

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV2019-04313

Between

ASSOCIATED BRANDS INDUSTRIES LIMITED

Claimant

And

TELECOMMUNICATIONS SERVICES OF TRINIDAD AND TOBAGO LIMITED

Defendant

Before the Honourable Mr. Justice R. Rahim

Date of Delivery: March 16, 2021

Appearances:

Claimant: Mr. S. Bidaisee

Defendant: Mr. K. McQuilkin instructed by Ms. N. Jagarine.

DECISION ON DEFENDANT'S APPLICATION TO SET ASIDE ORDER

Introduction

1. The claimant originally brought a claim in negligence against T&TEC to recover damages arising out of destruction of the claimant's insulated truck bodies by low hanging overhead lines on November 5, 2015. In its Defence T&TEC admitted that the light pole was theirs but not the overhead lines. In those circumstances, the claimant sought by application without notice of June 16, 2020 and was granted an order to substitute TSTT in place of T&TEC. On November 27, 2020 the claimant filed its Amended Claim Form and Statement of Case and served same on TSTT pursuant to the order. Having been served TSTT filed the present application to set aside the order on December 8, 2020 on the basis that it was improperly added as a defendant as the claim is statute barred.

Brief History

2. The claim arose out of an incident on November 5, 2015. On June 28, 2017, a pre-action protocol letter was sent to T&TEC via registered mail. The letter was addressed to T&TEC's Port of Spain office. The claimant having received no response to its pre-action protocol letter, filed its Claim Form and Statement of Case on October 29, 2019 (within the limitation period).
3. On February 14, 2020 T&TEC filed its Defence denying liability on the basis that the lines were not theirs although it admitted ownership of the light pole. T&TEC averred that both TSTT and FLOW (an internet service provider) were service providers permitted to install lines on the pole but at a lower height than the T&TEC lines. Further, the lines owned by T&TEC were secured to the light pole at the height of 6.1

meters above the lines owned by the service providers. T&TEC also denied receiving the pre-action protocol letter dated June 28, 2017.

4. On January 7, 2021 Rayette Bailey (“Bailey”) filed an affidavit in opposition to the defendant’s application. Bailey is the team leader of the claims department of Guardian General Insurance Limited, agents for the claimant. She deposed in her affidavit, that following her investigations, she reasonably believed that T&TEC owned the overhead electrical wires that came in contact with the claimant’s insulated truck bodies.¹ In addition, after the alleged incident, T&TEC visited the site, repaired the damaged lines and erected a new pole.
5. According to Bailey, the claimant’s Attorney sought further disclosure from T&TEC’s Attorney as to the ownership of the lines. Bailey also deposed that, due to the COVID-19 restrictions, communication between the parties was slow and the parties could not confirm with whom responsibility lay.
6. Bailey deposed that she received no information from TSTT or FLOW that suggested that they accepted ownership of the overhead wires.

¹ See exhibit **R.B.1** namely a letter dated May 10, 2016 from Kevin Khan, driver of the flatbed truck where it states, the *electricity wires that extended east-west were burst...*; and **R.B.2** namely a report dated January 27, 2016 commissioned by Jason E. Lewis Investigation Services; *DAMAGES TO PROPERTY: T&TEC Cable Lines.... FACTS (Police) with Trailer TAB 7191 which hooked and pull-down T&TEC Cable Lines, causing the barrel from the trailer to fall off onto the roadway*; and **R.B.3** namely a surveyor’s report dated December 7, 2015 *...On contacting the Trinidad and Tobago Electricity Commission (T&TEC), this surveyor was advised- the minimum height clearance from the roadway for telecommunication wires (cable, internet, telephone) is 6 metres/20ft, while the minimum height clearance from the roadway for electricity wires ranges between 7m (23ft) to 8m (26ft) Examination revealed a significant amount of wires secured to Light Pole No. 585. Several burst wires atop the light pole were also observed. On measuring the distance between the lowest burst wire and the roadway, a measurement of 12 ft. was realised. The remaining burst wires were located 1-2 ft. above this 12 ft. mark....*

Issues to be determined

7. The application to set aside is predicated on several factors set out by the defendant. Firstly, it submits that the claimant's application was filed some seven months after the expiration of the Limitation Period and the legislation does not provide for an extension of time of the limitation period for tortious property damage. Secondly, that had it appeared at the hearing it would have been successful in arguing that the application is in breach of the Limitation of Certain Actions Act, Chapter 7:01 ("the Act") and where a party is added after the Limitation Period has expired, the amended claim would not revert to the initial filing date in circumstances where it needs to rely on the defence of limitation. Finally, that in any event the result of granting the order is that the defendant would make an application to strike out the claim which cannot be resisted.

General Matters

8. The relevant sections of the Act read as follows;

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;

5. (1) Subject to subsection (6), this section applies to any action for damages for negligence, nuisance or breach of duty whether the duty exists by virtue of a contract or any enactment or independently of any contract or any such enactment where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.

(2) Subject to subsection (3), an action to which this section applies shall not be brought after the expiry of four years from—
(a) the date on which the cause of action accrued; or
(b) the date on which the person injured first acquired knowledge of the accrual of the cause of action.

7. (1) In this Act, a person first acquired knowledge when he first became aware of any of the following facts:

- (a) that the injury in question was significant;*
- (b) that injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty;*
- (c) the identity of the defendant;*

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.*

9. Parts **19.2 (4), (5)(b)** and **19.5(7)** of CPR are also relevant to the application. They read;

19.2

(1) This rule applies where a party is to be added or substituted.

.....

(4) The court may order any person to cease to be a party if it considers that it is not desirable for that person to be a party to the proceedings.

(5) The court may order a new party to be substituted for an existing one if—

(a) the existing party's interest or liability has passed to the new party; and

(b) the court can resolve the matters in dispute more effectively by substituting the new party for the existing party.

(6) The court may add or substitute a party at a case management conference.

19.5 (7) Where—

(a) the court makes an order for the addition or substitution of a new party; and

(b) the new party is a defendant and the claim form is served on him, these Rules apply to the new party as they apply to any other party.

First Issue: Application brought seven months after the expiry of the limitation period

10. It is not in dispute that by the time the claimant filed its application to substitute, the period of limitation had expired. However, to simply state the obvious would be equally to ignore the fact that a party cannot file an application if it is impossible so to do through no fault on that party's part. In that regard it is well known that the Covid-19 pandemic was declared in March 2020 and filings were suspended ultimately until the introduction of electronic filing with effect from

June 16, 2020². The application to substitute was made immediately on the said date of the resumption of filing. This followed after a period of discussion with the attorneys for T&TEC in relation to provision of the disclosure information on the ownership of the TSTT lines. In the court's view therefore given the extra ordinary circumstances of both the nature of the claim and the intervention of the pandemic and its consequences, the application was made promptly.

11. Further, the submission of the defendant that there is no provision within the Act to extend the limitation period is misconceived in the court's respectful view. The issue is not one of the extension of the limitation period as it is clear that even in the absence of the exceptional circumstances of the cessation of filing due to the pandemic, the application was made and TSTT was joined outside of the relevant limitation period.

Issue two: relation back

12. Attorney for the defendant argued that the amendment to the Claim Form and Statement of Case could not relate back to the filing date of the original claim and relied on the case of *Liff v Peasley and another*³ wherein the Court of Appeal of the UK disapproved the doctrine of 'relator back' and held that the action against a person joined was deemed to have commenced from the date on which the writ was amended.

² See Practice Direction in Gazette Number 100. Vol 59.

³ [1980] 1 WLR 781 per Brandon LJ at 799; *It is an established rule of practice that the court will not allow a person to be added as defendant to an existing action if the claim sought to be made against him is already statute-barred and he desires to rely on that circumstance as a defence to the claim. Alternatively, if the court has allowed such addition to be made ex parte in the first place, it will not, on objection then being taken by the person added, allow the addition to stand.*

13. The court is of the view that the law is clear that the joinder cannot relate back to the date of filing of the claim for the several reasons set out in *Liff v Peasley* so that the defendant would have been able to successfully argue this point had it appeared at the hearing of the application. The court therefore finds that there is no relation back in relation to the original claim and that the effective date of joinder is the date that the claim form and statement of case were served on TSTT⁴. This was clearly outside the limitation period the pandemic restriction as to filing notwithstanding.

Issue three: Is the claim saved by one of the exceptions set out in section 14

14. Section 14 of the Act provides as exception to the prescribed periods of limitation so as not to extend the period but to prescribe from when it begins in certain circumstances. It reads as follows;

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.*

15. The claimant it appears has relied on this section to ground its argument that it would have been mistaken as against whom the action

⁴ See also the decision of the House of Lords in *Ketteman v Hansel Properties et al* [1987] A.C 189.

should lie and that mistake would only have been resolved when the defence was filed on February 14, 2020 by T&TEC. It therefore submitted that section 14(1)(c) is applicable thereby permitting the court to order the substitution pursuant to Part 19.5 CPR.

16. However, this claim is not one for relief from the consequences of a mistake as set out in section 14(1)(c) of the Act. Perhaps when stretched to its limit the application to substitute may be, but certainly not the claim and the section provides an exception only where the claim is for relief from the consequences of mistake. To that end the submission of the claimant in that regard is a non-starter and must be dismissed.

Issue four: The effect of Part 19.2 CPR and Part 19.7 CPR

17. In this regard the court takes the following into account. It is the case for the claimant by paragraph 14 of the statement of case that a pre-action protocol letter dated June 28, 2017 was dispatched to the defendant T&TEC well before the expiry of the limitation period. However, T&TEC failed to respond to that letter indicating that the lines on the pole did not in fact belong to them. In the result the claimant filed its claim with T&TEC as the defendant.
18. The evidence of the claimant in support of the application demonstrates to the court that at the time of filing the claimant had more than a reasonable basis for bringing the claim against T&TEC. An integral part of those facts is the non-response by T&TEC which would have deprived the claimant of the knowledge of the name of the owner of the line and the entity whose duty extended to its maintenance, knowledge that was uniquely within the bosom of T&TEC. In that regard T&TEC denied receipt of the pre action protocol letter at

paragraph 17 of its defence and averred that its Corporate Secretary was the only person authorized to accept service of legal documents but that the address of that office holder is not Corner Park and Frederick Streets Port of Spain (the address to which the letter was addressed) but is in fact Mt Hope. In the court's view it matters not the address because the letter is addressed to the Corporate Secretary in any event. This would have been a matter of fact to be decided should the claim against T&TEC have continued. Suffice it to say that it remains the claimant's averment that the letter was delivered to the Corporate Secretary.

19. Further, the police report set out that the lines were T&TEC lines, and so did the Investigator's Report. Also, the allegation is that the lines were repaired by T&TEC. It appeared that only upon the filing of the defence by T&TEC on February 14, 2020 that it was disclosed that the lines were those of TSTT.

20. It follows that the claimant could not have known, even in the face of the exercise of reasonable diligence that T&TEC was not a proper party to the claim until the filing of the defence on February 14, 2020. Even then, the position was simply that T&TEC had said so but there was on the evidence presented to this court on the application, nothing before the claimant to confirm that TSTT was the proper party so that TSTT could be immediately joined. It is in that context that discussions ensued between the claimant and T&TEC.

21. The court is of the view that Part **19.2(5)** cannot assist the claimant in the context of what has been set out above. 19.2(5)(a) and (b) are of cumulative effect and treat with substitution where the existing party's interest or liability has passed to the new party which is not the case here. On the evidence before the court T&TEC bore no liability which could have been passed to the new party. Neither can 19.7, the

claimant having failed in its reliance on section 14 of the Act. The court also considered the reliance by the claimant on the dicta of Mendonca JA in Civil Appeal No. 157/2015 *Helix Energy Solutions Group Incorporated v Otis Ryan and another* (transcript). In that case, His Lordship considered the effect of Part 19.2(7) CPR when adding a new party to the proceedings and opined that when adding a new party, the court must consider whether the addition has become necessary because of some change in circumstances which became known after the case management conference. The present case is not one of the addition of a party but the substitution of a party so that in the court's view 19.2(7) does not apply.

22. The unfortunate reality of the claim is that the claimant sued the wrong entity and despite the exercise of reasonable diligence was unable to discover the identity of the proper party until well after the expiration of the limitation period in circumstances where its claim is not one of those for which the limitation period is reckoned from the date of discovery of the proper party under section 14 of the Act. The legislature would have in their wisdom prescribed specific circumstances in which such reckoning would be permitted, and it is not for this court to bypass same and widen the category set by the legislature. The Limitation of Certain Actions Act is primary legislation so that the provisions of the CPR being rules of procedure can only be considered in the context of the legislative framework.

23. Further, there is no application before the court to disapply the limitation period set for bringing the claim.

"Section 23 of the Act

24. Finally, the Act was amended by the Miscellaneous Amendments Act No.10 of 2020 to include a new section namely section 23 which reads;

“23. Notwithstanding the provisions of this Act, the period 27th March 2020 to 30th April 2020 or such longer period as the Attorney General may, by Order, prescribe, shall not be included in the computation of a period of limitation under this Act.”

25. Several Orders extending the time have since been issued the last at the date of writing being that contained in Legal Notice N0.82 of 2021, extending the time to June 30, 2021. In the court’s view this makes no difference in this case having regard to the fact that the limitation period had elapsed well before the coming into force of Act No.10 of 2020.”

26. The order of the court is therefore as follows;

- i. The order of this court of October 28, 2020 is set aside and the claim against Telecommunications Services of Trinidad and Tobago (TSTT) is dismissed.
- ii. In so far as the effect of the setting aside is to revert to a claim against Trinidad and Tobago Electricity Commission (T&TEC) that claim is dismissed.
- iii. The claimant shall pay to TSTT the costs of the application of December 8, 2020 to be assessed by a Registrar in default of agreement.

Ricky N. Rahim

Judge.