

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMONWEALTH OF DOMINICA**

BETWEEN: DOMHCV2018/0112

REIGATE WATERFRONT LIMITED

Claimant

and

DOMINICA FOOTBALL ASSOCIATION

Defendant

On written submissions

Miss Cara Shillingford for the Claimant

Mrs. Heather Felix-Evans for the Defendant

2019: September 25

November 20

GILL, M. (Ag.):

1. The matter for the ruling of the Court is an application to strike out the Claimant's Statement of Claim on ground that it is statute barred.

Background

2. The Claimant filed a Claim Form and Statement of Claim against the Defendant on 13th June 2018. The main paragraphs of the Statement of Claim are as follows:

- “ 3. The Defendant was at all material times a company incorporated under the laws of Dominica.**
- 4. In or about 1998, by a partly oral and partly written contract, the Claimant and the Defendant's incorporator and former President Mr. Patrick John agreed that the Defendant would pay the Claimant to provide accommodation to certain persons at Reigate Hotel.**
- 5. The Claimant provided accommodation to the Defendant's guests and submitted an invoice for payment in accordance with the agreement in the sum of Thirty Four Thousand Eastern Caribbean Dollars (\$34,000).**
- 6. The Defendant's directors and executive members, including its then President Patrick John accepted the Claimant's invoice and repeatedly promised to pay the Claimant. The Defendant, through the words and actions of its incorporator, members and executive members, has repeatedly shown an intention to be bound by its contract with the Claimant over the past years.**
- 7. The Defendant has repeatedly acknowledged this debt to the Claimant by recording this debt in its Schedule of Accounts Payable in the Financial Statements prepared by Chartered Certified Accountant Winston & Co and published to its members. The years in which the Defendant acknowledged its debt to the Claimant include the period 1999 to 2015.**
- 8. On the 12th of September 2016 the Claimant, through its Solicitor wrote to the Defendant requesting payment of the \$34,000 owed plus the sum of EC \$325 incurred as legal expenses as at that date.**
- 9. Wrongfully and in breach of the contract, the Defendant has failed and/or refused to pay to the Claimant the monies owed to it. “**

3. In its Defence, the Defendant pleads:

- 1) The claim is time barred, the claim having been filed 6 years after the alleged contract.
- 2) Alternatively, the Defendant was incorporated on 6th October 2005, it has no knowledge of the alleged contract and denies the debt.

4. On 3rd October 2018, the Defendant filed the 'Notice of Application to Strike Out Time-Barred Claim' on the following grounds:

"1. The Claimant's claim was issued on June 13, 2018.

2. The Claimant is suing the Defendant for a sum under an alleged contract between the parties which, alleged sum, according to the facts pleaded, became due and payable more than six years prior to the filing of the claim.

3. The Claimant's cause of action having accrued more than six years before the filing of the claim is, pursuant to section 5 of the Limitation Act 1980, time barred and shall not be brought.

4. On that basis the claim ought to be struck out."

5. On 10th October 2018, at a case management conference, the Court made the following order:

"The parties shall file and exchange submissions on the application to strike out including the issue on whether this matter is capable of being maintained against the defendant it being a company incorporated after the alleged contract and debt on or before 23rd November 2018."

6. At the case management conference, the Court considered that an amended Statement of Claim was filed on the said 10th October 2018 which the Court had not seen prior to those proceedings.

Defendant's Submissions

Pre-Incorporation Agreement

7. The Defendant submits that it came into being on 6th October 2005 and being a company, it is governed by the Companies Act, No. 21 of 1994 ("the Act"). The Act allows a company to adopt a pre-incorporation agreement only if the agreement is in writing and it is made in the name of or on behalf of the company before the company comes into existence. Where a company adopts such an agreement within a reasonable time, it is bound by it.

8. The Defence contends that the Defendant did not come into existence until 2005, seven years after the alleged commencement of the contract.
9. Although the Claimant pleads that the contract was partly oral and partly written, there is no evidence before the Court that any part of the alleged contract was, in fact, in writing.
10. The Claimant has not averred or shown and the pleadings could not reasonably aver that the contract was entered into in the name of or on behalf of the Defendant as the Defendant was formed about seven years after the alleged contract.
11. Therefore, the Defence argues that the Claimant has not, and cannot, discharge the burden placed on it by the Act of showing that any alleged written contract entered into in the name of or on behalf of the Defendant before it was incorporated was adopted by the Defendant.

Statutory Time Bar

12. Assuming, but not admitting, that the Defendant adopted the alleged written contract, the Defence submits that the claim is statute barred as it was brought more than six years after the cause of action accrued. The claim shows that the alleged contract was entered into "in or about 1998". The Claimant alleges the Defendant "made part payments towards the debt over the years" (as stated in an amended statement of claim dealt with later in the ruling) but fails to state any year in which any such payment was made. There is no evidence of any such payment. The claim is wholly void of specifics and looks like a fishing expedition.
13. If the alleged contract was entered into in 1998, the limitation period of 6 years would have expired some time in 2004, even before the Defendant was incorporated. In the

absence of any evidence that the limitation period was extended, the Claimant's right of action became barred, at the latest, by 31st December 2004.

14. As stipulated in the Act, once expired, a right of action cannot be revived. This cause of action cannot be revived by any acknowledgement or purported acknowledgment subsequent to 31st December 2004.
15. The Defence states that to allow this matter to proceed on the present state of the pleading (the Statement of Claim) would result in a misuse or abuse of the Court's process. The claim is statute barred and should be dismissed with costs.

Claimant's Submissions

Pre-Incorporation Agreement

16. The Claimant relies on the provisions of the Act that a pre-incorporation contract may be enforceable, if after the company comes into existence demonstrates through its actions or conduct its intention to be bound by the said agreement. In this regard, the financial statements of the Defendant which include the debt owed to the Claimant are an express intention to be bound by the pre-incorporation contract entered into by its first president and incorporator. The debt was still reflected in the financial statements even after a change in president.
17. Therefore, the contract entered into is to be regarded as if the Defendant was incorporated from the date the contract was agreed upon.
18. The Claimant maintains as in paragraph 4 of the statement of claim and amended statement of claim that the pre-incorporation contract was partly written.

Statutory Time Bar

19. The Claimant submits that the Defendant through its actions both expressly and impliedly has made several acknowledgements of the debt over the years, thereby keeping the debt alive. The Claimant highlights the following:
1. Affidavit in Opposition of Reginald Shillingford, a director of the Claimant.
 2. Mr. Shillingford deposes that the debt owed by the Defendant was in excess of \$34,000 but the Defendant has made several part payments over the years. Part payment is an acceptable form of an acknowledgment of the debt.
 3. In 2016, the Defendant's incorporator, director and former president made a Statutory Declaration confirming that during his tenure as president, he promised Reginald Shillingford that the monies owed would be paid by the Defendant.
 4. The Defendant has acknowledged the debt repeatedly in its financial statements from the date of its incorporation until 2015 (as shown in copies of financial statements of the Defendant exhibited to Affidavit in Opposition of Reginald Shillingford dated 5th October 2018). The financial statements were signed by the Defendant's Auditor, President and Treasurer. The financial statements of the Defendant can be considered an acknowledgment of the debt.

Based on the foregoing, the Claimant urges the Court that the claim should not be struck out.

Issues

- [20] The Court must determine whether or not the claim should be struck out as being statute barred, or on the basis that the alleged pre-incorporation agreement is unenforceable.

Law and Analysis

- [21] Sections 5, 29 and 30 of the Limitation Act 1980 are applicable here.

“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.

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 the 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 acknowledgment or payment.

30. (1) To be effective for the purposes of section 29 of this Act, an acknowledgment must be in writing and signed by the person making it.

(2) For the purposes of section 29, any acknowledgment 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.”

[22] Learned Counsel for the Claimant provided authorities in support of the submission that balance sheets which contain records of a debt are sufficient acknowledgment of the debt.¹

[23] The application by the Defendant is based on the contention that time started to run when the alleged contract was entered into “in or about 1998”, and the Defendant uses this to assert that the action was brought six years after the cause of action accrued.

¹ Jones v Bellgrove Properties Ltd [1949] 2 KB 700, Freeway Properties Inc. v Genco Resources Ltd 2012 BCCA 258

The limitation period does not run from the date of the contract. It runs from when the right of action accrued. The right of action accrues from the date of the breach of the contract, not the date of the contract. The breach in this case is the non-satisfaction of the invoice. The statement of claim does not reflect the due date for payment of the invoice. It is not clear from the pleadings when the right of action accrued. This must be elicited from the evidence.

Pre-Incorporation Agreements

[24] Section 16 of the Companies Act, No. 21 of 1994 deals with pre-incorporation agreements.

“16.(1) Except as provided in this section, a person who enters into a written contract in the name of or on behalf of a company before it comes into existence is personally bound by the contract and is entitled to the benefits of the contract.

(2) Within a reasonable time after a company comes into existence, it may, by any action or conduct signifying the intention to be bound thereby, adopt a written contract made, in its name or on its behalf before it comes into existence.

(3) When a company adopts a contract under subsection (2) -

(a) the company is bound by the contract and is entitled to the benefits thereof as if the company had been in existence at the date of the contract and had been a party to it; and

(b) a person, who purported to act in the name of the company or on its behalf ceases, except as provided in subsection (4), to be bound by or entitled to the benefits of the contract.

(4) Except as provided in subsection (5), whether or not a written contract made before the coming into existence of the company is adopted by the company, a party to the contract may apply to the Court for an order fixing obligations under the contract as joint or joint and several, or apportioning liability between or among the company and a person who purported to act in the name of the company or on its behalf and the Court may, upon the application, make any order as it thinks fit.”

[25] If the alleged agreement between the Defendant’s incorporator, former president Mr. Patrick John and the Claimant was in writing, then the Defendant would be caught by

the provisions of section 16 (as long as the claim is not statute barred). The Claimant in its Statement of Claim states that the contract was partly oral and partly written. The Defendant finds issue with the fact that the Claimant has not pleaded what part of the contract was written and that there is no evidence before the Court that any part of the alleged contract was in writing.

- [26] A Statement of Claim is not required to give all the details of a case. All that is necessary is for the Claimant to state the facts relied on to ground a cause of action. This was made clear by Barrow JA. in **East Caribbean Flour Mills Limited. v Ormiston Ken Boyea and Eastern Caribbean Flour Mills Limited v Hudson Williams**² when he explained:

“The position ...is that the pleader makes allegations of facts in his pleadings. Those alleged facts are the case of the party. The “pleadings should make clear the general nature of the case,” in Lord Woolf’s words, which again I emphasize. To let the other side know the case it has to meet and, therefore to prevent surprise at the trial, the pleadings must contain the particulars necessary to serve that purpose. But there is no longer a need for extensive pleadings, which I understand to mean pleadings with an extensive amount of particulars, because witness statements are intended to serve the requirement of providing details or particulars of the pleader’s case.”

- [27] The Statement of Claim alleges that the contract was partly in writing. The claimant is not required, in the pleadings, to give details of or to exhibit the part of the contract it says was in writing. The exchange of witness statements and relevant documents should provide the necessary details of the claimant’s case.

² Civil Appeal No. 12 of 2006, St. Vincent and the Grenadines at paragraph 43

Amended Statement of Claim

[28] As alluded to earlier, the Claimant filed an Amended Statement of Claim on 10th October 2018 before the first case management conference. Of significance is a new paragraph 8 which reads:

“8. The Defendant through its officials including its current and past President has repeatedly acknowledged its debt to the Claimant and a period of more than five years has never elapsed without an acknowledgment of the said debt and promise to pay by the Defendant.”

In additional submissions filed on 30th January 2019, the Claimant submits that the application to strike out the Statement of Claim filed on 13th June 2018 is null and void in light of the Amended Statement of Claim filed on 10th October 2018. The Amended Statement of Claim was filed before the first case management conference as allowed by Rule 20.1 of CPR 2000. In support of its contention, the Claimant cites **The Attorney General v Allen Chastenet and Kenneth Cazaubon**³ in which it was held that the judge in the Court below had erred in striking out an amended statement of claim which had been overtaken by a further amended statement of claim. The further amended statement of claim was filed, with leave of the judge, after the application to strike out was filed and heard and it addressed issues raised in the application to strike out the amended statement of claim. The learned judge struck out the amended claim form and amended statement of claim without referring to the further amended statement of claim.

[29] Delivering the judgment of the Court of Appeal, Blenman JA. declared:

“[T]he mere fact that the further statement of claim was filed before the learned judge had rendered his decision and in the absence of any time limit within which the Attorney General ought to have filed the relevant documents, the learned judge would have been obliged to

³ Claim No. SLUHCVP2015/0016, St. Lucia at paragraphs 143 and 146

consider the further amended statement of claim had he been aware it had been filed. It is evident that the further amended statement of claim had overtaken the amended pleadings that were filed.....

In my view, once the latter pleadings had been filed and served in accordance with the leave that was granted by the learned judge, whether or not a cause of action arose on the amended claim and amended statement of claim was no longer a live issue. Indeed, the filing of the further amended statement of claim would have effectively brought an end to the application to strike out the amended claim.... In so far as the amended statement of claim was further amended, it is clear to me that the application to strike the amended claim as distinct from the further amended claim became otiose.”

- [30] In this matter, the Amended Statement of Claim, *inter alia*, addresses the issue of the claim being statute barred. The Defendant submitted that the cause of action cannot be revived by an acknowledgment subsequent to 31st December 2004 (assuming that the right of action accrued in 1998). An acknowledgement of the debt within a six-year period of the date of accrual of the cause of action keeps the debt alive. The period of limitation is extended by acknowledgments or payments. Paragraph 7 of the Statement of Claim states that the **Defendant** acknowledged its debt to the Claimant including the years 1999 to 2015. However, the Defendant was incorporated in 2005 and so, only could have acknowledged the debt from the earliest in October 2005. By then, as argued by the Defence, the limitation period would have expired. The new paragraph 8 alleges that the Defendant, through its officials including its current and past president, the person who entered into the alleged pre-incorporation agreement with the claimant, has repeatedly acknowledged the debt. The acknowledgment of the debt by the president from 1999 to the time of incorporation of the Defendant would have kept the debt alive. Further, the period 1999 to 2015 spans sixteen years. The new paragraph 8 clarifies that at no time was there a period of six years in which the

limitation period could have expired. It spells out that a period of five years never elapsed without an acknowledgment of and a promise to pay the debt. With this amendment, the claim is not statute barred.

Conclusion

- [31] Applying the reasoning of Blenman JA. in the case just cited, the Amended Statement of Claim properly filed on 10th October 2018 has overtaken the statement of claim filed on 13th June 2018. The filing of the Amended Statement of Claim, in effect, brought an end to the application to strike out the Statement of Claim.
- [32] Based on the foregoing, the Court finds that the Amended Statement of Claim, though bare, contains sufficient alleged facts to show that the pre-incorporation agreement is enforceable. The Claimant will have to produce the requisite evidence to support the claim.
- [33] The Amended Statement of Claim brings the claim within the limitation period so the application to strike out the Statement of Claim as being statute barred is rendered “otiose”.

ORDER

1. The application to strike out the Statement of Claim is refused.
2. Costs of this application shall be costs in the cause.

Tamara Gill
Master (Ag.)

BY THE COURT

REGISTRAR