THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2015 - 04342

BETWEEN

ATLANTIC BAY LIMITED

Claimant

AND

ELAINE MONICA DAVIS also called **ELAINE MONICA DAVIS ITON**

(Legal Personal Representative of the Estate of George Norris Melville, Deceased)

First Defendant

ELAINE MONICA DAVIS also called **ELAINE MONICA DAVIS ITON**

(In her personal capacity)

Second Defendant

Before the Honourable Mr Justice Ronnie Boodoosingh

Appearances:

Mr John Heath and Mr Kelston Pope instructed by Mr Lionel Luckhoo for the Claimant

Mr Brian Mc Cutcheon instructed by Mr Andre Rudder for the First Defendant

Mr Kerwyn Garcia instructed by Ms Hyacinth Griffith for the Second Defendant

Dated: 16 February 2017

Ruling

1. This claim involves an allegation of concealment/fraud. It was a transaction that took place in 2007. The issue for determination at this stage is whether the claim is statute barred.

2. The claimant is a limited liability company. Mr George Norris Melville was the Managing Director of the claimant. He is now deceased. This claim has been brought against the defendant in her personal capacity as well as in her capacity as Legal Personal Representative of the estate of Mr Melville.

3. The claimant alleges that on or about 28 September 28 2007, the deceased either drew or caused to be drawn, the sum of one million dollars ($1,000,000.00) of the claimant's money towards the payment of an Executive Flexible Premium Annuity (EFPA). He named his son, Siron Melville, as the beneficiary of said policy. The claimant further alleges that these actions taken by the deceased were done without the knowledge or consent of the Board of Directors. The usual procedure of a resolution being passed at a general meeting to authorize such a transaction was not done. The claimant says the transaction was only discovered on 10 January 2012, when the claimant's accountant conducted an audit of their accounts and found a copy of the RBL cheque.

4. Further the claimant contends that on 13 February 2012, the second defendant repaid to the claimant the sum of thirty-two thousand dollars ($32,000.00), which the claimant says represented a partial repayment of the sums used to pay for the insurance. The claimants now call upon the defendants to account for the outstanding amount of $968,000.00.

5. The defendants have stated in their Defences that they can neither admit nor deny whether the allegations made by the claimant are true. Further, that they paid the sum of $32,000.00 which represented the full debt owed by the deceased at the time of his death. The defendants admit that they were never shown any documents with respect to the $32,000.00 debt, but paid it nonetheless to preserve the good name and reputation of the deceased.

6. The defendants also raised as part of their defence, the issue of an expired limitation period which now makes the matter statue barred. They assert that the cheque used to facilitate the transaction could have reasonably been discovered on 28 December 2007, or shortly after when the claimant prepared its management accounts, or when it received its audited financial accounts for the year ended December 31 2007.

7. Section 3 of the **Limitation of Certain Actions Act, Chap. 7:09** provides:

> *3. (1) The following actions shall not be brought after the expiry of four years from the date on which the cause of action accrued, that is to say:*
> *(a) actions founded on contract (other than a contract made by deed) on quasi-contract or in tort;*
> *(b) actions to enforce the award of an arbitrator given under an arbitration agreement (other than an agreement made by deed); or*
> *(c) actions to recover any sum recoverable by virtue of any enactment.*

Additionally, section 12 provides:

> *(2) Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or payment.*
>
> *(4) Subject to subsection (3), a current period of limitation may be repeatedly extended under this section by further acknowledgments or payments, but a right of action, once barred by this Act, shall not be revived by any subsequent acknowledgment or payment.*

Another relevant provision is section 14 which states:

> *14. (1) Subject to subsection (3), where in the case of any action for which a period of limitation is prescribed by this Act, either—*
>
> > *(a) the action is based upon the fraud of the defendant;*
> > *(b) any fact relevant to the plaintiff's right of action was deliberately concealed from him by the defendant; or*
> > *(c) the action is for relief from the consequences of a mistake,*
> > *the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.*

8. The defendants contend that this claim is grounded in contract law and therefore the claim is now statute barred since the date of the transaction by the deceased took place on 28

September 2007. Further, that there were no facts pleaded which gave rise to a postponement of the limitation period.

9. The claimant submits that the use of the claimant's funds to purchase the EFPA was a breach of the deceased's fiduciary duty. Additionally, the concealment of this fact postponed the limitation period to the time when the alleged fraud was discovered which was around 10 January 10 2012.

10. There has been much discussion provided by both sides as to whether the actions of the deceased amounted to a breach of fiduciary duty. This will impact on whether the provisions of the Limitation Act apply. On the other hand if it is found that the Limitation Act is applicable, the issue arises whether the events as set out above gave rise to a postponement of the limitation period.

11. Both sides relied on the case of **Gwembe Valley Development Company Ltd and another v Koshy and others [2003] All ER (D) 465**.

12. The first issue to be considered is whether the actions by the deceased were capable of amounting to a breach of fiduciary duty and what would be the applicable limitation period, if any.

13. As stated before, the deceased was the managing director of the claimant company. As a director, he was bound by the provisions of the **section 99 of the Companies Act Chap. 81:01**, which states:

> "*99. (1) Every director and officer of a company shall in exercising his powers and discharging his duties—*
>
> > *(a) act honestly and in good faith with a view to the best interests of the company; and*
> >
> > *(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.*
>
> *(2) In determining what are the best interests of a company, a director shall have regard to the interests of the company's employees in general as well as to the interests of its shareholders.*

(3) The duty imposed by subsection (2) on the directors of a company is owed by them to the company alone; and the duty is enforceable in the same way as any other fiduciary duty owed to a company by its directors.
(4) No information about the business or affairs of a company shall be disclosed by a director or officer of the company except—

(a) for the purposes of the exercise or performance of his functions as a director or officer;
(b) for the purposes of any legal proceedings;
(c) pursuant to the requirements of any written law; or
(d) when authorised by the company.

(5) Every director and officer of a company shall comply with this Act and the Regulations, and with the articles and Bye-laws of the company, and any unanimous shareholder agreement relating to the company.

(6) Subject to section 137(2), no provision in a contract, the articles of a company, its Bye-laws or any resolution, relieves a director or officer of the company from the duty to act in accordance with this Act or the Regulations, or relieves him from liability for a breach of this Act or the Regulations.

14. Millet LJ discussed the meaning of the term fiduciary duty in the case of **Bristol and West Building Society v Mothew [1998] Ch 1**. He said:

> *"The expression 'fiduciary duty' is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties. Unless the expression is so limited it is lacking in practical utility. In this sense it is obvious that not every breach of duty by a fiduciary is a breach of fiduciary duty...." (p 16)*

And further:

> "*This leaves those duties which are special to fiduciaries and which attract those remedies which are peculiar to the equitable jurisdiction and are primarily restitutionary or restorative rather than compensatory. A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust;*

he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations....” (p 18A-C)

15. Millet LJ also made a critical distinction between the different ways in which those circumstances, a trust could arise in the case of **Paragon Finance plc v DB Thackerar & Co [1999] 1 All ER 400** and stated:

> “*The first covers those cases already mentioned, where the defendant, though not expressly appointed as trustee, has assumed the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust and is not impeached by the plaintiff. The second covers those cases where the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the plaintiff.”*

16. This case was examined in the case of **Gwembe Valley Development Company Ltd and another v Koshy and others [2003] All ER (D) 465**. At paragraph 87 of the judgment, the following statement is made:

> “*87. Millett LJ went on to explain that in the first class of case the constructive trustee “really is a trustee.” He does not receive the trust property in his own right. He receives it by a transaction, by which both parties intend to create a trust from the outset and which is not impugned by the plaintiff.*
>
> *“His possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust ... the circumstances in which he obtained control make it unconscionable for him thereafter to assert a beneficial interest in the property.” (p.409 b-d).*
>
> *88. In the case of the second class of constructive trust the defendant was not in fact a trustee at all. He never assumed the duties of a trustee; but, because of his implication in a fraud, he is held liable to account. He is liable to account as if he were a trustee in respect of property, which he has received adversely to the claimant by an unlawful transaction impugned by the claimant. The constructive trust is the response of equity* in *supplying a remedial formula for dealing with the consequences of fraud. It is different from the response of equity to the*

consequences of a breach of a pre-existing trust obligation. It is used to prevent the legal owner of property, which he has received in his own right, from asserting a beneficial interest in it.

89. A similar distinction to that drawn in the law of trusts is drawn in cases of breach of fiduciary duty. The fiduciary relationship has developed by analogy from the trust relationship to cover cases in which a person has assumed responsibilities for the management of another person's assets. There is a distinction between "those whose fiduciary obligations preceded the acts complained of and those whose liability in equity was occasioned by the acts of which complaint was made."(p. 414h-j)"

90. For limitation purposes the two classes of trust and/or fiduciary duty are treated differently."

17. Further in the case of **JJ Harrison v Harrison [2002] BCLC 162**, Chadwick LJ highlighted the following:

"…(i) that a company incorporated under the Companies Acts is not trustee of its own property; it is both legal and beneficial owner of that property; (ii) that the property of a company so incorporated cannot lawfully be disposed of other than in accordance with the provisions of its memorandum and articles of association; (iii) that the powers to dispose of the company's property, conferred upon the directors by the articles of association, must be exercised by the directors for the purposes, and in the interests of, the company; and (iv) that, in that sense, the directors owe fiduciary duties to the company in relation to those powers and a breach of those duties is treated as a breach of trust."

Chadwick LJ continued:

"*26. It follows from the principle that directors who dispose of the company's property in breach of their fiduciary duties are treated as having committed a breach of trust that a person who receives the property with knowledge of breach of duty is treated as holding it upon trust for the company. He is said to be a constructive trustee of the property....*

27. It follows, also, from the principle that directors who dispose of the company's property in breach of their fiduciary duties are treated as having committed a

breach of trust that a director who is himself the recipient of the property holds it upon a trust for the company..."”

18. The statement of Mummery LJ at paragraph 99 of the case of **Gwembe Valley Development Company Ltd and another v Koshy and others [2003] All ER (D) 465** is also relevant:

    “99. Applying the distinction drawn by Millett LJ in Paragon, Chadwick LJ held that a director who obtained the company's property for himself by the misuse of the powers, with which he had been entrusted as director, was a constructive trustee within Millett LJ's first class of constructive trust (paragraph 29).”

19. Based on the alleged course of dealings of the deceased in the instant case, a similar analogy of the law is applicable. The allegation is that the money was the property of the claimant. Without the knowledge or consent of the Board of Directors, without a resolution being passed at a meeting, without following the established procedure, the deceased had the EFPA executed in his name and what is more, named his son as the beneficiary of said policy. If proved by the claimant this would take the claim into the realm of a breach of the deceased’s fiduciary duty and the disposal of the company’s property in breach of his fiduciary duties. It is certainly arguable, without evidence at this stage, that the deceased was a constructive trustee within the first class of constructive trust as classified by Millet LJ. This was not a case where the company approved the transaction, for example, but then it was later discovered that the deceased named his son as the beneficiary against the wishes of the company.

20. This leads to the next question of what effect this finding would have on the determination of the applicable limitation period. It is tempting to conclude that there would be no applicable limitation period. However, since it is suggested that the deceased was indeed a constructive trustee, then **section 66 of the Trustee Ordinance Ch. 8 No. 3.** becomes necessary for consideration.

    Section 66 states:

    (1) No period of limitation prescribed by any enactment relating to the limitation of actions shall apply to an action by a beneficiary under a trust, being an action –

a. In respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

b. To recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

(2) Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any enactment relating to the limitation of actions, shall not be brought after the expiration of four years from the date on which the right of action accrued:

Provided that the right of action shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property, until the interest fell into possession.

21. Section 66 (2) provides an action must not be brought after the expiration of four years from the date the right of action accrued. This date must be from the date of discovery of the fraud. Based on the pleaded facts presented by the claimant, the date the fraud was discovered which was 10 January 2012. The defendants contend that the transaction should have been discovered before, either on 28 December 2007 or when the management accounts were generated. Without evidence, this court is not in a position to conclude that those events provided sufficient opportunities for the concealment to be discovered. As such, the claimant's date of discovery must be accepted at this stage.

22. In light of the above, the court cannot conclude either under sub-sections 66 (1) or 66 (2) above, that the limitation period has expired.

23. On the other hand, if I accept the submissions of the defendant, that this in is a claim solely based on the contractual employment of the deceased with claimant, then I must consider the consequence of the concealment and whether it had the effect of postponing the limitation period as section 14 prescribes.

24. This leads us back to a similar position as the first scenario. The limitation period begins to run from the time the fraud, concealment or mistake was discovered or with reasonable diligence, could have been discovered. The claimant's case is that the concealment was discovered on 10 January 2012, when the RBL cheque was found. There is nothing before me to suggest that with reasonable diligence this could have been discovered sooner. The

claimant submits that the usual procedures of notifying the Board as to the details of this transaction were not done. The claimant was then left to discover the concealment, which it submits was discovered as a result of an audit process. Even with this approach, at this stage, the court can only conclude that the limitation period runs from 10 January 2012.

25. There is also the issue of the part payment in the sum of $32,000.00. The defendant has pleaded that she was simply told that the deceased left an outstanding debt in the sum of $32,000.00 and that she was required to pay it. She states that did not know the nature of the debt, but she asserts that she paid it nonetheless to maintain her husband's good name and reputation. The claimant contends that this payment was made towards the principal debt after some of the Board members informed her of the unauthorized transaction. Depending on the court's findings on the evidence presented, this can amount to an acknowledgement of the debt which would have served to extend the limitation period.

26. The defendant contends that the claimant has not pleaded any facts relevant to a postponement of the limitation period. However, at paragraph 10 of the statement of case, the claimant stated that the cheque was discovered around 10 January 2012, after which several actions were taken by the Board of Directors, before a claim was eventually filed. The claimant submits that this is the date from which time should run. In the case of **First Citizens' Bank v David Sheppard (the Shepboys case) Civ. App No. P231 of 2011**, Mendonca JA stated at paragraph 36,

> *"36. In view of the above there is no obligation on a claimant in every case where the defendant may plead the limitation statute to set out in his statement of case facts necessary to take the case out of the statute. Such facts may be set out in a reply to rebut the plea of limitation raised by the defendant. But just as it cannot be said that a claimant must in every such case set out facts necessary to take the case out of the limitation statute, it cannot be said that in every case the claimant may do so in a reply. The facts, for example, may be necessary to establish the claimant's claim and are therefore facts on which he relies. In such a case although they also may be necessary to rebut a plea of limitation they should be set out in the statement of case.*

27. This statement is applicable to the instant case. The claimant did not need to go beyond what was pleaded. That would have the effect of having to set out all the details necessary to meet a potential limitation defence, which Mendonca JA clearly states is not necessary. The defence of limitation is one a defendant may opt not to raise. I find there was enough

information on the pleaded facts to show the point from when time for the purposes of the limitation period should run.

28. The defence of limitation has not been established at this stage. I am unable to conclude therefore that the claim is statute barred. The preliminary application by the defendants is declined. The issue of costs will be reserved to be dealt with in the round at the end of the claim.

Ronnie Boodoosingh
Judge