

**THE EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO: DOMHCV2015/0257

BETWEEN:

TI CADEAU INC.

Claimant

and

SAMPSON SAMUEL

Defendant

APPEARANCES: Mr. Geoffrey Letang for the Claimant
Mr. Darius Jones and Mr. Joshua Francis for the Defendant

2020: January 20
February 20

GILL, M. (Ag.)

[1] The Court is to determine whether to grant the defendant's application pursuant to Rule 26.3 (1)(c) of the Civil Procedure Rules (CPR 2000) to strike out the claim filed by the claimant on October 16, 2015 as being statute barred.

Background Facts

- [2] On September 1, 2009 the defendant Sampson Samuel and his daughter Kaywane Samuel, now deceased, a former employee of the claimant, executed a promissory note to pay the claimant the sum of EC\$112,139.00 on the following terms:
- \$30,000.00 by the end of the first week of September 2009;
 - \$5000.00 by the end of October 2009;
 - the balance of \$77,139.00 being converted into a loan to be paid by instalments of \$1500.00 with interest at 12% on the balance for the time being outstanding, commencing November 30, 2009 and continuing every month for 73 months thereafter until payment in full;
 - in the event any instalment was not paid on the due date, the whole balance then unpaid would forthwith become due and payable.
- [3] A chronology of events following the execution of the promissory note is useful.
- November 5, 2009. First payment of \$25,000.00 made to the claimant.
 - November 27, 2009. Second payment of \$5000.00.
 - No further payments made up to May 16, 2010.
 - May 17, 2010. \$1500.00 paid.
 - July 21, 2010. Letter to the defendant and Kaywane Samuel by Mr. Michael Pascal, a director of the claimant, bringing the default of payment to their attention and asking them to make an appointment to discuss a plan to pay the arrears.
 - August 18, 2010. Payment of \$3000.00 made.
 - October 26, 2010. Last payment of \$1300.00 made.
 - Up to March 2011, repeated oral requests by the claimant and repeated oral promises by the defendant to resume payments.
 - March 30, 2011. Letter to the defendant and Kaywane Samuel calling on them to immediately restart monthly payments and to come in and discuss arrears accumulated up to that date.
 - No further payments made.
 - On or about February 2, 2014, Kaywane Samuel died.

- No further payments to date. The total amount paid is \$38, 500, leaving a balance of \$76,339.00 plus interest.
- October 16, 2015. The claimant filed the claim herein for the said balance plus interest.
- Subsequently, file active with further pleadings, applications, orders, including a mediation referral order, extensions thereof, and trial directions.
- September 27, 2019. Notice of Application filed by the defendant to strike out the claim on the ground that it is statute barred.

Defendant's Submissions

- [4] By the Notice of Application and Affidavit in Support, the defendant relies on the provision in the promissory note that if any one instalment was not paid on the date due, then the whole balance then unpaid would forthwith become due and payable. The first payment was due on or about the of September 8, 2009 but no later than September 9, 2009. No payment was made then. As a result, the defendant contends that the claimant's cause of action arose at the said date of this first default. The promissory note is in the form of a simple contract for which the limitation period for the claimant to file the claim is 6 years. This claim was filed 6 years, 1 month and 1 day after the claimant's cause of action arose. It was filed outside of the limitation period and is accordingly statute barred and an abuse of the process of the Court.
- [5] In oral submissions, Leaned Counsel for the defendant, Mr. Jones, further argued that the payments made in the course of the 6 years after the cause of action accrued did not extend the limitation period.

Claimant's Submissions

- [6] The claimant opposes this application on 2 limbs as follows;
- (i) It is improper for the defendant to file this application when the defence of limitation was not pleaded. To succeed in this application, the defence of limitation must be specifically pleaded. The defendant did not do so in his defence filed on January 22, 2016 and therefore the application should be denied.
 - (ii) In any event, the claim is not statute barred. The claimant submits that based on the provisions of the promissory note, the balance to be paid by the defendant was supposed to commence on November 30, 2009 and continue by monthly instalments

for 73 months and so, payment in full was due on November 30, 2015. The cause of action would accrue on the date the defendant failed to pay the last instalment. In this case, the claim would have been statute barred on December 1, 2015. The claim being filed on October 16, 2015 is within the limitation period.

Issues

- [7] The Court must determine:
- (1) whether the defendant's failure to plead the defence of limitation is fatal to his application, and
 - (2) if not, whether the claim should be struck out as being statute barred, in particular, when did the cause of action accrue?

Law and Analysis

- [8] Part 26.3 (1) (c) of CPR 2000 empowers the court to strike out a statement of case if it appears to the court that it is an abuse of the process of the court. It is well established that it is an abuse of the process of the court to bring an action which is statute barred.
- [9] The striking out of a claim is considered to be a draconian step as it denies one the opportunity to proceed with a case. This option should be used sparingly and only in plain and obvious cases. In **Tawney Assets Limited v East Pine Management Limited et al**, Mitchell JA. (Ag.) stated:

"The striking out of a party's statement of case, or most of it, is a drastic step which is only to be taken in exceptional cases. The reason for proceeding cautiously has frequently been explained as that the exercise of this jurisdiction deprives a party of his right to a trial and of his ability to strengthen his case through the process of disclosure, and other procedures such as requests for further information. The court must therefore be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of case is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial."¹

¹ BVIHCVAP2012/007 at paragraph 22, delivered September 17, 2012

Defence of Limitation Not Pleaded

[10] Limitation is a defence to a claim and must be pleaded and proved in order for the defendant to derive its benefits. CPR 10.5 (1) requires the defence to set out all the facts on which the defendant relies to dispute the claim and CPR 10.7 spells out the consequences of not setting out a defence. It reads:

“10.7 The defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the court gives permission or the parties agree.”

[11] Learned Counsel for the claimant, Mr. Letang, relies on the following statement in Atkin’s Court Forms to support his contention that the application before the court is improper. It reads:

“The defence of limitation must be specifically pleaded, even if it is apparent from the statement of claim that the limitation period has expired.”²

[12] Learned Counsel for the defendant, Mr. Jones, argued that raising the issue of limitation at this stage without pleading it is not fatal to this application by virtue of the fact that it is a point of law.

[13] The judgment of the Court of Appeal in **Leonora L. Walwyn v Eustace Archibald et al**³ is most instructive on this point. In that case, among the issues dealt with, the subject of limitation was live. The appellant’s claim for repayment of money was brought five years after the deadline for bringing the claim had passed. The first named respondent Mr. Archibald did not plead the defence of limitation. However, the learned trial judge ruled that the claim was statute barred. One of the 11 grounds of appeal was that the trial judge erred in holding that the appellant’s claim against Mr. Archibald was statute barred even though Mr. Archibald did not plead the statute.

² Atkin’s Encyclopaedia of Court Forms in Civil Proceedings, 2nd Edition, Volume 12(2), at paragraph 46 which footnotes *Ronex Properties Ltd v John Laing Construction Ltd* [1983] QB 398, [1982] 3 All ER 961 CA.

³ SKBHC VAP2010/0012, delivered July 10, 2014

[14] Delivering the judgment of the Court, Pereira CJ. opined:

“In any event, this claim for payment was made some five years after the deadline in the **Limitation Act** had passed. Mr. Archibald was entitled to the benefit of the limitation defence which arose from this delay. However, it is well established that a limitation defence is required to be specifically pleaded in a defence to a claim for repayment of a debt, failing which its benefit does not arise. Mr. Archibald made no such pleading. The limitation defence did not, therefore, apply to him, and the judge was wrong to so find otherwise.”⁴

[15] The defendant has not pleaded a limitation defence. No application to amend the defence, an option open to the defendant, has been made as was successfully done in **Murtland Watterton v Nigel Landreth Smith et al**⁵ a matter in which Carter J. allowed the fifth and sixth named defendants, the Chief Engineer of Public Works and the Attorney General of St. Christopher & Nevis, to amend their defence where they had omitted to include in their defence that the claim was statute barred by virtue of section 2 of the Public Authorities Protection Act.

[16] Based on the foregoing, the Court is constrained to rule that the failure of the defendant to plead the defence of limitation is fatal to this application.

When Did The Cause Of Action Accrue?

[17] Having ruled as above, the Court need not proceed further on the defendant’s application, but in the interest of completeness, it would be proper to rule also on the second issue.

[18] The parties are *ad idem* that the promissory note constitutes a simple contract. Section 5 of the Limitation Act 1980 states:

“5. An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.”

⁴ Ibid at paragraph 24 of the judgment.

⁵ Claim No. SKBHCV2012/0181, delivered April 26, 2017

Crucial to this issue are provisions in section 29 of the Act. The following subsections are instructive:

"29. (5) Subject to subsection (6) below, [dealing with rent] where any right of action has accrued to recover –

(a) any debt or other liquidated pecuniary claim; or

(b) ...

and the person liable or accountable for the claim acknowledges the claim or makes any payment in respect of it the right shall be treated as having accrued on and not before the date of acknowledgement or payment.

(7) Subject to subsection (6) above, a current period of limitation may be repeatedly extended under this section by further acknowledgements or payments, but a right of action, once barred by this Act, shall not be revived by any subsequent acknowledgement or payment.

30. (2) For the purposes of section 29, any acknowledgement or payment –

(a) may be made by the agent of the person by whom it is required to be made under that section; and

(b) shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged or, as the case may be, in respect of whose claim the payment is being made."

[19] Mr. Letang cited the case of **Clifford Robertson v H.M Bhola & Co. Ltd**⁶ for the proposition that the cause of action was triggered when the defendant failed to pay the last instalment based on agreed fixed dates for instalments to be paid. He submitted that this case is instructive and applicable to the case at bar as the facts are similar.

[20] The brief facts in the **Clifford Robertson** case relevant to this matter are as follows. By an agreement dated October 9, 1998, the claimant agreed to sell and the defendant agreed to buy the claimant's 300 shares in the defendant for a contract price of \$200,000.00 by 4 instalment payments of \$50,000.00 each, the first on execution of the agreement, the second on October 9, 1999, the third on October 9, 2000 and the final instalment on October 9, 2001. It was a term of the agreement that the proceeds of sale of a parcel of land would be applied by the defendant to reduce the balance owed to the claimant. There was no time stipulated for the sale of the land. The first instalment was paid as agreed. The defendant defaulted on the second and third instalments.

⁶ GDAHCV2011/0037, judgment of Master V. Georgis Taylor-Alexander, delivered July 30, 2012

The claimant successfully sued the defendant for those payments. Subsequently, the claimant also sued for default of the final payment. That claim was discontinued.

- [21] On January 24, 2011 the claimant filed an action to recover the final instalment and the defendant alleged that this claim was statute barred. The defendant maintained that the default in relation to the final instalment occurred on October 10, 2001, and given the statutory requirement for a claim to be brought within 6 years of when the cause of action accrued, the claim should have been brought before October 12, 2007. The claimant countered that the cause of action arose on July 23, 2008 when the land was sold and the proceeds of sale were applied to the outstanding amount. That would place it within the 6 year limitation period. The Court ruled that the cause of action accrued on October 10, 2001, the day after the due date of the final instalment. Consequently, the claim was dismissed as being statute barred.
- [22] Mr. Letang uses this case to argue that based on the promissory note which provided for the balance of the debt to be paid by monthly instalments which would end with a final payment on November 30, 2015, the cause of action accrued on December 1, 2015. I disagree.
- [23] The distinguishing feature between the instant case and the **Clifford Robertson** case is the provision in the promissory note that in the event any instalment was not paid on the due date, the whole balance then unpaid would forthwith become due and payable by the defendant. This means that when the defendant defaulted on the first due date at the end of the first week in September 2009, the entire balance became due and payable then. In the absence of any further payment, any claim for recovery of the balance had to be filed on or before September 10, 2015. This claim was filed on October 16, 2015.
- [24] However, based on the statement of claim and as chronicled earlier herein, 5 payments, totalling \$38,500.00, were made to the claimant from November 5, 2009 to October 26, 2010. Section 29(7) of the Limitation Act 1980 specifically governs this state of affairs. Although already quoted at paragraph 18, I repeat for emphasis:

“(7) Subject to subsection (6) above, a current period of limitation may be repeatedly extended under this section by further acknowledgements or payments, but a right of action, once barred by this Act, shall not be revived by any subsequent acknowledgement or payment.”

[25] Clearly, the limitation period in this case was repeatedly extended by payments to the claimant, all evidenced by receipts exhibited to the statement of claim. By each payment, the limitation period was extended. The right of action never became barred so as to consider an argument of being revived.

[26] In the premises, I find that the cause of action accrued on October 27, 2010, the day after the final payment with a balance still outstanding. The claim, having been filed on October 16, 2015, the claimant is within the limit by just short of one year. The claim is not statute barred.

ORDER

[27] It is hereby ordered as follows:

- 1) The defendant's application for an order to strike out the claim is refused.
- 2) The defendant is ordered to pay costs of this application to the claimant in the sum of \$1500.00.

Tamara Gill
Master (Ag.)

BY THE COURT

REGISTRAR

