus officio* in relation to the option because they continued to have dealings with the client in respect of the unregistered option, insofar as the firm was consulted for advice about the exercise of the option from time to time throughout the period between the grant of the option and its expiry.

38. In the *Capita* case, Longmore LJ contrasted the *Midland Bank* case to the decision in *Bell v Peter Browne Co* where no continuing duty was found to exist in respect of solicitors who were instructed by a husband to execute the sale of the matrimonial house to the wife and to reserve one-sixth of the proceeds for him. In that case the solicitors failed to execute the trust deed or mortgage which was the protective vehicle sought by the husband to shield his one-sixth portion. Unlike the facts in the *Midland Bank* case, in *Bell v Peter Browne Co* the solicitors had no further contact with the husband, their client, once the divorce proceedings

were drawn to an end; so, the solicitors in that case were *functus. Bell v Peter Browne Co* was similar to *Nouri v Marvi* in that the English Court of Appeal in the latter found that there were no special facts to suggest that any duty survived completion of the sale of the flat which the solicitors were instructed to undertake.

39. Lady Justice Gloster's judgment in the *Capita* case described the *Midland Bank, Bell v Peter Browne Co,* and the *Nouri v Marvi* cases as cases in which the subject matter involved "one off" conveyancing transactions and their aftermath. She also included the case of *Maharaj v Johnson* [2015] PNLR 553) in that classification, likening it to the approach in the *Bell v Peter Browne Co,* and the *Nouri v Marvi* cases rather than *Midland Bank*. However, Lady Justice Gloster plainly rejected any suggestion that the analysis in those cases was determinative of whether or not there was a continuing obligation or breach in the *Capita* case. She referred to the statements made by Nicholls LJ in the *Bell* case where another class of cases was recognized in which a continuing duty exists. Gloster LJ also pointed to the same judgment to highlight Mustill LJ's recognition that a solicitor may, in appropriate circumstances, have a continuing retainer. The quoted passage from Nicholls LJ's judgment in *Bell* was lifted from [500]-[501]. It provides as follows:

"*For completeness I add that the above observations are directed at the normal case where a contract provides for something to be done, and the defaulting party fails to fulfill his contractual obligation in that regard at the time when performance is due under the contract. In such a case there is a single breach of contract. By way of contrast are the exceptional cases where, on the true construction of the contract, the defaulting party's obligation is a continuing contractual obligation. In such cases the obligation is not breached once and for all, but it is a contractual obligation which arises anew for performance day after day, so that on each successive day there is a fresh breach. A familiar example of this is the usual form of repairing clause in a tenancy agreement. Non-repair for six years does not result in the repairing obligation becoming statute-barred while the tenancy still subsists. The obligation of the tenant or the landlord to keep the property in repair is broken afresh every day the property is out of repair, as Bramwell B. observed in Spoor v. Green (1874) L.R. 9 Ex. 99, 111." supplied.)*"

40. In the present case, the Defendant alleges that the Plaintiff unlawfully compelled him to sell the other mortgaged properties at unfavourable prices. That is the breach of duty alleged. In my judgment, that relates to a one-off transaction which does not entail a continuing duty. In my judgment, the alleged breaches of the Code of Conduct do not constitute continuing breaches of duty giving rise to a cause of action. Only the sale of the other mortgaged properties is capable of marking the point at which causes of action arose unless it can be shown on the Defendant's case that his knowledge of the grounds for issuing proceedings first occurred at a later date. For that reason, the Plaintiff's limitation arguments cannot be properly

defended on the basis that the alleged breach was one which continued post the sale of the other mortgaged properties.

<u>Where Accrual in limitation cases is marked by Actual or Constructive Knowledge</u>

41. The English Court of Appeal in *Sita UK Ltd v Greater Manchester Waste Disposal Authority* [2011] EWCA Civ 156 was concerned with an appellant, Sita UK Limited ("Sita"), who was unsuccessful in its tender for a £4 billion contract of 25 years. Having lost the bid, Sita issued proceedings against the respondent, Greater Manchester Waste Disposal Authority ("GMWDA"), for various infringements of public procurement law leading to GMWDA's application for the case to be struck out on the grounds that it had been commenced outside the relevant limitation period.

42. At first instance, Mann J struck out the claim. That decision was unanimously upheld by the Court of Appeal, constituted by Arden, Rimer and Elias LJs, each of whom provided a separate judgment containing some analysis of the decision of the European Court of Justice (the "ECJ") in *Uniplex UK Limited v NHS Business Services Authority* (<u>C-406/08</u>) [2010] 2 CMLR 47. In the *Uniplex* case the ECJ found that an English regulation, namely regulation 32(4)(b), failed to comply with EU law.

43. The impugned regulation 32(4)(b) provided:

"*(4) Proceedings under this regulation may not be brought unless –*
(a) The services provider bringing the proceedings has informed the contracting authority of the breach or apprehended breach of the duty owed to him pursuant to paragraph (1)…by the contracting authority and of his intention to bring proceedings under this regulation in respect of it; and
(b) <u>they are brought promptly and in any event within 3 months from the date when grounds for the bringing of the proceedings first arose unless the Court considers that there is good reason for extending the period within which proceedings may be brought</u>."

44. The ECJ's criticism of regulation 32(4)(b) was rooted in its finding that the rule infringed the EU doctrine of legal certainty which requires the rule to be sufficiently clear, precise and foreseeable. The ECJ found that the regulation wrongly stipulated that proceedings had to be taken "promptly", and in doing so, the limitation period was placed at the discretion of the national court, rendering it unpredictable.

45. More specifically, the ECJ considered the effect of Article 1(1) of the Council Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public work

contracts ("Directive 89/665"). By analysis, the ECJ found that Article 1(1) of Directive 89/665 required the period for bringing these kind of proceedings to start to run from the date on which the claimant knew, or ought to have known, of the relevant infringement.

46. Commenting on the ECJ's construction of Article 1(1), Elias LJ in *Sita UK Ltd* said at [14]: "*In effect this approach converts the discretion conferred by the regulation into a duty where the reason for delay is lack of actual or constructive knowledge. There still remains the genuine discretion to extend time further if the court thinks there is good reason to do so*."

47. More significantly, the decision of the English Court of Appeal in *Sita UK Ltd* provides real guidance on what constitutes knowledge, sufficient to trigger the start-gun on accrual. At paragraphs [19]-[25] Elias LJ said:

"*19*
At the heart of this case lies the question: what degree of knowledge or constructive knowledge is required before time begins to run? The knowledge must relate to, and be sufficient to identify, the "grounds" for bringing proceedings, as it is expressed in regulation 32(4)(b). So the question becomes: when is the information known or constructively known to the appellant sufficient to justify taking proceedings for an infringement of the public procurement requirements?

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Some assistance in answering this question can be gleaned from the Uniplex decision itself. The ECJ said this:

> *"30 However, the fact that a candidate or tenderer learns that its application or tender has been rejected does not place it in a position effectively to bring proceedings. Such information is insufficient to enable the candidate or tenderer to establish whether there has been any illegality which might form the subject-matter of proceedings.*
>
> *31. It is only once a concerned candidate or tenderer has been informed of the reasons for its elimination from the public procurement procedure that it may come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings."*

21
This reflects the approach of the Advocate General in that case who observed that time should run from the date when an unsuccessful bidder had been told the "essential reasons" why their bid had failed. The Advocate General observed that this would normally be from the date when

the tenderer was sent a summary of the relevant reasons—a requirement which the Directive, following an amendment in 2007, now requires.

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Plainly, the ECJ is drawing a clear distinction between the reasons for a decision and the evidence necessary to sustain those reasons. It does not envisage that the prospective claimant should be able to wait until the underlying evidential basis for the reasons is made available. To put it in the language of the regulations, there is a difference between the grounds of the complaint and the particulars of breach which are relied on to make good those grounds. Once the prospective claimant has sufficient knowledge to put him in a position to take an informed view as to whether there has been an infringement in the way the process has been conducted, and concludes that there has, time starts to run.

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But what degree of knowledge is sufficient to provide that informed view that a legal claim lies? That depends upon how certain a case should be before a party is expected to take proceedings. Is a claimant expected to initiate proceedings once there is an arguable case, a reasonably arguable case, a strongly arguable case, or even a certain case? He may have knowledge sufficient to enable him to conclude that he has an arguable case but it may not be sufficient to enable him to take an informed view as to whether it is a strong case. So if the latter test is the right one, time will not begin to run until he acquires further knowledge which enables him to take an informed view about that. In my judgment Uniplex does not assist in determining that question. It is true that in answer to the first question it says that time runs from when the claimant "claimant knew, or ought to have known" of the infringement. But I do not believe it was thereby intending to state that the claimant is entitled to be certain that there is an infringement before taking proceedings. The issue the ECJ was considering was simply whether time ran from the date of the (alleged) infringement or the date of actual or constructive knowledge about it. The Court was not addressing an argument how strong the evidence of infringement has to be before time starts to run, and I do not think it engaged with that question.

24

In the domestic context this was a matter that was considered by the House of Lords in Haward & Ors v Fawcetts (a firm) [2006] 1 WLR 68 which involved a claim for damages in a latent damage case where section 14A of the Limitation Act 1980 *applied. Lord Nicholls, in a characteristically succinct formulation, described the degree of knowledge required to bring a claim in the following way (para 9):*

> *"'knowledge'" does not mean knowing for certain and beyond possibility of contradiction. It means knowing with sufficient confidence to justify embarking on the preliminaries to*

the issue of a writ, such as submitting a claim to the proposed defendant, taking advice, and collecting evidence; suspicion, particularly if it is vague and unsupported, will indeed not be enough, but reasonable belief will normally suffice".

25
He added that "it is not necessary for the claimant to have knowledge sufficient to enable his legal advisors to draft a fully and comprehensively particularised statement of claim". Lord Nicholls added that one should ask in broad terms whether the claimant had knowledge of the facts on which his complaint is based."

48. So, the question for this Court, if guided by the judgments of Elias and Rimmer LJs, is whether it can be said, without any real doubt, that the Defendant knew or ought to have known of the grounds or essential facts sufficient to commence proceedings before the expiry of the statutory limitation period.

49. It warrants mention that Lady Justice Arden agreed to the dismissing of the appeal but departed from her judicial brothers on their conclusions as to the correct formulation of the test for knowledge, having had regard to the *Uniplex* decision. At paragraphs [100]-107] of her judgement, she stated:

"…
99
In my judgment, the principles in Uniplex are highly condensed. They need to be considered not simply for what they say in terms but also for what is necessarily implied in them. In my judgment, it would be better so far as possible to use the words of the Court of Justice and not to substitute some other formula. Prior domestic case law is useful as showing the issues that have arisen in the field of latent damage and how they should be resolved, but we must be mindful that European Union law is not necessarily the same.

100
In Uniplex, the Court of Justice decided to adopt a test of discoverability, not a test which would result in time running from the happening of an event of which the victim might not know.

101
The paragraphs of the judgment in Uniplex which I wish to emphasise are paragraphs 30 and 31:
"30 However, the fact that a candidate or tenderer learns that its application or tender has been rejected does not place it in a position effectively to bring proceedings. Such

information is insufficient to enable the candidate or tenderer to establish whether there has been any illegality which might form the subject-matter of proceedings.
31. It is only once a concerned candidate or tenderer has been informed of the reasons for its elimination from the public procurement procedure that it may come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings."

102
I accept that the question under reply by the Court of Justice only required the Court to decide whether the three month period began with the date of the date of the infringement or on the date when the claimant knew or ought to have known of the infringement, but it is clear that in paragraphs 30 and 31 the Court of Justice moved to consider the degree of knowledge necessary to constitute knowledge for the purpose of starting the three month period.

103
The conclusion in paragraph 31 that time only starts to run once the unsuccessful tenderer can "come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings" reflects a number of decisions that the Court of Justice must have taken with respect to the test of discoverability. The most obvious question that arises for consideration, given that the unsuccessful tenderer has such a small window of time in which to start proceedings and given that the factual basis of a claim may be complex, is what happens if the information which the unsuccessful tenderer has is incomplete? It seems to me that in effect the Court of Justice resolves the problem of gaps in knowledge by treating the existence of an informed view as sufficient to bridge this gap. Once that is reached, there is no further threshold test in terms of prospects of success or indeed any other reason to escape the consequence of knowledge, such as lack of resources or failure to realise the true position in law, that can be taken into account. From this analysis it must follow that it is irrelevant that the unsuccessful tenderer's evidence is incomplete. The unsuccessful tenderer has the requisite knowledge once he has sufficient information to enable him to reach an informed view as to the matters stated in paragraph 31 of the judgment of the Court of Justice. Finally, the formulation provided by the Court of Justice, involving an informed view as to the appropriateness of bringing proceedings, may well mean that knowledge of some trivial breach not justifying the start of proceedings would not be enough.

104
It follows from paragraph 31 of the judgment of the Court of Justice that the unsuccessful tenderer need not know that it has suffered loss. It is sufficient that it knew enough with respect to harm or the risk of harm to justify the issue of proceedings. The Court of Justice does not use terms such as arguable case because it is laying down a rule for member states with different systems of procedure. It is to be noted that, under the CPR 22, a statement of case

must bear a statement of truth, namely as statement that the party putting forward the claim believes the facts stated to be true.

105
A possible difficulty with the judge's formulation as it seems to me is that it is addressed to the situation where the evidence is not complete but this is only one of the reasons why it may be contended in any case that the unsuccessful tenderer's knowledge was insufficient. Miss Rose's test deals with gaps in knowledge as well as lack of evidence but it does not deal with the circumstances in which the commencement of proceedings may be inappropriate. I would anticipate that cases may arise in the future which are not covered by any of the three formulations considered by Elias LJ.

106
For these reasons I would not apply any of the tests put forward but would prefer so far as possible to adhere to the language of the Court of Justice. It follows that I am not putting forward any test of my own.

107
When in this case did Sita know enough to justify the issue of proceedings? Sita threatened to issue proceedings in its letter of 21 April 2009. That letter referred to there being a prima facie case for GMWDA to answer and in the final paragraph referred to loss which it was at risk of suffering. Sita cannot now resile from what it said then, or contend now that it was prevented from reaching an appropriate view to start time running while information to which it was entitled was being withheld by GMWDA."

50. For the purpose of these proceedings, I am content to pose the relevant question as simply as Arden LJ put in in *Sita UK Ltd* because the question before me concerns the actual knowledge of the Defendant, not any constructive knowledge. When did the Defendant know enough to justify the filing of the ADC? In this case, the Defendant's knowledge, sufficient to justify the issue of proceedings, is necessarily marked by the sale of the other mortgaged properties at what he alleges to be an underprice. There is no evidence before me to suggest that he was somehow unaware of the agreement to sell or the actual sale of the other mortgaged properties.

<u>Whether the Counterclaim should be struck out on Limitation Grounds</u>

51. Mr. Rothwell urged this Court to defer any final conclusion on when the Defendant's knowledge was sufficient to position him to commence proceedings. He argued that the question on limitation warrants the consideration of the trial judge and ought not to be disposed by way of a strike out. He submitted that limitation issues are generally best resolved at trial rather than by a determination on a strike out application. On his submissions, a determination

of these limitation issues calls for a detailed examination of the factual evidence, which may not be fully available or tested at an earlier stage. Mr. Rothwell implored this Court to allow the Defendant the opportunity to obtain full disclosure and a proper accounting by the Plaintiff in order to ascertain whether the alleged breaches of duty are isolated or whether they instead constitute an ongoing continuous breach stretching from 2010 to 2022. Mr. Rothwell argued that continuing breaches by a mortgagee may properly warrant an extension of the statutory time limits because a continuing breach may be treated as accruing day by day, thereby extending the accrual point to the date of the last breach.

52. I accept Mr. Rothwell's submission that limitation arguments should only be resolved at the strike out stage if it is clear that the claim is bound to fail on limitation grounds and that a trial would not alter this conclusion.

53. In *Sita UK Ltd* Elias LJ quoted from Mann J's first instance judgment on the test for striking out on limitation grounds at [40] as follows:

The test for striking out.

40
The limitation defence was raised by the respondent in a striking out action. Mann J considered that the test to be applied, in the light of authorities such as <u>Three Rivers District Council v Bank of England</u> [2003] 2 AC and <u>Swain v Hillman</u> <u>[2001] 1 All E R 91</u> was as follows:

"... a claim should not be struck out unless it can be demonstrated sufficiently clearly that it was bound to fail as a matter of law and/or fact, and that I should not determine the serious live issue of fact which requires oral evidence, or which requires a full scrutiny that a trial will bring to bear"

And a little later at paragraph 18, he said this:
"The real question for me is whether it is clear enough, at this stage, that the claim is bound to fail on limitation grounds, and that a trial (or a fuller hearing of a preliminary issue) would not change that situation. Any doubt about it would have to be resolved in favour of the claimant. When I make any determination in this matter whether of fact law or discretion, I should be taken to be doing so on the footing that the point has been clearly established, and that the same result would clearly be reached at trial."

54. As this is a strike out application, I must be void of any real doubt if I strike out this portion of the ADC on the basis of a conclusion that the Defendant's knowledge existed prior to the six-year period preceding the filing of the ADC. In this case, I have no such doubt. For all the

reasons stated further above, in relation to my findings on the absence of a continuing breach and the Defendant's knowledge, I find that the ADC in respect of the other mortgaged properties is bound to fail on the basis that the counterclaim is statute-barred.

55. Accordingly, I strike out the ADC at paragraphs [27]-[28.7] as there is no good or lawful reason to justify the extending of the statutory limitation period.

Conclusion

56. Paragraphs [27]-[28.7] of the ADC are struck out on the limitation grounds leaving it unnecessary for me to determine the strike out application on the basis of there being no reasonable cause of action pleaded.

57. Unless either party wishing to be heard on the issue of costs files a Form 31TC within 14 days, costs shall follow the event in favour of the Plaintiff, save that the Plaintiff is not entitled to make a double recovery on costs in the event that costs are recoverable pursuant to any contractual agreement.

Dated this 21st day of September 2026

THE HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT