

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2018-03558

BETWEEN

NATIONAL INSURANCE BOARD OF TRINIDAD AND TOBAGO

Claimant

AND

QUALITY SECURITY BODYGUARD SERVICES LIMITED

Defendant

Before the Honourable Mr. Justice R. Rahim

Date of Delivery: January 30, 2020.

Appearances:

Claimant: Mr. Heffes-Doon instructed by Ms. T. Rowley.

Defendant: Mr. R. Singh.

DECISION ON PRELIMINARY POINT OF LIMITATION

1. The claim against the defendant is that the defendant failed to make the statutorily required national contributions to the National Insurance Scheme due to it by the defendant. Further, the sums payable attract late payment penalties and interest under the National Insurance Act and are also claimed.

2. The defendant has raised the issue of expiry of the limitation period in its defence, contending that the claim was filed outside of the four year limitation period provided for in section 66 of the National Insurance Act Chap. 32:01 (“NI Act”) and/or, in the alternative section 3 the Limitation of Certain Actions Act Chap. 7:09 (“Limitation Act”). This issue of limitation is to be determined by the court as a preliminary point.

ISSUES

It is undisputed that contributions are owing by the defendant. The court’s primary consideration is to determine whether the claim or part thereof is statute barred. In this respect, the court will examine the following:

- i. Whether section 3 of the Limitation Act is applicable;

- ii. Whether the claim is subject to any other limitation period as spelt out in the NI Act and the Trustee Ordinance;

- iii. If the claim falls under section 3 of the Limitation Act, what was the date on which the action accrued;

- iv. If the claim is in fact statute-barred, whether any penalties and interest as set out in the amended statement of case, are due and payable for periods one to six (set out below) and are maintainable under section 3 of the Limitation Act.

THE PLEADINGS

The Claim

3. The claimant filed its claim form and statement of case on October 4, 2018 in the sum of \$8,214,320.65 for outstanding contributions, penalty and interest and by amended claim form and statement of case filed July 22, 2019, the claimant sought the following relief:
 - i. An order that the defendant pay to the claimant the total sum of \$8,355,059.04 inclusive of outstanding contributions, penalty, interest as at July 17, 2019.
 - ii. Costs;
 - iii. Further or other relief as the Honourable court deems fit.
4. The claimant avers that under section 39A of the NI Act the money (contribution) due and payable to by the defendant to the claimant is deemed to be held on trust for the claimant by the defendant and the defendant is therefore in breach of that statutory trust.
5. The claimant also submits that the non payment of contributions due attracted penalties and interest in accordance with section 39B of the

Insurance Act¹. Further, the claim for 100% penalty for the periods set out below accrued five years after the date upon which the payment of contributions fell due. As such, the defendant is indebted to the claimant for the following periods:

- i. **Period 1, September 3, 2012 to December 31, 2012;**
 - a. \$401, 793.01 in respect of contributions.
 - b. \$401,308.23 in respect of 100% of the outstanding sum accrued 5 years after.
 - c. \$494,426.25 in respect of interest and penalty at the rate of 15% per annum.

- ii. **Period 2, January 7, 2013 to December 31, 2013;**
 - a. \$1,041, 024.78 in respect of contributions.
 - b. \$1,039,774.02 in respect of 100% of the outstanding sum accrued 5 years after.
 - c. \$1,072,027.66 in respect of interest and penalty at the rate of 15% per annum.

- iii. **Period 3, January 6, 2014 to June 30, 2014;**
 - a. \$442, 100.91 in respect of contributions.
 - b. \$441,532.56 in respect of 100% of the outstanding sum accrued 5 years after.
 - c. \$356,581.93 in respect of interest and penalty at the rate of 15% per annum.

¹ “39B. Where any employer fails to pay the amount of contributions payable by him to the Board under the provisions of this Act by the fifteenth day after the due date, he shall be liable to pay— (a) a penalty of twenty-five per cent of the outstanding sum; or (b) penalty of one hundred per cent of the outstanding sum, where the period for which the contributions were retained, is in excess of five years; and (c) interest on the entire sum (penalty and outstanding sum at the rate of fifteen per cent per annum from the sixteenth day of the following month until payment)”.

- iv. **Period 4, July 1, 2014 to December 31, 2014;**
 - a. \$446,235.42 in respect of contributions.
 - b. \$111,558.86 in respect of 100% of the outstanding sum accrued 5 years after.
 - c. \$386,558.23 in respect of interest and penalty at the rate of 15% per annum.

 - v. **Period 5, January 5, 2015 to December 31, 2015;**
 - a. \$704, 017.35 in respect of contributions.
 - b. \$176,004.34 in respect of 100% of the outstanding sum accrued 5 years after.
 - c. \$519,549.01 in respect of interest and penalty at the rate of 15% per annum.

 - vi. **Period 6, January 4, 2016 to March 31, 2016;**
 - a. \$170, 916.93 in respect of contributions.
 - b. \$42,729.23 in respect of 100% of the outstanding sum accrued 5 years after.
 - c. \$104,380.32 in respect of interest and penalty at the rate of 15% per annum.
6. The pleaded case is that the claimant wrote what appears to be a “without prejudice” demand letter dated August 18, 2016 to the defendant setting out the debt to the National Insurance Board for the period September 3, 2012 to March 31, 2016 and demanding immediate payment. Two similar letters followed on June 1, 2017 and February 22, 2018.
7. The defendant responded by letter dated August 26, 2016 indicating that they received verbal notification of liability to the Board and that the

claimant's figures did not reconcile with the defendant's records. The defendant requested a statement pertaining to the claimant's audit.

8. On July 2018, the claimant sent a pre- action protocol letter to the defendant demanding payment for unpaid contributions, penalty and interest.
9. The defendant responded in writing on July 23, 2018 admitting that there was indebtedness but disagreeing with the figure of \$6,886,225.81.

Defence

10. The defendant originally contended that the claim is statute barred pursuant to section 66 (2) of the NI Act and/or in the alternative, section 3 of the Limitation Act, and that pursuant to section 3 (3) of the National Insurance (Contribution) Regulations, the contributions were to be paid on or before the last day of every month. Both parties however agree that section 66(2) of the NI Act is inapplicable.
11. The defendant denied that they are indebted to the claimant and avers that the claimant failed to provide them with the requested statement of the contributions allegedly due.
12. Further, although the defendant met with the claimant on May 17, 2017, the defendant submits that no agreement was made as to the amount owed to the claimant.

LAW AND ANALYSIS

Limitation Act

13. The Limitation Act spells out the periods within which a claim can be brought. More particularly, the action to recover sums is governed by the following provision:

“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).....

(c) actions to recover any sum recoverable by virtue of any enactment.

14. What is critical to the operation of this provision therefore, is a determination of the date of accrual of the cause of action.

15. Section 45A (1) of the NI Act provides:

“Where the Board believes that any person is indebted to or liable to make a payment to another person and that other person is indebted to the Board for unpaid National Insurance Contributions under this Act, the Executive Director may deliver to the first-mentioned person a demand for payment stating—

(a) the name of the person indebted to the Board;

(b) the amount of the debt due to the Board, including penalty and interest on the entire sum at the rate as specified in section 39B”.

16. This is of course separate and apart from the issue of the accrual of the debt in the first place. It means that the demand must be made within a reasonable time and certainly within the applicable limitation period.

Limitation period in the NI Act

17. It must be noted that the NI Act provides at 39 (A) that;

“39A. The amount of money due and payable by an employee or by an employer as a contribution under this Part shall— (a) be deemed to be **held in trust** for the Board by the employer;

(b)

(c)”

Trust Ordinance

18. This position of trust (above) is governed by the Trust Ordinance of Trinidad and Tobago and that very declaration of the fiduciary relationship necessarily means that one must consider this Ordinance. The section provides:

“65 (2)The powers conferred by this Ordinance on trustees are in addition to the powers conferred by the instrument, if any, creating the trust, but those powers, unless otherwise stated, apply **if and so far only as a contrary intention is not expressed in the instrument**, if any, creating the trust, and have effect subject to the terms of that instrument”.

66 (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”.

19. The Trust Ordinance therefore prevails over any other instrument creating the trust, that is, the NI Act in this case. As such the Defendant being deemed a trustee under the Act, the action falls to be considered under 66(1) (b) of the Act. It is to be noted that the claim is not one for fraud or fraudulent breach of trust as same has not been pleaded. So that in respect of contributions which accrued upon becoming due under the NI Act, the limitation is that of four years after the date the cause of action accrued, namely the date upon which the payments became due under section 66(2) of the Trustee Ordinance.

20. This applies equally to the interest and penalties accrued after the expiration of fifteen days from the due date of payment of contributions.

21. Therefore, but for the issue of whether the debts have been acknowledged in law, which thereby causes the limitation period to start afresh, some periods set out in the claim would be statute barred.

Acknowledgement

22. The defendant argued that its letter dated July 23, 2018 was not an acknowledgment of debt within the meaning of the Limitation Act. The letter dated July 23, 2018 stated;

“We acknowledge receipt of your letter dated 9th July 2018 which was received on 16 July 2018, in reference to our indebtedness to the National Insurance Board.

The Form provided by you for admittance of the debt is not submitted with this letter, since while we admit there is indebtedness, we disagree with the figure of \$6,886,225.61 as the debt standing as at 21st February, 2018.

Our Attorney will be contacting you early next week, to work out the terms for settlement of the amount due to the Board.

We look forward to an amicable settlement of the matter”.

23. Section 12 (2) of the Limitation Act provides:

“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.

24. (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”.

25. The claimant is required under section 13 of the Limitation Act to establish that there was such an acknowledgment or payment made in writing and signed by the defendant.

26. The English case of **Surrendra Overseas Limited v Government of Sri Lanka [1977] 1 WLR 565** interpreted section s.23 (4) of the UK Limitation Act 1939 (which is in all material respects the same as s.12 (2) of the local Act). Justice Kerr at page 576 stated:

“A part payment, like an acknowledgement, can only revive the cause of action and start time running afresh *if it provides evidence in the form of an admission* by the debtor that the debt remains due despite the passage of time. This is consonant with the authorities.”

At page 575 he continued:

“But, taking the debtor’s statement as a whole, as it must be, he can be only held to have acknowledged the claim if he has in effect *admitted* his legal liability to pay that which the plaintiff seeks to recover. *If he has denied liability* whether on the ground of what in pleader’s language is called “avoidance” or on the ground of alleged set off or cross claim then his statement *does not amount to an acknowledgement of the creditor’s claim*”

27. In the case of **CV2005-00766 PCA/Interplan Group (J-V) Limited v Urban Development Corporation of Trinidad and Tobago** the Honourable Madam Justice Jones, as she then was approved the *ratio* in Surrendra, supra, and set out that the claimant is burdened with proving that the part payment is an admission by the defendant that the outstanding debt is owed. At paragraphs 17-18, the Honourable Judge stated:

“The words “acknowledges the claim or makes any payment in respect thereof” in section 12 (2) must be referable to the debt or pecuniary claim made. In other words, both the acknowledgment and the part payment must be referable to the sum claimed by the action. That being the case, in order to found an acknowledgment under the Act, there must be an admission in writing or by way of a payment, that the debt or the liquidated pecuniary amount claimed is due....To be an acknowledgment under the section there must either have been an admission as to the specific amount owed or to an amount capable of ascertainment either by calculation, or by extrinsic evidence, without the need for further agreement or negotiation between the parties. If, however, in order to arrive at the quantum of the debt, further negotiation or agreement between the parties is necessary then, in my opinion, the admission cannot be an acknowledgment under the Act, since under the Act the acknowledgment must be in respect of the claim.”

28. In the court’s view, the defendant has acknowledged the debt. Although it has made it clear from the beginning that it did not accept the amount stated by the claimant to be owing. There has therefore been an acknowledgment of an amount capable of ascertainment either by calculation, or by extrinsic evidence, without the need for further agreement or negotiation between the parties. This is an accounting exercise and not a negotiation. It is either the money is owed as per the NI Act or not.

29. The court also accepts that the acknowledgment would have been made by way of the letter of the defendant of the August 26, 2016. By virtue of

section 12(2) of the Limitation Act therefore, time is deemed to begin to run from that date.

DISPOSITION

30. The preliminary point is therefore dismissed and the costs associated with the preliminary point shall be assessed by an Assistant Registrar in default of agreement and paid by the defendant to the claimant upon determination of the claim.

Ricky Rahim
Judge.