IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2009 HCV 03191

BETWEEN	INTERNATIONAL ASSET SERVICES LIMITED	CLAIMANT
AND	EDGAR WATSON	DEFENDANT

Mr Christopher Dunkley instructed by Patterson, Phillipson for the Claimant.

Mr Jeffrey Daley for the Defendant.

Civil Procedure - Application to strike out claim as being statute barred – Claim for recovery of credit card debt - Whether limitation period has run – Whether obvious on the face of the claim – meaning of "writing obligatory" – whether any reasonable ground for bringing the action – Limitation of Actions Act, section 52 – Limitation of Actions Act 1623, section 3 - CPR r.26.3(1)

11 and 25 October 2010

BROOKS, J.

The claimant, International Asset Services Limited, is a debt collector. It has brought the present claim against Mr Edgar Watson, alleging that he is indebted to it as a result of advances made pursuant to three credit card agreements. Those agreements were entered into by him in 1993, with three different banks. According to the claimant it has purchased the debts and it is entitled to pursue Mr Watson in respect of those debts.

Mr Watson has resisted the claim. He has not only denied that he was indebted to the banks but has pleaded, in his defence filed, that the present claim is barred by the operation of the Limitation of Actions Act (the Act). He seeks, in the present application, to have the claim struck out on that basis. The main issue to be decided is whether the claim falls within the purview of section 52 of the Act, which section stipulates a 20 year limitation period, rather than the usual six years allowed for simple debts and contracts.

The Claim

In order to determine whether Mr Watson can succeed in his application, it is first requisite that the terms of the claim be outlined. In the Particulars of Claim, the claimant first identified each of the credit card facility agreements entered into by Mr Watson. It asserted that Mr Watson is indebted by virtue of those facilities. The claimant then outlined how it became the successor-in-title to the debts on 10 March 2003. Paragraph 5 of the Particulars of Claim then states:

> "The Defendant failed to honour the Credit Card Facilities by falling into arrears with payments in respect thereto."

At paragraph 6 it specified the figures owing as at 11 March 2003. It will be sufficient to set out only one of the three particulars contained in that paragraph:

"Account #	**Balance Owing**	**As at:**
(a) **10318337 (NCB)**	$586,533.88	March 11, 2003
Principal:	$ 16,389.16	
Accrued Interest:	$570,144.72	
Sum Claimed:	**$586,533.88"**	

Finally, the claimant avers that Mr Watson has failed to pay the sums, despite demands made by it, of him, in 2004 and 2008.

The statements attached to the particulars of claim, commence with a September 1996 date, having carried forward a balance. One statement records that a payment of $3,000.00 was made in July 1997. After that date the only transactions recorded are the debits due to interest accruing against the outstanding balance. The Particulars of Claim do not assert any acknowledgment of the debt by Mr Watson.

The Law

The jurisdiction to strike out the claim

Whereas the assertion that a claim is statute-barred is a ground of defence to be dealt with at trial, a defendant may apply to strike out that claim, if, on the face of the claim, it appears that the limitation period has run. The cases of *Riches v Director of Public Prosecutions* [1973] 2 All ER 935 and *Ronex Properties Ltd. v John Laing Construction Ltd.* [1982] 3 All ER 961 are authority for the principle that, in such circumstances, the claim may be struck out as an abuse of the process of the court, that is, if the defendant indicates an intention to rely on the Act if the claim proceeds to trial. The principle was applied locally (although in the context of a different statute, the Public Authorities Protection Act), in the case of *Lloyd v The Jamaica Defence Board and others* (1981) 18 JLR 223. The rationale was succinctly outlined in *Lloyd's* case by Zacca JA, in his judgment in that case. He said at page 226 I:

> "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..."

The striking out of a claim, in circumstances such as these, is also authorised by rule 26.3 (b) and/or (c) of the Civil Procedure Rules 2002 (the CPR). Rule 26.3 authorises the court to strike out 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 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;..."

The applicable limitation period

It has been long established that in contract, the applicable limitation period is six years. The applicable statute is "An Act for Limitation of Actions, and for Avoiding of Suits in Law" (1623) 21 James 1 Ch. 16 (section 3). This principle was recently restated in the case of *Brown and Another v Jamaica National Building Society* [2010] JMCA Civ 7 (delivered 4 March 2010). In that case Harrison JA, in delivering the judgment of the Court of Appeal, said at paragraph 40:

> "The result…is that actions based on contract and tort (the latter falling within the category of "actions on the case") are barred by section III, subsections 1 and 2 respectively of the 1623 statute after six years (see *Muir v Morris* (1979) 16 JLR 398, 399 per Rowe JA)."

In the instant case, Mr Dunkley, for the claimant, submitted that the applicable limitation period does not fall under the purview of the 1623 statute, but is in fact provided for by section 52 of the Act. The relevant portion of section 52 states:

> **52.** 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: (Emphasis supplied)

On Mr Dunkley's submission, the agreement between Mr Watson and the respective banks was a "writing obligatory" and therefore the applicable limitation period, was 20 years. On that basis, Mr Dunkley submitted, the limitation period has not yet expired.

The term "writing obligatory" has been variously defined. *The Dictionary of English Law* (1959) by Earl Jowett defines "writings obligatory" as "bonds". The learned author 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, *simplex obligation,* which is rarely met with now."

On the other side of the Atlantic, the view is similar. Black's Law Dictionary, 9th Ed. defines the term as "A bond; a written obligation, as technically described in a pleading". *Bouvier's Law Dictionary, Revised* 6th Ed. (1856) is quoted in the *Onlinedictionary* as providing the following definition for "writing obligatory":

> "A bond; an agreement reduced to writing, by which the party becomes bound to perform something, or suffer it to be done."

In a glossary of terms for its "Territorial Briefs and Records", the University of Arkansas at Little Rock, William H. Bowen School of Law, (http://arcourts.ualr.edu/glossary.htm) defines "writing obligatory as "A written contract under seal".

Less direct references also assist. *Stroud's Judicial Dictionary of Words and Phrases* (7th Ed.), in its definition of "Obligatory" makes the following reference:

> ""Writing Obligatory": see *R. v Morton*, [1873] L.R. 2 C.C.R. 27, cited DEED."

In *R v Morton* the question for adjudication was whether a letter of orders, under the seal of a bishop, was a deed within the meaning of section 20 of the Forgery Act 24 & 25 Vict. Ch. 98. That section made it a felony to forge "any deed, or any bond or writing obligatory:". Blackburn J, in his judgment stated at page 27 of the report:

> "...the words of the section under which this indictment is framed are, "any deed, bond or writing obligatory;" and I think those words must be limited to something passing, or which is in affirmance of that which passes, a pecuniary interest..."

In *Carthage v Manby* (1794) 2 Show. K.B. 90; 89 ER 813, the court considered a release which contained the phrase, "all debts, dues, actions, causes of actions, obligations, and writings obligatory". The court ruled that:

> "although a covenant be a writing obligatory, yet it has a particular significance, as when we declare *per script. obligatarium*, it means no more than a bond…"

There also seems to be a link between writings obligatory and specialities. In volume 32 of the English and Empire Digest (Green Band) at paragraph 4296, the learned editors address the issue of when time begins to run:

> "Bond – On each successive breach.] - Civil Procedure Act 1833 s. 3 (repealed), constituted a bar to an action on a writing obligatory in those cases only where every breach of the condition had taken place more than 20 years previous to the commencement of the suit. *Sanders v Coward* [1847], 15 M. & W. 48…"

The section quoted does not include the words "writing obligatory". It does, however, speak to the limitation of actions "upon any Bond or other Specialty" etc. In *Sanders v Coward*, just cited, the writing obligatory, which was the subject of the suit, was a bond which created a debt.

In yet another case, Maule J in *Cork & Bandon Rail Co. v Goode* [1843-1860] 671 at page 673 stated:

> "an action on statute is an action on a specialty, and is clearly comprehended within the words of [section 3]: "debt upon any bond or other specialty," although **a bond is the plainest and simplest kind of specialty**, and a statute the highest…". (Emphasis supplied)

Preston and Newsom at page 80 of the first edition of their work *Limitation of Actions* state that, "*Prima facie* the word "specialty" includes a contract under seal, a statute, and probably a judgment".

From these various citations, it 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.

Application to the instant case

In the instant case, neither of the contracts exhibited by the claimant purports to be a deed or a document under seal. In applying for the credit cards, Mr Watson simply signed the application forms. In doing so, he agreed to the terms and conditions for the use of the card and promised to repay all credit extended to him, pursuant to the application. Nothing in the terms and conditions indicate that the agreement is anything but a simple contract in writing. In the circumstances I find that the agreement is not governed by section 52 of the Act, but by section 3 of the 1623 Act. The result is that the limitation period which is applicable, is six years.

If I am correct in this conclusion it means that the claimant must fail. The last transaction on these accounts was in 1997. There is no evidence of Mr Watson having acknowledged the debt after that date. The result is that the latest date on which the claim would have become statute barred would be in 2003. The claimant did not bring the instant claim until 2009. It is clearly out of time.

The fact that the claim is out of time is patent on the particulars of claim and the documents which have been exhibited thereto. I can therefore, with confidence, adopt the words of Rowe J (as he then was) in a judgment delivered at first instance in *Lloyd v Jamaica Defence Board* (1978) 16 JLR 252 at page 257 D-E:

> "To my mind there is no avenue through which the plaintiff can escape from the provisions of the [Act]. The defendants by entering a conditional appearance and then following up with the summons to strike out the claim, have made crystal clear their posture that if the action proceeds to trial they will be pleading the statute and relying upon it. Should I in those circumstances permit the action to continue with the attendant costs and waste of time until the day of trial, when in my view the plea that the action I statute barred is bound to succeed?"

In my judgment Mr Watson must succeed at this stage, and the claim must be struck out pursuant to rule 26.3 of the CPR.

The question of notice

Mr Daley, on behalf of Mr Watson, in arguing the matter of the limitation period, also complained that the claimant had not informed Mr Watson of the assignment to it of the claimed debt. It may well be that, if Mr Watson was alleging that he had paid the banks after the date of the assignment, the absence of notice would be a bar (to the extent of such payment), to the present claim. He would be entitled to the requirement of notice pursuant to section 49 (f) of the Judicature (Supreme Court) Act. That is, however, not the case. I find that there is no merit in the complaint.

Conclusion

The limitation period governing the agreement in this case is six years. It is patent on the face of the claimant's particulars of claim and the documents attached thereto, that the debt which it seeks to recover became statute barred long before it had filed the claim. Mr Watson is entitled to apply, before trial, for the claim to be struck out on that basis and on the ground that he intends to plead the statute at trial. He has filed a defence claiming the benefit of the Act and he has filed and pursued the present application for striking out. In my view he should succeed.

The order of the court is therefore as follows:

1. The Claimant's statement of case is hereby struck out as it discloses no reasonable grounds for bringing the claim and is an abuse of the process of the court;

2. There shall be judgment for the Defendant on the claim;

3. Costs to the Defendant to be taxed if not agreed;

4. Leave to appeal, if required, granted.