IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011 HCV 07862

BETWEEN	**ALVIN RANGLIN**	**CLAIMANT**
AND	**BERBEN LIMITED**	**DEFENDANT**

Heard: 19th April, 2013 & 31st July 2013

Dr. Randolph Williams instructed by Andrea Bickhoff-Benjamin for Defendant/Applicant.

Analisa Chapman instructed by Gayle Nelson & Co. for the Claimant.

CORAM: JUSTICE DAVID BATTS

[1] This matter concerns an application by the Defendant to strike out the Claimant's statement of case. The reasons advanced in support of the application is that the claim is statute barred, frivolous vexatious and an abuse of the process of the court.

[2] Before me in relation to the application are some five (5) Affidavits have been filed. Two on behalf of the claimant/respondent. There are contending factual allegations. The situation as to fact is compounded because the Defendant's principal who was most intimately involved in the transaction is now deceased. The transaction as we will see is also of some vintage.

[3] The Fixed Date Claim Form was filed on the 15th December 2011 and claims a breach of an agreement for sale of land, remedies suggested are –

i) Damages

ii) Specific performance for transfer of Lot No. 475 Ferry Pen Plantation Heights registered at Volume 1285 Folio 136 of the Register Book of Titles and Lot 100 Ferry Pen Plantation Heights.

iii) In the alternative the transfer of 2 lots of similar size.

[4] The Particulars of Claim allege that on the 8th February 1975 the Claimant and his wife (now deceased) entered into 2 separate agreements for the sale of land in respect of lots 475 and Lot 100 respectively (both are more fully described above). Both lots were unregistered properties but were described based upon a provisional plan deposited with the Defendant. At the material time and up to the present no road has been cut to the land.

[5] The purchase price as well as other alleged terms of the agreements are set out in the Particulars of Claim. The Claimant alleges that at all material times he dealt with Dr. Bernard Benjamin and that Dr. Benjamin died in or about the year 2006. He alleges that Dr. Benjamin was also the chairman of La Morne Limited which company acted as agent for the Defendant. The Particulars of Claim allege in Paras. (7) and (8) that the Claimant settled the purchase price in accordance with the agreed installments in respect of the said lots.

[6] The pleadings allege that in consequence of the delays a refund was requested of Dr. Benjamin who persuaded the Claimant to await title and persuaded the Claimant that he would be given a certain single lot rather than two. Further that in August 1989 Dr. Benjamin purported to attempt to refund the deposits paid. The Claimant rejected this in writing. It is alleged that further discussion resulted in Dr. Benjamin assuring the Claimant that title would be issued. It was following Dr. Benjamin's death and upon enquiry the Defendant informed the Claimant in 2007 that the contracts had been cancelled and the lots sold to third parties.

[7] The Defence takes issue with some aspects of these facts and alleges that the contracts had been terminated. The Defence also relies on the Limitation of Actions Act and alleges that the claim is barred, frivolous and vexatious and an abuse of the process of the Court.

[8] The Defendant gave evidence by way of an affidavit from a Director Andrea Bicknell-Benjamin. This confirms that there were in 1975 agreements in respect of Lots 100 and 475 with the Claimant. She states however that only a deposit and not the full purchase price is noted as having been paid. In 1988 she reviewed all files relating to the sale of lots in the Plantation Heights subdivision. The company decided then to cancel all agreements entered into between 1975 and 1980 on which only deposits were paid and to refund the deposits accordingly.

[9] She states that in 2007 Mr. Alvin Ranglin visited the Defendant's offices and asked for information about Lots 100 and 475 Plantation Heights. She therefore conducted a search and only was able to find the archived records of the two files. One had the word "refunded" written on it in Dr. Benjamin's handwriting and the other hand the words "cancelled 16/8/89" in Dr. Benjamin's handwriting. Each file had an original agreement for sale on it with the words "cancelled". The documents are attached to her affidavit. The affiant says no further information appears on the file. She also had no personal dealing with the Claimant prior to in or about June 2007. She states that 38 years after entry into the Agreement and more than 23 years after cancellation of the agreements the Defendant Company is not in possession of any other records and is prejudiced in its ability to defend the claim.

[10] The Claimant in his affidavit supported the allegations in his Particulars of Claim and gave some further detail. He says he was never furnished with a copy of the agreements. He stated that at all times he dealt with Dr. Benjamin who caused him to pay the full purchase price in respect of both lots. He says the payments

were made through Mr. Horace Brown. He states that by letter dated 2nd November 1977 written by his wife a refund was requested. Dr. Benjamin persuaded him not to insist on the refund but to accept another lot. He rejected that suggestion but agreed to wait on his two Original lots. This continued until in 1989 to his surprise he received a letter signed by Dr. Benjamin purporting to refund the deposits.

[11] By letter dated 7 September 1989 he therefore wrote to Dr. Benjamin. This letter sparked further discussions with Dr. Benjamin and he had further discussions with him. Dr. Benjamin promised to obtain the titles upon completion of all approvals and infrastructure. He says,

> "It was always understood that, based on the nature of these lots and the surroundings area, that it would take some time, including many years in addition to the decade that had already elapsed, to obtain all relevant approvals for construction of all relevant approvals for construction of all relevant infrastructure to be completed."

[12] He states that by letters dated 8 February 1990, 8 February 1993, 17th January 1994 and 16 March, 1995 he continued to follow up. Dr. Benjamin continued to assure him that titles would be issued and urged patience. Dr. Benjamin he says gave several excuses notwithstanding his letters dated 9 June 1998, 14th September, 1998, 4th January 1999, 3rd May 2000 and 26th November 2002. These letters are exhibited.

[13] It was following Dr. Benjamin's murder in 2006 that he contacted the Defendant's offices. He was advised that the agreements for sale had been cancelled in 1989. He says that at all material times Dr. Benjamin took steps to make him believe the contract was being completed and titles obtained.

[14] Mr. Horace Brown who describes himself as a real estate agent swore an affidavit in support of the Claimant. He confirms that the Claimant purchased lots

in Plantation Heights which at the time was “extremely undeveloped.” He confirms that the Claimant paid at least 50% of the price of the lots.

[15] The Claimant’s other affidavit exhibits the title to lot 100 which shows that it also has been transferred to a third party. The Defendants final affidavit sworn to by Andrea Bickhoff-Benjamin indicates that the defendant had not met or heard of Mr. Horace Brown and that after so long the Claimant’s assertions cannot be verified.

[16] The Defendants submit that the claim is barred by Statute of Limitation, in particular Section 46 which expressly recognizes as received the **Imperial Statute James I Cap 16 of 1623.** The claim they submit is barred 6 years next after the cause of action they contend, accrued when the contracts were cancelled in 1989.

[17] The Defendant points to the fact that there is no letter of possession nor evidence that the Claimant took physical possession. Reliance is placed on the authorities of **Heaven v. Road and Rail Wagons Ltd. [1965] 2 AER 409; Ronex Properties v John Laing [1983] 1 QB 398 @408.**

[18] The Claimant filed written submissions as well as further written submissions. Both parties made detailed exhaustive oral submissions before me. The parties will pardon me for not repeating in this judgment the arguments advanced.

[19] This court is given jurisdiction by Order 26.3 to strike out a statement of case which is frivolous, vexatious or an abuse of the process of the court, or where the statement of case discloses no reasonable grounds for bringing or defending a claim. The pleadings disclose a cause of action for breach of contract for sale of land. It is important to recall that the statute of limitations bars the remedy not the right. That is the cause of action remains valid but relief is barred. This is

why even if on its face the Particulars of claim reveal a time bar. The claimant is entitled to succeed until and unless the Defendant pleads a Statute of limitation. A time bar does not mean there is no reasonable cause of action. See generally Stuart Simes A Practical Approach to Civil Procedure Fifth Edition page 234.

[20] The Defendant has not applied for summary judgment but for the claim to be struck out pursuant to O 26.3 above. In order to succeed the Defendant will need to establish that the Limitation of Action Defence is valid and therefore the claim is frivolous, vexatious and an abuse of process. It is for this reason that the plethora of affidavit evidence placed before me sought to establish that the contract had been cancelled in 1989 and that the Claimant had done nothing about it.

[21] I do not accept that the claim is frivolous, vexatious or an abuse of process. On the evidence I hold that it cannot be said that the case that the claim is not statute barred is unarguable as per ***Leicester Market Ltd v Grundy [1990] 1 WLR 107.***

[22] There are several areas of factual dispute which will impact the resolution of the ultimate legal issues. The most readily identifiable ones are

> (a) The nature of the contract – This is relevant to the question whether the Limitation Act applies (Statute 21 James 1 Cop 16). The question whether it is a simple contract or specialty or contract under seal. These to my mind are issues best resolved after a trial when all the evidence is before the court.
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> (b) When did the cause of action occur –
> This is relevant to when time begins to run. The Claimant says they were unaware of the broach or repudiation and were misled and encouraged by representations that the contract was still alive. This continued until the Claimant heard of the untimely death of the Defendants principal. The question for a court will be whether this is in fact

so, and if it is what effect if any it has on the accrual of the cause of action.

(c) Was there repudiation or a termination of the contract. The Defendant contends that it never was terminated. They had paid the full purchase price and at all material times where awaiting completion of infrastructure and title. They rely on a term in the contract which they allege waives reliance on limitation periods. They say that the letters in 1989 were overtaken by events as the Defendant through its principal persuaded them not to terminate. The Claimants have correspondence, albeit it written by himself which appears to support this account. It will be a matter for a court at trial to find on the evidence whether the contract was repudiated or terminated by the Defendant.

(d) Whether the Claimant paid the full purchase price and whether the deposit was refunded as the Defendant alleges. These are also clear factual issues best determined after a trial.

(e) The applicable remedy. The defendant contends that Specific Performance is now impossible as the lots have been sold. However a trial court will determine if they were sold to innocent purchasers for value. If so, and if the claimant ultimately proves their case then damages are also claimed. So the fact that the Specific Performance may be unavailable is not a bar to the claim being pursued.

[23] For the reasons stated I therefore dismiss this application to strike out the Claimant's statement of case. Costs of this application will go to the Claimant to be taxed if not agreed. Leave to appeal granted.

David Batts
Puisne Judge
31st July 2013