

**IN THE SUPREME COURT OF GRENADA  
AND THE WEST INDIES ASSOCIATED STATES  
HIGH COURT OF JUSTICE  
(CIVIL)**

**GRENADA**

**CLAIM NO. GDAHCV2005/0209**

**BETWEEN:**

**IN THE MATTER OF SECTION 22 OF THE WEST INDIES ASSOCIATED STATES SUPREME COURT  
(GRENADA) ACT CHAPTER 336 OF THE 1990 REVISED EDITION OF THE LAWS OF GRENADA**

and

**IN THE MATTER OF THE APPLICATION OF  
NATIONAL COMMERCIAL BANK OF GRENADA LIMITED**

Claimant

and

**[1] IAN FRANCIS  
[2] IAN FRANCIS**

(In his capacity as personal representative of the Estate of Juliana Francis)

Defendants/Ancillary Claimants

and

**[1] RENWICK & PAYNE  
[2] MARGARET BLACKBURN  
[3] MICHELLE EMMANUEL-STEELE  
[4] NIGEL STEWART**

Ancillary Defendants

**Before:**

The Hon. Mr. Justice Raulston L. A. Glasgow

High Court Judge

**Appearances:**

Mr. Gregory Delzin with him Ms. Ariel Agostini, Ms. Rena Banfield and Mrs. Amy Bullock-Jawahir  
for the Claimant and Ancillary Defendants

Ms. Gennilyn Etienne for the Defendants and Ancillary Claimants

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2022: March 24;  
April 29; (Written submissions)  
July 1.  
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## JUDGMENT

- [1] **GLASGOW, J.:** This claim is of some vintage, having been filed on 27<sup>th</sup> April, 2005. The nub of the claimant's ("the Bank") case is for the construction of judicial pronouncements made by the court in Suit Nos. 582 of 1999 (the 1999 claim) and 185 of 2000 (the 2000 claim) with respect to restrictive covenants appertaining to a lot of land known as "Lot 5" forming part of Corinth Estate in the parish of Saint David, Grenada owned by Ian Francis. The court is asked to consider whether, in view of those pronouncements, the defendants ("the Francises") were under a duty to satisfy the mortgage dated 4<sup>th</sup> July 1997 in favour of the Bank and further charges dated 19<sup>th</sup> July 1999 and 26<sup>th</sup> April 2002. The Francises' case, on the other hand, is set out in their counterclaim with respect to allegations that the Bank and the ancillary defendants ("the firm") breached their duty to the Francises and more particularly, whether the firm, as solicitors, breached a duty to properly advise them on the restrictive covenants prior to executing the mortgage deed and deed of further charges.

### Background

- [2] Simeon Francis purchased Lot 5 from Elisha Baptiste (Mr. Baptiste) by virtue of a conveyance dated 27<sup>th</sup> August 1992. Thereafter, Simeon Francis subdivided Lot 5 into two portions. Simeon Francis sold one portion of Lot 5 to Ian Francis on 4<sup>th</sup> July 1997 ("the property"). On even date Ian Francis executed a mortgage in favour of the Bank with the property being used as security. Simeon Francis sold the remaining portion of Lot 5 to Hyacinth Hypolite on 12<sup>th</sup> July 1997. On 19<sup>th</sup> July 1999, Ian Francis and the Bank agreed to a further charge over the property.
- [3] On 9<sup>th</sup> December 1999, Mr. Baptiste commenced the 1999 claim against Simeon Francis and Ian Francis seeking orders which included requests for –

- (1) a declaration to enforce the restrictive covenant contained in the schedule to the 27<sup>th</sup> August 1992 deed;

- (2) a declaration that the dwelling house erected by Ian Francis was in breach of the covenant; and
- (3) an order that the dwelling house be removed, among other relief.

[4] In response to the claim, Simeon Francis and Ian Francis filed a defence and counterclaim on 16<sup>th</sup> February 2000. In their defence and counterclaim, they denied that they were in breach of the restrictive covenants and by way of relief sought a return of the purchase price of the property; costs for preparation of deed and plan; damages; interest and costs.

[5] On 6<sup>th</sup> April 2000, Mr. Baptiste filed the 2000 claim against Simeon Francis and Hyacinth Hypolite. Mr. Baptiste sought declarations that:

- (1) the sale of the property by Simeon Francis to Ms. Hypolite was in breach of the restrictive covenants not to sub-divide the lot and not to erect more than one main building thereon;
- (2) the construction of a second dwelling house on the property by Ms. Hypolite was in breach of the restrictive covenant not to erect more than one building thereon;
- (3) an injunction to restrain Ms. Hypolite from constructing any dwelling house or building on the property, among other relief.

[6] In response to the 2000 claim, the defendants filed a defence and counterclaim on 12<sup>th</sup> July, 2000 in which they denied being in breach of the restrictive covenants. Further, the defendants alleged that Mr. Baptiste was also in breach of covenants, in that he failed to develop and provided utilities and services to the property. Therefore, by way of relief the defendants counterclaimed for return of purchase price, wasted expenditure, among other relief.

[7] In the year 2003, the 2000 claim came before Barrow J on 5<sup>th</sup> December 2003 who ordered that:

- (1) The defence be struck out as disclosing no reasonable prospect for defending the action.
- (2) Judgment be entered for Elisha Baptise for the first and second declarations sought in the statement of claim.

(3) Costs to Elisha Baptiste in respect of the statement of claim, the claim, quantification of same to await the final outcome of the counterclaim brought by Simeon Francis and Hyacinth Hypolite.

(4) The counterclaim is to proceed to trial with the claims for relief to be amended “LT” as follows:

- (a) The first and second claims for relief by Simeon Francis are to be struck out.
- (b) The first, second and third claims for relief by Hyacinth are to be struck out.

[8] In the same year that the 2000 claim was resolved before Barrow J, the 1999 claim came on for case management and was determined by Cottle M (as he then was). Master Cottle in his judgment dated 25<sup>th</sup> September 2003, ruled that: *“Simeon Francis already has a judgment of this court against him declaring that he is in breach of the covenants in the deed. This judgment is binding not only on him but also on all his successors in title. Ian Francis would be in contempt of court if he persists in behaviour which is in breach of the covenants. There is no need to pursue this claim any further.”*

[9] On 27<sup>th</sup> April 2005, the Bank filed this claim against the Francises seeking:-

- (1) A declaration that upon a true construction of the orders made by the court in 1999 and 200 claims the Francises will not be in contempt of court if they were to reside in their house built on the property.
- (2) A declaration that in view of the judgment of Cottle M in the 1999 claim, “the cause of action on which the said suit was instituted has merged into the said judgment”.
- (3) A declaration that the Francises are liable to the Bank to pay the mortgage debt due and owing under the mortgage and deeds of further charges.

[10] The Francises filed a defence and counterclaim on 9<sup>th</sup> June 2005. They joined the firm and several of its then principals as defendants to the counterclaim. The Francises denied the Bank’s claim and counterclaimed against the Bank and the firm for, among other things, –

(1) a declaration that the ... Deed of Further Charge and Second Deed of Further Charge with respect to the Indenture of Mortgage made 4<sup>th</sup> July 1997 between the Defendants and the Claimant are not binding on the Defendants...;

(2) General Damages; and

(3) Special Damages being all costs expended by the Defendants subsequent to their purchase of the ... land

- [11] On 23<sup>rd</sup> February 2007, the firm filed an application to strike out the counter claim brought by the Francises against it. Henry J ruled on the strike out application and struck out the Francises' counterclaim. Ian Francis appealed the Henry J order striking out the counterclaim. On 5<sup>th</sup> February 2009, the Court of Appeal allowed the appeal brought by Ian Francis and set aside the decision to strike out the counterclaim, among other orders.

### **The Bank's case**

- [12] The Bank recites Cottle M's opinion that the Barrow J judgment against Simeon Francis in the 2000 claim was binding on his successors in title. The Bank also recited the learned Master's view that Ian Francis would be in contempt of court if he persisted in behaviour that was in breach of the covenants in the deed. The Bank's interpretation is that the learned Master did no more than recite that, pursuant to the 2000 claim, Simeon Francis and Hyacinth Hypolite were in breach of covenants.
- [13] Further, the Bank explains that Cottle M, in delivering his judgment, informed the Francises, who were present in court that they would be in contempt of court if they were to reside in the house that they constructed. The Bank contends that this statement was not necessary and did not logically follow since the restrictive covenant did not preclude subdivision but merely restricted the construction of more than one building. The Bank further argues that Barrow J made his ruling in the 2000 claim prior to hearing the claim against Ian Francis in the 1999 claim. In that ruling Barrow J entered judgment against Simeon Francis and Hyacinth Hypolite. The Bank posits that when Cottle M struck out the claim brought against Simeon Francis and Ian Francis, as an abuse of process, the learned Master thereby accepted that the issue of the breach of the restrictive covenant had been finally disposed of by the Barrow ruling.
- [14] The Bank says that the Francises have indicated to them that, having regard to the learned Master's ruling, neither themselves nor Hyacinth Hypolite are permitted to erect and reside in a dwelling house on the property. Therefore, the Francises have not moved into their home and are living in

accommodation elsewhere. The Francises are also in default of the mortgage and deeds of further charge, indicating that they are unwilling to keep up the mortgage payments for a house they cannot enjoy.

- [15] In the premises, the Bank claims that it has been prejudiced and that the arrears in mortgage payments owed by the defendants continue to accumulate. The Bank is also concerned with the perception of contempt which may affect its security and its commercial or marketable value.

### **The Francises' case**

- [16] The Francises' defence is that their relationship with the Bank is subject to the provisions of the Banking Act<sup>1</sup> and to the various banking and loan agreements and indentures of mortgage and further charges. In particular, the Francises plead that the Bank at all material times owed them a fiduciary duty and that the Bank's agents, the firm, owed a duty of care to them with respect to all acts of commission or omission on the part of the firm.
- [17] The Francises claim that prior to 1997 they have not been involved in the sale or purchase of property or have any experience therein. In respect of the Francises' relationship with the Bank, their case is that they had a relationship with the Bank, in that they maintained a current and savings account with the Bank. In or about the month of April 1997, the Francises plead that they requested a loan from the Bank for the purpose of purchasing the property from Simeon Francis. The Bank agreed to the loan subject to, among other things, a mortgage on the property and the conveyance and mortgage documents being prepared by the firm at the Francises' expense.
- [18] Elisha Baptiste was the predecessor in title to the property. The conveyance from Mr. Baptiste to Simeon Francis contained a covenant binding Simeon Francis and his successors in title which in effect stated that only one principal dwelling house could be built on the property. They plead that there was no covenant restraining Simeon Francis from subdividing the property or from selling or otherwise disposing of any part of the property.

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<sup>1</sup> Act No. 40 of 1993

- [19] In or about the month of July 1997, the Francises obtained a further loan from the Bank for the purpose of constructing a dwelling house on the property. The firm prepared those documents and the deed of further charges. Thereafter, the Francises commenced construction of a dwelling house on the property and drew down funds from the Bank for that purpose.
- [20] In or shortly after December 1999, the Francises were served with the 1999 claim, wherein Mr. Baptiste claimed damages for breach of covenant and an order restraining Ian Francis from continuing construction, among other relief. It is their case that it is only upon service of the 1999 claim that they became aware of the restrictive covenant which purportedly restricting their right to build on their land. They contend that the covenant was not brought to their attention by the Bank or the firm in their capacity as their solicitors. By order dated 21<sup>st</sup> January 2000, Benjamin J restrained Ian Francis from further construction until trial or further order. Therefore, in compliance with that order the Francises ceased all further work and advised the Bank of same. Further, they claim that the Bank advised them that it is instructed by the firm to resolve the matter. The Bank's loan officer assured them that *"the lawyers will sort it all out after the house is finished, go ahead with the building, and how much money do you need to finish?"*
- [21] As a consequence of the assurances given by the Bank's loans officer, the Francises applied for and obtained a further loan to complete the roof. This second deed of further charge was prepared by the firm and executed on 26<sup>th</sup> April 2002. On 5<sup>th</sup> February 2003, the Francises learned that Barrow J had declared in the 2000 claim that Simeon Francis was in breach of the restrictive covenants set out in his conveyance from Mr. Baptiste. Additionally, they maintain that Cottle M in had in the 1999 claim, struck out Mr. Baptiste's claim and stated that *"Ian Francis would be in contempt of court if he persists in behaviour which is in breach of the covenants."* Therefore, they explain that out of respect for those judgments they did not complete their house and have been obliged to take up rented accommodation.
- [22] The Francises insist that they acted on the Bank's advice that the matter would be resolved. In reliance on that advice, they continued making timely payments to the mortgage and did so until October 2003 when Cottle M made it clear that they would not be able to complete their house. The Francises plead that in a meeting with a representative of the bank and the firm and their counsel, Ms. Celia Clyne, the counsel for the firm advised that them that Cottle M's remarks that Ian Francis

would be in contempt of court if he persists, “*carries little weight if any at all*” and “*we do not think that Ian Francis would be in contempt of court if he completes his house and moves in*”. However, they state that their counsel, Ms. Clyne, did not concur with counsel for the firm’s view. Therefore, they did not take any steps to complete their house. As a consequence the house stood empty in excess of two years and suffered damage by weather and vandalism to the extent that it would be impracticable to complete and made fit for habitation.

[23] The Francises’ counterclaim avers that the firm and its members are each responsible in law for the negligence of any of them or any person or persons acting for them on their behalf. Further, in consequence of their acceptance of the Francises’ instruction and payment of their fees on three occasions, the firm was contractually bound to them to provide competent legal services. By failing to discover and inform them of the existence of a restrictive covenant on the title of their land prior to entering into the mortgage and further charges, the Bank was in breach of the contract and is liable for the losses and damage caused to them.

[24] Additionally, the Francises claim that the firm assumed a common law duty of care when it gave legal advice to them. In consequence of the foregoing matters, the firm was negligent in the performance of that duty and is liable for losses and damage caused to them. Moreover the firm acted in their capacity as legal advisors to both the Bank and to them. As such the Bank is equally responsible in law for the acts and omissions of the firm and any losses or damages suffered by its negligence to the Francises. Therefore, the Francises seek a declaration that the deed of further charges are not binding on them, an order for general damages among other relief.

### **Preliminary Objections**

[25] On 29<sup>th</sup> April, 2022 counsel for the Francises, Ms. Gennilyn Ettienne, in her written submissions objected to the court’s order dated 24<sup>th</sup> March 2022 (the March order). Ms. Ettienne argues that the effect of the March order is that it will alter the court’s previous decision dated 22<sup>nd</sup> November 2021, where the court refused the summary judgment application brought by the Francises. Counsel’s view is that the effect of the March order was to ignore the existence of the ancillary claim brought by Francises and to deny them the right to treat the claim as if it were a claim in accordance with CPR<sup>2</sup>

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<sup>2</sup> Civil Procedure Rules 2000



18.2. Further, counsel says, the March order was a complete “*summary distillation of the viability of the defence and ancillary claim*”.

[26] Counsel tendered the following reasons for her objections to the March order:

- (1) Cottle M’s decision is clear on its face and needs no further elucidation.
- (2) To order the parties to file submissions on the effect of Cottle M’s decision is not permissible.
- (3) The issue as to whether the Francises are precluded from fulfilling their obligation to the Bank, on the basis of the previous rulings, is not a matter for interpretation.
- (4) The issue between the Bank and the Francises can only be properly ventilated and determined at trial.
- (5) The judgments of Cottle M and Barrow J are clear and conclusive.
- (6) The Francises are prejudiced by the March order since it, in effect, deprives them from fully ventilating several causes of action raised in the defence and counterclaim.
- (7) The issue of the negligence of the firm and the Bank was raised prior to the decision of Cottle M.
- (8) The court has not provided any justification or basis to restrict the central issue as to whether the Francises are precluded from fulfilling their obligation to the bank on the basis of the decision by Cottle M.

[27] Ms. Etienne opines that this court has failed to frame or appreciate the issues raised on the pleadings, particularly the issues raised on the Francises’ defence and counterclaim. Ms. Etienne accepts that the court has the same power under case management as it possesses at pre-trial review pursuant to CPR 38. However, counsel points out that the court’s power to exclude any issue for determination can only be exercised if it considers that it will do substantive justice to the other issues between the parties. Counsel suggests that the original issue in the Francises’ counterclaim is one of negligence.

[28] I note that one of the reliefs sought by the Bank is for, in essence, an interpretation of the pronouncements made in Cottle M’s decision and in particular a declaration as to whether by virtue of Cottle M’s pronouncements, the Francises would be in contempt of court if they continued construction of their home and moved therein. In my view, logically, much in this claim turns on the

interpretation of Cottle M's ruling. These matters will be expanded below but I fear that, in my estimation, this question could be and ought to be resolved separately.

- [29] Suffice it to say, however, that the issue as to whether the Bank and/or the firm owed a duty of care to advise of or disclose the restrictive covenants to the Francises before they executed the mortgage and further charges is very much a live issue in these proceedings. In my view, it would be just and convenient to dispose of the interpretation issue first at this stage before considering any other issue on the claim and/or counterclaim.

### **The Cottle M decision**

#### **Submissions on behalf of the bank and the firm**

- [30] In submissions filed on 29<sup>th</sup> April 2022, counsel for the Bank and the firm, Ms. Rena Banfield, addressed the court on the interpretation to be given to Cottle M's decision and its impact on the contentions arising from the pleadings. It is Ms. Banfield's assessment that the statements made by Cottle M at paragraph 9 of the ruling ought to be considered obiter dicta, since the statement was not based on a principle or question that was decided by the court. Counsel relies on the Court of Appeal's decision in **Allen Chastanet v Ernest Hilaire**<sup>3</sup> and the English Court of Appeal decision in **R v Hatton**<sup>4</sup>, where both courts defined what is meant by obiter dicta.
- [31] Counsel recounts that Cottle M framed the issues before him at paragraph 3 of the ruling as follows *"when this claim came up for case management, the defendant took the position that the claim ought not to be allowed to continue. The issues are res judicata they say. Alternatively it would be an abuse of process to permit the claimant to litigate against matters which he ought to have litigated at the other trial. The issues are the same..."*
- [32] Counsel alludes to the findings on the issues and Cottle M's reasoning set out at paragraphs 6 to 8 of the ruling. Counsel explains that the issues before the court as set out in those paragraphs were in respect of whether the claim was res judicata or in the alternative an abuse of the court's process. Counsel submits that the Master did not agree that the matter was res judicata, but found that

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<sup>33</sup> SLUHCVP2019/0005 at para. 30

<sup>4</sup> [2005] EWCA Crim 2951 at para. 18

allowing the claim to proceed to trial would amount to an abuse of process since the claimant in that case (Mr. Baptiste) ought not to be permitted to re-litigate issues that could have litigated in the 2000 claim against Simeon Francis and Hyacinth Hypolite. Counsel posits that the contempt statement made by the learned Master did not form part of the reasons for the finding that the matter ought to be struck out.

- [33] The other statement by the learned Master that “*this judgment is binding not only on him but also on all his successors in title*” was a remark made in passing and did not form the basis of Cottle M’s decision nor was it necessary to dispose of the issue before him. Counsel argues that the statement was obiter dicta. Counsel urges the court to find that the emphasis ought to be placed on the decision made by the learned Master and not on individual phrases occurring in the judgment. Counsel supports this view by dicta found in **Miller-Mead v Minister of Housing and Local Government and Anor**<sup>5</sup>, where the Lord Diplock LJ stated at page 473 of the judgment that:

“and in doing so I bear in mind that, particularly in extempore judgments ....wide expressions must be read secundum subjectam materiam. One must look to see what the real decision was and not take an isolated phrase as if it were intended to expound the whole law on the subject.”

- [34] Counsel reasons that if the court were to accept the foregoing and find that the statements were made in passing and were not a part of the court’s ratio decidendi, then it must conclude that the statements made were obiter dicta and not binding. Therefore, the Francises cannot rely on the obiter statements and as such there was no legal impediment standing in the way of fulfilling their obligations to the Bank. Counsel reminds the court that Barrow J declared that it was Hyacinth Hypolite and Simeon Francis who were in breach of the restrictive covenant in respect of the construction of a house by Ms. Hypolite. Counsel points out that there is no judgment of a court deeming the property of the Francises to be in breach of the restrictive covenant. Therefore, counsel asks that the court grants the declarations sought by the Bank and that the court dismisses the claim against the ancillary defendants.

- [35] In respect of costs, counsel submits that the Francises’ case, although misguided, was not motivated with the intention to avoid their legal obligations under the mortgage. Therefore, counsel suggests that each party bear their own costs.

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<sup>5</sup> [1963] 1 All ER 459

### The Francises' submissions

- [36] Ms. Ettienne, in her written submissions, argues that generally under the common law, a pleading or defence based on cause of action estoppel, if accepted, prevents a party from pursuing a claim which has already been determined by a court of competent jurisdiction in previous proceedings between the same parties or their privies. Counsel says that the Barrow J and Cottle M rulings are judgments in personam which resemble judgments in rem. Ms. Ettienne explains that in the 1999 claim between Mr. Baptiste, Simeon Francis and Ian Francis, Cottle M confirmed the existence of the burden of two restrictive covenants as decided by Barrow J in the 2000 claim. Ms. Ettienne observes that Cottle M relied on **Bradford and Bindley Building Society v Seddon**<sup>6</sup>, where the court summarised the respondent's submissions which stated "*...it may be an abuse of process to re-litigate the same issues in subsequent actions even where the parties are different and even where the duty owed the persons may be different.*"
- [37] Ms. Ettienne states that it is clear that the doctrine of precedent is based on the principle of stare decisis, which requires lower courts to take into account and follow decisions made by higher courts where the material facts are the same. Counsel says that judges of first instance usually follow the decisions of another first instance judge unless it is convinced that the decisions were wrong. Therefore, counsel concludes that the issues before this court are the same, in that they concern the breaches of the covenants in the same deed.
- [38] Further, Ms. Ettienne argues that stare decisis and the doctrine of precedent dictated comity between the rulings of Barrow J and Cottle M. Counsel contends that this court is bound to find the same comity among the rulings or based on the same doctrines. In order to do so, this court is duty bound to identify the issues in previous rulings to determine whether those issues have already been determined. However, Ms. Ettienne accepts that this court is not bound by obiter statements of any court. Counsel explains that obiter dicta are statements made during the course of a judgment that are not a part of the ratio decidendi, headnote or restatements of law. Counsel relies on statements made by Megarry J in **Brunner and another v Greenslade**<sup>7</sup> to support this view.

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<sup>6</sup> [1999] 4 All ER 217

<sup>7</sup> [1970] 3 All ER 833 at 839

[39] Ms. Ettienne suggests that there is no need for this court to interpret the statements made obiter dictum by Cottle M since the statements were not essential to the decision and were non-binding. Counsel submits that it is the court's duty to find the ratio decidendi of the Cottle M's decision. The fulcrum of that decision was that the re-litigation of the 1999 claim based on the restrictive covenants contained in the same deed constituted an abuse of the court's process. Ms. Ettienne maintains that the significance of the Cottle M's decision is that the Francises as privies of the Barrow J judgment are bound by its terms by virtue of their relationship with Simeon Francis and Hyacinth Hypolite. In essence, counsel's views the Barrow J judgment as not only applicable to Simeon Francis and Hyacinth Hypolite but to Ian Francis as well. The Cottle M judgment precludes the Bank from asserting that Mr. Baptiste is not entitled to the fruits of his judgment as granted by Barrow J and followed by Cottle M.

### **Discussion and Analysis**

[40] It might be useful to advert to the matters that were before Cottle M for deliberation and resolution. With respect to the matters before the court for consideration, Cottle M at paragraphs 3 and 4 of the judgment stated:

At paragraph 3:

"When this claim came up for case management, the defendant took the position that the claim ought not to be allowed to continue. The issues are res judicata they say. Alternatively it would be an abuse of process to permit the claimant to litigate again matters which he ought to have litigated at the other trial. The issues are the same. They concern breach of the covenants of the same deed."

And at paragraph 4, he continued:

"The claimant says that no issue of res judicata can arise. The instant proceedings are not subsequent proceedings as this claim was filed first."

[41] The learned Master then made findings on those issues at paragraphs 6 and 8 of the judgment, where he stated:

At paragraph 6:

"I do not consider that the facts of the instant case amount to res judicata. I accept the contentions of the claimant that there still remains issues which were not adverted to in the claim already determined. But the matter does not rest there. There exist circumstances

where although it may not amount to res judicata it may still constitute an abuse of process to permit the claim to continue.”

And at paragraph 8:

“I consider that the issues which are raised in this claim could easily have been dealt with at the earlier hearing. To permit this case to continue would amount to an abuse of the process of this court.”

[42] At paragraph 9 of the ruling the learned Master made the following statements which form the basis of the contentions that they are obiter -

“I pause to add that the striking out of this statement of claim as an abuse of process does not leave the claimant without a remedy. Simeon Francis already has a judgment of this court against him declaring that he is in breach of the covenants in the deed. This judgment is binding not only on him but also on all his successors in title. Ian Francis would be in contempt of court if he persists in behaviour which is in breach of the covenants. There is no need to pursue this claim any further.”

[43] As recited above, counsel for the bank, Ms. Banfield states that the statements at paragraph 9 did not form part of the ratio decidendi or reasons for Cottle M’s decision. I agree. Ms. Ettienne, for the defendants also agrees at paragraph 21 of her written submissions that the statement made by the learned Master that Ian Francis would be in contempt of the ruling in the 2000 claim if he persisted “... in behaviour which is in breach of the covenants ”, was indeed obiter dictum. I think that this is a correct view of the matter.

[44] It might aid this discourse to distil what Cottle M was referring to when he found earlier at paragraph 8 of his ruling that the claim was an abuse of process since the issues in that claim could have been ventilated on the previous claim brought by Mr. Baptiste. The trajectory of the law and facts suggest to me that Cottle M considered the following when he made his ruling –

- (1) In the 2000 claim, the court was asked to determine whether Simeon Francis had breached the covenant against building more than one house on Lot 5;
- (2) The court in the 2000 claim was also tasked with determining whether Ms. Hypolite’s house, (although built on a subdivided portion of Lot 5) amounted to a breach of the

restrictive covenant in that the presence of the house amounted to having more than one house on Lot 5;

- (3) That by striking out the defence and granting declaration 1 of the 2000 claim<sup>8</sup>, the court in that claim had indeed found that Simeon Francis acted in breach of the restrictive covenant when he permitted Ms. Hypolite to build a house on the subdivided portion of Lot 5;
- (4) That by striking out the defence and entering judgment on declaration 2 of the 2000 claim<sup>9</sup>, the court found that, in essence, Ms. Hypolite's house amounted to an additional house on Lot 5 when only one house was permitted to be built;
- (5) That the 1999 claim also sought declarations that Simeon Francis acted in breach of the restrictive covenant when he allowed the Francises to build a house on Lot 5;
- (6) That the 1999 claim also sought declarations that the house built by the Francises amounted to a breach of the covenant not to allow a 2<sup>nd</sup> house on Lot 5.

[45] In view of the matters that were before Cottle M as set out above, I find it hardly surprising that he formed the view that he did. It is clear that in the 2000 claim Barrow J found that Simeon Francis acted in breach of the restrictive covenant when he allowed Ms. Hypolite to build on Lot 5. The question of the second house on Lot 5 was also before Barrow J in the 2000 claim. In that claim, Barrow J ruled that Ms. Hypolite's house stood in breach of the restrictive covenant. There was no or could be no positive ruling by Barrow J about the question of the Francises' house since this was not a question that was before him. When making his ruling at the hearing of the 1999 claim though, the learned Master found, correctly in my view, that this question of whether this remaining house belonging to the Francises was also in breach of the covenant was a matter that could have also been raised previously. Hence he accepted that *"there still remain issues which were not adverted to in the claim already determined"*. It therefore makes sense that he did not "consider that the facts of the instant matter amount to res judicata" but he considered *"that the issues which are raised in this claim could easily have been dealt with at the earlier hearing. To permit this case to continue*

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<sup>8</sup> "A declaration that the sale of Lot 5 by the First Defendant to the Second Defendant of [sic] is in breach of the restrictive covenants not to sub-divided the said lot and not to erect more than one main building thereon."

<sup>9</sup> "A declaration that the construction by the Second Defendant of a dwelling house on the said Lot is in breach of the restrictive covenants not erect more than one main building thereon and not to erect or maintain thereon or any part thereon any building which shall cost less than \$150,000.00."

*would amount to an abuse of the process of this court.”* He struck out the 1999 claim as an abuse of process. Having struck out the claim on the basis as he did, I do not think that it was necessary to go on to comment on whether Ian Francis would be in contempt of court “... *if he persists persisted in behaviour which is in breach of the covenants...*” In any event I do not see the learned Master elaborating on what actions of Ian Francis would amount to “*behaviour which is in breach of the covenants*”.

- [46] In all the circumstances, it is quite apparent to me that the contempt comment was an obiter statement and that it was not binding on the Francises. In view of what I have stated above on the extent of the learned Master’s ruling the implication is that the Francises were not precluded from proceeding with their construction and moving into their home. But that is not the end of the matter.
- [47] The crux of the Francises’ defence is that they largely depended on the Bank and the firm (who the Francises claim was also acting as solicitors for the bank) and that these entities owed certain contractual and other duties to them. As Ms. Ettienne has pointed out, the Francises may have been misled or ill-advised or negligently advised by the Bank and/or the firm about a number of matters including the restrictive covenant .The Francises are asking the court to find that it is as result of the acts or omissions of the Bank and/or the firm that they found themselves confronted with a ruling from the court that included a statement indicating that they would be in contempt of court if they proceeded with the completion of their home and the entry thereto. As a consequence, the court ought to find that they are not to be held to have breached their obligations or ought to be bound by the terms of the deeds of mortgage.
- [48] I do not find that the Francises took an unreasonable posture with respect to their insistence to comply with the terms of Cottle M’s ruling. The parties were clearly at odds as to whether or not the disputed part of the ruling was obiter or not. It was not in the remit of either side to interpret and determine whether indeed this part of the ruling was obiter. However, the parties should have resolved their variance on the meaning in the ruling by earlier application to the court for a ruling on whether or not the statements were obiter and/or whether they were bound by the same. This they did not do.



### **Hearing the interpretation issue separately**

[49] As stated above, this court has taken the view that it would be useful to separate the interpretation issue and deal with it separately. Ms. Etienne says that this approach flies in the face of the court's earlier ruling on summary judgment. I am constrained to disagree with learned counsel. On the summary judgment application, the court found that neither the claimant nor the defendants were entitled to a summary judgment since there were, in addition to the legal issues, many factual issues to be resolved. But that does not mean that the court is not empowered to separate certain triable issues in the claim and deal with them separately<sup>10</sup>.

[50] It seems to me that it would serve the interest of a just outcome and proper case management to have the interpretation of the Cottle M ruling sorted before attempting to resolve the other issues. The question of whether the Francises were bound by the disputed statements in the Cottle M ruling or not is a triable issue that could only be resolved as a matter of legal interpretation. This is since, as discussed above, this issue can be resolved on ascertaining;

- (1) what were the issues before Cottle M and what did he actually decide; and
- (2) whether the disputed part of the ruling amounted to grounds or reasons for his decision (the ratio decidendi) or not (obiter dicta).

[51] It is now much clearer that those statements were obiter dicta and did not form part of the reasons for the ruling. As an ineluctable consequence of that interpretation, it is also apparent that the Francises were not bound by those statements. It is also now much clearer that the issues to go to trial are what, if any duties, by law, agreement or otherwise, did the Bank and/or the firm owe to the Francises. The court will also have to determine, if the Bank and/or the firm owed duties to the Francises, whether the Bank and/or the firm breached those duties and whether as a consequence the Francises suffered loss and damages. So, it is not a sine qua non, as the Bank claims, that because the Francises were not bound by the obiter statements made by Cottle M, that they are now enjoined to make payments under the mortgage or meet other obligations flowing therefrom. This is due to the fact that the court may, among things, find that the Bank was in breach of its obligations

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<sup>10</sup> CPR 26.1(2)(d),(e)

to the Francises and may then find that the Bank is precluded from pursuing money or other remedies purportedly owed to it on the mortgage.

- [52] On this preliminary ruling therefore this court may only go so far as to say that the Cottle M ruling, properly interpreted did not preclude the Francises from finishing the construction of their home and moving into it. As stated above, the question of whether the Bank is entitled to any remedies or orders for their failure to do so is, in my view, inextricably connected to whether or not the Francises are successful in their attempt to set aside the entire deal (or as they say on their counterclaim, the deeds of mortgage are not binding on them) due to the alleged acts and/or omissions of the Bank and/or the firm.

### **Conclusion**

- [53] For all these reasons, I order as follows:

- (1) A true construction of the orders of the courts in Suit Nos. 582 of 1999 and 185 of 2000 did not preclude the defendants and their successors in title from constructing and occupying their property with dwelling house thereon situate at Corinth Estate in the parish of Saint George, Grenada (the property).
- (2) The trial of this claim will continue with respect to the issues at paragraph (iii) of the claimant's prayer for relief on the statement of claim filed on 27<sup>th</sup> April 2005 and the relief sought on the counterclaim filed by the defendants on 9<sup>th</sup> June 2005.
- (3) The further hearing of the trial shall be conducted on 2<sup>nd</sup> November 2023;
- (4) Costs shall be determined at the outcome of the trial.

**Raulston L.A. Glasgow**  
High Court Judge

**By the Court**

**Registrar**

