BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 32 of 2001

BETWEEN:

JANE POWELL

Appellant/Plaintiff

AND

BARBADOS DAIRY INDUSTRIES LIMITED

Respondent/Defendant

Before: The Hon. Colin Williams and the Hon. Frederick Waterman, Justices of Appeal, and the Hon. Peter Williams, Justice of Appeal (Acting).

2002: July 11, 12 and October 16.

Mr. C.E. Lashley, Q.C. and Miss Kaywanah Springer for the Appellant/Plaintiff.

Mr. P.K.H. Cheltenham, Q.C. and Mr. Alrick Scott for the Respondent/Defendant.

JUDGMENT

Introduction

[1] This is the judgment of the court to which all members of the court have contributed. The appeal concerns the application of the limitation period to an agreement between the above parties, and it raises the related issues of the appropriate procedure for disposing of a plea of limitation and the defences thereto.

The Facts

[2] On May 15, 1989, the plaintiff, Jane Powell ("Mrs. Powell") entered into an agreement ("the agreement") with the defendant, Barbados Dairy Industries Limited ("The Dairy") for the sale of an exclusive recipe called "Lady Jane Ambrosia". In the agreement, Mrs. Powell is described as the sole [1] owner/developer of the recipe, which is referred to as "the product", but no details of the same have otherwise been disclosed. The Dairy agreed to acquire the right to use information as to the ingredients and recipe of the product and the licence and rights as set out in the agreement.

[3] The material terms of the agreement were that Mrs. Powell would be paid BDS $50,000.00 by The Dairy in exchange for full and complete details of the recipe. Thereafter, The Dairy would obtain all the necessary ingredients and machinery and Mrs. Powell would instruct its personnel on mixing and fabricating the product. The agreement contained the usual provisions with regard to confidentiality and the exclusive rights of the parties. It was to continue in force for an initial period of ten years unless determined according to its terms. Mrs. Powell would be paid a royalty fee of 5% calculated on the total turnover of The Dairy in respect of sales of the licensed product. The Dairy undertook to take all necessary steps to ensure that the product would be placed on the market for sale within six months of the date of the agreement. Royalty fees were to be paid to Mrs. Powell starting six months after signing the agreement. Finally, Mrs. Powell had the right under clause 15 to terminate the agreement by giving one month's notice thereof in the event that The Dairy failed to pay the royalty fees within fourteen days after they became due.

[4] The payment of the said BDS $50,000.00 was made and the information on the recipe given. The agreement was not otherwise carried out and the product was not fabricated. The affidavit evidence of the parties does not clearly explain why the agreement was not implemented and the product not put on the market.[2]

The Pleadings

[5] On October 2, 1998 Mrs. Powell filed a writ and statement of claim against The Dairy; nine years and four months after signing the agreement. Although the statement of claim pleaded a breach of the agreement, there was no date indicating when the alleged breach occurred. The prayer for relief was in the following terms:

"(a) Specific performance of the said agreement.

(b) All necessary and consequential accounts, directions and enquiries.

(c) Damages for breach of contract with interest thereon at the rate of 8% in lieu of or in addition to specific performance".

[6] The defence was filed on December 7, 1998. The Dairy admitted that there had been a breach of the contract and in its defence sought to rely on the statutory period of limitation. The relevant parts of the defence were pleaded as follows:

"5. The Defendant will contend that the Plaintiff's recipe required the use and purchase of additional machinery. The ingredients as presented would have required heating in order to give a viable shelf life. Moreover, the Plaintiff omitted or neglected to give the Defendant any mixing instructions on the preparation of the recipe.

6. Consequently, the Defendant has been unable from inception to implement the terms of the contract and continues to be so unable. The Defendant will accordingly contend that the contract was breached immediately after it was signed on the 15th of May, 1989 and that any right of action which had accrued to the Plaintiff became extinguished after the lapse of six years by virtue of the provisions of the Limitation Act 1623 (UK)".

[7] The reply was in the following terms:

"(4) The Plaintiff makes no admission of paragraph 5 of the Defendant's Defence and puts the Defendant to proof of the said allegations.[3]

(5) As to paragraph 6 of the Defendant's Defence, the Plaintiff will contend that the Limitation Act 1623 (U.K.) is inapplicable having regard to the circumstances of this case and that in any event on the 26th of August 1995 the Defendant acknowledged its obligation and agreed to carry out its terms of the contract".

As stated in "Pleadings: Principles and Practice" by Jacob and Goldrein at page 161, "the reply is the proper place for meeting the defence… thus…in order to defeat the defence of the Limitation Act the plaintiff must specifically plead in his reply any fact upon which he relies to take the case out of the statute". In this case, the reply pleaded no matters which constituted an effective legal answer to the defence.

[8] To plead that the defendant acknowledged its obligation would be relevant only where the acknowledgment was in writing and the obligation was a debt or liquidated demand; and to plead that the defendant agreed to carry out the terms of the contract merely stated that the defendant agreed to do what it was bound to do anyway. The fundamental error in pleading was sufficient to justify summary dismissal of the action. Granted that a party can be given leave to amend at almost any stage of the proceedings, subject always to ensuring fairness to the other parties, the fact is that in the present case, although the plaintiff's Attorney-at-law had ample warning that the answer to the limitation point was being challenged, yet he did not seek to amend the reply, but rather relied upon the plaintiff's affidavit to show that she could adduce evidence at the trial to answer the limitation defence – an exercise that failed, as will be seen later. It should be noted, also, that at the time when the preliminary point was set down for hearing, the plaintiff had already set down the action for trial, thereby suggesting that her Attorney-at-law was happy with the pleadings as they stood. [4]

Consent Order

[9] On December 7, 1998, the day that the defence was filed, the plaintiff filed a summons for judgment in default of defence. On February 2, 1999 the court "ordered by consent that the Defendant do file a Summons and supporting Affidavit to deal with the issue raised at paragraph 6 of the Defence viz limitation of the Plaintiff's action". Both parties, therefore, consented to the limitation point being dealt with by summons and affidavit.

Summons for Directions

[10] Over two years elapsed and the plaintiff on March 8, 2001 filed a summons for directions requesting that the action be set down for trial. The defendant was unrepresented at the hearing of the summons for directions and an order was made on September 18, 2000 setting the matter down for trial for three days. The order under the summons for directions effectively ignored the previous consent order.

Summons on Preliminary Point

[11] On March 9, 2001 the defendant filed its summons pursuant to the consent order. All parties were summoned to attend the judge in chambers on June 28, 2001, "for the hearing of an application by the Defendant concerning the following preliminary question or issue in this action, namely the question or issue raised by paragraph 6 of the defence as to whether the period prescribed by the Limitation Act 1623 (UK) for the Plaintiff to bring an action for breach of the contract made between the Plaintiff and the Defendant and dated the 15th May 1989 or to enforce that contact has expired".

[12] From a perusal of the High Court file, it is not clear what happened on June 28, 2001, the date set for hearing of the summons. However, a Notice dated July 30, 2001 setting down the action as a whole for trial on October 10 and 11, 2001 was served on the parties.[5]

Hearing of the Summons

[13] On October 10, 2001, Walcott J (Acting) granted the plaintiff leave to file an affidavit by October 12, 2001 in response to Mr. Cheltenham's affidavit, which had been filed in support of the summons on March 9, 2001. He adjourned the matter for hearing until October 16, 2001. On that date, he proceeded to hear and determine the summons on the limitation point. On November 15, 2001 he resolved the matter in favour of the defendant. He held that the plaintiff's writ had been filed out of time. He therefore ordered that the writ be struck out and that the plaintiff pay the defendant's costs. It is against this order that the plaintiff has appealed.

[14] It has already been stated at paragraph [8] that the plaintiff's failure to plead in the reply anything that could effectively answer the limitation defence was adequate by itself to justify an order for final judgment in favour of the defendant. Nevertheless, the judge proceeded to consider the summons and the affidavits in support and in opposition before determining that there were no facts to take the claim out of the statute. For the sake of fullness, we gave the parties similar leeway and heard counsel's submissions on the said summons and affidavits.

The Appeal

[15] The plaintiff applied to this court for leave to appeal, although the order granted by the judge was a final order and no leave was necessary: see White v Bunton [1984] 2 All ER 606 CA. However that may be, the Plaintiff was granted leave to appeal on April 30, 2002 and the appeal was heard on July 11 and 12, 2002. The grounds of appeal were encapsulated for the determination of this court as follows:

(1) The procedural point: whether the judge was correct to determine the limitation defence as a preliminary point of law.

(2) The limitation point: whether the plaintiff's claim was statute barred by virtue of the provisions of the Limitation Act 1623.[6]

(3) Defences to limitation plea: whether there were any effective answers to the limitation defence.

The Procedural Point

[16] Mr. Lashley, Q.C. placed much emphasis on the procedural point, which he formulated in the first ground of appeal as follows:

"(1) The Learned Trial Judge was wrong in law to proceed to hear the preliminary point of law thus reaching his conclusion on hypothetical facts or assumed facts when there were facts which were clearly in issue such facts could properly be ventilated at the trial which had been fixed for hearing on Motions Day."

[17] He submitted that as the case was already before the court for trial, it would have been convenient for the judge to have taken evidence to determine the factual position prior to deciding the limitation point and that he should not have resolved the same as a preliminary point of law. In effect, Mr. Lashley's contention was that the plaintiff's opportunity for successfully challenging the limitation point depended on her being able to give evidence on the matter. Accordingly, it was alleged that the matter was determined on "hypothetical facts or assumed facts" to the prejudice of the plaintiff.

[18] Mr. Lashley in his skeleton argument submitted that the affidavit of the plaintiff, filed on October 15, 2001, "highlighted facts which were material in determining whether there was indeed a variation of the terms of the contract dated May 1989 or whether there was a new contract collateral to the contract of May 1989 which nullified the effect of the Limitation Act relied upon by the Defendant/Respondent".

[19] Mr. Cheltenham, Q.C., answered the appellant's submissions on the procedural point carefully and fully in his skeleton argument and in his oral submissions. Firstly, as pointed out by the judge, the parties consented by [7] the order dated February 2, 1999 to the limitation issue being dealt with by summons and affidavit. If the plaintiff wished after two years and eight months to resile from the consent order, it would have been necessary for her to file an application seeking to revoke it. We were referred to Purcell v Trigell (F.C.) (Trading as Southern Window and General Cleaning Co.) [1970] 3 All ER 671 CA, which stated the contractual effect of a consent order and the grounds for setting aside the same. The plaintiff sought no relief from the consent order nor made any objection in her affidavit to the hearing of the summons.

[20] Mr. Lashley relied on the case of Tilling v Whiteman [1980] A.C. 1 HL and the observation of Lord Scarman that, "preliminary points of law are often treacherous short cuts. Their price can be as here, delay, anxiety and expense". However, it was not the judge's function to determine the mode of trial of the limitation issue; the parties themselves by the consent order had already agreed to this. We were also referred to Royal Caribbean Hotels Limited v Barbados Fire and General Insurance Company and The Bank of Nova Scotia, BDS H.C. No. 1057 of 1985, decided on February 1, 1988 (unreported). In that case, the court ordered that where the plaintiff raised points of law, those should be heard and disposed of before the trial of the issues of fact and other issues in the action. When the matter came on for hearing on the points of law, the second defendant objected to the course being pursued relying on Tilling's case (supra). However, Sir Denys Williams C.J. held that he was not minded to depart from the procedure ordered by another judge as he took the view that he could not sit on appeal from the order of the other judge and therefore proceeded to hear submissions on the points of law.

[21] Secondly, the procedure for and desirability of determining a limitation issue as a preliminary point of law is well established. Order 33 Rule 3 of the Rules of the Supreme Court, 1982 provides that:[8]

"The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated".

As will become apparent, the issues raised under the Limitation Act 1623 were particularly appropriate for determination as a preliminary point under Order 33 Rule 3.

[22] Thirdly, in the circumstances outlined above, this court would have no basis for holding that the judge was wrong in proceeding on the consent order in the absence of an application having been made to set it aside. We were referred to Ashmore v Corporation of Lloyd's [1992] 2 All ER 486 HL. In that case the judge ordered to be tried as a preliminary issue, whether in law the defendant owed the plaintiffs any duty of care. The plaintiffs contended that this issue could properly be decided only after oral evidence had been given concerning certain admissions alleged to have been made by the defendant. Although the Court of Appeal reversed the decision of the High Court, the House of Lords agreed with the trial judge that the point of law was properly dealt with as a preliminary issue. Lord Templeman said at page 491:

"In my opinion, when a judge alive to the possible consequences decides that a particular course should be followed in the conduct of the trial in the interests of justice, his decision should be respected by the parties and upheld by an appellate court unless there are very good grounds for thinking that the judge was plainly wrong".

Further, much emphasis has been placed on the fact that it is the duty of the modern judge to carry out his functions in an economical manner. As Lord Roskill said at page 488:

"In the Commercial Court and indeed in any trial court it is the trial judge who has control of the proceedings. It is part of his duty to identify the crucial issues and to see they are tried as expeditiously [9] and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judge's time as is necessary for the proper determination of the relevant issues".

[23] It follows that there is no merit in the first ground of appeal. We would be concerned if the procedure adopted had produced an unjust result to the plaintiff, but a consideration of the limitation point makes it clear that the plaintiff suffered no prejudice to her legal rights by the consent order.

[24] Before we proceed to consider the limitation point, a word of caution is appropriate. Our decision on the procedural point is limited to the facts of this case as they arose for determination under the Limitation Act 1623 (21 Jac. 1, c. 16). Different considerations may well arise under the Limitation of Actions Act, 1997 - 11 and as pointed out in the Supreme Court Practice 1999 at 33/4/11:

"… special circumstances may arise when the Court cannot, on the hearing of an interlocutory application, properly have regard to all the circumstances of the case, and would require the matter to be further or more closely investigated, such as by hearing oral evidence of the parties or other witnesses, their cross-examination, the service of documents and so forth".

However, no special circumstances arose in this case.

The Limitation Point

[25] The Limitation of Actions Act, 1997 – 11 came into force on October 1, 1997 when the Limitation Act, 1623 ceased to have effect in Barbados. The cause of action in this case accrued prior to the coming into force of the 1997 Act. [10] The applicable provisions were therefore those contained in the 1623 Act and the case proceeded on that basis.

[26] The relevant learning on the 1623 Act in relation to actions in contract is to be found in 20 Halsbury's Laws, Second Edition, paras. 744, 758 and 759 as follows:

"744. The period of limitation for most actions of tort and for actions arising out of simple contract is six years from the accrual of the cause of action.

…

758. In an action for a breach of contract the cause of action is the breach. Accordingly such an action must be brought within six years of the breach; after the expiration of that period the action will be barred, although damage may have accrued to the plaintiff within six years of action brought. In such an action it is not necessary to prove actual damage, and special damage is merely alleged as a measure of the damages to be recovered. The time is not extended by the fact that the breach has not been discovered or that damage has not resulted until after the expiration of six years.

759. If the contract is to do something at a particular time or upon the happening of a contingency, and the thing contracted for is not done, the cause of action arises at the time specified or upon the contingency happening".

It follows that, to succeed on its application, the defendant had to show that a breach of the agreement occurred sometime prior to October 2, 1992; six years before the commencement of the proceedings. The plaintiff could successfully overcome the limitation point only if the breach occurred within the six year period prior to her filing her claim; between October 2, 1992 and October 2, 1998. This position was not disputed between the parties.

[27] The dispute arose as to when the breach of the agreement occurred. Both [11] parties acknowledged that the agreement was breached, (paragraphs 20 and 21 of the statement of claim) and (paragraph 8 of the defence). The statement of claim gave no date for the breach, the defence stated that the agreement was breached "immediately after it was signed" (paragraph 6). This date was later revised to November 15, 1989 in the affidavit of Mr. Cheltenham sworn and filed on March 9, 2002, the material paragraphs of which were as follows:

"11. Subsequent to the execution of the agreement and the payment of the initial sum, the contract was not performed as contemplated by the agreement.

12. The Defendant was required to place the product on the market within six months of the signing of the agreement (clause 9). The latest date for doing so would have been the 15th November 1989. The Defendant did not comply with that date. Indeed, the product was never placed on the market.

13. The Defendant's contention is that its failure to place the product on the market within the time specified by clause 9 of agreement constituted a breach of the contract. From the day following the deadline date, the Plaintiff could have sued the Defendant for breach of contract. It is from that date that the cause of action for breach of contract accrued and time under the Limitation Act began to run.

14. Subsequent to the accrual of the cause of action, more than six years had elapsed before the Plaintiff's Writ of Summons was filed on 2nd October, 1998".

[28] It is important to add at this point that it is clear that the plaintiff's case was initially based on the fact that because the contract was for ten years, the cause of action accrued after the expiry of the ten years. Clause 5 of the agreement reads:

"5. This agreement shall continue in force for an initial period of 10 years unless determined under the provisions of Clause 15 hereto. The [12] Dairy shall have the first option to renew this agreement for a further period of 10 years on the terms to be agreed".

The plaintiff's position was revealed in the pre-trial brief, the notes of submissions of the judge and in the grounds of appeal. In the pre-trial brief the first paragraph stated, "(1) The fundamental term of the agreement is contained in Clause 5 of the agreement. The agreement shall continue in force for an initial period of 10 years unless determined under the provisions of Clause 15 hereto…(2) The fact that the Plaintiff did not exercise her right under Clause 15 only means that the contract continued to run". In the notes of submissions, the judge recorded Mr. Lashley's submissions on this point as follows:

"Life of contract is for 10 years. Limitations Act would not apply to this contract. In all of the cases cited by Defendant none of them cited specific time set for that contract…Anytime throughout that 10-year period could have put the product out….Extent of my submission is that contract was to last for 10 years. Defendant was entitled to put product in any one of the licensed territories within 10 years. Writ could be filed within that 10 years". (Emphasis added).

Ground 4 of the grounds of appeal stated:

"The Learned Trial Judge by holding that the Limitation Act 1623 (U.K.) applied as mentioned above failed to interpret properly the contract entered into between the parties when the clear interpretation of the agreement showed that the contract ran for a period of 10 years in the first instance".

The notion that the plaintiff had ten years from the date of the agreement within which to commence proceedings was an error of law.

[29] We were cited a number of cases which clearly illustrate that the cause of action accrued from the date of the breach of the agreement. In Battley v Faulkner (1820) 3 B & Ald 288, [1914-23] All ER Rep 408, Bailey J. stated, [13] "The statute says that you shall bring your action within six years next after the cause of action and not after. This is an action for a breach of contract, and the cause of action arises at the time when the contract is broken. Since that time, certain damages have resulted from that breach of contract. The breach of contract, however, is the gist of the action, and the special damage is stated merely as a measure of the damages resulting from that cause of action…It was, therefore, from the period when the contract was broken, that the cause of action accrued; and as that happened more than six years before the commencement of the present action, I think the non-suit was right". It was held In Boydele v Drummond (1808) 2 Camp. 157, that, "If a cause of action arising from the breach of a contract to do an act at a specific time, is once barred by the Statute of Limitations, a subsequent acknowledgment by the party, that he broke the contract, will not take the case out of this statute".

[30] The judge did not make any finding of the date on which the breach of contract occurred. He should have: however, it did not matter in the circumstances of this case as the breach obviously occurred outside the six year period within which the plaintiff was required to commence proceedings. We agree with Mr. Cheltenham that the breach can be dated from November 15, 1989. Nearly nine years elapsed before the plaintiff filed her writ on October 2, 1998.

Defences to Limitation Plea

[31] The plaintiff's response to Mr. Cheltenham's affidavit was contained in her affidavit, the material paragraphs of which were as follows:

"(7) About two years after the signing of the agreement, I contacted Mr. Sylvester from the United States and he informed me that a certain important person of the Dairy was out of the Island whose input was vital to the supervision of the product. He requested my indulgence and I agreed.[14]

(8) In or about the year 1993 to 1994, in a conversation with Mr. Sylvester, it was mutually agreed between Mr. Sylvester and me that the Defendant through its servant or agent would perform certain other matters to ensure performance of the agreement. It was as a result of this promise and the good relationship between Mr. Sylvester and me that I waived my rights.

(9) Further, in about the month of August 1995, it was again mutually agreed between the said Managing Director and me in the presence of a witness that the product would be placed on the market with a name or form different from 'Lady Jane Ambrosia' having obtained the approval of the appropriate Body for such a product to be placed on the market. I again accepted this promise.

(10) I never exercised my option in bringing the agreement to an end since I took into consideration that the discussions and negotiations continued and that it was mutually accepted that the obligations could be performed notwithstanding the lapse of time. It was after the breach in 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 Defendant and me in about the year 1993 to 1994 and in the alternative in August 1995 varying the contract dated the 15th of March, 1989 or collateral to the said contract and consequently the Limitation Act 1623 (U.K) cannot be invoked".

The plaintiff never specifically answered paragraphs 12 and 13 of Mr. Cheltenham's affidavit or stated any date on which she alleged that the agreement was breached. It should be noted that the plaintiff's affidavit was the sole factual basis relied on for the defences to the limitation point. Further, the plaintiff's list of documents disclosed only the agreement and the defendant filed no list of documents.

[32] The facts alleged in the affidavit by the plaintiff were not challenged by the [15] defendant; no doubt because it was considered that the affidavit did not provide any legal defence to the limitation point. The evidence amounted to no more than a promise made on behalf of the defendant to perform the agreement. However, a promise to carry out the terms of the agreement would not have prevented the defendant from relying on the limitation defence. The plaintiff stated that as a result of the promise from Mr. Sylvester she waived her rights: it would have been for the defendant and not the plaintiff, to waive its rights in relation to the limitation period. The only relevant promise that could have defeated the limitation defence would have been a promise by the defendant between October 2, 1992 and October 2, 1998 to waive its rights to plead the Statute of Limitations in any action brought by the plaintiff for breach of contract. No such promise was alleged by the plaintiff to have been made by the defendant's representative.

[33] It follows that the plaintiff produced no evidence on which the limitation point could be defeated. In Parey v Colonial Fire and General Insurance Co., Ltd. (1972) 22 W.I.R. 481, Malone J. in the High Court of Trinidad and Tobago, held that the evidence in that case amounted to a promissory estoppel precluding the defendant from relying on a condition in its policy which required the commencement of proceedings within twelve months of the loss. There is no evidence in the present case of any waiver or promissory estoppel relevant to the limitation point.

[34] We were referred by Mr. Lashley to J. Evans & Son (Portsmouth) Ltd. v Andrea Merzario Ltd. [1976] 1 WLR 1078 CA, which held that the oral promise was contractual and enforceable to override printed exemptions from liability. Two decisions of the High Court of Australia which considered the law of estoppel, were also cited: Waltons Stores (Interstate) Ltd. v Maher (1987-1988) 164 C.L.R. 387 and The Commonwealth of Australia v Verwayen (1990) 170 C.L.R. 394. However, in these cases, unlike the[16] instant case, there was evidence from which the applicable principle of law could be invoked.

[35] The plaintiff maintained both in the High Court and in this court that the 1623 Act had no application to her case. She filed her action almost three years after the expiration of the limitation period. However, a plaintiff does not have an unlimited time within which to commence proceedings after the cause of action accrues. As Abbott C.J. said in Battley's case (supra) at paragraph [291], "The Statute of Limitations was intended for the relief and quiet of defendants, and to prevent persons from being harassed at a distant period of time after the committing of the injury complained of". In this case, the defendant, after such a long period, was entitled to relief and quiet.

Conclusion

[36] We can best conclude this judgment by quoting the words of Lord Templeman in Ashmore's case (supra) at page 493:

"The parties and particularly their legal advisers in any litigation are under a duty to co-operate with the court by chronological, brief and consistent pleadings which define the issues and leave the judge to draw his own conclusions about the merits when he hears the case. It is the duty of counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of ten bad points the judge will be capable of fashioning a winner".

The appeal is therefore dismissed with costs certified fit for two Attorneys-at-Law.[17]

Justice of Appeal

Justice of Appeal Justice of Appeal (Acting)