

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO.: ANUHCV 2011/0176

BETWEEN:

TREETOPS GARDEN CENTRE LTD.

Claimant

AND

JOHN'S DEVELOPMENT CORPORATION

Defendant

Appearances:

Mr. Hugh Marshall and Ms. Kema Benjamin for the Claimant.

Mr. Colin Derrick for the Defendant.

2012: October 25

Ruling

[1] J Remy J.: By Claim Form and Statement of Claim filed on the 18th March, 2011, the Claimant claimed against the Defendant the sum of \$150,373.91 for the cost of goods and services supplied to the Defendant by the Claimant, as well as interest and costs.

THE PLEADINGS

[2] In its Statement of Claim the Claimant pleaded as follows:

a) It is a Company engaged in the business of supplying of horticultural supplies and

services.

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b) The Defendant is a statutory corporation charged with the responsibility of managing the Heritage Quay Shopping Centre.

c) The Defendant has long engaged the Claimant to provide supplies and services in respect of Heritage Quay and that all of these services are provided on a continuing account basis.

d) It is an implied term of the agreement to supply services that the Claimant would provide periodic statements of account and that the defendant, upon receipt of the statements would make payment thereon.

e) On or about 2nd

February, 2006, the Defendant made a payment on its account of \$840.00 leaving a balance of \$86,891.16 unpaid. The Defendant, in breach of the agreement made no further payments on the account which said account continues to acquire interest per the agreement at 18% per annum.

o The Claimant has sustained loss of \$151 ,373.91.

[3] By Defence filed on 11 th May 2011 and Amended Defence filed on the 10th July, 2012 pursuant to the Order of Master Mathurin dated the 15th June, 2012, the Defendant denied what was pleaded in the Statement of Claim as stated above.

[4] The Defendant averred that:

i). On or about 24th July, 2003 the Defendant contracted Peter Harker to provide services in respect of the Heritage Quay facility for the sum of \$153,601.00 pursuant to an Agreement comprised in a proposal dated 17th June 2003, various other estimates of costs and a letter of confirmation dated 24th July, 2003 under the hand of the then Executive Director of the Defendant.

ii). It was anticipated by the parties that the works would commence on or about 1st August 2003 and be completed prior to the commencement of the 2003-2004 Cruise Ship Tourist Season, namely not later than 15th December, 2003.

iii). Pursuant to the said Agreement the Defendant made payments totaling \$119,000.00. These payments were made between the period 31 st July 2003 and 7th April 2004.

iv). In breach of the agreement, Peter Harker failed to complete the contractual works contained in the agreement by 15th December, 2003. The Defendant made no further payments in respect of the agreement beyond 7th April 2004, the date of the last payment.

[5] The Defendant further averred that in the premises, the Claimant's Claim set out in the Statement of Claim is barred by the provisions of the Limitation Act 1997, Section 7, and that the Claimant is not entitled to the relief claimed in the Statement of Claim or any relief whatsoever.

[6] In its Reply filed on the 20th July, 2011, the Claimant averred that "he provided goods and services

on a continuing account basis and debited the Defendant's account with the costs of the goods and services as and when supplied". The Claimant pleaded that each payment made was a payment on account of the whole balance outstanding at the date of payment and each was in respect of that balance for the purpose of the Limitation Act 1997, Section 29, 30 and 31. The Claimant contends that time started to run afresh on the occasion of each payment.

[7] On 3rd April, 2012 the Learned Master ordered that the Limitation issue was to be decided at trial.

She then proceeded to make a case management order. Pre-Trial Review was set for 1st June 2012 and the Trial date set for 4th July 2012.

[8] On 11 th May 2012, the Defendant filed an application to strike out the Claim Form.

[9] On 15th

June 2012, the Learned Master ordered inter alia that the Application to strike out the Claim Form was dismissed. She then set another date for pre-trial review and for the trial. The pre-trial review was set for 26th

July 2012 and the trial date for the 1st October 2012.

[10] When the matter came up for trial on the 1st October 2012, it was discovered that no Pre-Trial

Review had taken place, and that the matter was not ready for trial on that date. The trial was adjourned to a date to be fixed by the Court in the next law term, and the Court held a Pre Trial Review.

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The Court also ordered that Counsel for the Claimant file a supplemental List of Documents by Friday the 12th October 2012.

[11] The Pre-Trial Memoranda filed by Counsel for both parties identified the following as some of the

issues to be determined:

a) Whether the Claimant's claim is statute barred pursuant to Section 7 of the Limitation Act 1997.

b) Whether payments made by the Defendant was an acknowledgement of the debt owed to the Claimant pursuant to Section 29 of the Limitation Act 1997.

[12] The Court decided to deal with the limitation issue as a preliminary issue. Counsel for the parties

brought to the attention of the Court the fact that, pursuant to the order of the Learned Master, they

had previously filed submissions on the Limitation issue. There was no ruling on the submissions by the Master, who deferred the ruling on the issue to the trial judge. The Court then invited Counsel to make short oral submissions if they desired to supplement their written submissions and reserved its ruling.

[13] Before dealing with the Limitation issue, the Court will deal with another of the issues raised in the Defendant's Pre-Trial Memorandum, and which was raised by Counsel for the Defendant, namely:

"Is the Claimant Treetops Garden Centre Limited lawfully entitled to file this claim having regard to the fact that it did not exist prior to it being incorporated on the 4th day of June, 2008?"

[14] As stated in paragraph 8 above, on the 11th May 2012, the Defendant filed an application to strike out the Claim Form and Statement of Claim. Alternatively, that certain portions of the Claimant's Reply be struck off. An Affidavit in Support of the Application was deposed to by Senator the Honourable Anthony Stuart.

[15] In paragraph 4 of the said Affidavit, Senator Stuart deposed:

"That since the filing of the Defendant's List of Documents on the 24th day of October, 2011 and in accordance with the Defendant's Defence filed on 11th May 2011, the Registrar of Companies has confirmed that the Claimant, Treetops Garden Centre Limited, did not legally exist before the 4th day of June, 2008. I am further advised that the Incorporation of the Claimant was under the care of the Attorneys-at-Law for the Claimant. A true copy of the Certification by the Registrar of Companies is now shown to me and is attached and exhibited herewith and marked "AS1".

[16] Again, as mentioned above, by Order of Master Mathurin dated 15th June, 2012, the application to strike out the Claim Form and Statement of Claim was dismissed; the Defendant, however, was granted leave to amend part of his Defence. There has been no appeal against the Order of Master Mathurin dismissing the Defendant's application to strike out. In light of the foregoing, the Court is of the view that the issue of whether or not the Claimant was entitled to file the claim has already been dealt with and will therefore not be addressed by this Court.

THE LIMITATION ISSUE

[17] Section 7 of the Limitation Act NO.8 of 1997 of Antigua and Barbuda (the Act) provides that "an action founded on simple contract shall not be brought after expiration of six years from the date on which the cause of action occurred."

[18] Section 29(5) of the Act provides:

"29(5) Subject to subsection (6), where any right of actions has accrued to recover a) Any debt or other liquidated or 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 deemed to have accrued on and not before the date of the acknowledgement or payment."

SUBMISSIONS OF COUNSEL

[19] It is the submission of Counsel for the Claimant in their submissions filed on the 6th March 2012

that:

- a) The Claim Form was filed on the 18th March 2011 . Thus the issue is whether there was existing cause of action up to 17th March 2005.
- b) Paragraph 1947 of Chitty on Contract states: "The computation of the period may require the Court to determine the precise day on which the period starts running ." At paragraph 1942, it states "unless the time for payment is otherwise agreed, the right to claim payment upon an entire contract accrues when the work is complete."
- c) Essential to this issue is whether there was a continuing account as pleaded at paragraph 3 of the Statement of Claim. If so the matter is not statute barred. Footmen Power & Co. Ltd.[1961 J 2 ALL ER 161. It is accepted that the Defendant disputes this. However, the Defendant in their pleadings also assert continuing dealings with the Claimant on the same account.
- d) We therefore conclude that the issue of Limitation is alive but arguable and should be determined upon a full hearing of the evidence.

[20] In the Pre-Trial Memorandum filed on the 11th June 2012, Learned Counsel Kema Benjamin,

Counsel for the Claimant submits inter alia, that the following issues fall to be determined:

- a) Whether the Claimant's proposal dated 14th July 2003 and incorporated in the Defendant's letter of confirmation dated 24th July 2003 is the only contract governing the relationship between the Claimant and the Defendant.
- b) Whether the Claimant's demand letter dated 24th July 2005 interrupted the limitation period.
- c) Whether payments made by the Defendant was an acknowledgement of the debt owed to the Claimant pursuant to Section 29 of the Limitations Act 1997.

[21] The submissions of Counsel for the Defendant as stated in the Pre-Trial Memorandum filed on the 6th

July 2012 are that:

- a) The Claimant's claim is statute barred pursuant to Section 7 of the Limitation Act 1997 by reason of the fact that the Claimant's right of action in respect of the Claim expired on 8th April, 2010.
- b) The contracts between the Defendant and the said Peter Harker were separate and distinct contracts which were invoiced as separate and distinct contracts and paid as such. Further there is no evidence on the pleading to support the claim that the Contracts were consumed and paid on a 'continuing account basis.' Counsel relies on the case of Day v William Hill (Park Lane) Ltd.,[1949]1 ALL ER 219, in support of his contention.
- c) The Claimant's right of action in this claim concerns contracts entered into and breached in

the period 24th July, 2003 to December 2003 and the right of action expired six years after the respective breaches the last of which would have expired on 1st January, 2012 save for the Contract of 24th July, 2003 which would have expired on 8th April, 2010 by reason of the fact that the last payment made in respect of that Contract was made on 7th April, 2004. Counsel relies on the case of *Powell v Barbados Dairy Industries Limited*, BB 200CA 36, in support of this contention.

d) The payment on or about 2nd February, 2006 was not an acknowledgement by the Defendant of debt in relation to alleged 'continuing account' as pleaded in the Claimant's claim and is incapable of amounting to an acknowledgement or part payment in respect of the Claimant's claim within the meaning of Section 29(5) of the Limitation Act in order to defeat the Defendant's reliance on Section 7 of the Limitation Act 1997.

ANALYSIS/CONCLUSION

[22] As a general rule, a limitation period of six years from the date on which the cause of action accrued applies to all actions founded on simple contract.

[23] According to *Halsbury's Laws of England*, Fourth Edition, Re-Issue, page 446, paragraph 864:

"In an action for breach of a simple contract the cause of action is the relevant breach and not the time of damage, as a breach of contract is actionable per se. Accordingly such an action must be brought within six years of a breach, after the expiration of that period the action will be barred, although damage may have accrued to the plaintiff within six years of action brought." The determination of the date on which a breach of contract occurred is a question of fact, to be determined in the light of the surrounding circumstances - *Transoceanic Petroleum Carriers v Cook Industries Inc, The Mary Lou*[1981]2 Lloyd's Rep 272.

[24] In the case of simple contract, if the action is not brought within six years of the relevant breach it will be barred. Time therefore runs from the date of the breach of the contract. It is therefore important to establish when the breach occurred.

[25] It seems to the Court that the terms of the agreement between the parties with respect to the contractual works needs to be determined at a trial, after hearing evidence from both sides. Further, that evidence from the parties is required in order to establish whether there was any agreement as to how payments were made by the Defendant in respect of invoices tendered by the Claimant. It is only then that the Court can make a determination firstly as to whether any breach of contract occurred and by whom, and secondly, that if any breach occurred, as to the date on which the said breach occurred. It is only then that the Court can determine whether the Claimant's claim is statute barred. I agree with the submission of Counsel for the Claimant that the limitation issue is a live issue, and should be determined upon the full hearing of the evidence. I therefore decline to hold that the claim is statute barred at this stage.

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[26] The pre-trial review hearing is adjourned to a date to be set by the Court office upon consultation with the parties.

JENNIFER
~~c A. REMY
Resident High Court Judge
Antigua and Barbuda