IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

IN MISCELLANEOUS

CLAIM NO. 2008HCV01326

BETWEEN	INTERNATIONAL ASSET SERVICES LTD.	CLAIMANT
AND	ARNOLD FOOTE	DEFENDANT

Ms. Carlene Larmond for the Defendant/Applicant.

Mr. Christopher Dunkley, instructed by Phillipson Partners for the Claimant/Respondent.

Limitation of Actions Act – Applicability to demand loan and credit card debt- Whether limitation period six years or twenty years – "Warrant Obligatory" – Summary Judgment Procedure - Rule 15.2 of the Civil Procedure Rules, 2002, as amended.

IN CHAMBERS

Heard: January 12 & 28, 2009

F. Williams, J (Ag.)

(i) Does a limitation period apply to demand-loan and credit-card debts?

(ii) If a limitation period applies to these debts, is that period six (6) years; or twenty (20) years, or some other period?

These are the questions that fall for the court's consideration and decision in this application.

They have come before the court in the form of an application for summary judgment by the defendant/applicant, Mr. Arnold Foote, pursuant to Rule 15.2 of the Civil Procedure Rules, 2002, as amended in 2006. By Notice of Application

dated the 4th August, 2008, the defendant/applicant seeks summary judgment in the claim and asks the court to determine the following issue at the hearing: -

> "Whether the Claimant has a real prospect of succeeding on a claim that is statute barred by reason of the provisions of the Limitation of Actions Act".

The Substantive Claim

By claim form dated the 10th of March, 2008 and filed on the 17th March, 2008, the claimant seeks to recover from the defendant the following: - (i) the sum of two hundred and eighty thousand, two hundred and eighteen Jamaican dollars and eighteen cents (J$280, 218.18); and (ii) one thousand one hundred and twenty-five United States dollars and forty-five cents (US$1, 125.45).

The former amount is stated in the claim form to be :- "the amount due and payable as at the 10th day of March, 2008 by virtue of a demand loan facility on which the said Defendant failed to effect payment on or before the due dates". The principal sum is said to be twenty thousand and seventy-two dollars and forty-three cents ($20,072.43) and the rate of interest is stated to be thirty-five per centum (35%) per annum. The latter debt is also stated in the claim form to be:- "the amount due and payable as at 10th day of March, 2008 by virtue a (sic) United States Credit Card Facility on which the said Defendant failed to effect payment on or before the due dates". Interest on this debt is stated to have been "suspended".

The Particulars of Claim and the exhibits "IAS 1" and "IAS 2" reveal the following: - (a) that the Jamaican-dollar loan was extended to the Defendant by way of a letter of commitment dated the 6th day of April, 1990 and is said to be in the amount of "$37, 483. 02 By way of a Demand Promissory Note".

The US-dollar debt arises from a credit card issued to the Defendant on or about the 17th day of June, 1996, with a limit of US$1,000.

The first facility was issued by Century National Bank Limited; and the second facility was issued by the Workers Savings and Loans Bank. The debts due to those entities as well as others were acquired by the claimant/respondent by way of a deed of assignment dated the 12th day of March, 2003, between itself and Jamaican Redevelopment Foundation, Inc. That Foundation had itself acquired those debts from the Financial Sector Adjustment Company Limited (FINSAC) on or about the 1st November, 2001, in the unfortunate circumstances which attended some institutions in the financial sector in the 1990's.

The Defence

By way of his Defence filed on the 7th of May, 2008, the defendant admits having been advanced the facilities alleged by the claimant.

He says, however, in respect of the demand loan, that that loan was settled after agreement between the parties. It had matured on or about the 6th day of April, 1990. In respect of both facilities, (and, in the alternative to what was said about the demand loan), the claims in respect of both facilities are statute barred by reason of the provisions of the Limitation of Actions Act.

The Affidavit Evidence

The affidavit evidence of the defendant/applicant is to the same effect as his defence.

The affidavit evidence of the claimant/respondent is also to the same effect as the claim form and Particulars of Claim. That evidence comes in the form of the affidavit of Precious Williams, the claimant's legal manager, filed on the 3rd

September, 2008. Of particular significance, however, are three (3) averments: (i) that the maturity date for the demand loan (or the date on which the "Demand Loan Facility became Delinquent") was the 2nd day of October, 1996; (ii) the date on which the credit card facility "became delinquent" was the 19th day of February, 1999; and (iii) the claims in respect of the two (2) facilities are not statute-barred; but are viable by virtue of section 52 of the Limitation of Actions Act, as they concern a "writing obligatory or deed", to which a limitation period of twenty years applies.

Various documents have been exhibited to the affidavits in support of each party's case.

The Submissions

The main thrust of the defendant/applicant's written submissions was that the debts that are the subject of this suit are founded on simple contracts, to which a limitation period of six years applies. The claim in respect of the two debts is therefore statute-barred. Several authorities and definitions were relied on for these submissions.

For the claimant/respondent, the main argument advanced was that the debts were not founded on simple contracts. Additionally, what takes this case out of the grasp of the six-year limitation period is the fact that interest has continued to accrue on the demand-loan debt. This amounts to a continuing obligation, which, at the very least, delays the six-year limitation period from taking effect. Alternatively, the twenty-year limitation period is the applicable one.

No authority was cited in support of the contention that the fact of accrual of interest would have, in effect, kept the debt "alive". Neither has the court's own researches been able to locate such an authority.

As the Limitation of Actions Act looms so large in both the claimant/respondent's case and that of the defendant/applicant, it is to an examination of that Act that we must now turn.

The Law

The Limitation of Actions Act

The Limitation of Actions Act was first enacted in 1881, with one amendment made to it in 1979.

The Act sets out time periods within which various actions can validly be brought.

The relevant sections of the Act, for the purposes of this case, are sections 46 and 52. The material parts of those sections are set out below:-

> 46. In actions of debt, or upon the case grounded upon any simple contract, no acknowledgement or promise by words only shall be deemed sufficient evidence in any of the Courts of this Island, of a new or continuing contract, whereby to take any case out of the operation of the United Kingdom Statute 21 James 1. Cap.16, which has been recognized and is now esteemed, used, accepted and received as one of the statutes of this Island or to deprive any party of the benefit thereof unless such acknowledgement or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby...".
>
> 52. All bonds and every other writing obligatory

> whatsoever, whereon no payment has been made or action brought within the space of twenty years from the time they respectively became or shall become due, or from the last payment thereon, shall be null and void to all intents, constructions and purposes whatsoever...".

These sections fall within a part of the Act (Part iv) headed "Limitation of Actions (Debt and Contract)".

The statute referred to in section 46 (that is, United Kingdom Statute 21 James 1. Cap.16), is an old English Statute entitled "An act for limitation of actions, and for avoiding of suits in law".

Section 3 of that Act (so far as is material for our purposes) provides as follows:-

> "III And be it further enacted, That... all actions of debt grounded upon any lending or contract without specialty; ... or any of them which shall be sued or brought at any time after the end of this present session of parliament, shall be commenced and sued within the time and limitation hereafter expressed, and not after (that is to say)... the said actions for account, and the said actions for trespass, debt, detinue and replevin for goods or cattle..., within three years next after the end of this present session or parliament, or within six years next after the cause of such action or suit, and not after...". (emphasis supplied).

This provision (incorporated by way or reference in s. 46 of our own Act), is generally interpreted to mean that, as regards debts arising from simple contracts, the period of limitation is six (6) years.

So then, in the search for an answer to the questions with which we started, we need to explore whether the types of debt with which we are concerned in this case would make one or the other of them fall within the definition of : (i) ..."all bonds and every other writing obligatory...", to put it within the reach of section 52 (to which a limitation period of 20 years applies); or (ii) "...actions of debt, or upon the case grounded upon any simple contract...", (s. 46, with a six-year limitation period).

Bond/Writing Obligatory

In **13 Halsbury's Laws of England** (2007 re-issue), paragraph 89, a bond is described or defined as follows:-

> "At common law a bond is an instrument under seal, usually a deed poll, whereby one person binds himself to another for the payment of a specified sum of money either immediately or at a fixed future date. The person who so binds himself is called the obligor, and the person to whom he is bound the obligee; and the instrument itself is sometimes called an obligation."

The definition of "bond" in **Stroud's Judicial Dictionary** (4th edn., p. 306), is to similar effect:-

> "A bond is an obligation by deed'.

In **Words and Phrases Judicially Defined**, it is said that a "writing obligatory":-

> "means no more than a bond".

Simple Contract

Before examining the documentary evidence in this case, it is convenient to consider, at this stage, the definition of a simple contract and actions founded upon it.

In this regard, it is instructive to review two volumes of **Halsbury's Laws of England** – volume 9 (1) (reissue) {dealing with contracts} and volume 28 (dealing with limitation of actions): -

Volume 9, paragraph 618, reads as follows:-

> "Simple contracts include all contracts which are not contracts of record or contracts made by deed. Simple contracts may be express or implied, or partly express and partly implied".

By contrast, contracts by deed are known as "specialties" -vide **R v Williams** [1942] A.C. 541, 555, per Viscount Maugham:-

> "The word "specialty" is sometimes used to denote any contract under seal, but it is more often used in the sense of meaning a specialty debt, that is, an obligation under seal securing a debt, or a debt due from the Crown or under statute".

Nature of the Documents

The Demand Loan

What exist by way of documentary evidence in respect of the demand loan are a letter of commitment and several items of correspondence. No "Demand Promissory Note" mentioned in the letter of commitment has been exhibited to either of the affidavits or has otherwise been seen by the court.

The Credit-card Facility

What exist by way of documentary evidence in relation to the credit-card facility are the cardholder agreement; the letter enclosing the credit card and a slip signed by the defendant/applicant indicating receipt of the credit card.

Whether Loans Founded on Simple Contract or Writing Obligatory

In the instant case, therefore, a careful perusal of the documents exhibited to the affidavits shows that no bond or writing obligatory was executed or is involved. To be certain, there is no instrument under seal or any deed whereby the defendant/applicant has bound himself to the claimant/respondent or another for the payment of a specified sum of money either immediately or at a fixed future date.

The documents that exist in this case, therefore, speak eloquently to the non-existence of a bond or a writing obligatory, and, instead, speak definitively to the existence of contracts. The contracts not being by deed are, additionally, not in the nature of a specialty; but, rather, simple contracts.

This conclusion takes the matter beyond the reach of section 52 of the Limitations Act, with its limitation period of 20 years; and places it squarely within the provisions of section 46 of the said Act, with its limitation period of 6 years.

When Does the Cause of Action Arise?

That having been established, we turn now to a consideration of when time would have begun to run in each of these cases for the purposes of the Limitation of Actions Act.

In **28 Halsbury's Laws**, at paragraphs 662 and 663, there are, succinctly set out, important considerations when dealing with the accrual of a cause of action in cases of simple contract and (more specifically), actions for money lent, respectively.

Volume 28, Halsbury's Laws of England, paragraph 662:-

> "**When the cause of action arises**. In an action for breach of contract the cause of action is the breach. Accordingly such an action must be brought within six years of the breach; after the expiration of that period the action will be barred, although damage may have accrued to the plaintiff within six years of action brought..."

Volume 28, Halsbury's Laws of England, paragraph 663:-

> "**Money lent**. In an action for money lent, if a time is specified for repayment or any condition for repayment, other than mere demand, is imposed, the statute of limitation runs on the expiration of the time specified or on the happening of the condition. If no time is specified the statute runs from the date of the loan.
> If in an agreement for the repayment of an existing

debt by instalments it is provided that on default of payment of any instalment the whole debt is to be recoverable, the statute runs as to the whole debt from the time of the first default in payment of an instalment".

Date of Breach

If we are to apply the principle enunciated in paragraph 662, above, then we need to look at the date when there were breaches of the two agreements and count the time as running from then.

It is to be remembered that the claimant's legal manager in her affidavit filed on the 3rd day of September, 2008, deposed (in paragraphs 4 and 5) as to the dates of breach. It is her evidence that : "on or about the 2nd day of October, 1996 the Demand Loan Facility became Delinquent and Century National Bank sent a Demand Letter to the Defendant for the repayment of the sums outstanding".

It is also her evidence that: "on or about the 19th day of February, 1999 the Credit Card Facility... also became delinquent and a Demand Letter to the Defendant for the repayment of the sums outstanding" (was sent out).

From October of 1996 to the filing of this claim in March, 2008, some twelve (12) years would have passed.

From February of 1999 to the filing of this claim in March, 2008, some ten (10) years would have passed.

By this measure, therefore, the claims in respect of both debts would long have become statute-barred.

Other Principles

If we are to apply the principles enunciated in paragraph 663 then we would normally need to consider (i) whether any time was specified for repayment in either of the two agreements; (ii) if no time was specified, then we would normally need to look at the dates of the facilities and count the time as running from then; (iii) was either debt payable by instalments; and, if so, is there a provision for the entire debt to become payable upon default of payment of any instalment? If so, time begins to run from the first default and it is from that date that we would normally need to start counting how much time has run.

I have used the phrase "would normally need to" in beginning this analysis as, in my humble view, any such analysis is rendered otiose by my just-stated finding, having regard to the dates and accompanying information given in the affidavit filed on behalf of the claimant/respondent. So that, for example, if we were to go back to search for the dates on which the facilities were extended to the defendant/applicant, these dates would obviously be earlier that the dates on which demand was made for full payment. Indeed, any of the other dates would be earlier than the dates on which the demands for payment were made. It will be seen, therefore, that all that that exercise would achieve, if anything, would be to enable us to say that the actions are doubly statute-barred or barred for a longer period that the approximately 10- and 12-year periods already stated.

I will, therefore, conclude as I started: - that is by posing (and this time, answering) the two questions that were asked at the start of this judgment: -

(a) Does a limitation period apply to demand-loan and credit-card debts? The answer to this is: "YES".

(b) If a limitation period applies to these debts, is that period six (6) years; or twenty (20) years, or some other period?

The answer to this is: "six (6) years".

As was stated at the outset, the applicability of the limitation period was really the sole issue for the court's determination on this application.

In the result, the court rules that there is no real prospect of the claimant succeeding in its claim. The application for summary judgment is therefore granted, with costs to the defendant/applicant to be taxed, if not agreed.