**COMMONWEALTH OF THE BAHAMAS**
**IN THE SUPREME COURT**
**Common Law and Equity Side**
**2017/CLE/gen/FP/00123**

**IN THE MATTER of The Industrial Relations Act, Chapter 321**

**AND**

**IN THE MATTER of The Employment Act, 2001**

**AND**

**IN THE MATTER of the Award of an Industrial Relations dated 31st January, A.D., 2007**

**BETWEEN**

**DANIEL MITCHELL**
**1st Plaintiff**

**AND**

**WAYNE FORBES**
**2nd Plaintiff**

**AND**

**BURSIL COOPER**
**3rd Plaintiff**

**AND**

**MAURICE SAUNDERS**
**4th Plaintiff**

**AND**

**NATHANIEL HIELD**
**5th Plaintiff**

**AND**

**WASHINGTON CAREY**
**6th Plaintiff**

**AND**

**FREEPORT CONCRETE COMPANY LIMITED/THE HOME CENTRE**
**1st Defendant**

**AND**

**HANNES BABAK**
**2nd Defendant**

BEFORE: The Honourable Justice Petra M. Hanna-Adderley

APPEARANCES: Mr. James Thompson for the Plaintiffs

Ms. Glenda Maria Roker for the 2nd Defendant

HEARING DATE: November 20, 2020

**RULING**

**Hanna-Adderley, J**

**Introduction**

1. By an Originating Summons filed the June 9, 2017 and Affidavit of Daniel Mitchell in support, the Plaintiffs, Daniel Mitchell, Wayne Forbes, Bursil Cooper, Maurice Saunders, Nathaniel Hield and Washington Carey, seek to enforce an Order by the Industrial Tribunal made on the January 31, 2017 for redundancy payments owed by the 1st Defendant following their termination. A Notice of Appointment was filed on the September 26, 2018 and on February 7, 2019 the Plaintiffs sought leave from the Court to amend their Originating Summons and Statement of Claim and to add Hannes Babak as the 2nd Defendant which was granted on February 7, 2019. The said amendments included:-

> **"(3) The Plaintiffs DANIEL MITCHELL AND NATHANIEL HIELD AND WASHINGTON CAREY also claim against the 2nd Defendant HANNES BABAK by reason of the following:**
>
> **STATEMENT OF CLAIMS**
>
> **1. That the said three defendants, being employees of the 1st Defendant and having been terminated by the 1st Defendant on dates in this Action being about the 21st of June 2010 and**
>
> **2.The Second Defendant, Hannes Babak, being the owner and chief executive of the 1st Defendant, having informed the said Plaintiffs of their said termination also informing the said Plaintiffs that they would not be immediately paid their severance pay from the 1st Defendant and**

**3. He, the 2nd Defendant personally informed each of the said Plaintiffs (at least three Plaintiffs) that upon completion of the sale of the assets of the 1st Defendant, Hannes Babak personally told each of the said three Plaintiffs that he (Hannes Babak, the 2nd Defendant herein) will see to it that they would be paid their severance pay.**

**4.That the assets of the 1st Defendant were sold and the funds for the same were paid to debtors also for the 2nd Defendant Hannes Babak.**

**5.That the assets of the 1st Defendant were being sold up to 2018.**

**6.That the said three Plaintiff demanded of the 2nd Defendant Hannes Babak payment of their severance pay but the 2nd Defendant refused in breach of the undertaking and/or guarantee given by him to the Plaintiffs.**

**PARTICULARS OF SEVERANCE**

**DANIEL MITCHELL - $55,100.00**
**NATHANIEL HIELD - $15,100.00**
**WASHINGTON CAREY - $12,100.00**

**On the 7th of February 2019 the Plaintiff were granted leave of the Honourable Supreme Court to amend the proceedings by adding this Cause of Action and adding the Defendant Hannes Babak as a Defendant.**

**By reason of the matters aforesaid the Plaintiff has suffered loss and damage.**

**The Three Plaintiff claims:**
**Damages**
**Severance payout**
**Costs"**

2. The 2nd Defendant subsequently filed a Summons and Affidavit of E. Andrew Edwards in support of the application on August 12, 2019 for an Order pursuant to Order 15, Rule 6 of the Rules of the Supreme Court ("RSC") and the Court's inherent jurisdiction to strike Hannes Babak as the 2nd Defendant as he has been improperly and unnecessarily made a party to the action and should cease to be a party to the proceedings on the grounds that the claim is statute barred and the 2nd Defendant has no nexus to the Plaintiffs. The 2nd Defendant relies on its undated Written Submissions.
3. The Plaintiffs rely on the Affidavit of Daniel Mitchell filed July 26, 2019.

**Statement of Facts**

4. The evidence of Daniel Mitchell in part is that the Plaintiffs were employees of the 1st Defendant and terminated by the 1st Defendant on June 21, 2010, that the 2nd Defendant, Hannes Babak being the owner and chief executive of the 1st Defendant informed the

Plaintiffs, himself included of their termination and that they would not be immediately paid their severance pay from the 1st Defendant. He also states that the 2nd Defendant personally informed each of the Plaintiffs (at least three of the Plaintiffs) that upon completion of the sale of the assets of the 1st Defendant that he will see to it that they would get their severance pay. He further states that the assets of the 1st Defendant were sold and the funds for the same were paid to the debtors of the 1st Defendant and that the said assets were sold up to 2018. That he and two other Plaintiffs demanded from the 2nd Defendant payment of their severance pay but the 2nd Defendant refused in breach of the undertaking and/or guarantee given by him to the Plaintiffs.

5. The evidence of Mr. Edwards in part is that the 2nd Defendant is a resident of the Commonwealth and the president and shareholder of Freeport Concrete Company Limited and that company operated a business known as The Home Centre and Freeport Concrete Company in Freeport, Grand Bahama. He states that at all material times, the Plaintiffs were employed by the 1st Defendant. That the Plaintiffs were compensated by the 1st Defendant and the 1st Defendant was at all material times listed as the Employer with respect to National Insurance Benefits. That the 2nd Defendant was not a party to the employment contract between the Plaintiffs and the 1st Defendant and as such the 2nd Defendant is not a proper party to these proceedings. That the said 1st Defendant is in involuntary liquidation and there are several creditors and liabilities that remain outstanding.

6. Mr. Edwards also states that there has been no allegation or finding of fact or in law that the 1st Defendant was used as a vehicle of fraud or for any wrong doing by the 2nd Defendant to pierce the cooperate veil and allow the 2nd Defendant to be a party to these proceedings. Further, that the instant action was commenced by way of Originating Summons filed on June 9, 2017, nearly one (1) calendar year after the claim against the 1st Defendant and would have been statute barred in accordance with Section 5 of the Limitation Act. Accordingly, it is the position of the 2nd Defendant that any claim against him in his personal capacity pursuant to the Order of 7th February, 2019 is also statute barred as more than six years has elapsed from the cause of action claimed. That he has been advised that no undertaking was given by the 2nd Defendant in his personal capacity to ensure that the Plaintiffs or any other employees of the 1st Defendant were to be compensated. That he has also been advised that the Originating Summons and the

Amendment thereof does not disclose specific particulars that support the Plaintiffs claim for relief for breach of contract against the 2nd Defendant.

**Issue**

7. The issue to be considered by the Court is whether the 2nd Defendant's addition as a party is necessary in order to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in the cause or matter.

**The Law**

8. The 2nd Defendant's application before the Court is pursuant to Order 15, Rule 6 (2) (a) of the RSC which states:-

" **6.** (1) No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party; and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.

***(2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application —***

***(a) order any person who has been improperly or unnecessarily made a party of who has for any reason ceased to be a proper or necessary party, to cease to be a party***

*.....*"

9. As the 2nd Defendant's application arises out of the issue of misjoinder the Court must first consider if the 2nd Defendant is indeed a "proper" party to these proceedings.
10. In considering who a proper party is and more specifically to the instant case regarding the 2nd Defendant, it must first be determined who qualifies as the proper Defendant.
11. Atkins Court Forms, Volume 29(2), Parties to Claims, A. Introduction to Parties to Claims, 1. Scope of Title: Parties to Claims at paragraph 10 states that a person deemed as a "proper" defendant to the proceedings is the person against whom the relief in those proceedings is sought, the person brought to enforce an equitable right. Additionally, in such proceedings the "proper" defendant(s) is the person(s) whose presence before the Court is desirable in order to resolve all the matters in dispute.

12. In ***Montgomery v Foy, Morgan & Co. [1895] 2 Q.B. 321*** an application was made by the Plaintiff pursuant to Order XVI., r 11 which gave the Court the power to order that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, be added.

13. ***Lord Esher*** at page 324 in the above case lamented that this rule provided that the Court or a judge may make an order to add the names of any party, whether the plaintiffs or defendants who ought to have been joined or whose presence before the Court may be ***necessary in order to enable the Court to effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter (emphasis mine).***

14. Moreover he stated:-

> **"Here the matter before the Court is the contract of affreightment, and there are disputes arising out of that matter as between the plaintiff and the defendants and the company whom it is sought to add as defendants, and who were the defendants' principals in the matter. I can find no case which decides that we cannot construe the rule as enabling the Court under such circumstances to effectuate what was one of the great objects of the Judicature Acts, namely, that, where there is one subject-matter out of which several disputes arise, all parties may be brought before the Court, and all those disputes may be determined at the same time without the delay and expense of several actions and trials."**

15. Although the Court may recognise that parties needed for the determination of disputes and issues arising before it are critical for adjudication, the Court's power to order a party being added to an action or ceasing to be a party is discretionary. **See Halsbury's Laws of England, Volume 11 (2015), Civil Procedure, Parties (i) Proper Parties to a Claim, paragraph 469. Parties generally.**

**Oral Guarantee**

16. The 2nd Defendant's assertion is borne out of the Plaintiffs' allegation that the 2nd Defendant provided them an oral guarantee to pay them their severance pay once the 1st Defendant's assets were sold.

17. Counsel for the 2nd Defendant, Ms. Glenda Maria Roker relies on Section 2 of the Statute of Frauds (Bahamas) Act Chapter 155 ("Statute of Frauds") which states:-

**"In actions of debt, or on 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 The Bahamas, of a new or continuing contract, whereby to take any case out of the operation of the Limitation Act, 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; and that 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 any respect, or by reason only of any written acknowledgement or promise, made and signed by any other or others of them:**

Provided that nothing herein contained shall alter, or take away, or lessen, the effect of any payment of principal or interest, made by any person whatsoever:

Provided also that in actions to be commenced against two or more such joint contractors, or executors, or administrators, if it shall appear at the trial, or otherwise, that the plaintiff, though barred by the said enactment, as to one or more of such joint contractors, or executors, or administrators, shall, nevertheless, be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgement or promise, or otherwise, judgment may be given and costs allowed for the plaintiff, as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff. **(emphasis mine).** "

18. She also relies on the case of **Actionstrength Ltd (trading as Vital Resources) v International Glass Engineering IN.GL.EN SpA and another [2003] 2 All ER 615** in support of her position that an oral guarantee in the instant case is unenforceable.

19. Ms. Roker submits that based on the Plaintiffs' own evidence there has not been any part-performance by the 2nd Defendant in support of their allegation of the guarantee nor has there been any acknowledgement as it relates to the guarantee.
20. It is also her submission that the facts in dispute relate to the oral guarantee and as such the action should not have been commenced by way of Originating Summons and instead should be properly before the Court as an action commenced by Writ of Summons. Therefore, she submits that the mode in which these proceedings have been brought before the Court are an abuse of the process and as such no application to convert the action to a Writ of Summons has been made.
21. Mr. James Thompson, Counsel for the Plaintiffs submits that Section 4 of the Statute of Fraud Act provides that no action shall be brought whereby to charge the Defendant for any special promise to answer for the debt. He continues that the law says this provision applies where the liability is guaranteed but it does not apply in cases where a third-person promise is made to the debtor but it does apply where the third person promise is made to the creditor to pay the debt. Therefore he submits that the debtor in this case is the Plaintiffs and the third party is the 2nd Defendant as he made the promise to the debtor. It is his submission that because of this the Statute of Fraud Act does not apply and the said Act does not apply in the case of an indemnity and further submits that the instant case is in the nature of an indemnity. Additionally, Mr. Thompson asserts that the difference between a guarantee and an indemnity is that a guarantee is a promise to pay another's debt if he fails to pay however, an indemnity is a promise to indemnify the creditor against loss arising out of the principal contract. Therefore, he submits that the 2nd Defendant promised to pay if the 1st Defendant was unable to pay and as such created the promise to indemnify consequently the Statute of Frauds Act would not apply.
22. Mr. Thompson also submits that the instant case is not a case just between the Company and the debtors but instead a part of a larger transaction as the 2nd Defendant is an agent of the Company and persons knew of him as being the agent for the company. Therefore, he submits that this is another exception to the application of the Statute of Frauds Act in the instant case.
23. It is also Mr. Thompson's submission in response to the 2nd Defendant's submission as to the mode of the action by way of Originating Summons that this can be cured by the

Court ordering that the parties proceed by converting the action to Writ of Summons. He submits that it is not a ground by which the matter should be thrown out.

24. Ms. Roker in response to Mr. Thompson's submissions, states that the action on the face of its originating documents speaks to the "Award of the Industrial Relations dated the 31st January A.D., 2007" and paragraph 1 of the relief sought by the Plaintiffs was for leave to enforce the award made by the Industrial Tribunal on January 31, 2017.
25. She also submits that the evidence of the Plaintiffs in the Affidavit of 1st Plaintiff shows that there is an admission from the Plaintiffs that there has been no part consideration or partial consideration.

**Analysis/ Discussion/Conclusions**

26. As found in Halsbury's Laws of England a guarantee is an accessory contract by which the promisor undertakes to be answerable to the promise for the debt, default or miscarriage of another person, whose primary liability to the promise must exist or be contemplated. **Halsbury's Laws of England, Volume 49(2015), Financial Transactions, 4. Guarantee and Indemnity, (1) The Contract of Guarantee, (i) The Nature of a Guarantee, a. Definitions, 638. Guarantee**
27. It is noted that Section 2 of the Statute of Frauds Act does not negate the fact a verbal promise was made but rather places the burden on the person asserting the verbal promise to provide sufficient evidence alongside the verbal promise. The short title of the Section 2 of the Statute of Frauds Act states "**verbal promise not sufficient evidence of the continuance of the contract**".
28. Although Ms. Roker has provided **Actionstrength Ltd (trading as Vital Resources) v International Glass Engineering IN.GL.EN SpA and another (supra)** as an authority in support of her claim that Section 2 of the Statute of Frauds Act applies, it is noted that in that case both parties presented evidence before the Court as the matter had already been heard as a trial therefore a ruling regarding the same was made.
29. Moreover, as affirmed in **Actionstrength Ltd (trading as Vital Resources) v International Glass Engineering IN.GL.EN SpA and another (supra)** the party relying on the oral guarantee must show there was something more than the oral promise/guarantee such as additional encouragement, inducement or assurance which would lead the parties to assume that the promise would be honoured (**per Lord Clyde at paragraph 35, page 625, Actionstrength**).

30. Therefore, I am of the opinion that as this matter has yet to be heard before the Court by way of a trial it would be difficult at this juncture to make a determination as to the sufficiency of the alleged oral guarantee between the parties.

**2nd Defendant Has No Nexus to the Plaintiffs**

31. Ms. Roker submits that it is trite law that a company, i.e. the 1st Defendant has a separate legal personality and the company's assets and liabilities are separate from that of its members.

32. Moreover she submits that the Plaintiffs did not include the 2nd Defendant as a party before the Tribunal and the Tribunal in its ruling determined that the 1st Defendant was the "fit and proper employer and was liable to the Plaintiffs, solely."

33. Counsel for the Plaintiffs, Mr. James Thompson asserts that the 2nd Defendant acted as an agent of the 1st Defendant when the guarantee was made.

34. Mr. Thompson also submits that the 2nd Defendant has failed to produce any evidence by way of Affidavit for the Court to consider the facts from his point of view and as such there is no case for the 2nd Defendant. He further submits that the 2nd Defendant does not have any ground upon which he should not be joined as a Defendant in the action.

35. Ms. Roker in response submits that the evidence in the Affidavit of Daniel Mitchell is insufficient in that it simply states that the 2nd Defendant is CEO and shareholder of the 1st Defendant but does not substantiate the claim as particularized in the Amended Originating Summons.

36. Considering the application to be determined before the Court, I am of the opinion that this is an issue to be determined at the trial of this matter as the burden would be on the Plaintiffs to establish that the 2nd Defendant had the lawful authority of the 1st Defendant to enter into **ANY** agreement whether it be oral or written or to have acted in a particular way that would be construed that he entered into an agreement with the Plaintiffs (**emphasis mine**).

**Statute Barred**

37. Ms. Roker submits that the instant action as against the 2nd Defendant is statute barred in accordance with Section 5 of the Limitation Act as more than 6 years has elapsed from the cause of action claimed.

38. She asserts, if she accepts that an oral guarantee was made, then the cause of action relating to that guarantee arose at the point the guarantee was made which would have been when the Plaintiffs were terminated in 2010.

39. Section 5 of the Limitation Act states:-

> **"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."**

40. Mr. Thompson however rejects the 2nd Defendant's argument and asserts that the cause of action, i.e. the oral guarantee becoming "enforceable" only arose after the 1st Defendant sold its assets and failed to pay the Plaintiffs what was owed. He submits that the time for limitation must be calculated from the time when the 1st Defendant disposed of its assets and the Plaintiffs were not paid and not from the time when the contract was made.

41. Ms. Roker, in response submits that if the Court finds that there was a cause of action against the 2nd Defendant, it would have arisen in 2010 as it relates to any indemnity or guarantee that should have been paid. She also submits that the Plaintiffs should have joined the 2nd Defendant or raised the issue before the Industrial Tribunal so that all of these issues could have been considered at that point in order to protect any cause of action or right that the Plaintiffs may have had. However, she submits that at this point based on what is before the Court, the 2nd Defendant was improperly and unnecessarily made a party.

42. In **Elizabeth Maddison v John Alderson** (1883) 8 App Cas: 467 the Appellant worked as a housekeeper in service of Thomas Alderson up until his death on the 16th December, 1877. She worked for him from 1854 and became his housekeeper before 1860 until his

death. Sometime in or around 1860 Thomas Alderson had not paid the Appellant her wages for at least 10 years prior and owed her a considerable amount of wages. During that time she had contemplated leaving his employ to start a family but Thomas Alderson wished her to stay with him as long as he lived and wanted to make it right by leaving her a life estate in Moulton Manor Farm (the property they had occupied during her service). She remained with him until his death and sought to enforce the guarantee. Although a Will had been prepared it was unattested and failed to show Thomas Alderson's intent to provide her with the life estate in the property.

43. It is noted in the above case that the Appellant by virtue of her conduct showed part performance of the oral guarantee. However, she was unsuccessful in her claim as the Respondent relied on Section 4 of the Statute of Frauds which was a bar to enforcement of the oral guarantee outside of a written agreement to effectively pass title.
44. Although unsuccessful on her claim, the cause of action only arose for the Appellant until after the death of Thomas Alderson and not at the time when the guarantee was made some 17 years prior.
45. Based on the arguments above, I am of the opinion that the claim against the 2nd Defendant is not statute barred. Although the oral guarantee was made some seven years ago, upon the 2nd Defendant's failure to pay the owed debt following the sale of the assets of the 1st Defendant it then became enforceable.

**Disposition**

46. In considering the submissions of Counsel above, I do not believe that it is possible to say at this interlocutory stage that the 2nd Defendant was not a necessary party or that he ceased to be a proper or necessary party to this action.
47. As it stands, there is an allegation of an oral guarantee/indemnity made between the Plaintiffs and the 2nd Defendant. I find that these are factual issues that have yet to be determined and the only way in which the validity of the same can be determined by a trial.
48. In the circumstances I find that it would be practical to order that this action be continued as if commenced by way of Writ of Summons and the usual course of litigation shall follow.
49. Therefore, having read the pleadings, read the Written Submissions and having heard Counsel, considered the evidence of the parties and the relevant authorities I find that it is necessary for the 2nd Defendant to remain a party to this action in order to enable the

Court to effectually and completely adjudicate upon and settle all the questions involved in this matter.

50. While the 2nd Defendant has not been successful on its application and the usual costs order being that the 2nd Defendant should pay the Plaintiffs costs, as this action must now be converted to a Writ action as a result of the Plaintiffs allegations as found in the Amended Originating Summons, I will depart from the usual costs order and order that the costs of the application be costs in the cause.

51. On one final matter, that of the delay in delivering this Ruling, the Court reserved the delivery of its Judgment to a date to be fixed regrettably, the disruption caused by the Covid 19 pandemic and the resulting lockdowns greatly interfered with the Court's writing schedule. I apologize profusely for the delay in this matter.

Dated the 13th day of May, 2022

**Petra M. Hanna-Adderley**
**Justice**