

**EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV2014/0542

BETWEEN:

- 1. JONES BICETTE**
- 2. MARIE BISCETTE**

Claimants

and

- 1. BANK OF SAINT LUCIA LIMITED**
 - 2. Haydyn Gittens**
 - 3. Norman Francis**
 - 4. Thaddeus Antoine**
- Defendants 3 and 4 trading under the business
name Francis & Antoine**

Defendants

Before:

Agnes Actie

Master

Appearances:

Mr. Winston Hinkson for the Claimants/Respondents
Mr. Leslie Prospere for the 1 & 2nd Defendants/Applicants
Ms Reneee St. Rose for the 3rd & 4th Defendants

2016: June 23
2017: March 2.

JUDGMENT

- [1] **ACTIE, M.:** Before this court are two applications seeking orders to strike out the claimants' amended statement of claim.

Background

- [2] The Biscettes' approached the Bank of Saint Lucia to obtain financing to purchase a dwelling house and land. The Bissettes' aver that they were coerced by the

loans officer to use the services of the Francis and Antoine to prepare the notarial documents in order to obtain a discount on fees. The Biscettes aver that it was subsequently discovered that part of the dwelling house encroached onto an adjoining property belonging to Angella Eugene-Flood. The Biscettes contend that the defendants failed to provide them with sound professional advice. They aver that Francis and Antoine as agents of the bank were negligent in failing to put them on notice that the property was defective. The Biscettes are seeking compensation from the defendants to cover the additional sum of money they borrowed to purchase the area of encroachment.

Francis & Antoine Application

- [3] On 30th October 2015, Francis and Antoine filed an application seeking a declaration that the court has no jurisdiction to hear the claim. Francis and Antoine contend that the action cannot be maintained having been filed outside of the limitation period. They aver that the Biscettes claim alleging breach of contract and negligence was filed in excess of three years limitation period for breach of contract and in excess of six years limitation period for negligence.

The Bank's Application

- [4] On 17th November 2015, the Bank of Saint Lucia and its General Manager, Mr Hayden Griffiths, applied to strike out the statement of claim. The application avers that the claim fails to disclose any reasonable cause of action against them. The Bank, like Francis & Antoine, states that the claim is prescribed both in contract and negligence in accordance with **Articles 2121(4) and 2122(2)** of the **Civil Code of Saint Lucia**¹
- [5] Mr Gittens avers that the statement of claim fails to disclose the capacity in which he was made a party as his appointment as General Manager started in October

[1] ¹ Cap 4.01 of the Revised laws.

2013 and on 1st January 2014, respectively. He avers that he was not a director, employee or agent of the Bank at the material time alleged by the Biscettes.

The claimants' response

- [6] The Biscettes' contend that Francis and Antoine application was made outside the period for filing a defence and are deemed to have accepted that the court has jurisdiction to hear the claim.
- [7] The Biscettes' further contend that the claim was filed within the limitation period of ten years as the time begun to run from the date of the discovery of the mistake. The Biscettes aver that the error was discovered after the survey of the parcel of land in 1999.

Law and Analysis – challenging the court's jurisdiction

- [8] CPR 9.7 provides the mechanism for challenging the court's jurisdiction to hear a matter and reads as follows:-
1. A defendant who disputes the court's jurisdiction to try the claim may apply to the court for a declaration to that effect.
 2. A defendant who wishes to make an application under paragraph (1) must first file an acknowledgement of service.
 3. An application under paragraph (1) of this rule must be made within the period for filing a defence; the period for making an application under this rule includes any period by which the time for filing a defence has been extended where the court has made an order, or the parties have agreed, to extend the time for filing a defence.
 4. An application under this rule must be supported by evidence on affidavit.
 5. A defendant who –
 - (a) files an acknowledgment of service; and
 - (b) does not make an application under this rule within the period for filing a defence;is treated as having accepted that the court has jurisdiction to try the claim."

- [9] The Biscettes' contend that Francis and Antoine's application was filed outside the period for filing the defence.
- [10] It is the evidence that the amended statement of claim adding Francis and Antoine as parties, was served on 5th August 2015 for which an acknowledgement of service was filed on 10th August 2015. CPR 10.3(1) allows the defendant a period of twenty eight (28) days from the date of service or within any extension of time as agreed by the parties, to file a defence.
- [11] Francis and Antoine contend that the application was filed within the time for filing the defence as time for service does not run during the long vacation.
- [12] CPR 3.5 governs service during the long vacation period. The long vacation period commences from the 1st August and ends on the 15th September. The Rule provides that during the long vacation, the time prescribed by the Rules or by any practice direction for filing or serving any statement of case **(other than a statement of claim) (Emphasis added)** does not run unless the court orders or directs that time shall run
- [13] On a proper interpretation of this Rule, the twenty eight (28) days for Francis and Antoine to have filed a defence commenced on the 16th September 2015 and ended on the 17th October 2015.
- [14] Francis and Antoine's application challenging jurisdiction was filed on 30th October 2015, outside the period permitted by the CPR 9.7. The evidence before this court does not disclose any agreement for an extension of time to file the defence.
- [15] It is a well-established rule that a defendant who files an acknowledgement of service will lose any right to dispute the court's jurisdiction, if he/she fails to file the application within the period for filing a defence. If the application is not made during the period for filing the defence, then the defendant is treated as having accepted that the court should exercise its jurisdiction to try the claim. The Privy Council in **Texan**

Management Ltd v Pacific Electric Wire & Cable Company Ltd² in relation to interpretation of CPR 9.7 at paragraph 26 states:-

“..... First, r.9.7 applies to applications disputing the court’s jurisdiction and also to applications arguing that “the court should not exercise its jurisdiction.” Second, the types of order which may be made under this rule do not expressly mention (by contrast with English CPR r.11(6)) an order staying the proceedings: EC CPR r.9.7(6). Third, the application must be made within the period for filing a defence, and the note states that EC CPR r.10.3 sets out the period for filing a defence: EC CPR r.9.7(3). Fourth, the application must be supported by evidence on affidavit: EC 9.7(4). **Fifth, if an acknowledgment of service is filed, and an application is not made within the period for filing a defence, the defendant is treated as having accepted that the court has jurisdiction to try the claim: EC CPR r.9.7(5).** “ (My Emphasis)

- [16] Francis and Antoine having failed to challenge the court’s jurisdiction during the time prescribed by the CPR 9.7 are deemed to have accepted and submitted to the court’s jurisdiction to determine the claim.
- [17] Accordingly, applying the principles enunciated by the Privy Council in **Texan Management Ltd v Pacific Electric Wire& Cable Company Ltd** and the provisions of CPR 9.7, Francis and Antoine’s application seeking a declaration that the court should not exercise its jurisdiction to hear the claim fails.

Whether the claim is prescribed

- [18] The next issue is whether the claim was filed outside of the limitation period and if so, is accordingly prescribed.
- [19] **Article 2121(2) of the Civil Code** prescribes actions for professional services of notaries by six(6)years. **Article 2122(2)** prescribes damages resulting from delicts and quasi- delicts by three (3) years.

² [2009] UKPC 46

- [20] The Biscettes' contend that the prescription period did not commence on the date of the execution of the deed of sale and hypothec on 15th January 2008. They contend that the prescription period commenced on the date that the error was discovered after the completion of the survey in 2009. They rely on the provision of **Article 2119 of the Civil Code** in support of their contention.
- [21] **Article 2119 of the Civil Code** provides prescription by ten years in rescission of contracts for error, fraud, violence, or fear.. Time runs from the day the error was discovered.
- [22] The court notes that the Biscettes are not seeking the rescission of the notarial documents. They are seeking damages for the additional costs for the purchase of the area of encroachment. It is their contention that Francis and Antoine negligently approved the security offered to the Bank of Saint Lucia as being sufficient whereas the security offered was partly owned by another land owner.
- [23] The Biscettes further aver that they were coerced by the bank to retain the services of Francis and Antoine to prepare the transfer and hypothecary documents in order to benefit from a discount.
- [24] A contract obtained by undue influence can be rescinded or damages awarded in the same manner as in the case of fraud. It is also the law that a mutual mistake concerning a material fact entitles the parties affected to seek recession or compensation for the mistake. To be successful, the Biscettes' will have to convince the court of the undue influence/coercion sufficient to completely overcome their will to seek other counsel.
- [25] I find merit in the Biscettes' contention that the accrual of the cause of action would be from the date of the discovery of the error. Whether the discovery was from the date of execution of the notarial documents or from the date of the survey is a matter of fact which can only be properly ventilated at trial after the close of pleadings, full disclosure of documents and filing of witness statements. The court

is always duty bound to allow parties an opportunity to properly ventilate their matters at trial.

[26] The statement of claim was first filed on 5th August 2015. Permission was granted on 22nd July 2015 to file an amended claim by which the claimants added Francis and Antoine as parties as permitted by CPR 19.4 and CPR 20.2. If it accepted upon evidence that the error was discovered in 2009 then the Biscettes will be within the prescription period of six years for negligence and ten years for error in accordance with **Articles 2122 and 2119 of the Civil Code**.

[27] CPR 26.3(1) provides that the court may strike out a statement of case if it does not disclose any reasonable ground for bringing or defending the claim.

[28] The striking out of a claim has been described as draconian as it deprives a party of an opportunity to present its case at trial. Striking out of statement of case is limited to plain and obvious cases where there was no point in having a trial.

[29] The Court of Appeal in **Tawney Assets Limited v East Pine Management Limited**³ citing **Baldwin Spencer v The Attorney General of Antigua and Barbuda**⁴ states:

“The striking out of a party’s statement of case, or most of it, is a drastic step which should only be used in clear and obvious cases, when it can clearly be seen, on the face of it, that the claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court. 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”

[30] A statement of case is not fit for striking out if it raises issues of fact that are to be left for proper ventilating at trial. The date of the discovery of the error to bring the

³³ BVIHCVAP 2012/007

⁴ ANUHCVP 1997/ 0020A

mater within the prescription period is a matter of fact to be pursued at trial upon full disclosure of all evidence and the filing of witness statements. I am of the view that the Biscettes be giving an opportunity to ventilate their case at trial

- [31] Accordingly, for the foregoing reasons, the application filed by the Francis and Antoine seeking a declaration for the court not to exercise its jurisdiction and also to strike out the claim on the ground of prescription is refused.

Whether the claim against the 1st and 2nd defendants discloses no reasonable ground

- [32] The Bank of Saint Lucia and Mr Hayden Gittens seek to strike out the amended claim as disclosing no reasonable ground against the second defendant. The application also seeks striking out the claim on the ground of Prescription.
- [33] The issue of the prescription having already been dealt with need not be restated.
- [34] However for completeness, I wish to make the following observations. This claim has had a history of amendments and applications.
- [35] The Bank of Saint Lucia filed a defence to the original claim on 2nd September 2014; an amended defence on 20th January 2015 and a further defence to an amended statement of claim on 19th August 2015. The issue of prescription was never pleaded in any of the defences filed. On 26th February 2015, the Bank of Saint Lucia filed an application to determine a preliminary issue and again failed to raise the issue of prescription.
- [36] A claim issued after the expiry of limitation may be struck out as an abuse of process or alternatively, the limitation point may be determined as a preliminary issue, or at trial⁵. Limitation provisions provide a defence to a claim. It is a defence which must be pleaded and proved by the defendant. CPR 10.3 requires a

⁵ Blackstone's Civil Practice page 433 para 33.13

defendant to plead all material facts that it wishes to rely on. Limitation becomes an issue if and when pleaded by the defendant.

[37] The court in **Leonora L. Walwyn v Eustace Archibald**⁶ states

“It is well established that a limitation defence needs to be specifically pleaded in a defence to a claim for repayment of a debt, failing which its benefit does not arise”

[38] The court is of the view that the Bank of Saint Lucia is seeking a collateral benefit in now filing an application at this late stage having had several opportunities to raise the issue of prescription in previous applications and the several defences filed. The tardiness of the counsel for the bank now seeking to challenge the claim on the ground of prescription cannot go unnoticed. The court is under a duty to promote saving time and expenses in dealing with cases justly.

[39] Counsel for the Biscettes concedes to the removal of Mr Hayden Gittens as a party. As indicated before, this claim has had a myriad of applications and amendments since filing in 2014. Mr Gittens had on the 9th January 2015, been removed as a party pursuant to a notice of discontinuance filed by counsel for the claimants. Also, the issue of legitimate expectation as pleaded at paragraph 6 of this extant amended claim had been expunged in a decision delivered by this court on 22 July 2015. However counsel for the Biscettes has filed an amended claim adding Mr Gittens and reproducing the exact pleading which had been struck out. This is an abuse of process.

[40] The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party however the court may depart from this general rule in just circumstances. I am of the view that counsel for the Biscettes has flagrantly disregarded the order and directions given in the ruling made on 22nd July 2015

⁶ SKBHCVP2010/0012

and has reproduced the amended claim adding Mr Gittens and pleading legitimate expectation which had already been expunged.

[41] I am of the view that the Biscettes although successful should be penalized with costs in the sum of \$750.00 to the second defendant. . I also propose to make an unless order directing the Biscettes to put matters right failing which their statement of claim shall stand dismissed. Accordingly, unless the Biscettes file an amended statement of claim removing Mr Gittens, the second named defendant as a party to the claim and expunging paragraph 6 of the amended claim referencing legitimate expectation within 7 days of today's date, the statement of claim shall stand dismissed.

ORDER

[42] In summary and for the foregoing reasons It is ordered as follows:

- (1) The application by Francis and Antoine for a declaration that the court should not determine the claim is refused with costs in the sum of \$500.00 to the claimants.
- (2) Unless the claimants file an amended claim removing Mr Hayden Gittens as a party and expunging paragraph 6 of the amended claim within 7 days of today's date, the claim shall stand dismissed.
- (3) The 3rd and 4th Defendants shall file and serve a defence to the amended claim within 14 days of service by the claimants.
- (4) The applications filed by the defendants to strike out the statement of claim on the ground of prescription are refused.
- (5) The claimants shall pay the second named defendant costs in the sum of \$750.00.
- (6) The parties may file amended defences in accordance with CPR 2000.

- (7) Thereafter the matter shall listed for further case management conference in accordance with CPR 2000.

**AGNES ACTIE
MASTER**