

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT
COMMON LAW AND EQUITY SIDE

2010/CLE/GEN/FP0052

BETWEEN

ALFRED MOSS

And

JENNIFER MOSS

Plaintiffs

AND

COMMONWEALTH BANK LIMITED

BEFORE: The Honourable Mrs Justice Estelle G. Gray Evans

APPEARANCES: Mr Jethro L. Miller for the plaintiffs

Mrs. Aisha Stuart-Smith for the defendant

17 February 2011; 25 March

RULING

Evans, J.

1. This is an application by the defendant by summons filed 26 July 2010 for an order that the writ of summons herein be struck out pursuant to the inherent jurisdiction of the Court as well as under Order 18 rule 19 (1), (b), (c), and (d) of the Rules of the Supreme Court on the ground that the plaintiff's claim is statute barred. Although the defendant was not relying on Order 18 rule 19(1)(a), in which case no evidence would be permitted, no affidavit in support of or opposition to the application was filed and the court was therefore restricted to the pleadings.

2. This action was commenced by a specially indorsed writ of summons on 10 February 2010 in which the plaintiffs allege that:

- a. In February 1997 the plaintiffs obtained a loan with the defendant in the sum of \$34,447.53 with a monthly repayment of \$889.11 payable over period of 70 months by salary deduction from the first plaintiffs' salary as an employee of the Grand Bahama Port Authority, Limited;
- b. The plaintiffs duly made all the payments but the plaintiffs in about 2008 conducted a review of their account and discovered that the defendant continued to deduct payments from their account after the 70 payments under the loan had been completed.
- c. The review of the account history by the plaintiffs and their accountant revealed that at least 78 payments were accounted for resulting in a minimum excess payment of \$5,9112.00 [sic] and a maximum of \$9,000.00.
- d. The difference between the minimum and maximum results from the fact that there were gaps in the payment history extracted from the defendant's records: such records will show no recorded payment but a late fee or penalty and from which is [sic] could be reasonably deduced that there were salary deductions but the defendant failed to show a corresponding credit to the loan or the deductions diverted internally by an employee of the defendant.
- e. Because the first plaintiff's salary was paid directly to the bank and then deductions made before the balance was credited to his account there can be no doubt that the money was always available to make the deduction.
- f. As a result of the above I contend the defendant was in breach of its fiduciary duty to the plaintiffs who thereby suffered damages and loss.

Therefore the plaintiffs claim:

- (1) Refund of overpayment as should be determined on an enquiry to have been made and deducted from plaintiff's account together with interest at the rate of 10% per annum from the date such overpayment began till judgment.
- (2) Damages for loss of use of the funds improperly charged to the plaintiff's account.
- (3) Costs.

3. In its defence filed 12 March 2010 the defendant alleges, inter alia, that the plaintiffs' loan was obtained on 28 January 1997; that it was payable over a 60-month period and was evidenced by a chattel mortgage. The defendant admits that the plaintiffs conducted a review of their loan account in 2008 but avers that the plaintiff obtained a series of loan extensions over the course of the loan, resulting in the original loan period being extended beyond the original date of maturity; that the period of gaps as alleged by the plaintiffs were due to the period of loan extensions as requested by the plaintiffs.

4. The defendant denies that it has breached a fiduciary duty to the plaintiffs resulting in loss and damage to them and asserts, in any event, that the plaintiffs' cause of action did not accrue within six years before the commencement of this action and is, therefore, statute barred. In that regard, the defendant contends that the plaintiffs' aforesaid loan with the defendant matured on 30 January 2003, more than seven years before this action was commenced.

5. Consequently counsel for the defendant submits that the plaintiffs' claim having been brought outside the relevant limitation period should be struck out as being frivolous, vexatious and an abuse of process. In support of that submission, she relies on the provisions of Order 18 rule 19 of the Rules of the Supreme Court as well as the provisions of Section 5 of the Limitation Act, chapter 83, Statute Laws of The Bahamas.

6. Order 18 rule 19 (1), (b), (c) and (d) of the Rules of the Supreme Court provide as follows:

19. (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that:

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court,

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

7. And section 5 of the Limitation Act ("the Act") provides as follows:

5. (1) The following actions shall not be brought after the expiry of six years from the date on which the cause of action accrued, that is to say-

(a) actions founded on simple contract (including quasi contract) or on tort;

(b) actions to enforce the award of an arbitrator where the submission is not by an instrument under seal;

(c) actions to recover any sum recoverable by virtue of any written law;

(d) actions to enforce a recognisance.

8. As I understand the submissions of counsel for the plaintiffs, the provisions of section 5(1) of the Act do not apply because the plaintiffs' claim is framed as a breach of fiduciary duty,

which he says, is "akin to fraud or deceit" and not a "simple suit in tort or contract." Further, that even if those provisions did apply, it is not clear on the face of the pleadings exactly when the cause of action arose.

9. In that regard, counsel for the plaintiffs points out that the plaintiffs aver at paragraph 2 of the statement of claim that it was in or about 2008 when they conducted a review of their account and discovered that the defendant continued to deduct payments therefrom after the 70 payments under the loan had been completed.

10. Consequently, he submits, as I understand him, in order to go behind that "clear date", 2008, it would be necessary "to submit extraneous material to show when the plaintiffs could have discovered that moneys were diverted from their account even after a loan, funded by salary deductions from the first plaintiff had been paid off". Further, in his words: "even without equity or fraud (principles based on the doctrine of "unjust enrichment" and in which limitation will not even arise) these litigants' knowledge arose in 2008."

11. Counsel for the defendant submits that regardless of how the plaintiffs have framed their claim, it is still a claim based on a simple contract. She argues, however, that even if the plaintiffs' claim is based on a breach of fiduciary duty, it is nevertheless a tort and section 5(1) of the Act still applies.

12. In that regard, counsel for the defendant points out that the plaintiffs do not claim that they are entitled to rely on any of the exceptions under the Limitation Act, such as would extend the date of accrual of the cause of action, nor, she points out, do they plead when they became aware of the breach, whereas, the statement of claim clearly pleads that the loan would have matured in 30 January 2003, which she submits is the date when the cause of action of arose and therefore the date on which time begun to run for the purpose of section 5(1) of the Act.

13. I note here that no where in the statement of claim is it pleaded that the loan matured in January 2003, although the defendant, at paragraph 8 of its defence, makes that allegation.

14. In *Girten v Andreu* [1998] BHS J No. 164, Sawyer C.J., as she then was, in relation to applications to strike out based on a limitation defence, said:

"...I think it is now trite law that where it is clear from the statement of claim that the cause of action arose outside the current period of limitation and it is clear that the defendant intends to rely on the limitation defence and there is nothing before the court to suggest that the plaintiff could escape from that defence the claim will be struck out as being frivolous, vexatious and an abuse of the process of the court - see e.g., *Riches v Director of Public Prosecutions* [1973] 1 WLR 1019; [1973] 2 All E.R. 935 as explained in *Ronex Properties Ltd. v John Laing Construction Ltd.* [1983] Q.B. 398; [1982] 3 All E.R. 961."

15. In the case of *Riches v Director of Public Prosecutions*, relied on by the defendant, Davies LJ, at page 939, opined:

"If there is any room for an escape from the statute, well and good; it can be shown. But in the absence of that, it is difficult to see why a defendant should be called on to pay large sums of money and a plaintiff be permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which has already been barred by the statute of limitations and must fail."

16. And in *Ronex Properties Limited v John Laing Construction Limited*, also relied on by the defendant, Stephenson L.J. 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 acknowledgement 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 - D.P.P. [1973] 2 All E.R. 935..., strike out the claim and dismiss the action." (emphasis added).

17. Similarly, Donaldson L.J. had in his judgment stated:

"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 circumstance can he seek to strike out on the ground that no cause of action is disclosed."

18. Counsel for the defendant made it clear that the defendant's application was not on the ground of "no reasonable cause of action." However, no affidavit evidence was filed in support of the plaintiffs' application or in opposition thereto and it is clear from the authorities, as I understand them, that in order for the defendant's application to succeed, the Court must be satisfied that there is a very clear case on the pleadings that the defendant would succeed in its plea that the plaintiffs' claim is statute barred.

19. There is a dispute as to the nature of the plaintiffs' claim - whether it is a claim for breach of contract as contended by counsel for the defendant or a claim in tort for breach of fiduciary duty, which is what the plaintiffs have pleaded. I am not required at this point to resolve that dispute. All that is necessary is to determine whether it has been clearly established that the plaintiffs' claim was statute barred before the action was commenced.

20. However, I agree with counsel for the defendant that whether the plaintiffs' claim is framed in contract or tort, the provisions of section 5(1) of the Act apply. I note here that notwithstanding counsel for the plaintiffs' claim that breach of fiduciary duty is "akin to fraud", the plaintiffs do not in their statement of claim, allege fraud, which must be specifically pleaded and, of course, proven.

21. Counsel for the plaintiffs says further that the provisions of section 5(2) of the Act: "might become important in examining the facts of the case". Section 5(2) provides that an instrument under seal shall not be brought after the expiry of twelve years from the date on which the cause of action accrued. I note here, however, that the plaintiffs do not, in their statement of claim, plead that their arrangement with the defendant was evidenced by an instrument under seal nor did they do so in a reply once they were alerted to the defendant's intention to plead the limitation defence and counsel's suspicion that "this loan was not a "simple contract" is not a pleading or evidence.

22. So, having determined, on the face of the pleadings, that whether the plaintiffs' claim is framed in contract or tort, the provisions of section 5(1) of the Act apply, the next issue then is the date when the cause of action accrued.

23. In the case of a breach of contract, Geoghegan J, delivering the judgment in *Irish Equine Foundation v Patrick J. Robinson, et al* [1999] 2 IR 442, relied on by the defendant, opined: "It is trite law that the limitation period commences on the date of the breach of contract and not on the date when the damage is caused. In other words, a breach of contract per se gives rise to a cause of action." So, if the plaintiffs' claim were based on breach of contract, I accept counsel for the defendant's submission that the cause of action would, on the pleadings have arisen on maturity of the loan. It is, however, unclear from the statement of claim when that was, although the defendant says it was in or about January 2003.

24. On the other hand, in cases of tort the cause of action arises, not when the culpable conduct occurs, but when the plaintiff first sustains damage. See *Nykredit Mortgage Bank Plc. v. Edward Erdman Group Ltd.* [1998] 1 All ER 305, [1997] 1 WLR 1627 H.L. in which Lord Nicholls of Birkenhead, after referring to the House of Lords' decision in *Forster v Outred & Co (a firm)* [1982] 2 All ER 753, [1982] 1 WLR 86 said that the question was when 'actual damage' occurred, which meant "any detriment, liability or loss capable of assessment in money terms and included liabilities which arise on a contingency." He gave, as a simple example, a 'no transaction' case in which a purchaser buys a house subject to a land charge of which his solicitor negligently fails to advise him, being a purchase he would not have made had his solicitor advised him correctly. In such a case, said Lord Nicholls, the purchaser suffered actual damage when he completed the purchase, by parting with his money and receiving in exchange a property worth less than he paid for it.

25. In this case, the plaintiffs allege that after the review of their account in 2008, they discovered that "at least 78 payments were accounted for" whereas their loan agreement called for 70 payments. I understand that to mean that at least eight payments over the number of payments that should have been deducted from their account were deducted by the defendant.

26. Using Lord Nicholls' example, it would seem that the plaintiffs would have suffered actual damage as soon as the defendant deducted the first "overpayment" from their account, whether they were aware of it or not. However, it is, in my view, unclear from the pleadings just when that first "overpayment", if any, would have occurred or the period over which the eight "overpayments", if any, would have occurred, although it is clear from the statement of claim that the payments were discovered after a review conducted by the plaintiffs in 2008.

27. As indicated, no affidavits were filed by either party and I remind myself that comments and submissions by counsel from the bar are not evidence. Perhaps when all of the evidence is in the Court may be satisfied that the plaintiff's claim is indeed statute barred, but until then, I cannot say that it is very clear from the pleadings that the cause of action arose outside the current period of limitation although clearly, the defendant intends to rely on the limitation defence.

28. In the circumstances, I dismiss the defendant's application.

29. Costs will be in the cause.

Delivered the 1st day of April 2011

Estelle G. Gray Evans
Justice