

**IN THE EASTERN CARIBBEAN SUPREME COURT
HIGH COURT OF JUSTICE
(CIVIL)**

ST. LUCIA

CLAIM NO. SLUHCV2018/0555

BETWEEN:

CHARLES ANTHONY **Claimant**

and

GERARD WILLIAMS **Defendant**

Appearances:

Mr. Horace Fraser for the Claimant

Ms. Rowana-Kay Campbell for the Defendant

2020: February 28

BURNETTE M (Ag.)

1. This is an application by the Defendant made on 14th February, 2019 for the Claimant's claim to be struck out as being prescribed or in the alternative on the basis that the claim is *res judicata*.

Background of facts

2. The Defendant Mr. Gerard Williams is an Attorney at Law. He represented the Claimant, Mr. Charles Anthony, who was the Claimant in Claim No. SLUHCV2007/0913, against one Imbert Simon. Mr. Anthony was successful in his claim and was awarded the sum of \$205,406.25 in damages and prescribed costs of \$28,175.78 on 7th March, 2012.
3. The proceeds of the judgment was collected Mr. Williams and on 4th November, 2013, he paid to Mr. Anthony the sum of \$134,598.57 after deducting his legal fees from the judgment sum collected by him. Mr. Anthony felt aggrieved by the sum deducted by Mr. Williams and by Claim Form filed 9th April, 2014 in SLUHCV2013/1037, he sought certain declaratory relief against Mr. Williams with

a view to recovering the amounts deducted by Mr. Williams as legal fees. The parties agreed in that case, that there was no written retainer setting out the fees payable to Mr. Williams and the central issue for the court was, what was the appropriate fees and disbursements payable to Mr. Williams and sums due for refund, if any, to Mr. Anthony. The decision on the amount due as reasonable fees to be paid which was to be assessed was reserved by the Court. The learned trial Judge in considering the matter held that she had no jurisdiction to conduct the assessment and she ordered that the claim be struck out with no order as to costs. This was on 12th October, 2018.

4. There was no appeal against that decision.
5. On 1st November, 2018, Mr. Anthony filed this claim afresh, against Mr. Williams and amended the same on 4th February, 2019 in which he seeks the following relief:
 - (a) Special damages in the sum of \$152,554.62
 - (b) General damages for breach of trust
 - (c) Costs
 - (d) Interest
 - (e) Further or other relief
6. A Defence to the amended claim was filed by Mr. Williams on 27th February, 2019 in which he denied the claim and pleaded prescription pursuant to Article 2122 of the Civil Code Cap. 4:01 of the Revised Laws of Saint Lucia as well as *res judicata*. On 14th February, 2019, Mr. Williams also filed an application for the claim to be struck out. Both parties have filed written submissions on the issues raised in the striking out application.
7. It is this application that I will now consider.

The issues

8. The issues for determination are whether the claim is prescribed within the meaning of the Civil Code and/or whether the claim is *res judicata* and should be struck out as an abuse of the process of the court.

Is the claim prescribed?

9. To properly address this issue, it is necessary to determine the nature of the cause of action for it is this which would determine which Article of the Civil Code applies for the purposes of prescription.
10. In his Amended Statement of Claim, Mr. Anthony pleaded the following:

7. at all material times there was no specific fee agreement in place existing between the Claimant and the Defendant but it was understood by the parties that the Defendant was only entitled to reasonable fees according to the services he provided. Accordingly the Defendant had an obligation and a duty of trust regarding the delivery to the Claimant of the fruits of his judgment.

11. the Defendant was in further breach of duty for failing to advise the Claimant on all matters of his fees and expenses in relation to the services he rendered in the claim and related matters involving Imbert Simon. The Claimant contends that the Defendant was in further breach of duty and breach of obligation when he sought to unjustly inflate his fees which for all intents and purposes cannot be justified given the limited service he provided.

12. the Claimant contends that the Defendant owes him the sum of \$115,580.47 which he has converted to his own use which he had not earned and for which he has failed to account in breach of his duty of trust and the obligation he owes to the Claimant.

AND THE CLAIMANT CLAIMS:

- (a) Special damages in the sum of \$152,554.62
- (b) General damages for breach of trust
- (c) Costs
- (d) Interest
- (e) Further or other relief

11. When the nature of Mr. Anthony's complaint is examined, it is in essence alleging that Mr. Williams, who at the material time was his Attorney at law, was in a position of a fiduciary on whom the law imposes a duty of trust. That is the nature of the Attorney/Client relationship and the nature of the relationship between these two parties.
12. Under the Civil Code, "*a breach of trust falls squarely within the realm of a delict or quasi-delict*", per Gordon JA in **Dorina Joseph et al v Nora St. Louis as representative of the Estate of Veronique Edwards et al (St. Lucia) SLUHCVP2008/0255**. In this case, Gordon, JA went through the exercise of explaining how the cause of action of a breach of trust is to be identified under the St. Lucia Civil Code.
13. Similar to the opposing arguments advanced by both Counsel Mr. Fraser and Ms. Campbell, both Counsel in the **Dorian Joseph case** (supra) argued on the one hand (in respect of Counsel for the Respondent), that a breach of trust is grounded in equity and so cannot be considered a delict or quasi-delict which speaks to the

"tortious liability of individuals whose actions cause injury to persons to whom they hold a duty of care". In such a case, Counsel for the Respondent contends that there is no period of limitation. On the other hand, Counsel for the Appellant argued that the cause of action, being a breach of trust lies squarely in delict or quasi-delict, in which case, the prescribed period is three (3) years from the date when the cause of action arose.

14. In resolving the issue, Gordon JA, at paragraph 23 of the Judgment, stated:

"I am of the view that considerable assistance might have been gained from the definition of delict and quasi-delict to be found at Article 1(15) of the Civil Code which reads as follows:

1. *The meaning, explanation or application assigned in this section to a word, term or enactment, attaches to it whenever occurring in this Code, in the Code of Civil Procedure, or in any ordinance or proclamation, unless such meaning, explanation or application is inconsistent with the context or with the object of the provision in which such word, term or enactment occurs, or is repugnant to some special law.....*

15. Each of the terms delict and quasi-delict indicates an injurious act or incident which, in the absence of any contact gives rise on an obligation towards the injured person (the creditor), on the part of another person (the debtor). The act or incident is termed "delict" when there is, and quasi-delict when there is not, injurious intention or culpable negligence on the part of the debtor".

15. Counsel for Mr. Anthony, Mr. Fraser argues that the claim is one for a "breach of an obligation", whereas Counsel for Mr. Williams, Ms. Campbell contends that it is one for breach of trust, which constitutes a tort and that tort under the St. Lucia Civil Code is considered a delict or quasi-delict. It appears that the premise of the arguments of both Counsel may be flawed somewhat in that while I agree with Ms. Campbell, that there is no cause of action known as "breach of obligation", I do not agree with her that a delict or quasi-delict is simply a tort.

16. I am fortified in this view by the findings of the Court of appeal in the said Dorian Joseph case in which Gordon JA stated at paragraph 26 where he said,
"Conceptually, the definition of delict/quasi-delict is significantly different from the definition of Tort. According to the classic definition of Tort in Winfield tortious liability arises from the breach of a duty primarily fixed by the law; such duty is towards persons generally and its breach is redressable by an action for unliquidated damages". The difference, as I perceive it, as between the Common Law concept and the Civil Law concept is that whereas the common law concept gives rise to an obligation in rem the Civil law gives rise to obligations in personam.

17. I agree with Ms. Campbell however that the cause of action is indeed one of breach of trust for the reasons already outlined at paragraph 10 above. Applying the principles laid down by the Court of Appeal in **Dorian Joseph's** case, I find that that a breach of trust falls squarely within the realm of a delict or quasi-delict. I see no reason to depart from this.
18. The cause of action, therefore being one of a delict/quasi-delict, then Article 2122 will apply. It reads as follows:
"2122. The following actions are prescribed by three years
1. For seduction, or lying-in expenses;
2. For damages resulting from delicts or quasi-delicts, whenever other provisions do not apply....
19. When did the cause of action arise? The Claimant was handed the cheque on 4th November, 2013 and on 9th April, 2014 he filed a claim against the Defendant. That claim was dismissed on 12th October, 2018.
20. According to Article 2047 of the Civil Code,
"Prescription is a means of acquiring property or of being discharged from an obligation by lapse of time, and subject to conditions established by law.

Extinctive negative prescription is a bar to, and in some cases precludes, any action for the fulfillment of an obligation or the acknowledgment of a right when the creditor has not preferred his claim within the time fixed by law."
21. Article 2085 of the Civil Code also provides:
"A judicial demand in proper form, served upon the person whose prescription it is sought to hinder, or filed and served conformably to the Code of Civil Procedure when a personal service is not required, creates a civil interruption."
22. In the case of **David Sweetnam et al v The Government of Saint Lucia Civil Appeal No. 42 of 2005**, it was held that interruption of the period of prescription only takes place if both requirements are met, namely the filing of a judicial demand in court of competent jurisdiction and the service of such demand. This principle was applied by Cenac-Phulgence, J in **St. Lucia Workers Credit Union Limited v Peter Delbert Ferdinand SLUHCV2018/0262**, in which the Judge found that the filing of a claim and the proper service of the same on a defendant to that claim interrupts prescription. In other words, time ceases to run once a claim is filed and served.
23. In the case at bar, when Mr. Anthony filed his claim in April, 2014, time was not running against him until the claim was dismissed on 12th October, 2018.

Unfortunately, Article 2087 would then be invoked when the claim was dismissed. Article 2087 reads:

"Prescription is not interrupted:

If the service or the procedure be null from informality;

If the plaintiff abandon his suit;

If he allow preemption of the suit to be obtained;

If the suit be dismissed"

24. The clear and unambiguous meaning of Article 2087 is that time continued to run against Mr. Anthony from the date when the cause of action arose, that is to say on 4th November, 2013 when he was handed the cheque, the date when the alleged breach occurred. The claim having been filed afresh on 1st November, 2018 was therefore prescribed and must be struck out.
25. Notwithstanding this ruling, I will go on to consider the other issue for completeness.

Are the issues raised in the claim *res judicata*?

26. The claim before the Court in Claim No. SLUHCV2013/1037 between Mr. Anthony and Mr. Williams according to paragraph 9 of the decision of the learned trial Judge was as follows:
- (a) *A declaration that Mr. Williams was guilty of misconduct as an Attorney at law before the Honourable Court by overbilling Mr. Anthony in the sum of \$153,756.25*
 - (b) *A declaration that Mr. Williams was in breach of his duty of trust owed to Mr. Anthony*
 - (c) *An order directing that Mr. Williams pays to Mr. Anthony the sum of \$153,756.25 unlawfully extracted as fees from Mr. Anthony*
 - (d) *An order directing Mr. Williams to render a true and proper bill of costs for his legal services*
 - (e) *That the Court do punish Mr. Williams appropriately for his impropriety and misconduct as an Attorney at law*
 - (f) *Costs*
 - (g) *Interest*
 - (h) *Such further or other relief as the Court deems just.*
27. Prior to the filing of the actual claim form in the said suit, Mr. Anthony filed an application supported by an Affidavit in which he sought certain interim orders to wit, (i) Mr. Williams deposit the sum of \$153,756.25 with the Chambers of Fraser & Company to be held on escrow in their clients' account until further order (ii) alternatively that Mr. Williams be directed to pay the sum of \$153,756.25 into an account as identified by the court to be held in escrow until further order (iii) Mr.

Williams be directed to hand over Mr. Anthony's file concerning the claim with Mr. Imbert and (iv) Costs.

28. This application was heard and Mr. Williams was ordered by the Court to to hand over Mr. Anthony's file with Mr. Imbert Simon to his Counsel. The Court then reserved its decision on the preliminary issue: what was the correct procedure for the filing of a disciplinary complaint. The Court determined on 17th November, 2014 that it will deem the Fixed Date Claim form and Affidavit as the Complaint before the court and the court would proceed under its inherent jurisdiction to hear the complaint.
29. Mr. Anthony then withdrew his application for interim orders and Mr. Williams by written application sought and was granted the leave of the court to file his Bill of Costs. Mr. Anthony filed a response. On May 4, 2016 the court heard the parties on the matter of the assessment of costs and reserved its decision.
30. The issues raised in the said Claim No. SLUHCV2013/1037 concerned what is the appropriate fee and disbursements payable to Mr. Williams and sum due for refund to Mr. Anthony. At paragraph 20 of the Judgment, the learned trial Judge stated:

"While according to the pleadings this suit started out as a disciplinary action suit for misconduct, it subsequently evolved and settled into one concerned solely with what was the appropriate fee and disbursements payable to Mr. Williams and sums due for refund to Mr. Anthony."
31. The Court was of view that it was guided by Rule 65.12 of the Civil Procedure Rules 2000 which the Court stated limited its ability to carry out the assessment. The Court then dismissed the claim without there being an assessment of what was the appropriate fee and disbursement.
32. Mr. Anthony then filed this claim seeking the relief set out at paragraph 10 above.
33. Counsel, Ms. Campbell contends that this fresh claim is *res judicata* for the following reasons:
 - (a) The Claimant had already had his day in court and an opportunity to litigate all issues, remedies and matter relevant to the subject matter in the present claim
 - (b) The Claimant could have appealed the decision of the learned judge in the first claim instead of filing a new claim which would necessitate the parties filing the same documents in relation to the same facts a second time
 - (c) The first claim contained several applications and hearing as stated in the judgment delivered on 18th October, 201[8]. The first claim was therefore contentious and took up significant court time. It is the interest of the court not to allow a second claim in keeping with the overriding objectives of the court to

save expenses (CPR 1.1(2)(b)) and to not allot court resources to a claim contained in a subject matter that was already before the court and given extensive consideration when other cases are before the court (CPR 1.1(2)(e)).

- (d) Defendant defended the first claim and had to instruct an attorney to act on his behalf in the first claim. Although the claim was struck out the Defendant did not receive costs. It is therefore unfair and prejudicial to the Defendant to be subject to a second claim concerning the same facts, subject matter, parties' issues and to retain Counsel again to assist in defending the claim. The Claimant is being vexed twice.

34. Counsel, Mr. Campbell relied on the case of **Virgin Atlantic Airways Ltd. v Zodiac Seats UK Ltd. [2013] UKSC 46** from which she extracted the following principles of *res judicata*:

- i. That once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings
- ii. where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action.
- iii. the doctrine of merger which treats a cause of action as extinguished once a judgment has been given upon it, and the claimant's sole right as being a right upon the judgment
- iv. even where the cause of action is not the same in the later action as it was in the earlier one, some issues which is necessarily common to both was decided on the earlier occasion and its binding on the parties.
- v. a party is precluded from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones.

35. Ms. Campbell submits that although Mr. Anthony did not expressly state the cause of action in the first claim, it is evident based on the pleadings that one of the causes of action was breach of trust since a declaration was sought to that effect. She contends that the same cause of action is in the present case and that some issues which are common to both claims were decided in the earlier claim and is binding on the parties. She identified one such issue as the factual finding that there was no written or oral retainer agreement. She also identified the finding by the learned trial judge that the assessment of the legal fees cannot be done by a Judge as being an issue that was also determined. And so Ms. Campbell submits that applying the 1st, 4th, 5th and 6th principles in the Virgin Atlantic case (although she identified only 5), the claim is *res judicata*.

36. Mr. Fraser on the other hand submits that the issue of *res judicata* does not arise on the application because as noted by the learned Trial Judge in the earlier proceedings, the case is not starting as one for assessment of costs/fees. The

claim having proceeded as an assessment of costs/fees it became contrary to Part 65.12(3) and the proceedings were therefore a nullity, which were not dismissed on the merits. Mr. Frazer cited the cases of **Leymon Strachan v The Gleaner Company Limited et anor [2005] UKPC 33** and **Martin v Chow (1985) 34 WIR 387** in support of his contention that where proceedings were not determined on their merits but were dismissed for some technicality, the plea of *res judicata* must fail. Mr. Fraser did not develop his arguments beyond this point, nor did he show how these cases applied to the case at bar.

37. In **Strachan v The Gleaner**, the Privy Council dismissed the appeal of the Appellant against the majority decision of the Court of Appeal, which Court had dismissed the Appellant's appeal against an Order of a High Court Judge (Smith, J). Smith, J had refused to set aside an earlier order made by another High Court Judge (Walker, J) as being an order made without jurisdiction. The issues before the Privy Council were whether Walker J had jurisdiction to set aside a judgment made after assessment and whether Smith, J had jurisdiction to set aside the Order of Walker, J. The Board did not pronounce on whether the issues were *res judicata* and so I do not see how this case assists Counsel.
38. In the **Martin v Chow** case, the Court of Appeal of Trinidad & Tobago held that although two previous applications made by the Appellant for an extension of time to appeal out of time had been dismissed, the third application was not *res judicata* for the reason that the earlier applications had not been dismissed on their merits. I agree that this case is consistent with the well established principles of *res judicata*.

Court Analysis & Findings

39. According to the learned authors of Halsbury Laws of England 4th ed. Para. 977 "*It is a fundamental doctrine of all courts that there must be an end to litigation. Where res judicata is pleaded by way of estoppel to an entire cause of action, rather than to a single matter in issue, it amounts to an allegation that the whole legal rights and obligations of the parties are concluded by the earlier judgment, which may involve the determination of questions of law as well as finding of fact. To decide which questions of law or fact were determined in the earlier judgment, the court is entitled to look at the judge's reasons for his decision and his notes of evidence [if any].*"
40. At paragraph 978, it continues
"In all cases where the cause of action is really the same and has been determined on the merit, and not on some ground which has ceased to operate when the second action is brought, the plea of res judicata should succeed."

41. It seems to me that when all is said and done, the question is, did the learned trial Judge in the earlier decision make a determination on whether or not there is a breach of trust on the part of Mr. Williams and/or what are the appropriate fees and disbursements that should be charged by Mr. Williams?
42. It is clear that the facts giving rise to both claims arose out of the same incident. However, when one examines the claim as pleaded in Claim No. SLUHCV2013/1037 and the issues identified by the learned Judge that she was invited to consider, it cannot be said that they are one and the same as pleaded in the present case.
43. Claim No. SLUHCV2013/1037 begun as a claim for professional misconduct and the parties agreed there was no issue of breach of contract to consider since there was no written or oral retainer for fees. The proceedings had reached the stage where the central issue for the Judge was the assessment of the fees and disbursements. The learned Judge held that she had no such jurisdiction and she dismissed the claim
44. I agree with Counsel for the Claimant, Mr. Fraser, that there was no determination of Claim No. SLUHCV2013/1037 on its merits. I find as a matter of fact, that the learned Judge did not make any determination on the issue before her, which issue related only to the assessment of the fees and disbursements. The learned Judge held that she had no jurisdiction and declined to make any determination.
45. According to Halsbury Laws of England 4th ed. paragraph 978, note 2 :
“A holding that the court has no jurisdiction to consider a claim is not a determination of the merits of the claim and creates no estoppel”
In the case of **Tak Ming Co. Ltd. v Yee Sang Metal Supplies Co. [1973] 1 All ER 569 UKPC** held that the dismissal of a summons for want of jurisdiction is not *res judicata* since the issue of interest in the claim was not adjudicated on by the trial Judge.
46. Although this is academic at this point, had the claim not been prescribed, Mr. Anthony could have properly pursued this fresh claim against Mr. Williams since the Court in the earlier claim did not adjudicate on the issues before her, but dismissed the claim for lack of jurisdiction.
47. I thank both Counsel for their very helpful submissions.
48. Accordingly, I order as follows:

- i. The application made by the Defendant on 14th February, 2019 for the claim to be struck out is hereby granted, the claim being prescribed pursuant to the provisions of the Civil Code 4.01 of the Revised Laws of Saint Lucia.
- ii. The Claimant do pay to the Defendant costs to be assessed if not agreed between the parties within 21 days of the date of this Order.

C Debra Burnette

Master (Ag)

By the Court

The Registrar