



[2020] JMSC Civ 23

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013 HCV 01555

BETWEEN	BARIFFE HALL DEVELOPMENT LTD.	CLAIMANT
AND	NATIONAL HOUSING TRUST	DEFENDANT

IN CHAMBERS

Carlene Larmond and Anna Gracie instructed by Rattray, Patterson and Rattray for the Claimant

Denise Kitson QC, instructed by Grant, Stewart, Phillips for the Defendant

HEARD: July 24, 2017 and January 10, 2020

APPLICATION TO STRIKE OUT CLAIM – WHETHER CLAIM IS STATUTE-BARRED – WHETHER CLAIM IS FOR BREACH OF CONTRACT OR INSTEAD, FOR RELIEFS PURSUANT TO A MORTGAGE AGREEMENT WHICH OUGHT TO HAVE BEEN DISCHARGED – LIMITATION ACT DEFENCE

ANDERSON, K., J.

- [1]** The defendant filed an application for the claimant's statement of case to stand as struck out, pursuant to **rule 26.3 (b) of the Civil Procedure Rules (CPR)**. That application was filed on June 3, 2014.
- [2]** That application was heard in Chambers on July 24, 2017 and this court's ruling on same, was then reserved.
- [3]** In the stipulated grounds of that application, it has been stated that the application was filed pursuant to **rule 26.3 (1) (b) of the CPR**. See paragraph (f) of the grounds of the application, in that regard.

[4] That rule of court provides that:

'In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –

b. That the statement of case or the part to be struck out is an abuse of process of the court or is likely to obstruct the just disposal of the proceeding.'

[5] In paragraph (g) of the grounds, the essence of the defendant's reliance on its Limitation Act defence, is set out as follows:

'The last payment under the compromise agreement was in 2001. Reliance is being place on the compromise agreement by the claimant. To that end, the claimant had until 2007 to bring a claim. Accordingly, the claim is to be struck out as it is statute-barred pursuant to the Limitation of Actions Act.'

[6] There is no dispute and rightly so, that the defendant has properly set out, in their defence to this claim, the **Limitation Act** defence, which they have at all times maintained their reliance on. Same was expressly set out in paragraph 16 and reiterated in paragraph 18 of the, 'Affidavit of Helen Pitterson in response to the affidavit of Roosevelt Thompson.' That affidavit, which was filed on March 20, 2014, constitutes the defendant's defence to this claim, since this claim was instituted by means of Fixed Date Claim Form supported by the affidavit of Roosevelt Thompson, both of which were filed on March 13, 2013.

[7] In total, the claimant is relying on three (3) affidavits and the defendant is relying on four (4) affidavits as constituting part and parcel of their respective statements of case and evidence in support thereof. For the claimant, there are three (3) affidavits which have been deponed to, by Roosevelt Thompson. He was, at the respective times when he deponed to those affidavits, the claimant's managing director.

- [8] For the defendant there are four (4) affidavits, which have each been deponed to, by Ms. Helen Pitterson, who was, at the time when she deponed to each of those affidavits, the defendant's assistant general counsel.
- [9] In the Court of Appeal judgment in the case: **Bertram Carr and Von's Motor and Company Ltd.** – [2015] JMCA App 4, Brooks, JA made it clear that the defence that a limitation period has expired, is a procedural defence and therefore, it is normally one that has to be raised as a defence, *'and resolved at trial.'* (Paragraph 11 of judgment). Immediately after having so stated though, his Lordship Brooks, JA went on and stated that, *'if the defence is pleaded, it is open to the defendant, in a clear case, to apply to have the claim, or the affected part thereof, struck out as being an abuse of the process of the court.'*
- [10] The following cases, each support that stated legal principle and were each set out in the aforementioned judgment of Brooks, JA: **Ronex Properties v John Laing Construction Ltd. and ors. Clarke, Nicholls and Marcel (a firm), third parties** [1982] 3 All ER 961; **Riches v DPP** [1973] 2 All ER 935; **Dismore v Milton** [1938] 3 All ER 762; **Lloyd v The Jamaica Defence Board and ors.** [1981] 18 JLR 223; **The Jamaica Flour Mills Ltd. v The Administrator General for Jamaica** [1989] 26 JLR 154.
- [11] I have no doubt therefore, that in the given circumstances, the defendant is entitled to seek to have the claimant's statement of case struck out, on the ground of its **Limitation Act** defence. That cannot and does not though, mean that the defendant's application must or will be granted.
- [12] The burden of proof regarding an application such as this, rests on the applicant – that being in this case, the defendant, who is relying on the **Limitation Act** defence.
- [13] In the **Flour Mills** case (*op. cit.*), Rowe P stated that the striking out of a claim on the basis of the limitation point should only be made in clear cases. He stated at

page 156 I. *'We think that applying the principle that the point of law should be crystal clear and should be on the face of it unanswerable before the Writ and Statement of Claim ought to be struck out. The appellant (who sought to rely on the limitation point) has not met the standard of proof required because the matter is left in a state where it is unclear to the court what is the applicable period of limitation where the claim is for a breach of statutory duty.'*

- [14] Thus, the question to now be addressed is whether or not this is, 'a clear case,' *vis-à-vis* the effect of **Limitation Act** defence, such that the claimant's statement of case ought to be struck out.
- [15] It should be noted in that regard, that it is open to this court, on an application such as this, to strike out only part of the claimant's statement of case – this as distinct from striking out the claimant's entire statement of case, which is what the claimant has expressly applied for. The preface in **rule 26.3 (1) of the CPR**, as earlier quoted, makes that apparent.
- [16] In their submissions, the defendant/applicant's counsel, had submitted that it is open to this court, if it were not to strike out this claim, to award in the defendant's favour, summary judgment.
- [17] I agree with the claimant's counsel, that the case: **Cable and Wireless Jamaica Ltd. trading as LIME v Alliance Investment Management Ltd. et al** [2012] JMSC Admin 1, which was a case that pertained to an application for summary judgment, cannot be and is not of any relevance, for present purposes.
- [18] That is so, primarily, albeit not only, because this is a Fixed Date Claim Form proceeding and therefore, summary judgment cannot properly be granted. See **rule 15.3 (c) of the CPR** in that regard. Furthermore though, it should always be noted and remembered by legal practitioners and litigants, that **rule 11.13 of the CPR** also specifies that, *'An applicant may not ask at any hearing for an order which was not sought in the application unless the court gives permission.'*

- [19] No such permission was sought, with respect to the application which is now under consideration and thus, none such was granted. In the circumstances, since no application for summary judgment was made, it is not properly now open to this court, to grant summary judgment, pursuant to said application.
- [20] It follows inexorably, that this court must carefully consider the precise nature of this claim, in order to determine whether or not, it is clear at this stage, that the defendant's **Limitation Act** defence is of such a nature that the claimant's claim ought properly to now be considered as being an abuse of process.
- [21] If there is any reasonable basis for any doubt in that regard, then it would mean that the defendant's application cannot succeed, since it would then mean that the disputed issues which have served to create that doubt, will need to be addressed upon a trial, at which the evidence and submissions of the respective parties, will be presented to the trial court, presided over by the trial judge, whose primary duty it will then be, to resolve those disputed issues.
- [22] In the **Bertram Carr** case (*op. cit.*), the judgment of this court, striking out a claim on the basis that it had been the judge's view that the **Limitation Act** defence was applicable to the extent whereby the claim should be struck out, was the subject of an application to the Court of Appeal, for leave to appeal. It was the view of Brooks, JA, that leave to appeal ought to have been granted and consequentially, he had, on the Court of Appeal's behalf, granted leave to appeal. He expressed that he was of the view, that leave ought to have been granted, because the disputed issue between the parties, needed to have been considered further, by the Court of Appeal, in order for that court to be able to properly determine whether that case was a clear one, such that the claimant's claim should have been struck out, arising from the **Limitation Act** defence which the defendant/respondent to that application for leave to appeal, had raised. See paragraph 16 of that judgment, in that regard.

- [23] At page 968 of the **Ronex** case (*op. cit.*), Stephenson, LJ stated that the parties can file evidence in support of their respective positions, either that the claim is, or is not, an abuse of process. As was stated by Brooks, JA, at paragraph 14 of his judgment in the **Carr** case (*op. cit.*) and reiterated in other cases, if the case is not a clear one, as regards that abuse of process issue, this court is not permitted to, in the words of Ld. Woolf, MR in **Swain v Hillman** [2001] 1 All ER 91, conduct a, 'mini-trial,' of that issue.
- [24] As was stated by Rowe, P in **The Jamaica Flour Mills Ltd.** case (*op. cit.*), as reported at page 156 I, '*We think that applying the principle that the point of law should be crystal clear and should be on the face of it unanswerable before the Writ and Statement of Claim ought to be struck out. The appellant (who sought to rely on the limitation point) has not met the standard of proof required because the matter is left in a state where it is unclear to the court what is the applicable period of limitation where the claim is for a breach of a statutory duty.*'
- [25] With respect to the application under consideration, the burden of proof rested on the defendant/applicant's shoulders, to establish (if possible to do so), that the claimant's claim is an abuse of process on the basis of the defendant's **Limitation Act** defence.
- [26] Based on the aforementioned, if the defendant's present application is to be successful in its totality, it has to be apparent to this court, that this is a clear case in which it is a claim which constitutes an abuse of process; in the context of the defendant's defence founded on the **Limitation Act**.
- [27] It may be though, that said application can be successful in part, or entirely unsuccessful. That is particularly so, in a matter such as this, because this claim is founded on and being pursued on, more than one cause of action.
- [28] It is though, the defendant's contention at present and particularly for the purposes of said application, that the claimant's claim is, in reality, only a claim for breach of

contract and that such is so, because it is the claimant's allegation that the defendant breached the relevant compromise agreement between the parties, which is an agreement that is not under seal and therefore, same is treated with, under the law, as a contract and thus, this claim is statute-barred, since the **Limitation Act** prescribes that claims for reliefs founded upon breach of contract, must be instituted within six (6) years of the date when the cause of action, arose.

- [29] It is being alleged by the defendant that since the last payment made by the claimant under the relevant compromise agreement, was in 2001, therefore, if breach is deemed to have occurred, because the mortgage was not discharged from that date, then the claimant would have had, up until 2007, to institute this claim. Instead, this claim was instituted in 2013.
- [30] To put it as simply as possible, the claimant has put forward, in Mr. Thompson's second affidavit, that the claimant had a limitation period of 12 years, within which to commence its action against the Trust and therefore, this claim, which was filed in 2013, was filed in time.
- [31] In considering whether the defendant's contention that the entire claim is an abuse of process, should be accepted as valid by this court, it is necessary for this court to consider firstly, whether or not there is only one cause of action and if so, whether said cause of action is founded upon an alleged breach of contract.
- [32] If that is not accepted as a valid contention though, that is not at all, the end of this court's consideration of the said application. Each cause of action must be considered in the context of the said application.
- [33] Of course though, it is not properly open to this court, to grant the application on any ground, other than such as have been put forward by the defendant /applicant. It is specifically provided in **rule 11.7 (1) (b) of the CPR**, that an application must briefly, state the grounds on which the applicant is seeking the order.

- [34] It would render that particular rule of court, meaningless and useless, if this court could grant the application, on a ground not filed. That would also, be manifestly unfair to the respondent to that application.
- [35] I therefore will consider this claim, in its entirety, firstly to ascertain whether it consists of a singular cause of action and if so, what is that cause of action and whether or not, same is statute-barred. If though, I am of the view that it consists of more than one cause of action, I must ascertain what those causes of action are and whether or not, any of same, are statute-barred.
- [36] To the extent that any cause of action which is being pursued as either the entirety, or as part and parcel of this claim, is considered as statute-barred (if that is what the court decides), then same will be struck out, on that same ground, as specified in the defendant's application for court orders, which is now being adjudicated on.
- [37] The claimant has claimed for several reliefs in this claim. By means of the first two reliefs claimed for, which are numbered as (1) and (2), the claimant has sought declaratory reliefs pertaining to an allegedly binding compromise agreement between the parties, which the claimant is contending that it has fully complied with.
- [38] The claimant is also seeking orders, each described as '*A Direction,*' that the defendant delivers up all agreements for sale and all certificates of title in respect, 'of the said lands which sales have not been completed' and that the mortgages endorsed on the certificates of title in respect of the said lands by the defendant, be discharged by the defendant at the defendant's sole cost.
- [39] In addition, the claimant is seeking orders requiring the defendant to account for, all sums paid by the claimant on account of the loan entered into in or around 27th June 1978. Also, the claimant is seeking an account of, '*the sums, interest, monies, income and rents had and received by the defendant and/or its agent between 1st October 1982 to present in respect of the sale of said lands.*' Further,

'an account of the sums, interest, monies, income and rents had and received by the defendant and/or its agent between 1st October 1982 to present in respect of the said lands for the use and occupation thereof.'

- [40] The claimant is seeking an order that the accounts to be provided by the defendant, be certified as accurate, by a chartered accountant, *'to be appointed by the court;'* and that the defendant be ordered to render the accounts, 'within 90 days of the first hearing of this claim.'
- [41] The claimant is additionally seeking an order that any amount showing to be due to the claimant, be paid within 14 days of the date of the certification of the accounts by the chartered accountant appointed by the court; and *'that the defendant delivers to the court copies of such receipts, cashbooks, ledgers and books of account in proof of the sums received in respect of the repayment of the loan and the sums, monies, income and rents had and received by the defendant in respect of the sale and/or occupation in respect of said lands.'*
- [42] The claimant seeks damages also and, in the alternative, for unjust enrichment.
- [43] The claimant further, seeks interest, costs and any further relief as this Honourable Court deems fit.
- [44] As regards the claimant's alternative claim for damages for unjust enrichment, I agree with the submission of the claimant's counsel that such claim is founded upon equitable principles and as such, no limitation period applies, with respect to same.
- [45] As far as the claim for accounting records to be provided, is concerned, whilst it could be that such is founded upon the alleged breach of the compromise agreement, it may be that such is also founded upon the claimant's claim for damages for unjust enrichment.

- [46] Accordingly, I will not strike out the claimant's claim for accounting records to be provided, or for such records to be verified by a chartered accountant, to be appointed by the court.
- [47] The claimant's claim for directions to be ordered, are directly related and referable to the two (2) declaratory reliefs which the claimant is seeking and thus, I will refer to the claimant's claim for directions after I have resolved whether the claimant's claim for declaratory reliefs should be struck out.
- [48] As regards the claimant's claim for declaratory reliefs, it is worthwhile at this juncture, to specify, what are those declaratory reliefs that are being sought, by the claimant. They are as follows: *'1. A Declaration that the exchange of letters dated 13th November 1997, 14th September 1998, 1st March 2000, 4th August 2000 and 12th January 2001 constitute a binding compromise agreement between the claimant and the defendant; 2. A Declaration that the claimant has paid the defendant all the sums due and owing pursuant to the terms of the compromise agreement.'*
- [49] It is the defendant's contention that the claimant's claim, in its entirety, is founded upon a breach of contract and is statute-barred, since such claim was pursued, more than six (6) years after the said compromise agreement was entered into between the parties.
- [50] On the other hand, it is the claimant's contention that the compromise ('settlement') agreement was inextricably linked with the mortgage agreement and that relationship and accordingly, the court ought to have regard to **sections 3 and 29 of the Limitation of Actions Act**.
- [51] **Section 3 of the Limitation of Actions Act**, 1881, states that: *'No person shall make any entry or bring an action or suit to recover any land or rent, but within 12 years next after the time at which the right to make such entry, or to bring such action or suit shall have first accrued to some person through whom he claims, or*

if such right shall have not accrued to any person through whom he claims, then within 12 years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to the person making or bringing the same.'

[52] **Section 29 of the Limitation of Actions Act, 1881**, states, in part, that: *'When a mortgagee shall have obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in the mortgage, the mortgagor, or any person claiming through him shall not bring any action or suit to redeem the mortgage but within 12 years next after the mortgagee, obtained such possession or receipt unless in the meantime and acknowledgment in writing of the title of the mortgagor, or his right to redemption, shall have been given...and in such case, no action or suit shall be brought but within 12 months next after the time of such acknowledgment ...'*

[53] I agree with the claimant's counsel's submission, that, in respect of the matter at hand, the mortgage between the parties remains live, since same has not been discharged in accordance with the statutory provisions which pertain to same. As was stated by Mangatal J, in **Jamaica Redevelopment Foundation Inc. v Capital Solutions Ltd.** – Claim No. 2008 HCV 02664, at paragraph 44, a mortgage remains live until discharged in accordance with the statutory provisions in relation to same.

[54] That is the law, to my mind, correctly set out by Mangatal J in that specific respect. Why I agree with the claimant's submission that the relevant mortgage which is at the center of the dispute between the parties to this claim, remains live, is because, as at this time, there does not yet exist on the relevant land title, any entry in the Register Book, stating the time when the mortgage was discharged. At the very least, there is no evidence of there existing any such entry in the Register Book.

[55] In addition, there is also no evidence before this court, at this time, suggesting, or even implying that any memorandum has been produced by the defendant – which

is the mortgagee and which is signed by the defendant and attested to, by a witness to the satisfaction of the Registrar of Titles, which would thereupon have required the Registrar to make the entry in the Register Book as was earlier referred to.

[56] **Section 121 (1) of the Registration of Titles Act**, provides that: *‘Upon the production of a memorandum signed by the mortgagee... and attested to by a witness to the satisfaction of the Registrar, discharging the land in whole or part of the moneys...the Registrar shall make an entry in the Register Book, stating the time at which the mortgage or charge is discharged wholly or partially ...and upon such entry being made, the land or portion of the land described in such memorandum shall cease to be subject or liable for such moneys...’*

[57] In the absence of any such entry having been made in the Register Book of titles, the mortgage, to my mind, remains extant. That is my conclusion for present purposes, only.

[58] It is the claimant’s position, that the correspondence between the parties, up until January, 2001, which resulted in the settlement agreement, along with the payments completed as of December, 2001, entitle the claimant to redeem the mortgaged property, since the debt secured by the mortgage, was discharged as of December 2001.

[59] It is the submission of counsel for the claimant, that: ‘The claimant under the discharge of its obligations pursuant to the Settlement Agreement made the payments of the principal and portion of the interest due under the Loan Agreement and the mortgage which was capped pursuant to the Settlement Agreement. The claimant made full payment to the defendant by December 2001 at which time the defendant became obliged to do the following:

- a. Discharge the mortgage;

- b. Return the Certificates of Titles duly endorsed with the discharge to the claimant; and
- c. To account for all rents, profits and other sums received or ought properly to have received and or paid in relation to the mortgaged property while the National Housing Trust (NHT) was in possession of the same.

[60] In the circumstances, I can do no better at this stage, than to quote from paragraphs 10 to 13 of the claimant's submissions, which are written under the heading '*Basis of the application and opposition.*'

- 10. *The defendant submits at paragraph 15 of its submissions filed November 4, 2015 that 'As the last payment made by Bariffe Hall under the settlement Agreement occurred in 2001, if breach is deemed to have occurred because the mortgage was not discharged from that date, then Bariffe Hall had until the year 2007 to institute this claim which it failed to do until 2013.'*
- 11. *The defendant contends that the relief as prayed by the claimant arises solely from a breach of a simply contract, which has a six (6) year limitation period.*
- 12. *This is a misunderstanding of the claimant's case. The claimant's case is founded on the continued existence of the mortgage, the written acknowledgement of the same and the duties and obligations which flow thereunder and/or as modified by the Settlement Agreement.*
- 13. *The Affidavit of Roosevelt Thompson filed as far back as July 21, 2014 on behalf of the claimant makes it clear at paragraph 24 that 'the compromise agreement is being relied on merely to show that the agreed indebtedness to the defendant has been extinguished in full and that there is no legal basis for the defendant to retain its mortgage...'*

[61] To my mind, by virtue of the operation of **sections 3 and 29 of the Limitation of Actions Act** and also, bearing in mind that this claim was field in March 2013, the claimant's claim for declaratory reliefs, is not statute-barred, since such claim can properly be pursued, within the prescribed period of 12 years. The applicable limitation period therefore, for a claim such as this, is 12 years and not six (6) years, as has been contended for, by the defendant.

[62] Returning now, to the claim for, 'Directions', it follows that said aspect of the claim, ought not to be struck out, on the ground that the claim for same, is statute-barred.

Conclusion

[63] Overall therefore, after having heard the defendant's disputed application to strike out this claim, and having considered all of the respective written and oral submissions of the parties, it is this court's considered view, that this claim ought to remain extant before this court and not be struck out, either in whole, or in part.

Orders

- 1) The defendant's application for court orders which was filed on June 3, 2014 is denied in it's entirety.
- 2) The claimant is awarded the costs of that application and such costs shall be taxed if not sooner agreed.
- 3) Leave to appeal is granted.
- 4) The first hearing of this claim shall take place before a Judge in chambers, on May 13, 2020, commencing at 10 a.m., for 45 minutes.
- 5) The claimant shall file and serve this order.

.....
Hon. K. Anderson, J.