IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. CL 2002/G007

BETWEEN	*RICCO GARTMANN*	*CLAIMANT*
A N D	*PETER HARGITAY*	*DEFENDANT*

Miss Malica Wong instructed by
Myers, Fletcher & Gordon for the Claimant.

Ian Wilkinson instructed by
Ian Wilkinson & Co. for Defendant.

Heard: September 30 & October 25, 2005

Coram: Harris. J,

By a specially endorsed Writ of Summons issued on January 31, 2002 the claimant commenced an action against the defendant to recover the sum of 2.623,924.65 Swiss francs, as a debt due and owing by him. An unsuccessful application had been made to strike out the claim for want of jurisdiction. On November 10, 2004 an application was made to file defence out of time. This was adjourned for hearing on September 30, 2005.

The defendant now makes an application to dismiss the claim on the ground that it is statute barred. Subsequent to this application, the claimant filed an affidavit sworn on June 10, 2004 and a supplemental affidavit sworn on June 18, 2004. Exhibited to the affidavits were, inter alia, documents

comprising correspondence passing between the Claimant and the defendant as well as a statement of account.

The claimant sought to rely on letters dated March 10, 1992 and June 10, 1999 as well as the statement of account as proof of the acknowledgement of the debt. These documents are written in German. Purported English translations of only the letters were exhibited.

In my view, the claimant is obliged to place before the court documents, which the court could deem authentic, in support of allegations made by him. When it is desired to rely on a document in foreign language the usual course is to obtain a translation of such document by a qualified translator and exhibit the translated document together with an affidavit or a certificate of the translator verifying the translation. This was not done by the Claimant.

It cannot be disputed that the cause of action arose on December 12, 1991. Eleven years before the action was brought. An action in simple contract may not be brought after the expiration of 6 years from the date on which the cause of action accrued. However, an action of recovery of debt may be pursued notwithstanding the six-year time limit, if a debtor acknowledges the debt. In Hyleing v. Hastings 1699 Ld Rayn 389 it was

held that the recovery of a statute barred debt was revived by the subsequent promise of a debtor to pay.

The claim would have been statute barred on December 30, 2001 when the action commenced. Those documents on which the claimant seeks to place reliance, as the acknowledgement of the debt, have not been authenticated. This court, therefore, ought not to take cognizance of them. It follows that the claim has not been substantiated and should be struck out.

If I am wrong, proceeding on the premise that the letters of March 10, 1992 and June 10, 1999 are authentic translations of the originals, the question is whether the claim is in fact statute barred. I must state at the outset that no account will be taken of the Statement of Account, as it had not been translated.

Although a statute barred debt may be revived by the debtor's acknowledgement, such acknowledgement must not only be clear and unequivocal but it must be pleaded.

The learned authors of Bullen and Leake PRECEDENT OF PLEADING (11th Edition) page 884 state:-

> "The facts as to acknowledgement or part payment . should be expressly pleaded in the statement of claim or reply."

The learned authors of Halsburys Volume 24 (3rd. Edition) at page 208 para 376 recognise the issue in the following context:

> "Where there is an acknowledgement in writing or part payment, a fresh cause of action accrues. Where title would be extinguished but for such an acknowledgement of part payment, it seems that the acknowledgment or payment should be alleged in the statement of claim as part of the cause of action. That course would also seem desirable where only the remedy is barred; but in such a case an alternative course, which would not, it is thought, be wrong; would be to plead the acknowledgement or part payment in the reply."

In Busch v. Stevens [1962] 1 ALL ER 412 at p. 416 Lawton J. observed:

> "***The facts relating to the acknowledgement are material facts on which the plaintiff intends to rely when he starts an action for recovery of a debt or other liquidated sum, which, but for the acknowledgement would be statute barred and as such should be in the statement of claim.***"

The acknowledgement was not pleaded in the claim.

The statement of claim states:

> "The plaintiff's claim is against the defendant to recover the sum of 2,623,942.65 Swiss francs being the balance owed by the defendant to the plaintiff as at 31st December 2001, being money loaned by the plaintiff to the defendant

And the plaintiff also claims interest on the outstanding amount pursuant to the Law Reform (Miscellaneous Provisions) Act.

And the sum of $16,000.00 for costs. "

It is essential to state that, of the two letters on which the claimant seeks to rely, that of March 10, 1992 is in admissible as evidence of an admission of the debt. In that letter, the action begun over 9 years after the date of the purported acknowledgement of the debt. Further, the letter refers to a debt of US $700,000.00 and not Swiss francs.

The letter of June 10, 1999 which may be taken into account, reads:-

"**Mr. Ricco Gartmann**
Luetzelsee 12
8634 Hombrechtikon

Basel, June 10, 1999

Debts

Dear Ricco

As of 31.12.1991 there existed a debt in your favour in the amount of CHF 1'164'00.--.
This amount was then only used to buy back the shares in the Hargitay Group Holding AG, Zug, from the IPT, AG, Baden, a subsidiary of BBC.

According to your accounting I paid back the amount of totally CHF 509'125.95 between 31.12.1991 and 21.7.1994. Thus as of 21.7.1994 there would have been a capital balance of CHF 654'874.05 to be booked as remainder of debt.

During 31.12.1991 and 30.6.1999 interests in the total amount of CHF 1'540'639.80 were accumulated despite of my repayments mentioned above. This increases the balance calculated by your accounting to CHF 2'049'919.75 as to today.

In summary, this means that the actual capital debt amounts to totally CHF 654'872.05; the accumulated interest payments you charged me at a rate of 10 percent per annum amount to CHF 1'540'993.80.

With respect to the above period of 7.5 years these amounts tally with an accumulated interest growth of 235 percent, i.e. an average interest rate of 31.33 percent p.a.

Because of reasons which are known to you in detail I was not able to make further payments in the above mentioned matter between 1995 and 1999.

Since beginning of 1999 things are back to normal so that I will soon be able to dispose of liquid funds again.

I am pleased to confirm to you that I will start to make further repayments as soon as possible.

As far as the capital interests and the compound interests are concerned you have told me, that "a solution will be found." I herewith formally ask you to

a) freeze the interest as of today's date (moratorium of interest); and
b) cancel the accumulated interests partially after I will have again started to pay back the capital in installments, if this seems possible for you.

I like to thank you indeed for your continuing support.

Yours,

[signature]
Peter J Hargitay"

It is clear that the defendant acknowledged owing a debt to the Claimant. However, the sum he has admitted owing is less than that claimed. It may be that his admission relates only to a part of his indebtedness to the claimant. But the statement of claim does not disclose particulars of the debt. Its lacking in particularity limits the claim and

deprives the defendant from knowing the precise nature of the case he should meet in the event of a trial.

The fact that the claimant pleaded that the claim is for a specified sum, being the balance owed by the defendant, is insufficient. In my view it was incumbent on the claimant to have particularized the sum loaned, the amount repaid, the interest charged, and the acknowledgment of the debt.

Although this court is empowered to grant an amendment of the statement of claim in order to regularize the pleading, I am constrained to decline from so doing. The cause of action arose on December 12, 1991. The acknowledgement of the debt, which might have renewed the action, originated on June 6, 1999. More than six years have elapsed since that date. To permit an amendment of the statement of claim would be to deprive the defendant of a defence under the Stature of Limitation. As ***Lord Wright M.R. in Marshall v London Passenger Transport Board [1963] 3 ALL ER 83 at page 87*** observed:

> "..... it is well settled that an amendment will not be allowed if its introduction would deprive the defendant of a defence under the Statute of Limitations ... ... in the words, if it is something which involves a new departure, a new head of claim or a new cause of action."

This claim is statute barred and accordingly struck out. The application for extension of time to file defence is dismissed. Costs to the defendant to be agreed or taxed.