



[2017] JMSC COMM 2

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2015CD00145

BETWEEN	SURREY HOTEL MANAGEMENT LIMITED	CLAIMANT
AND	NATIONAL COMMERCIAL BANK JAMAICA LIMITED	DEFENDANT

IN CHAMBERS

M Georgia Gibson Henlin QC, Kristen Fletcher and Nickoy Ferguson instructed by Henlin Gibson Henlin for the claimant

Sandra Minott Phillips QC and Rachel McLarty instructed by Myers Fletcher and Gordon for the defendant

December 15, 2016 and January 10 and 25, 2017

**CIVIL PROCEDURE – RULE 20.1 OF THE CIVIL PROCEDURE RULES -
ORIGINATING STATEMENT OF CASE NOT SERVED BEFORE AMENDMENT –
WHETHER AMENDED STATEMENT OF CASE SERVED AFTER CONTRACTUAL
LIMITATION PERIOD – WHETHER CONSUMER PROTECTION ACT, 2005
APPLICABLE**

SYKES J

A PREEMPTIVE STRIKE

- [1] Surrey Hotel Management Limited ('Surrey') and National Commercial Bank Jamaica Limited ('NCB') have a contractual relationship regarding the use of credit cards for payment for goods and services offered by Surrey. There is a dispute between the parties and Surrey has sued NCB seeking damages, damages by reason of restitution and/or unjust enrichment, exemplary damages and interest at a commercial rate. All this is stated in the amended claim form and amended particulars of claim (collectively called 'the amended statement of case'). The amended statement of case are the documents served on NCB.
- [2] Mrs Minott Phillips QC is leading NCB's pre-emptive strike against Surrey. Learned Queen's Counsel submitted that the amended statement of case served on NCB is a nullity on the basis that the amendments made required the court's permissions. According to counsel, the amendments were made outside of the limitation period. Secondly, Mrs Minott Phillips submitted that even if the amendment statement of case were valid, it was served after the relevant limitation period. The relevant limitation period in view here is the contractual one of eighteen months. Thirdly, going in the premise that the amended statement of case is a nullity and that the limitation period applies, the contract limits damages to an amount that is within the Parish Court's jurisdiction and the claim should have been brought there.
- [3] Mrs Gibson Henlin QC submitted that permission is not necessary because there is nothing to prohibit amendments to a statement of case before service. Surrey has challenged whether the contractual limitation period can withstand the Consumer Protection Act which means that the legality of the limitation period is now in issue.
- [4] When this application was heard, Surrey had an application for specific disclosure. The decision was made to await the outcome of this application

before considering the specific disclosure application. NCB's application was dismissed. In light of that the disclosure application was dealt with on the day judgment was delivered. That application was also granted. Leave to appeal was granted in both and a stay granted in respect of the disclosure application. These reasons for judgment concern NCB's application.

[5] NCB's application in this case is for:

- (1) The court to disallow the amendments to the amended statement of case listed below as having been made without permission:
 - (a) amended claim form filed January 4, 2016;
 - (b) amended particulars of claim filed January 4, 2016;
 - (c) further amended claim form filed October 27, 2016;
 - (d) further amended particulars of claim filed October 27, 2016;
 - (e) amended reply to defendant's defence filed October 27, 2016.
- (2) Service of this action on the defendant is not proper service because both amended claim forms served on the defendant are nullities and ineffective for any purpose;
- (3) The action is within the monetary limits of the [Parish Court] in civil matters and, accordingly, is not appropriate for trial in the Supreme Court.
- (4) Costs of this application are awarded to the defendant and are to be taxed if not agreed.

It's complicated

[6] Mrs Gibson Henlin's position is that the Civil Procedure Rules ('CPR') permits amendments before the case management conference and if done before the case management conference then the amended statement of case can be

served and there is no legal necessity to serve the original statement of case and then serve the amended statement of case. On the limitation point, Mrs Gibson Henlin said that the limitation point is complicated and not as clear cut as Mrs Minott Phillips suggests. According to Mrs Gibson Henlin, when the nature of credit card transaction is properly understood it is not just a matter between the merchant and the bank. The submission was that there are other necessary parties to a credit card transaction who have particular roles in the payment system and because of that it is necessary to imply terms into the contract between the bank and the merchant which take account of that fact. This expanded view of the matter may lead to claims in tort as well as contract.

- [7] Mrs Minott Phillips dismisses all this talk about complication. It is a contract between Surrey and NCB, plain and simple. Counsel submitted that where a relationship is governed by contract it not a good idea to find liability in other areas in order to make an end run around the contractual provisions. If this were so, then it would make nonsense of concluding contracts.

Is it really as complicated as Mrs Gibson Henlin suggests?

- [8] This is Surrey's position. Surrey operates the famous Jamaica Pegasus Hotel which stands proudly in New Kingston. The hotel provides services to its guests who may pay by credit card. Surrey says that in this particular case a problem has arisen over the use of credit cards that are part of the Visa network. Surrey claims that NCB 'wrongfully, processed and debited multiple refunds against' Surrey's accounts totalling US\$533,684.73. It claims that in processing the refunds, NCB failed or neglected to observe the terms of the agreement between the parties and/or failed to observe standards and regulations which require that the bank processes transactions in a particular manner. What does this mean? For that we turn to the details of a credit card transaction.
- [9] Let us start with what is a credit card? It is a revolving loan of a fixed amount that is utilised by means of a credit card. The cardholder is required to use the card in compliance with the contract between himself and the credit card issuer.

[10] Surrey states that there are five parties to a credit card transaction and consequently multiple relationships involved. Let us meet the parties. These are

- (i) the credit card network or organisation;
- (ii) the cardholder;
- (iii) the merchant acquirer;
- (iv) the merchant;
- (v) the card issuer.

[11] The court will refer to the definitions in the exhibited Visa document since they are shorter but will also add from the pleaded case where necessary.

[12] The credit card network or organisation (as defined in the pleadings) is an interconnected system made up of individual members who are authorised to use the Visa marks on payment cards, credit or otherwise, offered by the members. The most important benefit of the network, at least from the merchants' standpoint, is that payment is guaranteed. According to the Visa document, Visa Inc is a corporation 'that works with financial institutions that issue Visa card (card issuers) and/or sign merchants to accept Visa cards, for payment of goods and services (acquirers).' Visa also has 'rules and regulations' governing participation in Visa programmes.

[13] From this it appears that the members of the network or organisation are those who agree to offer Visa services in accordance with the network's rules and regulations. Here we see the makings of Mrs Gibson Henlin's submissions. Her point is that NCB is part of this network and even though the contract between itself and Surrey does not expressly contain or incorporate the network's rules and regulations these standards must necessarily be part of NCB's contract with Surrey because, it was said, it is impossible for NCB to offer Visa products or products with the Visa mark unless it agrees to adopt and abide by the network's standards. These standards, the argument does, impose obligations on NCB and

under these obligations, NCB must deal with payments and refunds in a particular manner. This means, the argument goes, that when dealing with Surrey, NCB must comply with the standards and in that necessarily means that the standards must be part of the contract, and if not part of the contract then they certainly outline NCB's duty and such duty may conveniently be called, a duty of care and hence the possibility of tortious liability.

- [14] The cardholder, as is self-evident from the name, is an authorised user of a credit card bearing the Visa mark.
- [15] The merchant acquirer is a financial institution that contracts with merchants to accept Visa cards for payment of goods and services. In the pleadings, it is said that the merchant acquirer, that is the financial institution, has a banking relationship with cardholders. The merchant as part of his agreement with the merchant acquirer agrees to accept cards from cardholders with whom the merchant acquirer has a banking relationship. In other words, according to Surrey, the merchant acquirer has a banking relationship with the cardholder and the merchant. This means, that in this case, the merchant acquirer is also the credit card issuer. NCB is at the apex of a triangle with the merchant and the credit card holder at the other vertices. What this means, from Mrs Gibson Henlin's standpoint, is that even before a credit card is swiped there is a relationship between the merchant acquirer, in this case, NCB, the merchant, in this case Surrey, and the cardholder, in this case, the customer.
- [16] The merchant is any business entity that is authorised to accept Visa cards for the payment of goods and services. Surrey is the merchant.
- [17] The card issuer is a financial institution that maintains Visa cardholder relationship. It issues Visa cards and contracts with its cardholders for billing and payment of transactions.
- [18] Depending on the particular case, NCB may be merchant acquirer and/or card issuer. It is important to grasp that the key role here of the credit card issuer is

that it decides whether credit should be granted since it knows the balance on the credit card.

- [19] How does all this work in a typical credit card transaction? According to the Visa document, there are eight steps. These are:

- (i) the card is swiped or waved in front of Visa payWave reader by the merchant or the cardholder;
- (ii) the merchant enters the transaction amount and where necessary sends an authorisation request to the merchant acquirer;
- (iii) the merchant acquirer electronically sends the authorisation request, if there is one, to Visanet or determines the network to which the transaction should be routed;
- (iv) Visanet or other network passes the request to the card issuer;
- (v) the card issuer provides an online response and that response is either an approval or a decline of the credit card;
- (vi) Visanet forwards the card issuer's authorisation response to the acquirer;
- (vii) the acquirer sends response to the merchant;
- (viii) the merchant receives the authorisation response and if that response is an approval then the sale takes place and the transaction is completed.

- [20] It is crucial to grasp that during this eight-step process using a credit no money is actually paid to anyone. It is series of authorisations done electronically, at high speed. Thus when the credit card is swiped all that is sought by the merchant is whether there is sufficient credit available to the card holder to cover the transaction. Once the answer transmitted is yes, the merchant, if acting in

accordance with the rules, standards and procedures of the merchant acquirer then the merchant can safely provide the good or service, secure in the knowledge that he will get payment. His payment is guaranteed.

- [21] Once the credit card issuer makes the payment then it seeks to recover the loan, and interest, if any, from the credit cardholder.
- [22] On this view of the matter, it is not hard to see why Mrs Gibson Henlin places a great deal of emphasis on the credit card network. The mere swiping of the card without the signal going on to the merchant acquirer, then to the network, then to the issuer and the reverse back to the merchant would not complete the transaction. Thus the swiping activates a process that is only completed when the signal goes the whole distance and back. The reason for sending the signal to the credit card issuer is that none of the other parties set the limit on the loan. That is done by the credit card issuer and so it must get the signal in order to determine whether the transaction can go through. The authorisation of the transaction only means that on the face of it the card is valid and there is sufficient credit to support the transaction. Also by passing the card through the network and to the credit card issuer is part of the anti-fraud mechanism of the payment process.
- [23] Even if the transaction is declined all that means is that the credit card issuer is saying is that the credit cardholder cannot borrow the amount required to pay for the good or service.
- [24] For the actual payment of money (called settlement) to take place the merchant batches all the day's sales and sends them to the merchant acquirer to receive payment. The acquirer sends the information through the credit card network to the credit card issuer. The issuer then sends the payment to the credit card network to the merchant acquirer who then sends the funds to the merchant. On this case NCB happens to be the merchant acquirer and the credit card issuer. This is why Mrs Gibson Henlin says that for there to be a legitimate reversal of a transaction there must necessarily have been a prior legitimate transaction. In

other words, if there was no legitimate prior transaction then there cannot be a legitimate reversal because there would be nothing to reverse. The implication of this is that even if the merchant is defective in his use of the system that does not absolve the credit card issuer and merchant acquirer of their responsibility in ensuring that the transactions are processed properly in accordance with the credit card network procedures.

- [25] As noted earlier, the credit card issuer may also be the merchant acquirer. Even if this is so the hats are not combined or conflated. The roles remain distinct.
- [26] In this case, Surrey is the merchant and NCB is the merchant acquirer/credit card issuer. Surrey alleges that in this case, NCB as merchant acquirer/credit card issuer, contracted with Surrey to accept Visa cards. Surrey pleads that NCB agreed either expressly or impliedly that by virtue of being part of the Visa network relationship between Surrey and NCB is regulated not just by contract between Surrey and NCB but also by the Visa network rules. Surrey says that the terms of the credit card network regarding payment and settlement terms, refunds, clearance, authorisation limits, fraud and prompt payment and the like are implied into the agreement between Surrey and NCB. The rules of the credit card network of which NCB is a part are binding on it.
- [27] The pleadings go further to say that NCB has to abide by the credit card network's standards and regulations on providing technical assistance to the merchant in matters relating to credit card fraud and risks and how to avoid them. To put it shortly, there ought to have been training by NCB of Surrey but this training did not take place. Surrey claims that NCB is under a duty to disclose the risks of operating a credit card payment system and provide technical assistance on how to prevent them. The point of this, as the court understands the claim, is that even if these points about training are not covered by the contract, it is still an obligation owed by NCB to Surrey and on this premise there is a basis for seeking to ground liability in NCB in tort.

- [28] Surrey alleges further that NCB as credit card issuer is financially responsible for transactions that are accepted by the merchant. Surrey states that NCB has a duty to make sure that all transactions including refunds are dealt with in accordance with the credit card network's regulations and these regulations include risk management and due diligence. This duty, it was said, exists even if the Surrey was incompetent or inefficient in its use of the system. The court understands the submission to mean that NCB is like the fielder on the third man boundary. The slips cordon's primary job is catch the balls coming of the bat that come in their direction. The fact that the ball came through the slips cordon does not mean that the third man fielder can simply stand and allow the ball to go into the boundary and content himself by saying, 'The slips men should have caught that.' NCB and Surrey are supposed to be on the same team seeking to prevent fraud. They back up and support each other. The failure of Surrey does not exonerate NCB from its responsibilities under the credit card network's standards. That is the argument.
- [29] Translating all this into an actionable claim, Surrey alleges that NCB failed in these duties between October 2013 and January 20th 2015 when it wrongfully processed and debited multiple refunds totalling US\$533,684.73 from Surrey's accounts. Surrey asserts that NCB debited Surrey's accounts in circumstances where there was (a) no antecedent lawful transaction; (b) failed to follow the credit card network's regulations.
- [30] Implicit in the pleadings and explicit in submissions is the case theory that fraudulent persons, perhaps employees of Surrey, procured refunds of non-existent transactions, that is to say, NCB, responded to a request for a refund and reversed the credit card payments without first checking to see whether there was a lawful antecedent transaction. Surrey is saying that had NCB done the requisite checks it would have found out that there was no antecedent lawful transaction and this would have alerted it to the possibility of fraud and this is their duty even if Surrey was negligent in its own fraud detection effort.

- [31] NCB's defence provides some information not made very clear in Surrey's pleadings and goes somewhat in explaining how Surrey suffered the loss and why it is suing NCB. NCB states that Surrey was required to establish a settlement account into which or out of which the net result of the day's transactions conducted by Surrey. From this it would seem that after the refunds were made by NCB, the fraud was uncovered and NCB took money from Surrey's account on the basis that this problem is of Surrey's own making. Also, in any event, the claim is too late since the 18 month limitation period took effect.
- [32] NCB denies that it is part of the Visa network. Surrey insists that NCB must be part of the Visa credit card network because unless it is the whole credit card payment system would not work for NCB.

The service

- [33] All of what has been stated come from the statements of case of Surrey and NCB. No one, except Surrey and its legal advisers, has actually seen the original claim form and particulars of claim.
- [34] NCB states that it has only been served with Surrey's amended statement of case, further amended statement of case and an amended reply. Mrs Minott Phillips is of the view that Surrey's amended and further amended statement of case is a nullity because 'the amendments require[d] the court's permission as they [were] all made after the end of the relevant limitation period.' For this proposition, counsel relies on rule 20.1 (b) of the CPR which reads:

A party may amend a statement of case at any time before the case management conference without the court's permission unless the amendment is one to which either

- (a) rule 19.4 (special provisions about changing parties after the end of a relevant limitation period);
- (b) rule 20.6 (amendments to statements of case after the end of a relevant limitation period).

- [35] NCB's submission, through learned Queen's Counsel, is that the parties to the agreement are Surrey and NCB and therefore that is the only document that is relevant to this claim. The other point made by counsel is that clauses 8.37 and 10.16 are irrefutable and conclusive against Surrey. Clause 8.37 states among other things that (i) the bank shall not be obliged to keep any record of statements or other records regarding the merchant's account for more than 18 months since the date of creation and (ii) any queries, claims or disputes against the bank regarding any transaction or other elements reflected in the account or the statement regarding such account must be made within 18 months. Thus the crux of the submission was that Surrey's claim was time barred and had it served the original statement of case, NCB would have been able to take the limitation point before being served with the amended statement of case. Since NCB was not served with the original statement of case then NCB was deprived of the opportunity of taking the point.
- [36] Clause 10.16 provides that no claim or proceeding shall be brought by the merchant in respect of any transaction entered into more than 18 months prior to notification, institution or commencement of such claim or proceeding.
- [37] Finally, counsel cited clause 8.53 which states that the agreement forms the whole of the contract between the parties and shall not be removed, varied in any way except as provided for by the agreement. It also says that no other express terms, written or oral, shall be incorporated in the agreement.
- [38] Mrs Minott Phillips cited **Lemon Strachan v The Gleaner and another** SCCA No 54/97 (unreported) (delivered December 18, 1998) and **Evanscourt Estate Company Limited v National Commercial Bank** Civil Appeal No 109/07 (unreported) (delivered September 27, 2008). Both cases say that if permission is needed before some act is done then any act done or action taken before the permission is granted has no legal effect. Those cases decide nothing further. They do not say that the original statement of case must be filed and served before any amendment statement of case can be filed and served.

- [39] The combined effect of the cases, clauses and rules is that Surrey's claim is statute barred and any amendment after the limitation period must be approved by the court and failure to secure that approval is fatal to Surrey's case.
- [40] In addition to noting what Mrs Minott Phillips said, it is important to note what was not said or implied. Learned Queen's Counsel did not advance the proposition that the original statement of case must be served and unless this was done there no amendment is permissible.
- [41] Mrs Minott Phillips also submitted that since this relationship between Surrey and NCB was governed by contract, then any liability should be in contract and not under any other law of obligations. Mrs Minott Phillips relied a passage from Lord Scarman, in a Privy Council Appeal from Hong Kong, in **Tai Hing Cotton Mill Ltd v Liu Chong Bank** [1980] AC 80, 107:

Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship. Though it is possible as a matter of legal semantics to conduct an analysis of the rights and duties inherent in some contractual relationships including that of banker and customer either as a matter of contract law when the question will be what, if any, terms are to be implied or as a matter of tort law when the task will be to identify a duty arising from the proximity and character of the relationship between the parties, their Lordships believe it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis: on principle because it is a relationship in which the parties have, subject to a few exceptions, the right to determine their obligations to each other, and for the avoidance of confusion because different consequences do follow according to whether liability arises from contract or tort, e.g. in the limitation of action.

- [42] Lord Scarman's views have not gone untouched. In 1995 the House of Lords modified that position. In **Henderson v Merrett** [1995] 2 AC 145, the issue of concurrent claims in tort and contract arose. Lord Goff noted that the issue in **Tai Hing** was whether the tortious duty of care could be more extensive than that

under the contract in question. His Lordship observed that 'even before the *Tai Hing* case we can see the beginning of the redirection of the common law away from the contractual solution adopted in *Groom v. Crocker* [1939] 1 K.B. 194, towards the recognition of concurrent remedies in contract and tort' (page 186). Lord Goff referred to Oliver J's judgment in **Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp** [1979] Ch 384. In that case Oliver J decided that a solicitor could be liable either in tort or contract to his client. Lord Goff approved of Oliver J's striking statement at page 420 in **Midland Bank**:

There is not and never has been any rule of law that a person having alternative claims must frame his action in one or the other. If I have a contract with my dentist to extract a tooth, I am not thereby precluded from suing him in tort if he negligently shatters my jaw: Edwards v. Mallan [1908] 1 K.B. 1002; ...

- [43] Lord Goff also cited, approvingly, Le Dain J's statement in the Canadian Supreme Court's **Central Trust Co v Rafuse** (1986) 31 DLR (4th) 481, 522:

A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort. Subject to this qualification, where concurrent liability in tort and contract exists the plaintiff has the right to assert the cause of action that appears to be the most advantageous to him in respect of any particular legal consequence.

- [44] These cases show that in certain circumstances it is permissible for a claimant to pursue both remedies. Having regard to the pleadings it is by no means clear that some of the matters raised by Surrey would necessarily be covered by the contract between itself and the bank. Surrey has raised the issue of tortious liability on the premise that NCB, as part of the Visa network, had to conduct its credit card business in accordance with the Visa rules. That fact, may be a legitimate basis for seeking compensation in tort, specifically, the tort of negligence. If this is correct, then it is entirely possible that the limitation clause in the contract would not apply to these possible breaches. A determination of that

question would depend on a thorough examination of the contract, the limitation clause and now the Consumer Protection Act 2005. This statute came up in Surrey's reply to NCB's defence. Mrs Minott Phillips sought to say that Surrey was raising the statute as new matter in its reply. Context is important. NCB pleaded all sorts of contractual provisions in its defence and Surrey was simply saying that some of those provisions in the contract cannot be relied on because Surrey is entitled to any protection afforded by the statute. Surrey is saying that under that statute it may be the case that the limitation clause does not have any legal effect. If that is so, then the contractual limitation period would fall away and any limitation would now have to be found in the general limitation statute. All these matter would have to be determined in a full trial where an examination of the contract and the relevant statutes can take place.

- [45] This means that the court does not accept, at this point, the submission that the amendment was made outside of the limitation period because the issues raised on the pleadings have placed squarely the legality of the limitation clause as an issue for decision. The court is therefore unable to agree with Mrs Minott Phillips that the amendments have taken place outside the applicable limitation period. The premise of the submission is that the contractual limitation period is the applicable one. In light of Mrs Gibson Henlin's reference to the Consumer Protection Act it is not the case that Mrs Minott Phillips' position is unassailable. Thus the foundation for Mrs Minott Phillips' submission that the amended statement of case is a nullity is not firmly established at this stage.
- [46] To remind ourselves of NCB's position. It is not its case that the failure to serve the original statement of case made the proceedings a nullity but rather the amendment without permission of the court after the contractual limitation period has passed. In other words, NCB is not advancing the argument that service of the original statement of case is a necessary and mandatory step before any amendment could be made.

- [47] It follows that NCB's application is dismissed with costs to the claimant to be agreed or taxed. Leave to appeal granted.
- [48] Surrey had an application for specific disclosure. On the delivery of this judgment, that application was dealt with and the order for specific disclosure made. The costs of that application are to be costs in the claim. Leave to appeal was granted and a stay of the specific disclosure order is granted on the premise that NCB will file an appeal in accordance with the relevant procedural rules. Case management conference adjourned to May 1, 2016 at 10:00am for an hour.