THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
SUB-REGISTRY SAN-FERNANDO

CLAIM NO: CV2018-04073

BETWEEN

TAMASHRAJ RAMKISSOON

RESPONDENT/CLAIMANT

AND

RICHARD SIRJOO

APPLICANT/DEFENDANT

Before the Honourable Madame Justice Quinlan-Williams

Date of Delivery: 7th June, 2019

Appearances: Mr. Michael Rooplal for the Respondent/Claimant
Mr. Anthony Manwah instructed by Mr. Ronald Dowlath for the Applicant/Defendant

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DECISION ON THE APPLICANT/DEFENDANT'S NOTICE OF APPLICATION FILED 10th DECEMBER 2018

Background

1. The instant proceedings were commenced by Claim Form and Statement of Case filed on the 7th November 2018. The respondent/claimant is seeking the recovery of the sum of Four

Hundred and Seventy Thousand Dollars ($470,000.00) pursuant to a sale agreement concerning a property situate at 74 Arena Road, Freeport ("the property"). The applicant/defendant was the attorney-at-law for the vendor, Nazil Ali ("the vendor").

2. In or around January 2012, it was agreed amongst the parties that the applicant/defendant would act for both the vendor and the respondent/claimant as stakeholder and attorney-at-law for the purpose of completing the legal requirements for the conveyance of the property. As a result, the respondent/claimant gave the applicant/defendant the sum of $470,000.00 to hold in escrow pending the completion of the purchase. On completion of the transaction the said sum of $470,000.00 would be passed by the applicant/defendant to the vendor.

3. The transaction for the sale of the property was never completed. The respondent/claimant and the vendor mutually agreed to cancel the agreement for sale upon which the respondent/claimant requested the return of the said sum held by the applicant/defendant. However, despite numerous requests by the respondent/claimant to the applicant/defendant, he has failed and/or refused to return the monies.

4. Consequently, the respondent/claimant is seeking:
    i. the return of the monies due and owing;
    ii. damages for;
        (a) conversion and detinue
        (b) and/or unjust enrichment
        (c) and/or breach of fiduciary duty
    iii. interest; and
    iv. costs.

5. On the 10th December 2018, the applicant/defendant filed a notice of application requesting summary judgment of the claim on the ground that it is statute barred and therefore has no realistic prospect of success. Alternatively, the applicant/defendant is asking for the claim to be struck out. Failing both grounds the applicant/defendant requests an extension of time be granted to file his defence. This notice of application was filed after the time had passed for filing the applicant/defendant's defence.

6. Prior to the commencement of the instant proceedings, the respondent/claimant filed an analogous claim CV2016-00231 *Tamashraj Ramkissoon -v- Richard H. Sirjoo & Co. Limited* on the 28th January 2016. The respondent/claimant avers that the claim has since been abandoned as it was wrongly instituted against Richard H. Sirjoo and Company Limited. No steps have been taken after service of the said claim.

Issues

7. The issues for the court's determination are:
   i. Whether summary judgment is appropriate on the ground that the claim is statute barred pursuant to the Limitation of Certain Actions Act Chapter 7:09;
   ii. If not, whether the claim ought to be struck out; and
   iii. If not, whether the applicant/defendant should be granted an extension of time to file its defence.

Law and Analysis

8. The court notes at the outset, that on one version proffered by the applicant/defendant, Limitation would not arise as a defence. The applicant/defendant's account is that "To date I have received no instructions from both the Claimant and Nazir Ali to pay this sum to the

Claimant"[1]. The applicant/defendant seems to be asserting that no cause of action has as yet arisen.

9. The court will, nevertheless consider the various aspects of the applicant/defendant's application.

10. The applicant/defendant relies on Part 15.2 of the Consolidated Civil Proceedings Rules 2016 ("CPR") which sets out the grounds by which the court is empowered to give summary judgment:

> "The court may give summary judgment on the whole or part of a claim or on a particular issue if it considers that—
> …
> (b) on an application by the defendant, the claimant has no realistic prospect of success on the claim, part of claim or issue."

11. An application for summary judgment hinges on the applicant/defendant's ability to satisfy the court that, the respondent/claimant has no realistic prospect of success at trial[2]. Kangaloo J.A. in *Western United Credit Union Co-operative Society Limited -v- Corrine Ammon* C.A. Civ. 103 of 2006 provided further guidance on Part 15 of the CPR as follows:

> "(i) The court must consider whether the defendant has a "realistic" as opposed to a "fanciful" prospect of success*: Swain v. Hillman* [2001] 2 All E.R. 91;
> (ii) A "realistic" defence is one that carries some degree of conviction. This means a defence that is more than merely arguable: *ED & F Man Liquid Products v. Patel* [2003] E.W.C.A. Civ 472 at [8];
> (iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v. Hillman*;
> (iv) This does not mean that the court must take at face value and without analysis everything that a defendant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v. Patel* at [10];

[1] Affidavit of Richard Sirjoo sworn on 10th December 2018. Paragraph 5
[2] Civil Appeal No. 103 of 2006 *Western United Credit Union Co-operative Society Limited -v- Corrine Ammon*

(v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v. Hammond (No. 5)* [2001] E.W.C.A. Civ 550;

(vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63."

12. Lord Woolf MR in the case of *Swain -v- Hillman* (2001) 1 AER 94 emphasized that the court's powers of summary judgment are consistent with the overriding objective in dealing with cases justly as it saves expense, achieves expedition and avoids wastage of the court's resources. However the court is not required to conduct a mini trial. If a claim is bound to fail, then it is in the interest of the claimant to know as soon as possible.

13. In an application for summary judgment, the applicant generally sets out their case against the respondent. The evidential burden then shifts to the respondent to show a case answering that advanced by the applicant. Once successful, the respondent would ordinarily be allowed to take the matter to trial: as per Tuckey LJ in *Director of the Assets Recovery Agency -v- Woodstock* [2006] EWCA Civ 741.

14. In the instant application, the applicant/defendant's basis for summary judgment is premised on section 3(1)(a) of the Limitation of Certain Actions Act Chapter 7:09 which state:

"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;"

15. As such, critical to the operation of this provision, is the determination of when the cause of action first accrued. The applicant/defendant in the Notice of Application filed 10th December 2018 averred that the cause of action accrued on the 30th January 2012. On that said date, the respondent/claimant paid the applicant/defendant the sum of $470,000.00 to hold in escrow as stakeholder. It was subsequently agreed between the respondent/claimant and the vendor that the agreement of sale was cancelled. The respondent/claimant avers that he then called upon the applicant/defendant to return the said sum which never materialized.

16. Upon a reading of the statement of case, it discloses no date on which the agreement was cancelled nor when the requests for repayment were made by the respondent/claimant. The applicant/defendant highlighted however that the claim CV2016-00231 *Tamashraj Ramkissoon -v- Richard H. Sirjoo & Co. Limited* indicates that requests for payment illustrative of the cause of action occurred at the latest in May 2014. As a result, more than four years have elapsed, since the current proceedings were filed in November 2018 thereby rendering the claim statute barred.

17. In support of its contention the applicant/defendant relied on paragraphs 10 to 13 of the statement of case in CV2016-00231 *Tamashraj Ramkissoon -v- Richard H. Sirjoo & Co. Limited.* The applicant/defendant avers that after the agreement for sale had been quashed between the parties, the respondent/claimant subsequently contacted the office of Richard H. Sirjoo and Company Limited and Mr.

Richard Sirjoo personally, on numerous occasions regarding the return of the $470,000.00. No solution was provided or agreed upon between the applicant/defendant and the respondent/claimant.

18. Thereafter, the respondent/claimant retained the services of a debt collection company named Credit Chex. After a lengthy period of time, no positive feedback was received and those services were deemed futile. It is not pleaded whether or not Credit Chex made contact with or demanded of the applicant/defendant the return of the $470,000.00.

19. In or around May 2014, one Peter Jagroopsingh, a purported friend of Mr. Richard Sirjoo, contacted the respondent/claimant. Mr. Jagroopsingh made arrangements and drafted documents to extinguish the debt owed and exonerate the respondent/claimant. This action did not yield any positive results for the respondent/claimant.

20. The respondent/claimant avers in this claim that he caused his attorney at law to send a pre-action protocol letter dated the 19th November 2015 to the applicant/respondent. In that pre-action protocol letter, the attorney states that the agreement between the parties had ended and respondent/claimant therefore demanded the repayment of the sum of $470,000.00 held in escrow.

21. On one interpretation of the facts, it is possible to conclude that the cause of action accrued on or about the 19th November 2015 when the applicant/defendant received the pre-action protocol letter. It is also possible to conclude that the cause of action accrued in May 2014. Therefore, there are triable issues between the parties based on the pleadings and what the court projects will be the evidence adduced by the respondent/claimant. This court therefore, is not able to say that

the applicant/defendant has a realistic defence by way of section 3(1) (a) of the Limitation of Certain Actions Act Chapter 7:09.

22. The respondent/claimant asserts that in accordance with its statement of case, the claim against the applicant/defendant is premised, in part, on breach of fiduciary duty. As a result, the limitation period as prescribed by section 3(1) of the Limitation of Certain Actions Act Chapter 7:09 does not apply and as such the claim is not statute barred. Section 3(1) of the Limitation of Certain Actions Act states:

    "(3) This section shall not apply to any—

    (a) claim for specific performance of a contract or for an injunction or for other equitable relief;"

23. The court is in agreement with the submissions of the respondent/claimant that the exception applies to the circumstances of this case. The claim under this head is premised upon a stakeholder agreement in which the applicant/defendant holds the said sum in escrow. It is settled law that solicitors owe their client(s) a fiduciary duty[3]. The arrangement entered into among the parties had the effect of creating a fiduciary relationship between the applicant/defendant and the vendor, as well as an independent fiduciary relationship between the applicant/defendant and the respondent/claimant.

24. The applicant/defendant (the trustee) was duty bound by virtue of the fiduciary relationship he had with the respondent/claimant, to return the sum of monies to the respondent/claimant when the agreement between the vendor and the respondent/claimant came to an end.

25. Any act by a trustee with reference to trust property in contravention of the equitable duties imposed on him by the creation of the trust or in excess of those duties and any neglect or omission on his part to

[3] Snell's Equity 33rd Edition at paragraph 7-004

fulfill those duties constitutes a breach of trust[4]. It follows that a breach of trust in itself is a violation of an equitable obligation wherein the remedy lies in equity invoking the equitable jurisdiction of the court[5]. As a result, the claim for breach of fiduciary duty falls within the ambits of section 3(3) (a) of the Limitation of Certain Actions Act Chapter 7:09 and is not precluded by the limitation period in section 3(1) of the Act.

26. The respondent/claimant seeks restitution for unjust enrichment by the applicant/defendant's wrongdoing in failing to return the sum of $470,000.00. Based on the claims sought in the statement of case, the claim can either be premised in equity pursuant to the applicant/defendant's purported breach of fiduciary duty or in tort whereby the applicant/defendant has deprived the respondent/claimant of his possessory right to the said sum[6]. As the basis of this claim is capable of falling within the equitable jurisdiction of the court, the limitation period in section 3(1) (a) of the Limitation of Certain Actions Act Chapter 7:09 does not apply.

27. Based on the foregoing, there are various claims and different interpretations of the facts in the instant proceedings, that prevents the applicability of the four year limitation period pursuant to the provisions of section 3(3)(a) of the Limitation of Certain Actions Act Chapter 7:09. In accordance with the guidance of Tuckey LJ in *Director of the Assets Recovery Agency -v- Woodstock* [2006] EWCA Civ 741, the court is satisfied that the respondent/claimant has successfully answered the case as advanced by the applicant/defendant.

28. Therefore, the court finds neither summary judgment nor striking out the claim is appropriate in these circumstances and the matter ought

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[4] Halsbury's Laws of England Volume 98 paragraph 665
[5] CV2013-00212 *The University of Trinidad and Tobago -v- Professor Kenneth Julien and others* at paragraph 57
[6] Halsbury's Laws of England Volume 88 (2012) 11. Restitution for wrongs at paragraph 550

to proceed to trial as the respondent/claimant has a realistic prospect of success.

29. The court must now determine whether it should grant an extension of time to the applicant/defendant to file a defence. The application for an extension of time to file the defence was made pursuant to Rule 26.1[7]. The ground that supports the application is stated to be "that the Defendant's file in respect of this transaction cannot be located"[8]. The evidence in support of the application is the affidavit sworn by applicant/defendant on the 10th December 2018. The applicant/defendant avers, "Further the file in respect of this transaction has been misplaced in my Chaguanas office and I am currently seeking to locate it. I am unable to properly do my defence until I find this file."[9]

30. An application for an extension of time to file a defence, is properly made under Rule 10.3(5)[10]. In this case, the application was made pursuant to Rule 26.1. Rule 26.1 gives the court its general powers of case management. However where there are specific powers, such as Rule 10.3(5), this court will not exercise a general power.

31. Assuming that an application could have been made under Rule 10.3(5), the court applied the decision of *Roland James -v- The Attorney General of Trinidad and Tobago*[11]:

> 20. Unlike rule 26.7, rule 10.3(5) does not contain a list of criteria for the exercise of the discretion it gives to the Court. The question then arises, how the Court's discretion is to be exercised. I think because no criteria is mentioned in rule 10.3(5) it was intended that the Court should exercise its

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[7] Notice of Application filed 10th December 2018. Paragraph 3.
[8] Notice of Application filed 10th December 2018. Paragraph 3.
[9] Affidavit of Richard Sirjoo sworn 10th December 2018. Paragraph 5.
[10] **10.3**(5) A defendant may apply for an order extending the time for filing a defence.
[11] Civil Appeal No.44 of 2014

discretion having regard to the overriding objective (see Robert v Momentum Services Ltd. [2003] EWCA Civ. 299).

…

22. It is relevant to note that the list in 1.1(2) is not intended to be exhaustive and in each case where the Court is asked to exercise its discretion having regard to the overriding objective, it must take into account all relevant circumstances. This begs the question, what other circumstances may be relevant. In my judgment on an application for an extension of time, the factors outlined in rule 26.7(1), (3) and (4) would generally be of relevance to the application and should be considered. So that the promptness of the application is to be considered, so too whether or not the failure to comply was intentional, whether there is a good explanation for the breach and whether the party in default has generally complied with all other relevant rules, practice directions, orders and directions. The Court must also have regard to the factors at rule 26.7(4) in considering whether to grant the application or not.

23. In an application for relief from sanctions there is of course a threshold that an applicant must satisfy. The applicant must satisfy the criteria set out at rule 26.7(3) before the Court may grant relief. In an application for an extension of time it will not be inappropriate to insist that the applicant satisfy that threshold as the treatment of an application for an extension of time would not be substantially different from an application for relief from sanction. Therefore on an application for extension of time the failure to show, for example, a good explanation for the breach does not mean that the application must fail. The Court must consider all the relevant factors. The weight to be attached to each factor is a matter for the Court in all the circumstances of the case.

24. Apart from the factors already discussed the Court should take into account the prejudice to both sides in granting or refusing the application. However, the absence of prejudice to the claimant is not to be taken as a sufficient reason to grant the application as it is incumbent to consider all the relevant factors. Inherent in dealing with cases justly are considerations of prejudice to the parties in the grant or refusal of the application. The Court must take into account the respective disadvantages to both sides in granting or refusing their application. I think the focus should be on the prejudice caused by the failure to serve the defence on time.

…

27. Firstly, it must be borne in mind that the Court on the hearing of the application for an extension of time is not engaged in a rubber stamping exercise. It must not be taken for granted that such an application, as opposed to an application

for relief from sanction, is one that the Court must or would ordinarily grant. Secondly, as has been said before, it was the casual or laissez faire approach to litigation that mandated the repeal of the Rules of the Supreme Court, 1975 and brought the CPR into existence (see Civil Appeal 79 of 2011 and The Attorney General of Trinidad and Tobago v Miguel Regis). The old lax culture is not to be tolerated and while that does not mean zero tolerance the intention of the CPR is to create a culture of compliance. There is therefore a need for compliance with the rules and this applies as much to rules where a sanction is imposed as to other rules where there is none. Thirdly, by identifying the factors that should be considered in the exercise of the Court's discretion, it is the expectation that decisions would be less subjective and be more predictable. Fourthly, I do not see that the approach should cause any increase in opposed applications. First of all it is not new. This has been the approach of the Court of Appeal for some time (see Civil Appeal 83 of 2010 Lincoln Richardson v Elgeen Roberts-Mitchell). Secondly the law is not concerned with trivial or insignificant things. Where therefore the delay is trivial or insignificant I do not expect that such applications would usually be opposed or if it is that it should generally detain the Court for any length of time. Thirdly it is the duty of the parties and their representative to help the Court to further the overriding objective. This is clearly spelt out at rule 1.3 which provides:

"The parties are required to help the court to further the overriding objective."

Parties should therefore work together to ensure that applications for extensions of time are avoided. In relation to that obligation the Court of Appeal of England and Wales in Denton v T.H. White Ltd. and anor. ; Decadent Vapours Ltd. v Bevan and others; Utilise T.D.S. Ltd. v Davies and others [2014] EWCA Civ. 906 (at para 43) made the following comments and observations in the context of an application for relief from sanction which I think are apposite here"

32. The court considered the explanation provided by the applicant/defendant. The deponent's evidence was scant and provided no insight as to whether the applicant/defendant would ever be in a position to file a defence. Assuming the applicant/defendant never locates the file that was misplaced in his office then he will, according to him, remain unable to "properly do his defence".

33. Therefore to grant the application pursuant to section 10.3(5) would have disproportionally benefitted the applicant/defendant and cause unrequited detriment to the respondent/claimant. The applicant/defendant has the advantage of having insight into what is required of an attorney-at-law, as well as, the relationship between attorney-at-law and client. Details such as the efforts being made or the timeframe required to search all the files in the office might have assisted the court with its deliberations on the application.

34. Promptitude was less of an issue than was insufficiency of evidence. It was difficult for the court to make any finding other than, the failure to comply was intentional. Based on all the circumstances, the application for an extension of time for the applicant/defendant to file a defence was refused.

35. The applicant/defendant having failed on the application was ordered to pay the respondent/claimant's cost in the amount of $9,800.00:

    i. Court attendances – one hour in aggregate – $1,400.00
    ii. Two hours for receiving instructions – $2,800.00
    iii. Four hours for settling reply and submissions – $5,600.00

36. Stay of execution, twenty-eight (28) days.

Justice Avason Quinlan-Williams

JRC: Romela Ramberran