[2019] JMSC Civ 209

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2017HCV00616

BETWEEN	**TYRONE CHEN**	**CLAIMANT**
AND	**CONSTANCE CECILE ALBERGA (Executrix of the Estate of Roderick Ivanhoe Francis, deceased)**	**1st DEFENDANT**
AND	**CONSTANCE CECILE ALBERGA**	**2ND DEFENDANT**

IN CHAMBERS

Robert Collie and Dionne Samuels instructed by Collielaw for the claimant.

Abe Dabdoub instructed by Dabdoub, Dabdoub and Co. for the defendants.

October 10 and 25, 2019.

Application to strike out statement of case – Limitation of Actions Act (LAA) – Simple contract – applicable limitation period – six years – ss. 3 and 46 LAA – no reasonable ground for bringing the claim – abuse of court's process – No proof of oral agreement/ agreement in writing qualifying as a contract under seal, deed, specialty or obligatory writing for which the limitation period under s. 52 of the LAA is twenty years – Equitable jurisdiction of the court cannot override statute

D. FRASER J

THE BACKGROUND

[1] The claimant and the deceased Roderick Ivanhoe Francis who met his end in tragic circumstances on June 25, 2011 were friends. The 1st and 2nd defendant is one and the same person. She is the sister of the deceased who has been sued

by the claimant by claim filed on February 24, 2017 both in her capacity as executrix of the estate of the deceased and in her own capacity. The action claims that the sum of $15,000,000.00 allegedly loaned by the claimant to the deceased to assist the 2nd defendant remains unrepaid. The 2nd defendant while acknowledging that the deceased received the sum of $15M, denies that it was a loan. Rather she says the said sum was invested in a failed venture.

THE APPLICATION

[2] Pursuant to Rule 26.3(1) (b) and (c) of the Civil Procedure Rules (CPR) the defendants have applied to strike out the claimant's claim on the basis that the limitation period expired prior to the claim being filed. The contention of the defendants is that the claim is statute barred and cannot stand, even if, which is denied, the sum of $15M was provided to the deceased as a loan.

THE FACTS

The Claimant's Version

[3] Based on their close friendship, the deceased had approached the claimant about a proposed residential housing development at a property called Francis Meadows which was owned by the 2nd defendant. The development was to be undertaken by a company in which the 2nd defendant was owner and principal. The deceased had advised the claimant that Francis Meadows was in jeopardy of being sold to settle a lien that Beaver Street Fisheries, an American based fishing company, had placed on the property.

[4] The claimant obtained a $15M loan from the Bank of Nova Scotia Jamaica Limited to facilitate the payment of the debt to Beaver Street Fisheries, on behalf of the deceased and the 2nd defendant. The sum was paid out to the Attorneys-at-Law for Beaver Street Fisheries, Messrs. Myers, Fletcher and Gordon. *(The claimant relies on a letter from Bank of Nova Scotia Jamaica Limited dated August 13, 2004, to Myers, Fletcher and Gordon marked TC 1, and Loan letter from the Bank of*

Nova Scotia Jamaica Limited dated July 22, 2004, to Tyrone Chen confirming the loan marked TC 2, both exhibited to the Particulars of Claim)

[5] It was further indicated in the facts outlined by counsel for the claimant that a suggestion that the sum should represent the claimant's shareholdings in "Francis Meadows" later called "Aqueduct Gardens" was accepted by the claimant, subject to the 2nd defendant reducing the agreement into writing for the parties. It was however not stated, from whom this suggestion came. In any event, counsel subsequently noted that no such agreement in writing was ever created.

[6] The claimant however contends that the loan sum is reflected in an Agreement, *(a copy of which is exhibited to the Particulars of Claim as TC 3),* drafted to develop lands in Saint Catherine by Francis Meadows Limited, a company directly connected to the deceased and the 2nd defendant. The claimant also maintains that the “Tyrone Loan” referenced at Special Condition 2.3 of that Agreement relates to the $15M paid over to Beaver Street Fisheries, through their Attorneys-at-Law, on the instruction of the deceased and/or the 2nd defendant.

[7] The claimant also relies on an invoice dated August 31, 2014, exhibited to the Particulars of Claim and *marked TC 4* from Wong Ken & Company, Attorneys-at-Law, that reflects a meeting of July 27, 2004, between, among others, the 2nd defendant, the claimant and the deceased, at which the Attorneys-at-law were required to arrange on “URGENT BASIS the deposit from Tyrone Chen into a BNS account and to have same stand as Cash Security for a $ 15m undertaking to MFG.")

[8] The development by Francis Meadows Limited at Aqueduct Gardens did not bear fruit and there was no formal written agreement concerning that development. The claimant has since been unable to recover the sum of $15M, though the claimant contends that throughout the lifetime of the deceased, and up to the time of his death, the deceased and the 2nd defendant always acknowledged to the claimant this loan from him.

The Defendants' Version

[9] The essence of the Defence set out to the Particulars of Claim is that the claimant did not loan the deceased any money whatsoever and that the $15 million was invested by the claimant in Francis Meadows Limited, a development company in which the claimant was a 13% shareholder. The 2nd defendant also stated that to the best of her personal knowledge information and belief no claim for repayment of a loan had ever been made on the deceased during his lifetime.

THE ISSUES

[10] Three primary issues arise for determination:

(i) Whether the Agreement which makes reference to the 'Tyrone loan' constitutes a writing obligatory for the purposes of s. 52 of the **Limitation of Actions Act** (**LAA**) where the limitation period is 20 years;

(ii) Whether the operative date when the cause of action arose for the purposes of the **LAA** is just before or at the death of the deceased and therefore within the limitation period of 6 for simple contracts; and

(iii) Whether the claimant's statement of case should be struck out on the basis that it is an abuse of the process of the court/is likely to obstruct the just disposal of the proceedings; or because it discloses no reasonable ground for bringing the claim?

ISSUE 1: ***Whether the Agreement which makes reference to the 'Tyrone loan' constitutes a writing obligatory for the purposes of s. 52 of the Limitation of Actions Act (LAA) where the limitation period is 20 years?***

The Law

[11] It has been clearly established that the limitation period in this jurisdiction in matters of contract is 6 years. (See for example ***Bertram Carr v Von's Motor and***

Company Ltd. [2015] JMCA App 4, per Brooks JA at para. 3). This is the case as s. 3 of the English **Statute of Limitation** of 1623, which has been incorporated into Jamaica's law by virtue of s. 46 of the **LAA** provides:

> And be it further enacted that…all actions of debt grounded upon any lending or contract without specialty;…or any of them which shall be sued or brought at any time after the end of this present session of parliament, shall be commenced and sued within the time and limitation hereafter expressed and not after…the said actions for account and the said actions for trespass, debt, detinue and replevin for goods or cattle…within three years next after the end of this present session of parliament or **within six years next after the cause of such action or suit and not after**…

[12] The relevant portion of s. 46 of the **LAA** states that:

> In actions of debt or upon the case grounded upon any simple contract, no acknowledgement or promise by words only shall be deemed sufficient evidence in any of the Courts of this Island, of a new or continuing contract, whereby to take any case out of the operation of the United Kingdom Statute 21 James 1 Cap 16, which has been recognized and is now esteemed, used, accepted and received as one of the statutes of this Island, or to deprive any party of the benefit thereof unless such acknowledgement or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby, or his agent duly authorized to make such acknowledgment or promise; and where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor or administrator shall lose the benefit of the said enactment, so as to be chargeable in respect or by reason only of any written acknowledgement or promise made and signed by any other or others of them...

[13] Concerning a writing obligatory, s. 52 of the **LAA** states that:

> All bonds and every other writing obligatory whatsoever, whereon no payment has been made or action brought within the space of twenty years from the time they respectively became or shall become due, or from the last payment thereon, shall be null and void to all intents, constructions and purposes whatsoever...

[14] In ***International Asset Services Ltd v Edgar Watson*** 2009HCV03191 (25 October 2010), relied on by the defendants, the main issue was whether the claim fell within the purview of s. 52 of the **LAA**, stipulating a 20 year limitation period,

rather than the usual 6 years permissible for simple debts and contracts. The debt arose in relation to credit card agreements. Brooks J (as he then was) having reviewed a number of English and local authorities concluded at page 6 that:

> [I]t is my view that a "writing obligatory" seems to refer to something more than a simple contract or agreement in writing. I find that a contract, which is not under seal, is not a "writing obligatory" for the purposes of section 52 of the Act.

[15] The matter went on appeal as ***International Asset Services Ltd v Edgar Watson*** [2014] JMCA Civ 42. Dukharan JA writing for the court which upheld Brooks J stated at paragraphs 17 – 18 and 20 – 21 as follows:

> [17] The Law of Limitation, 2nd edition by Prime and Scanlan at page 107 states:
>
> "All agreements under seal are specialties. Further the passing years have produced some relaxation of the strict requirements (**Whittall Builders Co. Ltd v Chester-le-Street District Council** (1986) 11 Con LR 40). In **Stromdale & Ball Ltd. v Burden** [1952] Ch 223, Dankwerts J said:
>
> 'Meticulous persons executing a deed may still place their finger on the wax seal or wafer on the document, but it appears to be that, at the present day, if a party signs a document bearing a wax or wafer or other indication of a seal, with the intention of executing the document as a deed, that is sufficient adoption or recognition of the seal to amount to due execution as a deed'."
>
> And at page 108:
>
> "Where a contract is under seal and therefore a specialty, all claims on the promises contained within the deed are claims upon a specialty, and therefore entitled to the longer period of limitation, and not merely claims for specific performance of the debt or other obligations created under it."
>
> [18] In my view, the above supports Brooks J's interpretation of "writings obligatory to mean "specialty", that is, contracts executed under deed and excluding simple contracts. This view is also supported by the case of **Matadeen v Caribbean Insurance Co Ltd** cited above by counsel for the respondent.
>
> ....

> [20] The term "writing obligatory" is defined in the Dictionary of English Law (1959) by Earl Jowett as "bonds". He defines "bond" among other things, as:
>
> "a contract under seal to pay a sum of money (a common money bond) or a sealed writing distinctly acknowledging a debt, present or future; and when this is all, the bond is called a single bond."
>
> [21] I agree with the view of Brooks J, that a "writing obligatory" seems to refer to something more than a simple contract or agreement in writing. A contract, which is not under seal is not a "writing obligatory" for the purposes of section 52 of the Act.

[16] In ***International Asset Services Ltd v Arnold Foote*** 2008HCV01326, (also relied on by the defendants), F. Williams J. (Ag.) (as he then was) referred with approval to **R v Williams** [1942] A.C. 541 where at page 555, Viscount Maugham said that:

> The word "speciality" is sometimes used to denote any contract under seal, but it is more often used in the sense of meaning a speciality debt, that is, an obligation under seal securing a debt, or a debt due from the Crown or under statute.

[17] By contrast, **Vol. 9(1) of Halsbury's Laws of England** (4th Ed.) para. 618 defines simple contracts as including all contracts which are not contracts of record or contracts made by deed. **Black's Law Dictionary**, 9th Ed. defines a simple contract in reference to informal and parol contracts. The former is defined as a contract other than one under seal, a recognizance, or a negotiable instrument...that derives its force not from the observance of formalities but because of the presence in the transaction of certain elements that are usually present when people make promises with binding intent- namely mutual assent and consideration. It may be made with or without writing. Concerning a parol contract, it refers to an agreement that is usually not in writing or only partially in writing. At common law it is therefore a contract not under seal, although it could be in writing.

[18] The distinction between simple contracts and specialties was poignantly made in the case of ***Aiken and others v Stewart Wrightson Members' Agency Ltd and***

others [1995] 3 ALL ER 449, cited by counsel for the claimant. In this matter, there was an action against a syndicate comprising several insurance agencies for breach of contract and negligence in their failing to disclose material facts when entering into re-insurance contracts with other underwriters. It was held that the claims in contract of all those syndicate members whose agreements were not under seal were statute barred as the six-year time limit for actions founded on simple contracts had expired. However, the syndicate members whose agreements were under seal were entitled to rely on the 12-year limitation period laid down by section 8(l) of the **Limitation Act** (UK) 1980 for actions upon a specialty.

Submissions

[19] In her submissions, counsel for the claimant argued that the loan was based on an oral agreement, which should be classified as a "special circumstance" which would extend its nature to that of more than what the courts may deem as a simple contract. She also contended that the written agreement that makes reference to the "Tyrone loan" (which was signed by the 2nd defendant) was circumstantial evidence of the oral agreement.

[20] Counsel actually maintained that taken together **TC1** to **TC4** exhibited to the claimant's particulars of claim would suffice to indicate that there was indeed a loan from the claimant to the deceased, and/or the defendant, for the purposes of facilitating them, jointly or severally, to satisfy a debt to Beaver Street Fisheries Inc. Counsel compared the written agreement to a bond or writing obligatory and thus contended that there was a contract between the parties outside of the ambit of ss. 3 and 46 and within that of s. 52 of the **LAA.** Therefore that would mean the claimant had a period of 20 years to file the claim once the debt had become due.

[21] Counsel for the defendant in opposing submissions argued that the Agreement which refers to the "Tyrone loan" clearly established that the sum of $15M sum was an investment in Francis Meadows Ltd.

[22] He argued further that whether the alleged loan was a loan to the deceased or a loan to Francis Meadows Limited or an investment in Francis Meadows Limited, the provisions of the **LAA** apply. He submitted that the claim whether as a loan (debt) or contract is extinguished and recovery thereof barred by statute, as s. 46 and not s. 52 is the governing section of the **LAA.**

Analysis

[23] Counsel for the claimant submitted that the requirement under the Statute of Frauds for there to be proof in writing of the agreement being relied on, was satisfied by reading the exhibits TC1 – TC4 together. As noted in **The Law of Contract** by G.H. Treitel, 8th ed at page 167, contracts within the statute must be evidenced by a signed note or memorandum in writing. The exact nature of the evidence is not specified by the statute but certain rules have been laid down. The parties must be identified or described; there must be consideration; the material terms of the agreement must be present; it must be signed by the party to be charged or his agent; a memorandum does not have to be prepared as such; and documents may be joined to produce a sufficient memorandum.

[24] A perusal of the undated agreement that is annexed to the Particulars of Claim and is being relied on by the claimant is instructive. In type, it is said to be made in 2004, but no date in that year is indicated. It is an agreement between the 2nd defendant (Owner), Francis Meadows Limited (Developer) and Millwin Investment Limited (Contractor) for the establishment of a residential housing development.

[25] Under the Heading “FINANCING & PARTICIPATION” it provides:

> 1. The Developer shall be financed by shareholders loans of indefinite term, none interest bearing secured by Demand Promissory Notes with the proviso that SAVE as is unanimously approved by all the shareholders demand shall not be made thereon earlier than 12 months from the date of issue.
>
> 2. The loan funds shall be utilized as follows:

2.1 FORTY-FIVE MILLION SIX HUNDRED THOUSAND DOLLARS (Cecile Loan) shall be used to:-

2.1.1 acquire the first 38 building lots; and

2.1.2 provide working capital

2.2 FIFTEEN MILLION DOLLARS (Patrick Loan) shall be used for working capital

2.3 FIFTEEN MILLION DOLLARS (Tyrone Loan) shall firstly be used to provide the basis of an undertaking issued by Scotia Bank Jamaica, dated July 21st 2004 bearing reference number 505757890921704 to Messrs. Myers Fletcher & Gordon, Attorneys-at-Law.

2.3.1 Provided that the Tyrone loan is released from the undertaking aforementioned it shall secondly be used as partial repayment of the Cecile loan;

2.4. ADDITIONAL WORKING CAPITAL shall be generated from the sale of housing units.

[26] While the agreement was signed by the 2nd defendant both in her own capacity and as a Director of Francis Meadows Limited, though space was provided for the claimant's signature he did not sign. Also, nowhere on the agreement was there any provision for the deceased to sign, nor was there any indication that the deceased was a director or shareholder of any of the companies involved.

[27] The claimant's version of the purpose (s) of the $15M allegedly loaned by the claimant to the deceased and the 2nd defendant is not directly supported by the documents TC1 – TC4 placed before the court. I have noted that there is a letter from BNS to Myers, Fletcher & Gordon; another letter from BNS to the claimant outlining terms and conditions of credit facilities; the Agreement; an invoice from Wong Ken & Co. Having regard to who the parties are in this matter and the terms of this claim, it cannot be said that, the material terms of the agreement being relied on have been identified, as the documents together do not point or necessarily relate to the specific oral agreement or contract that the claimant contends was entered into.

[28] The intricate arrangements that the claimant alleges, of a loan to the deceased on behalf of the 2nd defendant, that was reflected as an undertaking in a development agreement that could subsequently be applied to partially repay another loan once released from the undertaking, are largely dependent for their establishment on the oral assertions of the claimant in a context where the 2nd defendant disputes that the $15M in question was a loan to the defendants and maintained by the claimant.

[29] If, as the defendants maintain, the money represented sums invested in a failed investment as contended by the 2nd defendant, the claimant having taken the risk inherent in investments would be unable to recover. It is however by no means clear that it was initially an investment, or if it was not, whether it was subsequently converted to such. Assuming for the moment without deciding the point that, as contended by counsel for the claimant, the sum was a loan, on several bases the claimant is still in no better position.

[30] There are several difficulties faced by the claimant on the material placed before the court. On the documentation relied on, *firstly,* any loan advanced would have been to the defendant or Francis Meadows Ltd, there being no evidence the deceased signed the Agreement, *secondly*, Francis Meadows Ltd is not a party to these proceedings and, *thirdly*, the Agreement containing the Tyrone loan reference is not signed by the claimant.

[31] Those difficulties aside, the fundamental challenge facing the claimant is that based on the review of authorities in the earlier outline of the law, there is nothing that transforms the oral agreement referred to, even considering the Agreement said to be circumstantial written evidence of the oral agreement, from being a simple contract. As a simple contract, it comes under the purview of s. 46 of the **LAA**. It does not become a speciality contract because, if the submission of the claimant is accepted, it was plain and simple a loan between friends. A careful review of the Agreement also does not reveal that a bond or writing obligatory was involved. While it is in writing, it is not a deed nor a document under seal, a

recognizance or negotiable instrument. In the circumstances, the Agreement would not be governed by s. 52 but by s. 46 of the **LAA** incorporating s. 3 of the English Statute of Frauds. Accordingly the relevant limitation period would be 6 years.

[32] Therefore if, though not admitted by counsel for the defendant, the sum $15M was a loan, the sustainability of the claim is dependent on when that loan would have become due for payment. This naturally leads to consideration of the second issue.

ISSUE 2: ***Whether the operative date when the cause of action arose for the purposes of the LAA is just before or at the death of the deceased and therefore within the 6 year limitation period?***

The Law

[33] In ***Bertram Carr v Von's Motor and Company Ltd****.* in considering the question of whether a limitation period had expired, Brooks JA stated at paragraphs 11 - 14 that:

> [11] In determining that issue it must be borne in mind that the defence that a limitation period has expired is a procedural defence. It is normally one that has to be raised as a defence and resolved at a trial. 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. This principle was set out in **Ronex Properties Ltd v John Laing Construction Ltd and others (Clarke, Nicholls & Marcel (a firm), third parties)** [1982] 3 All ER 961. Donaldson LJ explained the point at page 965 of the report. He said:
>
>> "Authority apart, I would have thought that it was absurd to contend that a writ or third party notice could be struck out as disclosing no cause of action merely because the defendant may have a defence under the Limitation Acts….it is trite law that the English Limitation Acts bar the remedy and not the right, and furthermore that they do not even have this effect unless and until pleaded. Even when pleaded, they are subject to various exceptions, such as acknowledgment of a debt or concealed fraud which can be raised by way of reply."

[12] He went on to make the point, at page 966, that the defendant who seeks to rely on a limitation defence may apply to strike out the claim as being an abuse of the process of the court:

> "Where it is thought to be clear that there is a defence under the Limitation Act, the defendant can either plead that defence and seek the trial of a preliminary issue or, **in a very clear case**, he can seek to strike out the claim on the ground that it is frivolous, vexatious and an abuse of the process of the court **and support his application with evidence.** But in no circumstances can he seek to strike out on the ground that no cause of action is disclosed." (Emphasis supplied)

His Lordship relied on the authorities of **Riches v DPP** [1973] 2 All ER 935 and **Dismore v Milton** [1938] 3 All ER 762 in support of his view.

[13] Stephenson LJ expressed similar sentiments at page 968 of the report in **Ronex**. He said:

> "There are many cases in which the expiry of the limitation period makes it a waste of time and money to let a plaintiff go on with his action. But in those cases it may be impossible to say that he has no reasonable cause of action. The right course is therefore for a defendant to apply to strike out his claim as frivolous and vexatious and an abuse of the process of the court, on the ground that it is statute barred. Then the plaintiff and the court know that the statute of limitation will be pleaded, **the defendant can, if necessary, file evidence to that effect, the plaintiff can file evidence of an acknowledgment or concealed fraud or any matter which may show the court that his claim is not vexatious or an abuse of process** and the court will be able to do in, I suspect, most cases what was done in **Riches v DPP** [1973] 2 All ER 935, [1973] 1 WLR 1019, strike out the claim and dismiss the action." (Emphasis supplied)

[14] The extract from the judgment of Stephenson J reveals that the parties should, if necessary, place evidence before the court supporting their respective positions. If, however, the case is not a clear one, the tribunal assessing the application is not permitted to, in the words of Lord Woolf MR in **Swain v Hillman** [2001] 1 All ER 91, conduct a "mini-trial" of that issue.

[34] In the earlier case of ***Medical and Immuniodiagnostic Laboratory Ltd v Dorett O'Meally Johnson*** [2010] JMCA Civ 42, while addressing the interplay between

when a cause of action for breach of contract accrues and the operation of the **LAA,** at paragraphs 4 -5 Harrison JA stated that:

> [4] ...the law makes it abundantly clear that an action shall not be commenced after the expiration of six years from the date on which the cause of action accrued: see the Limitation of Actions Act. A ‘cause of action’ has been defined as “every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court”: **Read v Brown** [1888] 22 QBD 128, 131.
>
> [5] The general rule in contract is that the cause of action accrues not when the damage is suffered but when the breach occurred. Consequently, the limitation period runs from the time the contract is broken and not from the time that the resulting damage is sustained by the plaintiff.

[35] More specifically in ***International Assets Services Ltd v Arnold Foote***, F. Williams J (Ag.) (as he then was) in considering when a cause of action arises for a breach of contract in relation to money lent made reference to the following paragraphs from Vol. 28 of **Halsbury’s Laws of England**:

> **662-When the cause of action arises-** In an action for breach of contract the cause of action is the breach. Accordingly, such an action must be brought within six years of the breach; after the expiration of that period the action will be barred, although damage may have accrued to the plaintiff within six years of the action brought...
>
> **663-Money lent**. In an action for money lent, if a time is specified for repayment or any condition for repayment, other than mere demand, is imposed, the statute of limitation runs on the expiration of the time specified or on the happening of the condition. **If no time is specified the statute runs from the date of the loan.** If in an agreement for the repayment of an existing debt by instalments it is provided that on default of payment of any instalment the whole debt is to be recoverable, the statute runs as to the whole debt from the time of the first default in payment of an instalment. (Emphasis added.)

Submissions

[36] Counsel for the claimant submitted that an agreement for a loan (whether written or oral) will usually contain clear terms for repayment. Therefore in each case, (particularly in relation to oral agreements), care should be taken to establish the precise words employed or the gist of what was agreed in order to establish the date upon which the limitation period began to run. Counsel also noted that in many cases, time will run from the date on which the repayment of the first instalment of debt fell due; if so, then in the case of simple contracts the period is 6 years; if under a deed, the period is 20 years.

[37] Counsel rightly acknowledged that in order for the claimant to successfully pursue a claim for debt, he must establish the time at which the debt became due. Counsel advanced that the date at which the calculation of time should begin, is at the date the deceased's death in 2011, rather than the date of disbursement of the loan in 2004. Thus calculated, the claim filed in 2017 would have been just within the 6 year limitation period and not statute barred. The basis on which counsel for the claimant advanced the date of death as the operative starting point, is that the claimant contends that throughout the lifetime of the deceased, and up to the time of his death, the deceased and the 2nd defendant had always consistently acknowledged to the claimant the $15M loan from him.

[38] In further arguments in support of the latter operative date counsel for the claimant advanced that $15M was not a sum that would be forgotten, especially where it was a loan to facilitate the continuation of a business venture, and to save a property from a forced sale.

[39] Counsel also argued in the alternative that in the event the court found that the operative date was 2004 thus making the filing of the claim seven years late counsel also prayed in aid the equitable jurisdiction of the court. Counsel maintained that the delay in bringing the matter before the court was explained by the fact that the claimant wished to settle the outstanding sum amicably, had been

expectant that there would have been some payment from the estate and had decided to employ sensitivity given the tragic death of the deceased, thus taking the matter to court was a last resort. She submitted the claim was not a surprise as the parties were agreed that there was a loan for $15M between friends which had not been repaid, hence that sum, plus interest, was due and owing to the claimant.

[40] Counsel for the defendants for his part submitted that to the best of the 2nd defendant's personal knowledge information and belief, no claim had ever been made on the deceased during his lifetime and the first time she knew of a claim for a loan was after the deceased had passed. Counsel submitted that the **LAA** applies to the instant claim based on the fact that the alleged contract and loan arose in 2004 and there is no evidence in writing that, if a loan was made, it was made to the deceased or that the deceased or the 2nd defendant acknowledged any debt whatsoever.

[41] Counsel for the defendant further submitted that as there was a denial of the loan, s. 46 of the **LAA** makes it clear that the period begins to run from when the loan was disbursed or was last acknowledged. Counsel advanced that, as there was nothing in the pleadings showing that the deceased left a note acknowledging the debt, the operative date would have to be when the loan was disbursed.

[42] Counsel for the defendants further submitted that whether the alleged loan was a loan to the deceased or a loan to Francis Meadows Limited or an investment in Francis Meadows Limited the provisions of the **LAA** applies and the claim whether as a loan (debt) or contract is extinguished and recovery thereof barred by statute. Counsel also asked the court to note that no claim has been made against Francis Meadows Limited.

Analysis

[43] As clearly outlined in **Vol 28** of **Halsbury's Laws of England** (4th Ed.) at para 663, where a loan has been given, if there is no repayment time specified, the operative

date from which time should be calculated for the purposes of the **LAA** is at the date of the loan. As submitted by counsel for the claimant the alleged loan was an 'oral agreement between friends'. There was no time stipulated for the repayment of this alleged loan sum and therefore time commenced running from the date of the loan in July 2004.

[44] Had there been proof in writing that the deceased had acknowledged the debt, then the operative date would have been from that date of acknowledgment. On the facts of this matter there is no basis in law for the operative date running from the date of death of the deceased. As McCalla JA (as she then was), stated in ***Ricco Gartman v Peter Hargitay*** SCCA 116/ 2005 (March 15, 2007) at page 36, "S. 46 stipulates that an acknowledgment of the debt in writing would make time begin to run afresh from the date of such acknowledgment." That position is supported by paragraphs 880 and 881 of **Vol. 28 Halsbury's Laws of England** (4th Ed.) where is it indicated that every acknowledgment must be in writing and signed by the person making the acknowledgment, or by his agent, but it need not be in any particular form.

[45] The requirement for acknowledgment in writing of a debt owed by the deceased is important as were it not a requirement, the estate of a deceased person would be at the mercy of the parol evidence of claimants. In the circumstances of this case in the absence of any acknowledgment in writing, there is accordingly no basis in law for the operative date to be other than July 2004 when the alleged loan was disbursed. On that time table, the filing of the claim in 2017 was 7 years late!

[46] It therefore appears that whether the $15M was a loan to the deceased or a loan to Francis Meadows Ltd or an investment in that company, the provisions of the **LAA** applies and the claim whether as a loan (debt) or contract is extinguished and recovery thereof barred by the **LAA**.

[47] The bold appeal to the court's equitable jurisdiction for assistance must also fail. In the case of ***Baker, Shaun v O'Brian Brown & Angella Scott-Smith*** Claim No.

2009 HCV 5631 (May 3, 2010) a distressed father who was 18 days late for filing a claim under the **Law Reform (Miscellaneous Provisions) Act** to seek damages for the negligent death of his six year old son in a motor vehicle accident was unable to proceed[1]. Bookending her judgment at paragraphs 2 and 115 C. Edwards J (as she then was), acknowledged the inflexibility of the operation of the **LAA.** She stated as follows:

> 2. Under the Statute of Limitations, the limitation period in Jamaica in respect of causes of actions grounded in the tort of negligence, is six years. For such actions, there is no discretion under this Act to extend time.
>
> 115. The Court rules that the time limited for filing a claim under the Law Reform (Miscellaneous Provisions) Act having expired there is no rule of law or practice or any enabling legislation allowing a court to extend time within which to file such a claim. The claim is statute barred.

[48] Of course, the same principle applies in respect of actions grounded in contract as for those in tort. The instant case has to be decided according to law not sentiment. There is no equitable principle that would enjoin the court to override the safe harbour now enjoyed by the defendants by virtue of the operation of the **LAA,** which places them beyond the reach of the claimant. As noted by P. Williams JA in ***Attorney General of Jamaica v Arlene Martin*** [2017] JMCA Civ 24 at paragraph 35 quoting Lord Griffiths in **Donovan v Gwentoys** [1990] 1 WLR 472 at page 479, (relied on by the defendants):

> "The primary purpose of the limitation period is to protect a defendant from the injustice of having to face a stale claim, that is, a claim with which he never expected to have to deal."

[49] There is another basis on which counsel for the defendants argued that the claim must fail. As the claim is being made that money was paid pursuant to an

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[1] At paragraph 73, the court noted that under the Fatal Accidents Act (FAA) the court was given discretion to extend time. However, after considering the factors outline in section 33 of the LAA to inform the exercise of the court's discretion, as the delay after the expiry of the limitation period was 3 years the court held it was not in the interests of justice to extend time under the FAA. (See paragraphs 73 and 116).

agreement with Francis Meadows Ltd, counsel submitted the claim should have been brought against that company, which the deceased was never a party to. The court has to deal with the parties and the issues before it. It is sufficient to resolve this matter on the issue of the application of the **LAA** without the necessity for consideration of whether the $15M represented a loan or an investment or whether the correct parties are before the court.

ISSUE 3: ***Whether the claimant's statement of case should be struck out on the basis that it is an abuse of the process of the court / is likely to obstruct the just disposal of the proceedings; or discloses no reasonable ground for bringing the claim?***

The Law

[50] Rule 26.3 (1) of the CPR 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 –
>
> (a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;
>
> (b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;
>
> (c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or
>
> (d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10.

[51] In **International Asset Services Ltd v Edgar Watson**, Dukharan JA stated at paragraphs 15 and 25 that:

> [15] If Brooks J was correct that the six year limitation period was applicable, rule 26.3(b) and/or (c) [sic] of the Civil Procedure Rules (CPR) 2002, provides that the court can strike out a claim or statement of case

> which is an abuse of process or where it discloses no reasonable grounds for bringing, or, defending a claim. Under the Act, a matter that is statute barred will have no prospect of success at trial and is therefore an abuse of process.
>
> ...
>
> [25] As was stated in paragraph [15], pursuant to rule 26.3 of the CPR, the respondent was entitled to apply to have the matter struck out. This he did, claiming the benefit of the Act. In **Lloyd v The Jamaica Defence Board et al** (1981) 18 JLR 223, Zacca JA at page 226 said:
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> "The defendants made it quite clear that if the action proceeded they would be relying on the protection of the Act. It is, therefore, open to the trial judge to strike out the statement of claim as disclosing no reasonable cause of action, **Riches v Director of Public Prosecutions** [1973] 2 AER 935."

Submissions

[52] Counsel for the defendant/applicant submitted that pursuant to rule 26.3 (1) (b) and (c) of the CPR, the court should strike out the claimant's statement of case as it is an abuse of the process of the court/ is likely to obstruct the just disposal of the proceedings; or discloses no reasonable ground for bringing the claim. Counsel submitted that was the appropriate course to be taken by the court as the claim was clearly statute barred, more than 6 years having passed since the alleged loan was made and there being no evidence before the court that the alleged debt was ever acknowledged by the deceased.

[53] Counsel for the claimant submitted that it was in the interest of justice that the defendant's oral application for the claimant's case to be struck out should be denied as the loan was known and acknowledged by the deceased and the 2nd defendant.

Analysis

[54] Having regard to my findings on issues 1 and 2 and in keeping with the analysis in ***Ronex*** referred to by Brooks JA in ***Bertram Carr v Von's Motor and Company***

Ltd, I find that this is *"a very clear case"* that supports the application of the **LAA.** I also hold that there is no *"evidence of an acknowledgment…or any matter which may show the…claim is not vexatious or an abuse of process"***,** that would mitigate against the court striking out the claimant's claim on the basis that it is statute barred pursuant to ss. 3 and 46 of the **LAA**.

[55] As stated by Dukharan JA in ***International Asset Services Ltd v Edgar Watson*** at paragraph 15, "…*a matter that is statute barred will have no prospect of success at trial and is therefore an abuse of process."* Accordingly the defendants' application is entitled to succeed on the basis that the statement of claim should be struck out as an abuse of process as the claim is statute barred and has no prospect of success at trial.

DISPOSITION:

[56] In light of the foregoing the court makes the following orders:

1. The claimant's statement of case is struck out.
2. Judgment on the claim is entered for the defendants.
3. Costs to the defendants to be agreed or taxed.