THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No CV2016-02513

BETWEEN

SHAFFIKUL HOSEIN

And

SHARIDA HOSEIN

And

SAIF SAMEER HOSEIN

Claimants

AND

THE MINISTRY OF WORKS AND TRANSPORT

And

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendants

Before the Honourable Mr. Justice Robin N. Mohammed

Appearances:

Mr Glen Bhagwansingh for the Claimant
Ms Mary Davis and Mr Nairob Smart instructed by Ms Kendra Mark for the Defendant

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DECISION ON SECOND DEFENDANT'S APPLICATION TO STRIKE OUT CLAIM

I. **Background**:

[1] The Claimants are fee simple owners of a parcel in land in the ward of Montserrat. They assert that in **February, 2011**, agents of the Ministry of Works and Transport, the First Defendant herein, entered their parcel of land without consent and commenced the digging of a new watercourse so as to divert the Carapichaima River. The result being that after the excavation, two watercourses now existed on the land.

Principally, they take issue with the fact that the waste material from the excavation was dumped on the side of the newly dug watercourse, which has caused the land to become undulating and also seek compensation for the *"loss of land for the watercourse and the watercourse reserve"* which they calculated to be in the vicinity of 12,000 square feet. It is also pleaded that the Ministry destroyed fruit trees, vegetation and bamboo.

Upon informing the Ministry of their complaint, it is their case that at all times, the Ministry informed them that they were looking into the issue of compensation. However, to date, such compensation has not been forthcoming. In the circumstances, they initiated this action on the **25th July, 2016** seeking damages for, *inter alia*, trespass, loss of value of the land and for reinstating the land in its prior condition.

[2] The Defendants' case is that they were given Cabinet Approval for a *"Flood Mitigation and Erosion Control Programme"* aimed at addressing seasonal flooding and that in pursuance of this objective, they started clearing the watercourse on the Claimants' land, which they assert is a tributary to the natural watercourse. Further, they maintain that they obtained consent to enter the land from the First Claimant, Shaffikul Hosein. Therefore, they not only deny that they trespassed but also dispute that they ever dug a new watercourse. Moreover, while the material excavated was initially left on the Claimants' land, the Ministry asserts that they landscaped the land by spreading the left over material and levelling it off.

Upon receipt of the complaint, the First Defendant avers that they offered to do corrective works on the land but such offer was denied by the First Claimant because, in their words, Shaffikul *"requested more than the position in which he was originally."*

[3] A mere 7 days after filing their Defence, the Defendants filed the Application herein, which sought so to have the Claim struck out pursuant to **Parts 26.1(1)(k) and 26.2(1)(b) of the Civil Proceedings Rules 1998 (CPR)**. In particular, they stated that the Claim is statute-barred and therefore, amounts to an abuse of process. Secondly, they assert that the First Defendant, the Ministry of Works and Transport, is not a proper party to these proceedings as it is not a legal entity and ought to be struck out.

[4] At the first case management conference (CMC), I gave directions for the filing of submissions, submissions in response and submissions in reply, if necessary, and fixed a hearing date for the Defendants' Application.

II. Submissions:

[5] Both parties' submissions, as would be expected, revolved around their interpretation of **Section 3 (1) of the Limitation of Certain Actions Act, Chap 7:09 (the Act)**, which requires that any action seeking damages for a tort be brought within 4 years from the date on which the cause of action accrued. In support, the Defendants relied on the cases of **Otis Jobe v Police Constable Edgar Baird and the A.G. CV2009-00642** as well as **Nigel Aparball & Ors v the A.G. CV2007-04365**.

[6] In response, the Claimants focused on the provision at **Section 2(2) of the Act,** which allows for the extension and postponement of such limitation periods in certain circumstances. They relied, in support, on the cases of **Maharaj & anor v Johnson & ors 2015 UKPC 28** and **Building Concepts & Construction Ltd v T&T Housing Development Corporation CV2012-2508**.

III. Law & Analysis:

[7] **Section 3 (1) (a) of the Act** states as follows:

> *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."

[8] Critical to the operation of this provision therefore, is determining when the cause of action accrued. Paragraph 4 of the Statement of Case, clearly indicates that the alleged trespass by the First Defendant occurred in the month of February, 2011. Thus, this action would have become statute barred by February, 2015. Prima facie therefore, the fact that this Claim was not initiated until the 25th July, 2016 means that the Claim ought to be statute barred.

[9] In response, the Claimant raises **Section 2 (2) of the Act**, which states:

*2) "Periods of limitation prescribed by this Act, shall be subject to the provisions for **extension or postponement of such periods** in the case of disability, acknowledgement, part payment, fraud, concealment or mistake."*

[10] The Claimants however, omitted to also refer me to the material provisions that relate to such extension, one of those being contained in **Section 9 of the Act**. **Section 9** lists the circumstances in which the Court may override a limitation period:

1) "Where it appears to the Court that it would be inequitable to allow an action to proceed having regard to the degree to which—

*a) **the provisions of sections 5 or 6 prejudice the plaintiff** or any person whom he represents; and*

b) any decision of the Court under this subsection would prejudice the defendant or any person whom he represents, the Court may direct that those provisions shall not apply to the action or to any specified cause of action to which the action relates.

Subsection 9 (3) then proceeds to list the circumstances which the Court must take into account when using its power to extend or postpone the limitation period.

[11] However, when read carefully, the provisions of **Sections 9 (1) & (2)**, clearly indicate that any extension or postponement of the limitation period can only apply to actions caught by **Sections 5 & 6 of the Act. Section 5** states that it applies to *"any action for* ***damages for negligence, nuisance or breach of duty*** *whether the duty exists by contract or any enactment independently of any contact…"*

Section 6, on the other hand, relates to ***"actions under the Compensation for Injuries Act."*** Thus, it is clear that this action, which seeks damages for a Tort, is caught only by **Section 3 of the Act** and is not applicable under **Section 5 and/or Section 6**. It follows that the provisions for extension of the limitation period in **Section 9** are similarly inapplicable to the case at bar.

[12] The only other Section in the Act that permits a postponement and/or extension of the limitation period is **Section 12**, which states as follows:

> *1) "Where there has accrued any right of action of a mortgagee of personal property to bring a foreclosure action in respect of such property, and the person liable for the mortgage debt makes any payment in respect thereof, whether of principal or interest, the right shall be deemed to have accrued on and not before the date of the acknowledgment or payment.*
>
> ***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."***

[13] **Section 12(2)** therefore does appear to have some applicability to these proceedings, which similarly involve the accruement of an action to recover a liquidated pecuniary claim for damages to property and trespass. However, **Section 12** must be read conjointly with **Section 13(a)**, which states that for the purposes of this Act, ***"an acknowledgment shall be made in writing and signed by the person making the***

acknowledgment." Further specifications on the form of the acknowledgment are given in **Section 13(b)** as follows:

> *2)* ***"an acknowledgment or payment shall be evidenced in writing and may be made by the agent of the person by whom it is required to be made and shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged or, as the case may be, in respect of whose debt the payment is being made."***

Thus, the material provisions for me to consider in deciding whether an extension of the limitation period ought to be given are really **Sections 2 (2), 12 & 13 of the Act** and **not Section 9**. In those circumstances, the dicta of Jamadar J (as he then was) in **Mitchell v Bickraj HCA No. 617 of 2004**, while I consider to be accurate, is not applicable in the circumstances prevailing in these proceedings:

> ***"****Courts ought not to extend statutory limitation periods without good cause, and section 9 (3) describes at least six considerations which a court must have regard to. These considerations are not weighted. This is a matter which Parliament has left to the courts. The overriding consideration is "all the circumstances of the case", which gives the court a fair measure of latitude. However, as with all judicial discretions, this one must be exercised in a fair and reasonable manner, bearing in mind the relevant facts and applying the appropriate legal considerations. Judicial discretion is not some amorphous power to be exercised whimsically."*

[14] On the Claimants' case, the delay in bringing this action was as a result of the First Defendant's continuous requests that they *"hold their hands"* in bringing any claim as they were investigating the issue of compensation. The Claimants sought to adduce several documents in their submissions in support of this reason for the delay. While the Court is not normally minded to admit evidence in submissions, given the fact that no directions were given for affidavits in response, I shall make the exception.

[15] On the Defendants' pleadings, it is admitted that they received a pre-action letter in 2011 from the Claimants. In response, the Defendants plead that they offered to do corrective works which offer was refused by the First Claimant. No evidence of such response, however, was ever produced by the Defendant.

[16] Instead, the Claimant, at attachment B of its submissions, produced a letter sent by its attorney to the Director of Drainage of the First Defendant dated the **28th December, 2011**. This letter set out the history of complaints made by the Claimants to the First Defendant, which had resulted in a previous site visit by the **Director of Drainage of the First Defendant** on the 2nd November, 2011. It is stated that one Mr Baboolal advised the Claimants to submit a report of the extent of damage done to the First Defendant.

Upon submitting that report, the letter states that Mr Baboolal then informed the Claimants that they have no case.

Thus, the letter of December, 2011 was drafted in response and requested that the Director look into the matter urgently failing which, legal redress would be sought.

Several other correspondences were sent by the Claimants in 2012 and 2013. However, the first documented response from the First Defendant appears to have occurred on the **12th October, 2011**. In terms of the chronology of events, however, the Claimants state that they were not aware of this response letter until sometime in 2013.

The October, 2011 letter was drafted by one Mr Junior K. Dell, Head of District-Drainage Central and addressed to the Director of Drainage. In summary, the letter **recommended that compensation be given for the fruit trees and for the *"day rental of one front end loader and truck"***. Further, it stated that **"*all other claims should not be entertained due to lack of evidence or the land existed within the reserve.*"**

The following letter sent by the **"Drainage Engineer"** to the Director of Drainage occurred on the **1st March, 2012**. Paragraph (vi) of this letter is material. In it, the Drainage Engineer states that he recalled a discussion with Mr Hosein, the First Claimant, in which the Drainage Division informed him that they can ***work together to***

arrive at an amicable solution that would benefit both parties. He also stated that he would make a recommendation to the Director of Drainage that involved filling the old watercourse and diverting it to the eastern boundary of the land but that "***before any firm decision on this recommendation could be made, Mr Hosein initiated legal action."***

This last quote from the letter seems confusing considering that the letter is dated in May, 2012 and legal action was not commenced until July, 2016.

Nevertheless, it was not until 4 years later on the **3rd May, 2016** that a letter was prepared and issued by one **Mr Shamshad Mohammed as Director of the Drainage Division of the First Defendant** and addressed to the First Claimant. The final paragraph of this letter advises the Claimant that the Ministry's Legal Department is still working on this matter.

Thereafter, the pre-action letter to this Claim dated the **14th May, 2016** was issued by the Claimants' attorneys.

The final correspondence is a letter dated the **20th May, 2016** issued by the said Mr Mohammed that appears to be an internally circulated letter. The letter essentially requested that all courtesies be extended to the First Claimant in resolving this longstanding complaint.

This chain of correspondence does fit the Claimants' narrative that the Defendant assured them that they were in the process of resolving this matter and thus, their reason for delay in bringing these proceedings appears to result from a belief that this matter would be settled.

[17] However, from the above summary, there are only two letters and/or statements that may amount to an acknowledgement of the claim and thus, can potentially allow this Court to extend the limitation period under **Section 12 of the Act**.

The first is the letter **signed by Mr Junior K Dell** on the 12th October, 2011, which recommended that ***"compensation be given (at the approved rate) for the fruit trees identified in Item 1 of the claim"*** and also states that **"*assuming approximately 300 sq.***

ft. of clearing and disposal, compensation for the day rental of one front end loader and truck should be applied. All other claims should not be entertained due to lack of evidence, or the land existed within the reserve."

By this recommendation, it appears that there was some acknowledgment of part of the claim. However, the provision in **Section 13 of the Act**, which specifies how such acknowledgment is to occur, must be read conjointly and thus, both requirements in **paragraphs (a) & (b) of Section 13** must occur to amount to a valid acknowledgment. It follows that the acknowledgment **(i) must be in writing and signed by the person making the acknowledgment** and more importantly, **(ii) must be made by the Defendant or an agent of the Defendant and made to the Claimant.**[1]

In this light, the **letter of the 12th October, 2011** does not comply as it (i) was not signed by the Defendant and (ii) was not addressed to the Claimant.

For the same reasons, the contents of the letter dated the **1st March, 2012** would also not amount to an acknowledgment of the claim.

[18] In any event, I disagree with the Claimant that any of the letters issued by the First Defendant to the Claimants ever advised them ***not*** to initiate legal proceedings until the matter is settled. In fact, there is no evidence of any settlement discussions between the parties. Rather, it appears from the correspondence provided that the Claimants were merely informed that the First Defendant was still investigating the matter.

[19] Moreover, when I consider the gap in correspondence between October, 2011 and May, 2016, it is clear that, whether due to inadvertence, neglect or otherwise, the First Defendant was not taking these investigations seriously enough. In those circumstances, the Claimants ought to have preserved their position by filing their action. In fact, after the subsequent letters sent in 2012 and 2013 went unanswered, the Claimants had every reason to bring this Claim prior to February, 2015. If, indeed, the Claimants were as serious about their Claim as they would like this Court to believe, being confronted with a non-responsive Defendant, who has not made any attempts to settle the matter or suggest a figure for compensation for over 4 years, their decision to let this matter lapse

[1] See Section 13 (2) of the Act

until July, 2016 amounts to nothing short of negligence in my opinion. At the very least, they ought to have sought legal advice which would have likely prompted them to initiate these proceedings expeditiously. Further, had they filed their Claim within the limitation period, it would have likely alerted the First Defendant and its servants and/or agents of their oversight in this matter and prompted a more concerted effort at settlement.

[20] Finally, I note that the Claimants have exceeded the limitation period by just over 15 months. As at the date of this judgment, it means that over 7 years have passed since the alleged trespass. By now, it is presumed that whatever damage had been done to the land by the First Defendant's agents would likely have been remedied and thus, the compensation sought would be academic.

[21] Thus, considering the analyses above, I do not view that this is a case that persuades me to exercise my discretion under **Section 12 (2) & 13 of the Act** to postpone or extend the limitation period contained at **Section 3(1)(a).**

This finding is dispositive of this matter and therefore there is no need to consider whether the First Defendant is an appropriate party to these proceedings.

IV. Disposition:

[22] Having considered the Defendants' Application and the attendant submissions, the Order of the Court is as follows:

ORDER:

1) **That the Claimants' Claim be and is hereby deemed statute-barred pursuant to Section 3(1)(a) of the Limitations of Certain Actions Act, Chap 7:09.**

2) **That the Claim Form and Statement of Case filed on the 25th July, 2016 be struck out pursuant to Part 26.1(1)(k) and 26.2(1)(b) of the CPR 1998.**

3) **Taking into account all the circumstances of the case, there shall be no order as to costs.**

Dated this 17th day of May, 2018

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Robin N. Mohammed
Judge