IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2008 HCV02213 AND 2008 HCV02214

BETWEEN	CONSTRUCTION DEVELOPERS ASSOCIATION LIMITED	CLAIMANT/RESPONDENT
AND	URBAN DEVELOPMENT CORPORATION	DEFENDANT/APPLICANT

Mr. Charles Piper for the Defendant/Applicant
Mr. Ian Wilkinson instructed by Ian G. Wilkinson & Company for the Claimant/Respondent

Application to strike out statement of case; R.26.3(1); Limitation of Actions; Whether claims statute barred

Although the court is notoriously slow to exercise its power to strike out a statement of case, where the pleaded defence allege the claims to be statute barred, in the absence of a reply averring an exception to the operation of the statute, the court, in giving effect to the overriding objective of the CPR, will be constrained to strike out the statement of case.

In Chambers

Heard: 19th February, 2010 and 23rd March 2010

E.J. BROWN, J (Ag.)

By Notices of Application for Court Orders filed on the 15th October, 2009, the defendant/applicant sought *inter alia,* the following orders:

1. That the claimant's statement of case be struck out as disclosing no reasonable ground for bringing the claim.
2. The reference to mediation be dispensed with or postponed.

The grounds upon which the applicant relied for the abovementioned orders were:

a) The claimant's statement of case discloses that the proceedings were commenced outside of the period provided by the Limitation of Actions Act for the commencement of proceedings for recovery of damages arising from an alleged breach of contract.

b) The claim is unsustainable in law as it does not constitute a valid claim which is capable of being brought, maintained or mediated.

c) It is inappropriate to pursue mediation in circumstances in which, on the face of the pleadings, the claim is unsustainable.

The claimant started proceedings on the 28th April, 2008 to recover debt and interest thereon from the defendant in two separate claims. In both claims the particulars of claim were filed on the 17th July, 2008. Both claims have a common origin and are identical in every material particular save for the date of the debt and the difference in the sums claimed.

In 2008 HCV02213, the claimant claims against the defendant the sum of $1,442,998.15, "being sums outstanding and unpaid as certified by quantity surveyor on or about 4th July, 2000 for services rendered by the Claimant to the Defendant." In respect of 2008 HCV02214, the claim is for $2,489,023.15 "being sums outstanding and unpaid as certified by a quantity surveyor on or about the 14th day of August, 2001 for services rendered by the Claimant to the Defendant." In both cases, the claim includes "interest on the amount due at the rate of 2% per month compounded pursuant to the contract between the parties until payment."

In virtually identical particulars of claim, the defendant contends that the respective sums became due under an agreement between the parties for the claimant to construct a bus park at Santa Cruz, St. Elizabeth. The consideration under the agreement was $11,800,739.00 "to be paid in various instalments." By virtue of clause 30 of the agreement the instalments became payable upon the issuance of the certificate.

In support of the application in 2008 HCV02213, learned counsel Mr. Piper referred to paragraphs 7 and 8 in the particulars of claim which speak to the date of the cause of action. Paragraph 7 recite that the debt became "payable pursuant to the said Agreement on or about 4th July, 2000." Paragraph 8 asserts that the claimant "will rely on the statement dated the 4th July, 2000 from the Defendant to the Claimant for its precise terms and legal effects." While paragraph 9 avers that "by means of said certificate dated 4th day of July, 2000," the defendant "has acknowledged and accepted responsibility for the said debt."

Learned counsel went on to submit that on its face, the plea is an action in debt or breach of contract, which has been brought in excess of six (6) years of the date on which the cause of action arose. Learned counsel contended further, on the face of the pleadings the cause of action arose on 4th July, 2000.

In respect of 2008 HCV02214, counsel first made reference to identically numbered paragraphs in the particulars of claims. Paragraph seven (7) reads:

> That, by Certificate No. 12, the said sum of Five Hundred and Nineteen Thousand Seven Hundred and Thirty-Six Dollars and Thirty-Five Cents ($519,736.35) was payable

> pursuant to the said Agreement on or about 14th August, 2001.

In paragraph eight (8) the claimant declares it will "rely on the statement dated the 14th August, 2001 from the Defendant to the Claimant for its precise terms and legal effect." Paragraph nine (9) asserts that "by way of the said certificate dated the 14th day of August, 2001," the defendant "has acknowledged and accepted responsibility for the said debt."

Learned counsel submitted that by virtue of section 46 of the Limitation of Actions Act, the time within which both should have been brought was six (6) years from the date the respective causes of action accrued. That period having elapsed, both claims are now statute-barred and consequently there is no reasonable ground for bringing the claims.

On the question of mediation, Mr. Piper submitted that if the court agrees that on its face, the claims do not reveal a reasonable ground for bringing them by reason of being statute barred, the court ought also to conclude that mediation would be inappropriate. This, it was argued, is because if there is no reasonable ground for bringing the claim, then there can be no matter to be mediated.

On the opposite side of the litigation divide, learned counsel Mr. Wilkinson submitted that the application is premature. That argument rests on four premises. First, the relevant dates from which time is to run have not yet arrived. That is so because the claims are based on interim, not final certificates. No final certificates have been issued.

Secondly, the sums payable under the contract are the subject of an extant dispute between the parties. Until that dispute is resolved, it was submitted, the limitation period cannot begin to run. Thirdly, it would not be a counsel of prudence to grant the application in the absence of the agreement, the Quantity Surveyor's Report and the architect's certificates. Finally, the application should properly abide the scheduling of a case management conference.

To buttress that argument, Mr. Wilkinson cited **Ricco Gartmann vs Peter Hargitay SCCA #116/2005** March 15, 2007. Learned counsel relied on **Gartmann** as authority for the proposition that a litigant can plead material (for example in a reply) to combat an application or argument that a claim is statute barred. He culled that proposition from what Cooke, J.A. said concerning when an acknowledgment of debt could be pleaded at page 12.

On the question of a referral to mediation, Mr. Wilkinson disagreed that mediation was pointless. He argued, that even if the claim is statute-barred, the claimant maintains that the matter can still go to mediation as that concept involves exploring the idea of restorative justice. The latter rendered as a means of bringing closure to the issues between the litigants, not necessarily ferreting out who is right and who is wrong.

The Law

The jurisdiction to strike out a statement of case is enshrined in the Civil Procedure Rules 2002 (CPR). By virtue of r.26.3(1):

> In addition to any other powers under these Rules, the court may strike out a statement of case or

> part of a statement of case if it appears to the court –
>
> (c) That the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim.

This power falls under the rubric of the court's general case management powers. Like the farmer separating the wheat from the chaff, the power to strike out allows the procedural judge to set apart cases so weak that they have no real prospects of success from those requiring a full investigation at trial. This, of course, is to do no more than give effect to the overriding objective of 'dealing justly with a case' which includes saving expense (r.1.1(2)(b)) and ensuring that it is dealt with expeditiously and fairly (r.1.1(2)(d). In the exercise of the power to strike out, the court is enjoined to give effect to the overriding objective (r.1.2).

The use of the power to strike out is clothed with judicial conservatism which antedates the promulgation of the CPR. The old rules required sparing use of this power. That attitude has been transitioned to the new regime. The dictum of Cooke, J.A. in **Gartmann** (supra) best encapsulates the post CPR position:

> The striking out ... of a claimant's statement of case ... is a draconian order. Such an order, while compelling in suitable circumstances, should be informed by caution lest litigants are deprived of access to the "judgment seat". In my view this drastic step of striking out a statement of case should only be considered when such statement of case can be categorized as entirely hopeless.

The position is compendiously stated by the learned authors of Blackstone's Civil Practice 2010 (BCP 2010) paragraph 33.6:

> Under the old rules it was well settled that the jurisdiction to strike out was to be used sparingly. The reason was, and this has not changed, that the exercise of the jurisdiction deprives a party of its right to trial, and of its ability to strengthen its case through the process of disclosure and other procedures such as requests for further information. Further, it has always been true that the examination and cross-examination of witnesses often changes the complexion of a case. It was accordingly the accepted rule that striking out was limited to plain and obvious cases where there was no point in having a trial.

Ratiocination

The question is, are the claims statute barred? If the answer is in the affirmative, can the claimant find solace in any of the exceptions to the operation of the statute? So then, what is the chronology of events which brought the parties to this point?

A *sine quo non* of establishing whether or not an action is statute barred, is identifying the marker from which time begins to run. In short, fixing the date when the cause of action arose. According to Lindley, L.J. in **Reeves v. Batcher [1891] 2 Q.B. 509**, 'it has always been held that the statute runs from the earliest time at which an action could be brought.' A cause of action encompasses:

> every fact which it would be necessary for the [claimant] to prove, if traversed, in order to support his right to the judgment of the court. In other words, time runs from the point when facts exists establishing all the essential elements of the cause of action.
> (Blackstone's Civil Practice 2010 paragraph 10.12)

The claims which are the subject of this application both arise from alleged breaches of contract. Time runs from the date of the breach, generally. However, in construction contracts, such as that between the parties, further considerations arise. The position is encapsulated by the learned authors of BCP 2010, at paragraph 10.18(f):

> In a construction contract where stage and final payments are payable after certification by an architect or engineer, the certificate is a condition precedent to payment, so time runs from the date the certificate is issued or ought to be issued.

The pleadings in both claims aver that the right to payment of the sums claimed arose on the issuance of the quantity surveyor's certificate. Even without having had sight of the agreement, it is palpable that the furnishing of the quantity surveyor's certificate was a condition precedent to the claimant's entitlement to payment. That being so, the right to sue for the sums claimed arose at the date the quantity surveyor issued his certificate. Ergo, the causes of action arose in the respective claims on the 4th July, 2000 and 14th August, 2001.

Therefore, the claim in HCV02213 was filed eight (8) after its accrual. In the case of HCV02214, it was filed seven (7) years after the earliest time at which it could be brought. So, neither claim was brought within the statutory six (6) year period.

Mr. Wilkinson contends that time hasn't yet started to run as the certificates issued are interim. In other words, time can only run from the date of the release of a final certificate by the quantity surveyor. Taken to its logical conclusion, counsel appears to be saying the cause of action will not arise until a final certificate has been

issued. The illogicality of that position becomes manifest in the face of the question, what then is it that forms the bases of the claims? For, if time can only run when a final certificate is issued and time runs from when the cause of action first arises, without the final certificate the claims become suits without causes of action.

That the certificates were of the character ascribed by Mr. Wilkinson is supported by paragraph 3(e) of the defence. Paragraph 3(e) is set out in full hereunder:

> By the terms of the said contract, the Claimant was required to present to the Defendant, at intervals stipulated in the contract, requests for interim payments and the Architect appointed by the Defendant who, for the purposes of the contract, was the contract administrator, was required to issue interim certificates stating the amount that was due to be paid to the Claimant.

Learned counsel for the claimant/respondent submission would allow the claimant to sue upon each interim certificate but at the leisure of the claimant as the very nature of the certificate holds the operation of the Limitation of Actions Act in abeyance.

A similar question arose in **Henry Boot Construction Ltd v. Alstono Combined Cycles Ltd [2005] EWCA Civ. 814.** Dyson L.J. at paragraph 56 said that "the cause of action in respect of an Engineer's failure to include a sum in an interim certificate is not the same as the cause of action in respect of a failure to include a sum in a final certificate."

Two authorities cited in the judgment provide further illumination of the point. In **Wilkinson v. Verity (1871) LR 6 CP 206**, Willes J said:

> It is a general rule that where there has once been a complete cause of action arising out of contract or tort, the statute [of Limitations] begins

> to run and that subsequent circumstances which would but for the prior wrongful act or default have constitute a cause of action are disregarded.

Secondly, **Reeves v. Butcher**, supra. There the plaintiff brought a claim within six years for principal and interest at the end of a five year loan agreement. The claim failed upon a plea that the action was statute barred. It was held that time began to run from the earliest time at which the action could have been brought, that is, 21 days after the first instalment of interest become due.

The dictum of Lindley, L.J. at p. 511 is entirely *apropos* with respect to the claim in the instant application:

> The cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought.

So then, each interim certificate issued by the quantity surveyor represents an outstanding debt in favour of the claimant and by that same token, a cause of action. That the claimant/respondent recognized this is inescapable from a mere glance at the pleadings. How could it be a cause of action for the purpose of bringing the claim but not for the operation of the Limitation of Actions Act. The claimant cannot approbate and reprobate in the same breath.

If the court is correct in its finding concerning each interim quantity surveyor's certificate, then Mr. Wilkinson's second submission may be summarily disposed of. The fact of a dispute about sums payable under the contract becomes irrelevant once the debt has ripened into a cause of action. These claims matured on the dates of the

issue of the respective quantity surveyor's certificates. This takes the court to the third submission.

Of what moment is it that the agreement, quantity surveyor's report and quantity surveyor's certificates are not before the court? From the pleadings, no reliance is being placed on the agreement save to ground the claims. Both parties *are consensus ad idem* on the effect of the agreement on the claims filed. Similarly, there is no contention that the quantity surveyor's certificates have any effect contrary to that asserted by the claimant. *Au contraire*, paragraph 3(e) of the defence supports the assertions of the claimant vis-à-vis, the mechanism for payment. That having been said, the relevance of a quantity surveyor's report resides behind an impenetrable veil as the sums claimed fall within the realm of the ascertained not the ascertainable, to be divined by a Quantity Surveyor.

I come now to the last of the contending arguments that the application is premature. Should this application abide the scheduling of a case management conference? There can be no argument that a court has a duty to actively manage cases (CPR r.25.1). Is that duty to find expression only within the confines of a scheduled case management conference (CMC)? It is more than a little difficult to see how it would further the overriding objective of the CPR to hold over an application attacking the pleadings as unsustainable to CMC on that solitary basis. The court at CMC would be in no better position than that hearing the application. Each would have only the pleadings to adjudicate upon.

Finally, the reliance placed on **Gartmann v. Hargitay** is misconceived, with all due deference to learned counsel. While it is true that Cooke, J.A. held that an acknowledgment could be pleaded in a reply, it is equally clear that the learned Justice of Appeal did not mean to convey that that facility operates as a sort of bar or shield against an application to strike out a statement of case. In that case no defence had been filed and in the draft defence reliance on the Limitation of Actions Act had not been pleaded. So, as Cooke, J.A. said, there was nothing to reply to.

In the instant case, by agreement, a defence was filed out of time on 4th December, 2008. Paragraph two (2) of the Defence reads:

> The Defendant says that the claim herein is barred by the operation of the Limitation of Actions Act and that accordingly, the Claimant is not entitled to the relief claimed or any relief.

This application was filed some ten months later on 15th October, 2009 and set down for hearing on 19th February 2010.

Unlike in **Gartmann v. Hargitay** there was something here to reply to. Alas! The claimant sat on its hind quarters and did nothing for over a year. The claimant/respondent is self-confessed as to his ability to join issue with the pleaded defence in a reply. However, the claimant is not at large in the reply. His reply must be tailored to wrap him in one or the other of the exceptions to the operation of the Limitation of Actions Act.

Since no issue was joined with the defence in a reply, was the defence anticipated in the particulars of claim? The claimant averred in its particulars of claim that the defendant 'acknowledged and accepted responsibility for the said debt.'

Although the defendant denies making any such acknowledgment, the pleading plainly says the acknowledgment is 'by way of the said certificate.' So, the acknowledgment pleaded is one which is contemporaneous with the origin of the debt and would leave the Limitation of Actions Act wholly unaffected.

In that event, and since nothing was pleaded in reply, the conclusion that both claims are statute barred is as inexorable as it is compelling. Quaere, notwithstanding the lapse of the limitation period, should the claims be allowed to proceed to trial?

The dictum of Davies L.J. in **Riches v. D.P.P. [1973] 1 W.L.R. 1019, 1024** is instructive:

> If there is any room for an escape from the statute, well and good; it can be shown. But in the absence of that, it is difficult to see why a defendant should be called upon to pay large sums of money and a plaintiff be permitted to waste large sums of his own or somebody else's money in attempt to pursue a cause of action which has already been barred by the Limitations Act 1939 and must fail.

The decision to strike out the plaintiff's statement of case was upheld upon the ground that it was statute barred, *inter aiia*.

In **Ronex Properties v. John Laing [1083] 1 Q.B. 398**, the application was to strike out the action on the basis that it disclosed no reasonable cause of action. The contention of no reasonable cause of action rested on the fact of the expiration of the relevant limitation period. Donaldson, L.J. thought such a contention absurd and at page 404 said:

> It is trite law that the English Limitation Acts bar the remedy and not the right, and, furthermore,

> that they do not even have this effect unless and until pleaded. Even when pleaded, they are subject to various exceptions, such as acknowledgment of debt or concealed fraud, which can be raised by way of a reply.

Taking the position of the purist, it could not properly be said there was no cause of action. However, their Lordships were concerned with the procedure adopted to strike out the action. Donaldson, L.J. opined that the decision might have been different if some other ground had been pleaded.

The burden of the court seems to have been for the applicant to have chosen a procedure allowing the court to:

> Explore the factual basis upon which it could be said that the Limitation Acts do, or as the case may be do not, apply.

The court specifically contrasted the position of the case before it with that which faced the court in **Riches v. D.P.P.** (supra).

If the application relied only on ground (b) it would have fallen squarely within the dictum of Donaldson L.J. A procedural defence does not unravel a valid claim in law. It merely deprives the claim of the remedy sought. If more evidence was needed to prove the point, the judgment of Stephenson, L.J. provides it. At page 408 he explicitly said that the right course was for the:

> Defendant to apply to strike out the plaintiff's claim as frivolous and vexatious and as an abuse of process, on the ground that it was statute-barred.

Ronex Properties v. John Laing was decided under the R.S.C. Order 18, r. 19(a).

This application is being considered under a new regime and rubric. It does not only allege a failure to disclose a reasonable cause of action. The charge of ground (a) is that the statement of case discloses no reasonable ground for bringing the claim. A patently statute barred claim is doomed to fail unless there is indication that the defence will not be pleaded. Otherwise, the claimant will be left with an unenforceable cause of action.

Nothing has been placed before the court to warrant an investigation at trial. Indeed, the state of affairs is as analogized by Lord Hope of Craighead in **Three Rivers District Council and others v. Bank of England (No. 3) [2001] 2 All.E.R. 513, 542:**

> It may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible.

Even if the claimant proved the debt, without being able to except the Limitation of Actions Act, the defendant would be left with a complete defence. While the court has no wish to drive the claimant from the 'judgment seat', the court must give justice according to the law. In the instant application, justice is to "protect [the] defendant from the injustice of having to face a stale claim" per Lord Griffiths in **Donovan v. Coventoys Ltd. [1970] 1 WLR 472**

Although the court is notoriously slow to exercise its power to strike out a statement of case, where the pleaded defence allege the claims to be statute barred, in

the absence of a reply averring an exception to the operation of the statute, the court, in giving effect to the overriding objective of the CPR, will be constrained to strike out the statement of case. The court finds that both claims have no real prospect of succeeding. Accordingly, in keeping with the overriding objective of the CPR, they are struck out. Having decided as I have, there is no need to go on to consider the question of mediation.

Order in the terms of paragraphs 1 and 3 of the Notices of Application for Court Orders dated and filed 15th October, 2009.

Leave to appeal granted.