BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL JURISDICTION

No. 1619 of 1998

BETWEEN

JANE POWELL

(Plaintiff)

AND

BARBADOS DAIRY INDUSTRIES LIMITED

(Defendant)

Before: HisLordship the Honourable Mr. Justice Theodore A. Walcott, Judge of the HighCourt (acting)

2001: October 10th , 16th and November 15th

Mr. C.E Lashley for the Plaintiff

Mr. P.K. H. Cheltenham Q.C for the Defendant

DECISION

By an agreement in writing dated the 15th May, 1989 andentered into between the plaintiff and the defendant, the plaintiff as the soleowner/developer of the recipe for a product called "Lady Jane Ambrozia" (the product)granted to the defendant a licence to use the plaintiff's recipe for theproduction of the product under certain terms and conditions. One such term was the exclusive right for thedefendant to market the product anywhere within the Caribbean region(clause 4). The agreement was for aperiod of ten years with an option to renew it for a further ten years. The defendant agreed to pay the plaintiff aninitial sum of $50,000.00 on the date of execution of the agreement which sumwas to be held in escrow by the attorney-at-law for the plaintiff until theplaintiff disclosed the recipe to the defendant and taught personnel of thedefendant how to blend the product (clause 2). Thereafter the plaintiff was entitled to a Royalty fee of 5% calculatedon the sales of the product (clauses 7 and 8).

Clauses 9 and 14 of the agreementprovides as follows:

> "9. The Dairyhereby undertakes that it will take all necessary steps to ensure that thelicensed product is placed on the market in Barbados for salefor general distribution within 6 months of the date of this agreement.
>
> 10. …..
>
> 11. …..
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> 12. …..
>
> 13. …..
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> 14. The Dairyshall use all reasonable endeavours to promote and sell the licensed product inBarbados and uponintroduction of the product to other Caribbean islands inthe licensed Territory."

Thelicensed Territory includes: Jamaica, Antigua, St. Lucia, St. Vincent, Dominica, Trinidad and Tobago, Grenada, St. KittsNevis, Guyana and the Bahamas.

The plaintiff commenced proceedingsagainst the defendant in this court by the filing of a writ of summons on the 2nd October, 1998 claimingspecific performance of the written agreement, damages and other relief . A defencewas filed on the 7th December, 1998. Paragraph 6of the defence pleads that the defendant has been unable and continues to beunable to implement the terms of the agreement and contends that the agreementwas breached immediately after it was signed on the 15th day of May,1989. The pleadings further aver thatany right of action which had accrued to the plaintiff became extinguished afterthe lapse of six years by virtue of the provisions of the Limitation Act 1623of the United Kingdom. (The provisions of this Act applied toBarbados prior to the implementation of the Limitation Act 1997 of Barbados).

On the 2nd February, 1999 by aruling of this court, it was ordered by consent that the defendant file a summonsand affidavit to determine the interlocutory issue as to the limitation period. This summons was filed on the 9th March, 2001 and supported by an affidavit filed on the same day.

The summons seeks the determinationof the following issue, namely, whether the period of six years prescribed bythe 1623 Limitation Act to bring an action for breach of contract in thecircumstances of this case, has expired.

Procedural Issue

Order18 rule 11 of the Rules of the Supreme Court enables any party by hispleadings to raise any point of law. This rule is identical to the provisions of the English rules and I havefound very useful the commentary to this rule set out at paragraph 18/11/5 of the 1988 edition of the SupremeCourt Practice of England relatingto the order of speeches, and I quote:

> "The proceedings being inthe nature of a demurrer, the party who raises the objection has the right tobegin (see RICHARDS v BUTCHER (1890) 62 L.T p 757; STEPHENS v CHOWN (1901) 1CH. 894)."

Order 35 rule 4 (1) of the Rules of the Supreme Court of

Barbados provides that:

> " The Judge before whom an actionis tried …… may give directions as to the party to begin and the order ofspeeches….. and, subject to any such directions the party to begin and the order ofspeeches shall be that provided by this rule."

For the purpose of this interlocutoryapplication I gave directions for the defendant to address this court first.

Mr.Cheltenham for the defendant submits that the plaintiff's action is statutebarred as the case was bought more than six years after the cause of actionaccrued. He argues that paragraph 20 tothe plaintiff's statement of claim alleges that the defendant has breached theagreement. This he admits is not indispute but he submits that such breach occurred more than six years prior tothe filing of the plaintiff's writ and that the writ was therefore filed out oftime. In response to the claim of theplaintiff that the contract wassubsequently varied, and such variation was acknowledged by the defendant, Mr. Cheltenham submits that in order for anysuch acknowledgment to be valid it must be in writing and in any event thisprinciple of law applies only to a claim for a debt or liquidated damages.

On the other hand Mr. Lashley forthe plaintiff argues that by oral agreement sometime between 1993 and 1995 thedefendant acknowledged its obligations to the plaintiff, thus varying the termsof the agreement or, alternatively, there came into existence a collateralagreement and in consequence the limitation period was not breached. He further submits that clause 9 of theagreement is not mandatory because of the use of the word "undertakes" which isexcluded in other clauses. He submitsthat identical principles in interpreting statute law must be applied ininterpreting deeds. A further submissionof Mr. Lashley is that when the defendant through its

managing director made a subsequent promise to the plaintiff,a new contract came into being upon which the plaintiff could rely.

It is trite law that a contract maybe made by word of mouth, wholly in writing, or partly by word of mouth andpartly in writing. In the present casethe Statement of Claim alleges that the contract is wholly in writing. The plaintiff alleges breach of thiscontract. The defendant pleads that theplaintiff's action is statute barred as the contract was breached immediatelyafter it was signed on the 15th day of May, 1989 and any right ofaction by the plaintiff was extinguished six years after that date by virtue ofthe Limitation Act 1623. The plaintiffnow claims in affidavit evidence that after the written contract came intobeing it was varied by an oral agreement made between the parties.

When does the cause of action accrue?

In BATTLEY v FAULKNER 3 B ALD668 at page 671 Bailey J in answer to this question and explaining therationale of a limitation period in actions before the court stated as follows:

> "The statute says that youshall bring your action within six years next after the cause of action and notafter. This is an action for a breach ofcontract, and the cause of action arises at the time when the contract isbroken. Since that time, certaindamages have resulted from that breach of contract. The breach of the contract, however, is the gist of the action and thespecial damage is stated merely as a measure of the damages …. One of theobjects of the Statute of Limitations was, thatactions should be bought to trial at a period of time when the defendant couldbe prepared with his witnesses to meet the charge, which would not be the caseif the action might be postponed to an indefinite period."

In the samecase Bert J expressed the view that the cause of action accrued the moment thedefendant failed to perform that which he agreed to do. In a similar vein McCardie J in LYNN v BAMBER1930 2 KB at page 74 stated:

> "The breach of contract hereoccurred on December 3, 1921 …. The cause of actiontherefore arose on December 3, 1921. This is clear from BATTLEY v FAULKNER … andthe many decisions cited in Darby and Bosanquet on the Statutes of Limitation 2nd Ed; p., 37. Prima facie, therefore, the cause of action was barred at theexpiration of six years from December 3, 1921."

See alsoGIBBS v GUILD 1881 VOL VIII Queen's Bench Division 296; Halsbury Laws ofEngland Vol XX paragraph 758 at page 604 and Limitation Periods, Second Editionby Andew McGee, Chapter 10 pages 165-167.

Effectof subsequent acknowledgment of liability

Halsbury'sLaws of England Volume XX Part II paragraph 790 states as follows:

" A debt may be taken out of the operation of theLimitation Act 1623, by an express unconditional promise to pay, or by anunconditional acknowledgment of the debtfrom which a promise to pay is implied, or by a promise to pay on the fulfilling of a condition, or on the expiration ofa specified time, or the happening of a certain event, if the condition isfulfilled, or the specified time has elapsed or the specified event hashappened. Time begins to run afresh fromthe making of such an unconditional promise or acknowledgement, or, in the caseof a conditional or contingent promise, from the fulfillment of the creditor orthe lapse of the specified time, or the happening of the specified event…….

An acknowledgment has the same effect whether made before or after theexpiration of six years from the accrual of the original cause of action , provided it is made withinsix years before action brought."

And atparagraphs 791 and 794 it is stated as follows:

> "791 The promise must be in writing signed by the party
>
> chargeable…..
>
> 794It is only in the case of a debt that a promise to pay or an acknowledgementtakes a liability out of the statute; an acknowledgment of a liability inrespect of a breach of contract other than a debt….. willnot in general have any such effect. Ifupon a breach of contract there is no need for the assessment of damages, but adefinite sum can be recovered as liquidated damages ….. amere acknowledgment of the breach has, it seems , no effect, but an

acknowledgement of the stipulated sum being due takes thecase out of the statute."

CheshireFifoot & Furmiston's in Eleventh edition of the Law of Contract at page 622 puts it in this way:

"In the particular case of a claim to a debt or other liquidated sum,it has long been recognised that time which has started to run against thecreditor may be stopped and made to start afresh by an acknowledgment of liability, or by a part payment made bythe debtor. This is so even though thisacknowledgment or payment is not given until after the expiration of the fullstatutory period."

Where itcan be shown that there has been fraud on the part of the creditor which wasconcealed until after the limitation period, time does not begin to run untilthe fraud is discovered: GIBBS v GUILD 1882 VOL IX QBD 59.

Mr. Lashleysubmits that there were ongoing discussions between the parties and it istherefore important to determine what was said between them. The relevant parts of the plaintiff'saffidavit in reply are paragraphs 9 to 11 which I now set out in full:

> "9. Further, inabout the month of August 1995, it was again mutually agreed between the saidManaging Director and me in the presence of a witness that the product would beplaced on the market with a name or form different from "Lady Jane Ambrozia"having obtained the approval of the appropriate Body for such a product to beplaced on the market. I again accepted this promise.
>
> 10. I neverexercised my option in bringing the agreement to an end since I took intoconsideration that the discussions and negotiations continued and that it wasmutually accepted that the obligations could be performed notwithstanding thelapse of time. It was after the breachin 1995 that I sought legal advice.
>
> 11. Accordingly, I am legally advised that in the circumstances of this case, there was an agreement entered into between the

Defendantand me in about the years 1993 to 1994 and in the alternative in August 1995 varying the contractdated the 15th of March, 1989 or collateral to the said contract andconsequently the Limitation Act 1623 (U.K) cannot be invoked."

In essencewhat is submitted is that after the written contract was entered into on the 15th May, 1989 it wasvaried by an oral agreement between the parties between 1993 and 1995 oralternatively there was a collateral agreement resulting in thenon-applicability of the Limitation Act 1623. A number of authorities were cited by counsel for the plaintiff insupport of this submission. I do notthink that any of these authorities can assist the plaintiff in the presentcase. It is accepted by Mr. Lashley thatthe claim is not for a debt or for liquidated damages but for the performanceof obligations set out in the written contract between the parties. The relevant terms of the contract arepleaded. A collateral contract is notpleaded and cannot therefore be relied upon.

I find thatthe plaintiff's writ has been filed out of time and must be struck out. The defendant will have its costs to beagreed or taxed certified fit for two counsel.

Judgeof the High Court (ag)