

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
CIVIL

SAINT LUCIA

CLAIM NO.: SLUHCV2020/0100

BETWEEN:

RAYMOND BORIEL

Claimant

and

[1] NATIONAL CONTRACTORS LIMITED

[2] DAVE BORIEL (ADMINISTRATOR OF THE
ESTATE OF THE LATE THOMAS BORIEL)

[3] DAVE BORIEL

Defendants

Appearances: Gerard Williams for the Claimant; and
Kimberley Roheman for the Defendants

June 10, 2021

July 26, 2021

DECISION

Defendants' application for summary judgment

[1] **PARIAGSINGH, M [Ag.]**: Before the Court is the Defendants' application for summary judgment. The basis of the Defendants' application is that the relief sought, although not plainly stated in those terms, are essentially relief that is only available if a breach of contract/ trust is established by the Claimant. The Claimant contends that the time to bring such an action has long passed. The Defendants further contend that even if the claim is based in equity, as the Claimant contends, the time prescribed for bringing such an action in this jurisdiction is prescribed as 30 years. The Defendants assert that the time being prescribed, the Claimant's claim has no realistic prospect of success.

[2] In answer to this application, the Claimant submits that the nature of his claim is not in the realm of breach of contract/trust. He submits that a contract for the sale of shares

to him was completed since 1989. He contends that his claim is based in equity for a declaratory relief based on a trust which arose by his direct financial contribution to the First Defendant in 1989.

[3] This claim was commenced some 31 years after the alleged sale of the shares. If the Defendants are correct in contending that all the causes of actions alleged arose on this sale, then the Claimant's claim will fail.

[4] In essence, for the purpose of this application, I am called upon to determine whether the Claimant's claim is barred by prescription.

[5] By claim commenced against the Defendants on February 20, 2020 the Claimant seeks the following relief on his claim form:

- a. A declaration that the Claimant is entitled to and purchased 310,000 - \$1.00 shares in the First Named Defendant and that such shares are being held on trust for him;
- b. Specific performance and/or registration of his legal interest in the First Named Defendant being the 310,000 - \$1.00 shares purchased in so far the same is capable of registration. Alternatively, registration in his name of the maximum number of shares held by the First Named Defendant being \$50,000.00;
- c. His appointment to the First Named Defendant as Director;
- d. An account of all dealings with the First Named Defendant for the past 30 years and copies of all minutes and relevant events;
- e. Payment to him of any dividends or any other benefits which he would be entitled to as shareholder and director of the First Named Defendant;

- f. Any other order as the court deems just in the circumstances;
- g. Interest on all sums awarded to the Claimant and;
- h. Costs;
 - i. Court Fees
 - ii. Personal Service Fees on Claim Form
 - iii. Legal Practitioner's fixed costs on issue
 - iv. Interest at the statutory rate of 6% per annum until payment in full.

[6] By way of preliminary observation; the Defendants have supported this application by an affidavit of a Legal Secretary of the Defendants' Legal Representative Firm. The contents of this affidavit seek to introduce several documents which are being relied on for truth of contents. In my respectful view, the deponent of this affidavit cannot give this evidence. The evidence contained in the documents are not simply on formal matters. I do not accept as proper practice documents being put into evidence for truth of its contents through Counsel's Secretary. I have accordingly attached no weight to the said documents attached to the affidavit outside of the fact that a request was sent and a response with documents and record was received.

[7] **Rule 15.2(b) CPR** allows the Court if satisfied, that the Claimant has no realistic prospect of succeeding on the claim, to grant summary judgment. A 'real prospect of success' must be something more than a fanciful prospect of success, it must be a realistic prospect.

[8] In **Saint Lucia Motor & General Insurance Co. Ltd. v Peterson Modeste HCVAP2009/008**, Pereira CJ stated that the Court should only grant summary judgment where it is clear that a claim or (defence) on its face obviously cannot be sustained or is in some other way an abuse of the process of the court.

These principles are also well set out in the case of **Dr Martin Didier et al v Royal Caribbean Cruises SLUHCVP2015/004**.

[9] The principles applicable to an application for summary judgment had been conveniently set out in the **Federal Republic of Nigeria v Santolina Investment Corporation and Ors. [2007] EWHC 437** (although coined on an application of the Claimant, the principles are the essentially the same) where at paragraph 4 it is stated:

- a. The court must consider whether the defendant has a “realistic” as opposed to a “fanciful” prospect of success: **Swain v Hillman [2001] 1 ALLER 91, [2000] PIQR p. 51**;
- b. A “realistic” defence is one that carries some degree of conviction. This means that is more than merely arguable: **ED & F Man Liquid Products v Patel [2003] EWCA Civ. 472 at 8**.
- c. In reaching its conclusion the court must not conduct a “mini trial”: **Swain v Hillman**;
- d. This does not mean that the court must take at face value and without analysis everything that a defendant says in his statements before the court. In some cases, it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: **ED&F Man Liquid Products v Patel at 10**;
- e. However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: **Royal Brompton Hospital NHS Trust v Hammond (No. 5) [2001] EWCA civ. 550 [2001] Lloyd’s Rep PN 526**;

- f. Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus, the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: **Doncaster Pharmaceuticals Group Ltd. v Bolton Pharmaceuticals Pharmaceutical Co. 100 Ltd. [2007] FSR 63;**
- g. Although there is no longer an absolute bar on obtaining summary judgement when fraud is alleged, the fact that a claim is based on fraud is a relevant factor. The risk of the finding of dishonesty may itself provide a compelling reason for allowing a case to proceed to trial, even where the case looks strong on the papers: **Wrexham Association Football Club Ltd. v Crucialmove Ltd. [2006] EWCA Civ. 237 at 57.**

[10] In support of this application the Defendants have filed affidavits of Arlene Boriel, Dave Boriel, Jeanette Francis and Nemiah Leonce. In relation to the affidavit of Arlene Boriel, she is a Director of the First Defendant. She deposes that at the time of the alleged sale of the shares to the Claimant she was 13 years old. Further, she has no knowledge of the contents of any of the letters referred to, the letter of offer, the letter of acceptance of the letter to the Bank nor did her father, the majority shareholder in the First Defendant tell her about the Claimant having an interest in the Company. She also does not know about the Claimant acting as surety for loans for the benefit of the Company. Taken at its highest and assuming all the contents of her affidavit are true, this still is not a complete answer to the Claimant's claim. In fact, this witness can give no evidence regarding the subject matter of the contention, the sale of shares in 1989. Her affidavit evidence in relation to the matters relevant to the application must therefore carry very little weight. I have also attached no weight to the paragraphs of her affidavit which speak positively, to the Claimant being guilty of delay and her

option about it being inequitable and unjust for the Claimant to be granted any relief. These matters ought not to have been contained in the affidavit in the first place.

[11] Dave Boriel filed two affidavits in support of the application. He was six years older than Arlene Boriel when this sale allegedly occurred. He was born in 1970. His affidavit adds nothing more than Arlene's evidence. He too could not speak to the sale of shares alleged by the Claimant. I have also attached very little weight to his relevant evidence and no weight to the opinions and findings he purports to depose to in this affidavit.

[12] Jeanette David, deposed that she was engaged in a relationship with Thomas Boriel from 1986 until his death in 2004. At paragraph 5 of her affidavit a different version of facts than those asserted by the Claimant in his Statement of Claim is advance. This deponent speaks to a dispute between the Claimant and his brother Thomas which resulted in a direction to one of Thomas's sons to write a cheque to the Claimant. No further particulars as to if and when this cheque was written, for how much and representing what is given. This different version of facts taken at its minimum creates disputed facts on which findings of fact will have to be made by a trial Court if that issue has to be resolved.

[13] Nemiah Leonce, a Legal Secretary attached to the Defendant's Legal Representative Firm gave evidence regarding a request for information and information received. To the extent that I take only the formal matters of the affidavit, no weight is attached to the documents received.

[14] Even if I am wrong on my approach to the affidavit evidence of Ms. Leonce, on a consideration of the documents disclosed all they say is that in May 1989 the equipment referenced was owned by the First Defendant. That respectfully is not a fact in issue in this case. The issue is who purchased the equipment for the First Defendant. In that regard, the documents disclosed ultimately, would not have affected my decision in any way.

[15] The Claimant's claim is that by a letter dated May 26, 1989 the First Defendant offered to sell him 310,000 shares. This sum he alleges was paid by input of plant and heavy equipment into the First Defendant company as well as cash deposits.

[16] He further contends that on the same day of the offer letter he accepted same and in performance of his obligations he made the input of plant and equipment and certain cash deposits.

[17] The investment alleged, would have at that time entitled the Claimant to be issued shares, one of the relief he now seeks and also to all the benefits and privileges in relation to dividends and accounts, relief the Claimant now seeks as well.

[18] By letter dated June 02, 1989 the First Defendant informed the Claimant that at a general meeting of the Board of Directors, the Claimant was appointed as a Director. The First Defendant also wrote to the Bank and informed it that the Claimant was appointed a Director and there was an intention to make the Claimant a signatory to its account. This letter in my view emphasizes that the Claimant knew and /or ought to have known that he was entitled to at the bare minimum be a part of the First Defendant as a Director, he chose not to have any dealings with the First Defendant.

[19] The Claimant contends that in his capacity as Shareholder and Director he entered into three Hypothecary obligation and mortgage debenture. The first being in 1989, the second in 1990 and the third in 1993. Again, if the Claimant's asserted facts are taken to be true, he well knew up to 1993 that he had some dealing with the Company and chose to do nothing to protect his alleged interest.

[20] For reasons which are not contained in his case, the Claimants alleged shareholding was never registered since the purported purchase in 1989. He contends that the First Defendant and its present shareholders hold his shares on trust for him either implied, express, resulting or constructive.

[21] The first written communication from the Claimant to the Defendants regarding his alleged shareholding in the First Defendant came by letter dated October 16, 2008. That is 19 years, 4 months, 20 days after the alleged purchase.

[22] The two letters written in June 1989, after the Claimant's alleged purchase of the shares make absolutely no mention of such purchase. The letter of offer dated May 26, 1989 offers the sale of 310,000 shares at \$1.00 payable by plant and equipment and \$23,774.00 in cash. This is a very precise sum stated for the alleged purchase price. These figures are not arbitrary figures they are very specific. This may very well be important but nothing more is said on this by the Claimant.

[23] The evidence before the Court can, if proved, create clarity as to the issue of the offer and the acceptance of the offer. These issues are apparent from the literal terms of the letters between the parties as far back as 1989 when the contract for the sale of the shares is alleged to have been entered into. The closing of the contract for the sale would have entitled the Claimant to be registered as a shareholder. Again, this is the substantive relief now claimed. Surely the time for obtaining this remedy for breach of the alleged contract has now passed, the time for bringing that action being prescribed.

[24] In respect of performance, that is the actual payment for the shares through plant and equipment and cash, the Defendants simply say in their defence that they have no knowledge of this at paragraph 6 of their amended defence. This is a fact that is alleged to have happened some 31 years ago.

[25] The Claimant contends that his claim falls in the realm of equitable relief in the nature of the declaration of a trust. In support of this position, counsel advanced the legal position of equity and trust that applies to Saint Lucia is the same as would apply in England. Specific reference is made to Article 916A(2) of the Civil Code of Laws of Saint Lucia. This is a claim for a declaration that the First Defendant's shares are held on trust for the benefit of the Claimant based on his direct financial contribution as far

as I understand it. Specific performance is claimed in respect of the registration of the ownership of the shares alleged to have been purchased.

[26] Equitable remedies are always at the discretion of the Court. There are no prescribed time for the bringing of a claim based in equity although delay defeats equity. There are also the other equitable maxims that apply to discretionary claims.

[27] It is more convenient to deal with relief (c), (d) and (e) before I deal with (a) and (b). These relief all arise from a breach of contract. Upon successful completion of the contract the Claimant would have been entitled to these relief. The cause of action to obtain these relief arose in 1989 when the Claimant says the contract was completed. In this regard, any claim for these relief would be caught by prescription. Whilst this relief may be barred in a common law action, a court of equity may consider granting some of these reliefs from a date in the future after a declaration is made, if one is eventually made, it is too early in the game to say. In this regard, whilst there are very compelling arguments to strike out this portion of the claim, to the extent that it may be more convenient to deal with the claim as a whole, I will not do so at this stage.

[28] Relief (a) and (b) are connected. The claim for a declaration of trust and specific performance are intimately connected. Both these claims are grounded purely in equity and declaratory relief. A declaration is the legal determination by the Court that resolves legal uncertainty for the litigants. It is not by itself order any action by a party, or imply damages or any other relief, although it may be accompanied by one or more remedies

[29] Delay defeats equity or equity aids the vigilant and not the indolent is a maxim that has echoed the corridors of these Courts for thousands of years. In **Smith v Clay [1767] 3 Bro.CC**, Lord Camden LC stated that a court of equity:

“has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court

into activity, but conscience, good faith and reasonable diligence; where these are wanting, the Court is passive and does nothing”

[30] Delay alone however does not defeat equity without qualifications. As stated in **Snell's Equity, 32nd Edition page 116:**

“ Apart from Statues of Limitations, mere delay is insufficient to bar equitable relief. Something more than mere delay, even extremely length delay, is required before a claimant will be denied equitable rights under the doctrine of laches. That “something more” under the equitable doctrine of laches is an additional element of acquiescence by the claimant or a detrimental change of position by the defendant. There are three situations to consider:

- (a) equitable claims to which the Statute Limitation applies expressly;
- (b) equitable claims to which the Statue of Limitations is applied by analogy; and
- (c) equitable claims to which no statute applies but to which the rules of laches apply”

[31] **Article 2103 of the Civil Code of Saint Lucia** provides a general prescription period for any cause of action not specifically provided for. It states:

“All things, rights, and actions, the prescription of which is not otherwise regulated by law, are prescribed by 30 years, without the party prescribing being bound to produce any title, and notwithstanding any exception pleading bad faith.

[32] In **Khardisha Jwahir v Davis Jwahir, SLUHCVP2017/0055** a similar issue was addressed. The Claimant’s claim centred a claim for 50% of the estate by an heir of the estate against the Administrator of the estate. In holding that it was not a common law claim and rather a claim for breach of trust with a limitation period of 30 years, at paragraphs 22 and 23 the Michel JA stated:

“22. By virtue of article 916A of the Civil Code, the law of England on trusts -whether expressed, implied, constructive or resulting, and whether concerning the rights, powers and duties of trustees or of beneficiaries under a trust –is applied wholesale to St Lucia. If one is looking to address any aspect of trust, such as a breach of trust, then it is to the law of England that one must turn. In England, breach of trust is not extracted from the general law of trusts and transported into the law of torts, which can be considered to be the common law cousin of the codal delict (or quasi delict); it is treated entirely within the ambit of trust law. Why then should a court in St Lucia treat with a breach of trust not within the scope of a common law breach of trust but within the realm of a delict, there to apply to it the period for prescription applicable to delicts and quasi-delicts?

23. A breach of trust is really a violation or dereliction of the duties of trustees, with respect to which article 916A (3) of the Code specifically states- “the law of England for the time being in force ... shall extend to and apply”. According to Halsbury’s Laws of England: “A breach of trust in itself is merely a violation of an equitable obligation; the remedy for it, therefore, lies in equity only and must be sought in a court of equitable jurisdiction”.

According to **Lewin on Trusts**: “A trust differs from such relations as contract and bailment in that it is enforceable only in equity. That system was originally administered only in the Court of Chancery, but now law and equity are administered in all courts concurrently”. According to Lindley LJ in the case of **re Williams, Williams v Williams**: “A trust is really nothing except a confidence reposed by one person in another, and enforceable in a court of equity”. In the same vein, in the old English case of **Sturty Mellish**, the Lord Chancellor said that “a trust is where there is such a confidence between

parties, that no action at law will lie, but is merely a case for the consideration of [the court of chancery]”. In the English Court of Appeal in the case of **re Lake Ex parte Dyer**, Rigby LJ said: “How is a trustee a debtor? Can he be sued at common law? I do not see how he can be a ‘debtor’, for the money he is fraudulently dealing with is, at law, his own money. No doubt he can be called upon to replace the money, but that must be a suit in equity, not at law”

[33] The Defendants have submitted that the prescription period at its highest would be 30 years. I agree with this general proposition and am in fact bound by this decision. In this case however, the Court is being asked to exercise an equitable jurisdiction for which time is not prescribed. There is no prayer for breach of trust.

[34] No doubt many factors in addition to the mere delay itself have been telegraphed by the Defendants including the prejudice to them in relevant and necessary evidence and documents not being available after 31 years. These are all matters which will no doubt be placed on the scales in conducting the balancing exercise, if an equitable interest is established.

[35] Counsel for the Defendants relied on learning from the Halsbury’s laws of England, Volume 47 (2014)/8. The caption of this learning is equitable defences. The learning makes the same point that the Claimant makes in my respectful view. All it emphasises is that in a certain classes of claims a stricter rule prevails and the claim to relief in equity must be made with special promptitude.

[36] Counsel for the Defendant also referred to the learning in the Halsbury’s Law of England on specific performance as contained in Volume 95 (2017)/1. From the Claimant’s submission no quarrel is made with the general position of the law as stated on specific performance. The Claimant simply, says his claim is not grounded in specific performance.

[37] The objective of the Court is to deal with cases justly. A just result is likely achieved when the Court considers the evidence, the law and what is fair. In considering the latter, the jurisprudence has developed over decades regarding how the Court is to treat an investment into a company with no further active role for a prolonged period. In exercising its equitable jurisdiction, the Court may well consider the effect of the Claimant sitting by and taking no part in the First Defendant for 31 years in determining if to grant any relief at all. This proposition is solidly grounded in the celebrated case of **Re Jarvis, Decd. Edge v Jarvis [1959] 1 WLR 815**. In this case a claim for equitable relief was refused on inter alia it was unfair for the Claimant to have sat by and done nothing for 10 years and then claim an interest in a company.

[38] Most of the relief claimed by the Claimant are barred by statute in relation to the recovery of profits, dividends or the right to claim accounts. On the issue of equitable ownership of a portion of the company this would have had to be the result of a contract. Evidence would have to be led and findings of facts made by the Court on this issue.

[39] The Defendant also raised the issue of a remedy for accounts needing to be commenced by a Fixed Date Claim Form pursuant to **Part 41 Rule 41.1(2) CPR**. I don't understand this to be a stand-alone claim for an account. It is a claim for a declaration of beneficial ownership in the First Defendant and certain relief that may be given consequent on such a declaration. In this regard, in my view the claim was correctly commenced by an ordinary claim form. Even if I am wrong, the Court can exercise its discretion to convert the proceedings and direct them to continue as if it was commenced by Fixed Date Claim Form and I would have been prepared to make such an order in this case if I deemed that it was necessary.

[40] For these reasons, I find that the Claimant's claim for declaratory relief on the issue of the equitable ownership of a part of the First Defendant Company however weak the same may be is not fanciful. Whilst there are obvious hurdles reading delay and limitation, as the Court's equitable jurisdiction is being invoked there is sufficient

reason to pause and not treat with the case summarily. I am of the respectful view that the issue of the equitable relief ought to be first considered by a trial Court. This Court will also at that stage be able to deal with the other relief claimed.

[41] There are special circumstances to depart from the general rule that costs follows the event even though neither party addressed the issue of costs in their submission. I have already expressed strong views on the relief claimed save for the declaration and specific performance which are equitable remedies. I have not struck out the other relief as I will not wish to box in the Judge trying the matter. It is only for this reason that I decline to strike out the other portions of the claim at this stage.

[42] In the circumstances, it is hereby ordered that:

- a. The Defendant's application filed on March 23, 2021 is dismissed; and
- b. There shall be no order as to costs.

Alvin Shiva Pariagsingh
Master (Ag.)