[2014] JMCA Civ 42

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 130/2010

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA

BETWEEN INTERNATIONAL ASSET SERVICES LIMITED APPELLANT

AND EDGAR WATSON RESPONDENT

Christopher Dunkley and Michael Deans instructed by Phillipson Partners for the appellant

Jeffrey Daley for the respondent

10 October 2012 and 7 November 2014

PANTON P

[1] I agree with my brother Dukharan JA's reasoning and conclusion that the appeal ought to be dismissed and have nothing further to add.

DUKHARAN JA

[2] This appeal challenges the judgment of Brooks J, (as he then was) when, on 25 October 2011, he struck out the appellant's statement of case, as it disclosed no reasonable grounds for bringing the claim and is an abuse of the process of the court. Judgment was given in favour of the respondent with costs to be taxed, if not agreed.

Background

[3] On 10 March 2003, the appellant became the successor-in-title to three debts relative to the respondent which are as follows:

(a) A credit card facility by National Commercial Bank Jamaica Limited on or about 17 April 1993.

(b) A credit card facility by Mutual Security Bank Limited on or about 13 June 1993.

(c) A further credit card facility by Workers Savings and Loan Bank on or about 8 April 1993.

The appellant's records reflect that the respondent was indebted to its predecessor in title as at the date of acquisition. A first demand was sent to the respondent on 22 January 2004. There was no response from the respondent. A final demand was sent on 15 February 2008. Having got no response, the appellant instituted proceedings against the respondent by way of claim form on 18 June 2009.

[4] The appellant sought to recover the sum of $1,710,321.27, being the amount due and payable as at 30 December 2008, by virtue of the credit card facility received from the National Commercial Bank Jamaica Limited (NCB) by the respondent, on which the said respondent failed to effect payment on or before the due dates.

[5] The respondent has denied that he was indebted to the banks but has pleaded in his defence that the claim is barred by the operation of the Limitation of Actions Act (the Act), and sought to have the claims struck out on that basis.

[6] The main issue Brooks J had to determine was whether the claim fell within the purview of section 52 of the Act. That section stipulates a 20 year limitation period rather than the usual six years allowed for simple debts and contracts. Brooks J, after hearing arguments, concluded that a simple contract governed the relationship between the respondent and the appellant's predecessors in title and that the loan agreements in question were therefore not subject to section 52, but to section 46 of the Act. He dismissed the claim as being statute barred. This is what the learned judge said in his 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."

[7] It is on the basis of those findings that the following grounds of appeal were filed by the appellant.

> "1. The Learned Judge in Chambers erred in finding as a matter of law that limitation on a contractual debt runs from the last payment to the creditor.
>
> 2. The Learned Judge in Chambers erred in holding that a known debt against which payments are being made is required to be acknowledged, notwithstanding any prior admissions.
>
> 3. The Learned Judge in Chambers erred in holding that failure to acknowledge the debt after his last payment

constituted a denial of a debt from which limitation may be construed to have begun to run.

4. The Learned Judge in Chambers found "*There is no evidence of Mr. Watson having acknowledged the debt after that date*" which was clearly arrived at on the basis that it was the Respondent's case, on Affidavit, that his indebtedness was settled which ought to have been a matter to be resolved by evidence, or at trial.

5. The Learned Judge in Chambers erred in adopting the Respondent's contention that a claim must be brought within six years from the date the cause of action arose, in circumstances where the cause of action arises upon non-payment of a debt, but limitation should only begin to run from notice to the creditor that the debtor refuses to pay which are not necessarily one and the same.

6. The Learned Judge in Chambers erred in finding that in all the circumstances the question of the effective limitation period arising between these parties could have been properly and fairly disposed of, summarily.

7. The Learned Judge in Chambers erred in concluding that the contract at issue was not a writing obligatory by relying on his own finding that the contract between the parties being not under seal must be limited to a simple contract or agreement in writing, having limited his consideration to the various definitions of "writings obligatory" without further reasoning, arising from those definitions, of what constituted a bond, and in any event is not so limited, where no payment by a debtor is made."

[8] The orders being sought are:

(a) that the order of the Honourable Mr Justice Brooks made on 25 October 2010 be set aside;

(b) that the claim be restored and remitted to the Supreme Court for trial;

(c) costs of this appeal to the appellant.

Submissions

[9] Mr Dunkley argued the grounds of appeal together for convenience. He submitted that the respondent had said that he cancelled each of the credit cards within months of receiving them. The respondent, he argued, had the burden to show evidence of settlement and cancellation of the credit cards, which he did not exhibit, nor did the court make an enquiry to that effect.

[10] Counsel further submitted that the learned judge erroneously determined that the last recorded transaction of the respondent marked the cause of action from which limitation would run and focused on whether the contracts at issue fell under section 52 of the Act, or simple contracts, governed by section 3 of the 1623 Statute of James. Counsel further submitted that the learned judge gave no consideration to the relevant clauses in the contract and confined his deliberations to the form and not the content of the contracts at issue.

[11] Counsel submitted that the learned judge adopted a narrow approach in his construction and interpretation of section 52 of the Act by concluding that any contract, not under seal, would fail to qualify as a writing obligatory. Counsel further submitted that a writing obligatory has also been taken to mean an agreement reduced to writing, by which the party becomes bound to perform something or to suffer it to be done. This definition, he argued, bears considerable similarity to the contract in question. This contract between the bank and the respondent was a 20 year contract. In support

of these admissions, counsel cited **Lloyds Bank Limited v Margolis and Others** [1954] 1 WLR 644 and **International Asset Services Limited v Arnold Foote** Claim No 2008 HCV 01326 - delivered 28 January 2009.

[12] Mr Daley, for the respondent, submitted that the respondent made the last payments in 1993 and closed all three accounts. He argued that the breach of contract would have occurred (in the appellant's case) from the expiration of the date for the next payment, following the last payment made by the respondent. He further submitted that no evidence was proffered by the appellant to demonstrate that the said accounts were being serviced, or that the respondent had acknowledged the debt. Section 46 of the Act, he argued, stipulates that an acknowledgement of the debt in writing would cause time to run afresh from the date of such acknowledgement. In supporting his argument, he cited Bullen and Leake Precedent of Pleadings, 11th edition at page 804 which states:

> "The facts as to acknowledgment or part payment should be expressly pleaded in the statement of claim or reply."

Counsel submitted that the appellant's failure to raise the issue of any acknowledgment of the debt by the respondent in its pleading was fatal to its circumventing the "6 year" provision of the Act.

[13] Counsel submitted that "bonds" and "writings obligatory" bear the same meaning as "specialties" and that all agreements under seal are specialties. He further submitted that contracts executed under deed exclude simple contracts. He reinforced his

submission by citing the Privy Council decision of **Matadeen v Caribbean Insurance Co Ltd** (Trinidad and Tobago) [2002] UKPC 69, in which the Privy Council was asked to interpret the Trinidad and Tobago statutory provisions relating to contracts made under deed. He further submitted that this case provides useful guidance in the Privy Council's interpretation of specialty and other agreements under deed which aligns with the ordinary meaning applied by Brooks J, to "writings obligatory" in the instant case. He submitted that credit card agreements, were, in fact simple contracts subject to the six year limitation law and the judgment of Brooks J ought not to be disturbed.

Analysis

[14] It is clear from the judgment of Brooks J, that the main issue he had to determine was whether the limitation period had expired by the time of the institution of the proceedings, and particularly what was the applicable limitation period for the contract in question. It seems also that the appellant argued in defence of its right to bring an action within six years of its demand on the respondent, but in the alternative, the contract ought to have been treated as a "writing obligatory", to which the period being argued by the respondent was not applicable to the contract at issue.

[15] If Brooks J was correct that the six year limitation period was applicable, rule 26.3(b) and/or (c) of the Civil Procedure Rules (CPR) 2002, provides that the court can strike out a claim or statement of case which is an abuse of process or where it discloses no reasonable grounds for bringing, or, defending a claim. Under the Act, a

matter that is statute barred will have no prospect of success at trial and is therefore an abuse of process.

[16] Section 46 of the Act deals with actions of debt, or upon the case grounded upon any simple contract, while section 52 of the Act reads as follows:

> "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]

Were the credit card agreements simple contracts subject to the six year limitation period, or were they "writings obligatory" subject to longer periods of limitation?

[17] The Law of Limitation, 2nd edition by Prime and Scanlan at page 107 states:

> "All agreements under seal are specialties. Further the passing years have produced some relaxation of the strict requirements (**Whittall Builders Co. Ltd v Chester-le-Street District Council** (1986) 11 Con LR 40). In **Stromdale & Ball Ltd. v Burden** [1952] Ch 223, Dankwerts J said:
>
> > 'Meticulous persons executing a deed may still place their finger on the wax seal or wafer on the document, but it appears to be that, at the present day, if a party signs a document bearing a wax or wafer or other indication of a seal, with the intention of executing the document as a deed, that is sufficient adoption or recognition of the seal to amount to due execution as a deed'."

And at page 108:

> "Where a contract is under seal and therefore a specialty, all claims on the promises contained within the deed are claims upon a specialty, and therefore entitled to the longer period of limitation, and not merely claims for specific performance of the debt or other obligations created under it."

[18] In my view, the above supports Brooks J's interpretation of "writings obligatory" to mean "specialty", that is, contracts executed under deed and excluding simple contracts. This view is also supported by the case of **Matadeen v Caribbean Insurance Co Ltd** cited above by counsel for the respondent.

[19] The distinction was also made in **Aiken and others v Stewart Wrightson Members' Agency Ltd and others** [1995] 3 All ER 449. In this case, there was an action against several insurance agencies ("the syndicate") for breach of contract and negligence in their failing to disclose certain material facts when entering into re-insurance contracts with other underwriters. Those re-insurance contracts were avoided on the grounds of non disclosure. It was held that the claims in contract of all those syndicate members whose agreements were not under seal were statute barred as the six year time limit for actions founded on simple contracts had expired. However, the syndicate members whose agreements were under seal were entitled to rely on the 12 year limitation period laid down by section 8 (1) of the Limitation Act (UK) 1980 for actions upon a specialty.

[20] The term "writing obligatory" is defined in the Dictionary of English Law (1959) by Earl Jowett as "bonds". He 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."

[21] I agree with the view of Brooks J, that a "writing obligatory" seems to refer to something more than a simple contract or agreement in writing. A contract, which is not under seal is not a "writing obligatory" for the purposes of section 52 of the Act.

[22] It is clear that the appellant's arguments in the court below on the issue of limitation were in the alternative and that the contracts at issue should be taken as "writing obligatory" for which section 52 of the Act applies.

[23] In looking at the claim of the appellant, the averment is that the respondent failed to pay the sums despite demands by it, of him, in 2004 and 2008. The statements attached to the particulars of claim commenced 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 acknowledgement of the debt by the respondent.

[24] A perusal of the contracts exhibited by the appellant do not, in my view, purport to be a deed or a document under seal. The respondent, in applying for the credit cards, simply signed the application forms. The respondent agreed to the terms and conditions for the use of the credit cards. I agree with Brooks J that there is nothing in the terms and conditions that indicate that the agreement is anything but a simple

contract in writing. The agreement is therefore not governed by section 52 of the Act but by section 3 of the 1623 Act. The limitation period applicable is six years. The appellant's claim was in 2009 and the last transaction on the accounts was in 1997. The claim would therefore have become statute barred in 2003 and so is clearly out of time.

[25] As was stated in paragraph [15], pursuant to rule 26.3 of the CPR, the respondent was entitled to apply to have the matter struck out. This he did, claiming the benefit of the Act. In **Lloyd v The Jamaica Defence Board et al** (1981) 18 JLR 223, Zacca JA at page 226 said:

> "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, **Riches v Director of Public Prosecutions** [1973] 2 AER 935."

[26] Based on the foregoing, I am of the view that Brooks J was correct when he struck out the appellant's case. I would dismiss the appeal with costs to the respondent to be taxed if not agreed.

PHILLIPS JA

[27] I agree with my brother Dukharan JA and have nothing further to add.

PANTON P

ORDER

The appeal is dismissed. Costs to the respondent to be taxed if not agreed.