



[2013] JMSC Civ 90

IN THE SUPREME COURT OF JUDICATURE

CLAIM NO. 2012HCV02698

BETWEEN TOUSSANT TUCKER CLAIMANT
AND INEZ BOGUES DEFENDANT

Carlton Williams instructed by Williams, McKoy & Palmer for the Claimant

George Traile instructed by Phillip Traile & Co. for the Defendant

APPLICATION TO STRIKE OUT CLAIM FORM AND AFFIDAVIT IN SUPPORT - LIMITATION PERIOD - WHETHER FILING OF CLAIM OUTSIDE OF LIMITATION PERIOD NEGATES EXISTENCE OF CAUSE OF ACTION – DATE OF TIME BEGINNING TO RUN FOR PURPOSES OF LIMITATION OF ACTIONS ACT - WHETHER REASONABLE CAUSE OF ACTION EXISTS

Heard in Chambers – May 22 and 31, 2013

Anderson K., J.

[1] This ruling is now being delivered after oral arguments were presented to me concerning an application by the defendant for Court Orders, on May 24, 2013. I had then reserved my ruling, but now, having had the opportunity to have given careful consideration to the respective oral and written arguments made to this court hereby deliver this written ruling. On May 31, 2013, I had informed the parties, in Chambers, of my ruling. I had then promised to put my reasons in writing and this ruling constitutes my fulfilment of that promise.

[2] The defendant's application for Court Orders which was filed on July 24, 2012, concerns a claim which was filed against her by the claimant, on May 15, 2012. This court will first outline the nature of the claim, which has by permission of this court and without objection to the application by the claimant, for amendment of his claim, been amended and as of May 24, 2013, filed as an amended claim form and amended particulars of claim respectively.

[3] The claim as amended, seeks various reliefs, the main ones of which are specific performance of a contract for the sale of a premises located at Merrivale in the parish of St. Andrew and registered at Volume 495 Folio 42 of the Register Book of Titles (hereinafter termed as 'the premises'); and/or in the alternative, damages for breach of contract; and/or in the alternative, damages for fraud and/or exemplary damages.

[4] The essence of the claimant's allegations, is that on June 16, 1991, the then proposed vendor – who is the defendant and the then proposed purchaser – who is the claimant, entered into a written agreement for sale of the premises. The purchase price was \$415,000.00, of which, the sum of \$100,000.00 was paid as a deposit upon the execution of that agreement for sale by the parties to this claim. It is further alleged that within months of the parties' execution of the agreement for sale and the payment of the deposit, the defendant (then proposed vendor), sought to increase the purchase price to \$600,000.00, but this was objected to by the claimant (then proposed purchaser). As a consequence, the claimant lodged a caveat, in order to protect his interest in the premises. At the date when the agreement for sale was executed, the premises was then registered in the name of Cyprian Eugene Ferguson, deceased. This is a fact which is not disputed by the defendant. It is also not disputed by the defendant that also at that date and up until now, the claimant was then and still is, the sole beneficiary of the estate of Cyprian Eugene Ferguson, deceased. Furthermore, as this court now understands it, there is no dispute that at the date when the agreement for sale was executed, the defendant was not then legally able to have sold the premises, as she had not, prior to then, taken the necessary steps to have her name registered as the lawful owner of same. Furthermore, it is also not disputed that at some later date, the defendant applied to the Registrar of Titles to be registered as the

owner of the premises, as a consequence of adverse possession. The date of that application to become the registered holder, is as yet unknown to this court, as the claimant's statement of case has not as yet, disclosed same and the defendant has not, as yet filed any statement of case, albeit that she has filed an acknowledgement of service which verifies that she was served with the claimant's claim form, but not particulars of claim, as the claimant, no doubt at that time, through her attorney, being oblivious of the Rules of Court requiring otherwise, served an affidavit in support of claim form, setting out certain particulars of his claim. The claimant's claim form and that affidavit were filed on May 15, 2012 and were both served on the defendant on June 20, 2012. The filing of an affidavit in support of claim form, in a regular claim form matter as this is, was clearly done in breach of applicable Rules of Court. See **Rules 8.1(1) (b) and 8.2 of the Civil Procedure Rules (CPR)**. Nonetheless, since the defendant has not, at least up until now, taken issue with the failure to serve particulars of claim on him, at the same time as the claim form was served on him and since also this court has, without objection from the defence, granted permission to amend claim form and particulars of claim and the same have now both been filed, this court will make no issue of same, for the purposes of this ruling on the defendant's application for court orders. To date, however, the defendant has filed no defence which would, at the very least, be part and parcel of her statement of case. In that regard, see Rule 2.4 of the Civil Procedure Rules for the definition of the term - 'Statement of Case.' The failure to file any defence to date is a point which will be of some significance as regards the outcome of this ruling upon the defendant's application for Court Orders and thus, will be addressed further, in that context, later on in this ruling.

[5] As things later progressed involving the parties to this claim, the caveat placed on the title by the defendant, was permitted to lapse, so as to permit the defendant to become registered as the owner of the premises. The defendant became the registered owner of said premises, by means of Certificate of Title registered at Volume 1454, Folio 813 of the Register Book of Titles. Following on that, the claimant served on the defendant and on the defendant's attorney-at-law, a notice requiring completion of the sale and making time of the essence. That notice was served on the defendant via

registered post and was received by her, on January 10, 2012. To date, however, that once proposed sale, has not been completed and now the parties are in dispute concerning same, before this court. The claimant is alleging fraud on the defendant's part and the claimant's counsel has contended before me, that one of the aspects of fraud which have been particularized in the claimant's Amended Particulars of Claim, pertains to, 'concealed fraud,' this insofar as the defendant had, with intent to defraud the claimant, pursued and obtained registered title to the premises based upon adverse possession.

[6] Having now completed the outline of the claimant's case, in response to which, no defence has, as yet, been filed, the bases underlying the defendant's application for Court Orders, can now more readily be understood. Said applicant seeks an Order of this court striking out the claim, on the ground that the claim does not disclose, 'a valid cause of action.' Under **Rule 26.3 of the Civil Procedure Rules** (hereinafter described, by the acronym – (CPR) there are various grounds upon which this Court can strike out a party's statement of case, as part and parcel of this court's overall case management powers. None of those grounds specifically, is that the claim, 'does not disclose a valid cause of action.' It does appear to this Court though, that if a claim does not disclose a valid cause of action, then there would be no reasonable ground for bringing that claim. It is in fact, one of the grounds upon which this court can strike out a party's statement of case, that such party's statement of case, 'discloses no reasonable grounds for bringing or defending a claim.' As such, this court will consider the claimant's application for Court Orders as pertaining to that basis, as provided for in Rule 26.3(1)(c), this even though that application has not directly so specified. For the purposes of a legal point which will be addressed later on in this ruling, it should be noted that another ground as provided for in Rule 26.3(1) (b) of the CPR, upon which this Court can strike out a party's statement case, is that that party's statement of case, or part to be struck out, is an abuse of the process of the court or 'is likely to obstruct the just disposal of the proceedings.' The defendant has not set out in her application for Court Orders, any reliance on Rule 26.3(1) (b) of the CPR.

[7] The grounds of the defendant's application to strike out the claim may be summarized as follows:

- i. The purported agreement for sale as entered into between the parties on May 16, 1991, is not a valid contract and is therefore unenforceable at law, since as at that date of execution of same, the defendant did not have the capacity to enter into that contract.
- ii. As at May 16, 1991, the defendant was not the registered owner of the premises.
- iii. That as at May 16, 1991, the defendant was neither the executrix nor administratrix of the estate of the deceased, who as at that time, recorded on the Register Book of Titles, as the registered owner of the premises, namely – Cyprian Eugene Ferguson.
- iv. The claimant is guilty of laches (delay) and the claim is statute barred, on the basis that more than twenty (20) years have elapsed between the date of the purported agreement for sale (20.06.91) and the date when this claim was filed (21.05.12).

[8] Essentially therefore, there are two grounds put forward as the basis for the defendant applicant's conclusion that the claimant has, 'no valid cause or action,' these being that the claim is statute barred and also that, the defendant had no capacity to contract, as and when she did with the claimant, to sell the premises. This court will address the laches/expiration of limitation period issues, first.

[9] Section 3 of Jamaica's Limitation of Actions Act, states that:

'No person shall make an entry, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to some person through whom he claims, or, if such right shall have not accrued to any person through whom he claims, then within 12 years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to the person making or bringing the same.'

[10] Section 25 of Jamaica's Limitation of Actions Act, provides that:

'No person claiming any land or rent in equity shall bring any suit to recover the same, but within the period during which, by virtue of the provisions hereinbefore contained he might have made an entry, or brought an action to recover the same respectively, if he had been entitled at law, to such estate, interest or right in or to the same as he shall claim therein in equity.'

[11] When then, did the right to claim against the defendant, for breach of contract and in the alternative, for specific performance of the contract accrue to the claimant? The relevant agreement for sale, did not make time, 'of the essence' thereof. As such, the time for completion of that which was required by that contract, to have been completed by the respective parties, would have been within a, 'reasonable time' after execution thereof. That 'reasonable time' has, of course, to be assessed objectively. The date when the cause of action accrued to the claimant, if indeed, it could have accrued at all – this being a question which will be answered at a later juncture in this ruling, cannot be, as postulated by defence counsel, the date of the execution of the agreement for sale – June 16, 1991. Clearly, the defendant could not properly transfer registered title to the claimant, until after she had become the registered proprietor of the premises and that did not occur until January 6, 2012. It was very shortly thereafter, that the defendant was sent a notice making time of the essence and not very long thereafter, in fact within the same year, that this claim was filed. This claim therefore, is not statute barred.

[12] In any event though, even if there had been a breach of Jamaica's Limitation of Actions Act by the claimant, insofar as the failure to file his claim within twelve years after his cause of action had accrued to him, is concerned, nonetheless, such could not, in the particular circumstances of this particular claim, as presently obtain, enable the defendant's application for Court Orders to succeed.

[13] This is because, the Limitation of Actions Act provisions as above-quoted, do not negate the existence of a, 'reasonable cause of action.' Those provisions instead, only can apply in situations wherein one has, 'a reasonable cause of action,' but has

not instituted the same in proceedings by way of claim before the court, prior to the expiration of the relevant limitation period. If one does not have a 'reasonable cause of action,' then a limitation period under the Limitation of Actions Act cannot begin to run. As such, it is necessary to file a defence setting out as an allegation therein, that the relevant period has expired. Once, that has been done, the burden will then rest on the claimant to prove that his claim was instituted within the relevant limitation period. On that point, see **Cartledge and Others v E Jopling & Sons Ltd** [1962] 1 QB 189, at p. 202, per Harman, L.J. and **Darley Main Colliery v Mitchell** [1886] 11 App. Cas. 127. This is why it was held in the English case – **Ronex Properties v John Long** [1983] 1 QB 398, that where a defence arises under a Limitation Act, a defendant can seek to strike out a claim that has been filed after the relevant limitation period has expired. on the basis that such claim constitutes an abuse of process and/or is frivolous and vexatious. It was also though, clearly laid down in the **Ronex Properties** case (op. cit), at p. 405, per Donaldson, L.J., that in no circumstances can a defendant seek to strike out a claim based on a defence to that claim which contends that the claim is statute-barred and that as such, no cause of action is disclosed. The dicta of Donaldson, L.J. in that particular respect was earlier adopted in at least one decided case, by the Supreme Court of Jamaica. See **Andrew Gillespie and Constable Denton Clarke and others** – Suit no. CLG 068 of 2002, per Anderson, J. (same last name, but different Judge), esp. at pp. 7 and 8 of that judgment, which is unreported.

[14] Accordingly, the application by the defendant to strike out the claim on the ground that the claim does not disclose a valid cause of action, since the claimant is guilty of laches and the claim is statute barred, must fail, on the grounds that:

- i. No defence to the claim has, as yet been filed, and*
- ii. The claim does disclose a valid or reasonable cause of action and*
- iii. Time did not begin to run against the claimant, for the purposes of the claim until sometime after the defendant became the registered owner of the relevant premises and not, as the defendant has contended, on the date when the relevant agreement*

for sale was executed. As stated in Halsbury's Laws, second edition, volume 20, at p. 618 – 'A cause of action cannot accrue unless there be a person in existence capable of suing and another person in existence who can be sued.' On that point, see **RB Policies at Lloyd's v Butler** [1950] 1 KB 76, esp., at p. 80, per Streatfield J.

[15] The next issue now to be determined by this court, for the purposes of the defendant's application to strike out the claimant's claim, is whether the claimant has a reasonable cause of action against the defendant. Notwithstanding the valiant efforts of the defence counsel, Mr. Traile, to convince this court otherwise, this court is not so persuaded.

[16] In the case at hand, when the agreement for sale was executed as between the parties, it is clear to this court, that the defendant then had an equitable interest in the relevant premises, as a beneficiary of her deceased father's estate. Her equitable interest in that regard, as a beneficiary, is not to be equated with the role of an administrator, who is not, without more, entitled to benefit from the proceeds of the deceased's estate, other than to the extent of being paid for his or her services as administrator. As such, the case relied on by the defendant in support of her contention that the claimant has no cause of action, is to this court's mind, of absolutely no assistance whatsoever in establishing the same in this case. That case so relied on by the defendant is: **Hitchins v Hitchins** JM2005 SC97. In the **Hitchins** case, it was undoubtedly correctly determined by Brooks, J. (as he then was), that in respect of an administrator, it is the grant of Letters of Administration which gives the administrator his authority to act in respect of the estate.

[17] In the matter at hand, the claimant's cause of action exists because the defendant is now the registered title holder of the premises. There exists an agreement for sale as between the parties. The claimant was, as at the date when that agreement for sale was executed, the intended purchaser and the defendant was then the intended vendor of same. Clearly, since the premises had been bequeathed to the defendant by her father, now deceased, as at the date when the agreement for sale was executed, the

defendant then had an equitable interest in the premises. See **Hanbury and Maudsley's Modern Equity**, 2005, 17th ed., at pp. 331-334 and also **Lysaght v Edwards** [1876] 2 Ch. D. 499, esp., at p. 507, per Jessel, M.R. Subsequent to the execution of that agreement for sale, the defendant has become the registered owner of the premises. It is only subsequent to the defendant having become the registered owner of the premises that this claim has been brought before the Court. Clearly, the claimant has a reasonable cause of action insofar as the claim for specific performance of the relevant contract is concerned also, insofar as he claims an equitable interest in the premises. Furthermore, his claim for damages for fraud also constitutes a reasonable cause of action, based on fraud.

[18] Insofar as the claim for damages for breach of contract is concerned, this judgment has already noted that the claim alleges that such breach occurred after the defendant became the registered owner of said premises and after she was notified that the claimant was then making time of the essence. In the circumstances, this Court cannot accept the defendant's contention that no breach could have occurred at that time.

[19] The striking out jurisdiction of this Court ought always to be exercised sparingly and only in plain and obvious cases. See **Blackstone's Civil Practice 2013**, para 33.6. This is clearly not one such case.

[20] In the circumstances, the defendant's application for Court Orders as filed on July 24, 2012, is denied, and the costs of said application are awarded to the claimant, with such costs to be taxed if not sooner agreed.

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Hon. K. Anderson, J.