REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P 346 of 2016

Between

THE TRINIDAD AND TOBAGO HOUSING DEVELOPMENT CORPORATION

Appellant/Defendant

And

ANTOINETTE ALLEYNE

Respondent/Claimant

PANEL: **N. BEREAUX, J.A.**
G. SMITH, J.A.
C. PEMBERTON, J.A.

APPEARANCES: **D. Peake SC and K. Garcia for the appellant**
S. Marcus SC and D. Toby for the respondent

DATE DELIVERED: 16 March 2017

I have read in draft the judgment of Bereaux J.A. I agree with it and do not wish to add anything.

G. Smith
Justice of Appeal

I too agree.

C. Pemberton
Justice of Appeal

JUDGMENT

Delivered by Bereaux, J.A.

Introduction

[1] By its notice of appeal dated 16th November 2016 the appellant challenged the judge's order of 8th November 2016 by which the judge found the appellant's counter claim to have been statute barred pursuant to the provisions of section 3(1)(a) of the Limitation of Certain Actions Act Chap 7:09 (the Act).

[2] The main ground of appeal is that the respondent did not plead section 3(1)(a) of the Act. Mrs. Peake for the appellant submitted that limitation must be specifically pleaded in order to be relied on by the appellant and in order to be considered by the judge. A subsidiary of that complaint is that the judge proceeded to rule on the limitation of the appellant's counterclaim without giving the counsel an opportunity to be heard on the same. But, as Mrs. Peake readily conceded, unlike her main submission, which does, this submission does not go to the final disposal of the issue but rather to allowing her the opportunity to persuade the judge that limitation did not arise on the pleadings.

[3] A second plank of the appeal is that the judge erred in holding that the appellant's cause of action accrued from the same date as that of the respondent's. Consequently, time would not have begun to run from the date found by the judge. This latter ground however is contingent upon a finding that limitation was in fact pleaded and will be rendered otiose if it is found that there was no plea of limitation made.

[4] The appellant in its defence had alleged that the respondent's claim was statute barred. This was upheld by the judge. The appellant also counterclaimed for the payment of the sum of $174,937.01. The respondent in response filed a defence to counterclaim on 16th October 2014. There was no dispute that the defence to counterclaim did not plead that the counterclaim was statute barred.

An amended defence to counterclaim which did plead the limitation defence was filed but Mrs. Peake submitted that no permission to amend was given by the court as required by Part 20.1(3) of the Civil Proceedings Rules 1998 (the CPR). The amended defence to counterclaim is not on the record before us but it is accepted by both sides that it does contain a plea of limitation.

[5] Mr. Marcus SC readily conceded that no permission was given by the court to file the amended defence to counterclaim. He submitted however that none was required. I understood his submission to be that he was entitled to amend it without permission at any time prior to a case management conference. The amendment was filed on 26th November 2014 and the next case management conference occurred on 8th January 2015. He relied on Part 20.1(1) of the CPR which he submitted was a stand-alone provision. He submitted that even if he failed to get permission, Part 26.8(2) of the CPR provided that:

> ***"An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders."***

Pleading of a limitation defence

[6] The necessity to plead a defence of limitation is well established. The dictum of Lord Griffiths in **Ketteman v. Hansel Properties [1987] AC 189**, 219 is instructive:

> ***"A defence of limitation permits a defendant to raise a procedural bar which prevents the plaintiff from pursuing the action against him. It has nothing to do with the merits of the claim which may all lie with the plaintiff; but as a matter of public policy Parliament has provided that a defendant should have the opportunity to avoid meeting a stale claim. The choice lies with the defendant and if he wishes to avail himself of the statutory defence it must be pleaded. A defendant does not invariably wish to rely on a defence of limitation and may prefer to contest the issue on the merits. If,***

therefore, no plea of limitation is raised in the defence the plaintiff is entitled to assume that the defendant does not wish to rely upon a time bar but prefers the court to adjudicate on the issues raised in the dispute between the parties. If both parties on this assumption prepare their cases to contest the factual and legal issues arising in the dispute and they are litigated to the point of judgment, the issues will by this time have been fully investigated and a plea of limitation no longer serves its purpose as a procedural bar.

If a defendant decides not to plead a limitation defence and to fight the case on the merits he should not be permitted to fall back upon a plea of limitation as a second line of defence at the end of the trial when it is apparent that he is likely to lose on the merits. Equally, in my view, if a defence of limitation is not pleaded because the defendant's lawyers have overlooked the defence the defendant should ordinarily expect to bear the consequences of that carelessness and look to his lawyers for compensation if he is so minded."

[7] See also Mendonça JA in **First Citizens Bank Limited v. Shepboys Ltd. & another, Civil Appeal No. P 231 of 2011**, (following the decision in **Kennett v. Brown [1988] 2 ALL ER 600**) at paragraph 26 where after considering Lord Griffiths' dictum, he stated,

"if the limitation issue is not raised by the defendant, it is not appropriate for the Court to determine whether the action is statute barred."

Analysis and discussion

[8] The very short, if not simple, question in this appeal therefore is whether the permission of the court was required for the amendment to the defence to

counterclaim pursuant to Part 20.1 of the CPR. In my judgment permission was required, for the reasons which next follow. Part 20.1(1) to 20.1(3) of the CPR are relevant.

[9] Part 20.1 provides as follows:

> ***"(1) A statement of case may be changed at any time prior to a case management conference without the court's permission.***
>
> ***(2) The court may give permission to change a statement of case at a case management conference.***
>
> ***(3) The court shall not give permission to change a statement of case after the first case management conference, unless it is satisfied that –***
>
> ***(a) there is a good explanation for the change not having been made prior to that case management conference; and***
>
> ***(b) the application to make the change was made promptly.***
>
> ***(3A) …"***

[10] Part 20.1(1) is not a stand-alone provision. It must be read in conjunction with sub rules (2) and (3). The conjoint effect of Part 20.1(1), (2) and (3) is as follows:

(i) A statement of case can be changed at any time prior to the first case management conference without the court's permission. A statement of case is defined by Part 2.3 of the CPR to include a claim, defence, counterclaim, ancillary claim form, defence to counterclaim and a reply to a defence.

(ii) Once the first case management conference has occurred however a statement of case cannot be changed unless the court gives permission. Given that a statement of case is defined to include a defence to counterclaim, it follows that a defence to counterclaim cannot be amended after the first case management conference

without the permission of the court.

(iii) The first case management conference means precisely that. That is to say, it is that case management conference which occurs, immediately upon the close of pleadings (subject to leave being granted to file a reply per part 10.10) pursuant to the provisions of Part 27.3(1), (2) or (3) of the CPR.

[11] Part 20.1(1) cannot stand by itself. A defence to counterclaim cannot be amended prior to a further case management conference, if the first case management conference has already taken place. Mr. Marcus' submission cannot survive a proper construction of Part 20.1(1), (2) and (3).

[12] As to Mr. Marcus' submission that any failure to obtain the court's permission to amend the defence to counterclaim after the first case management conference was covered by Part 26.8(2), I do not agree. Part 26.8(2) cannot apply to a substantive breach of the rules particularly in a case such as this in which the rule which has been breached (Part 20.1(3)) requires the judge to exercise a discretion by the active consideration of specified criteria. At best Part 26.8(2) covers errors of procedure or breaches of the rules which amount to mere irregularities.

Conclusion

[13] It was not disputed that the first case management conference had already occurred at the time of filing of the amended defence to counterclaim. The respondent therefore had to demonstrate that permission had been given pursuant to Part 20.1(3). Mr. Marcus having conceded that no such permission had been given, it follows that the amended defence to counterclaim was not valid and cannot stand. The defence of limitation therefore was not pleaded and the trial judge should not have considered it. By doing so he fell into error and was plainly wrong. Since I have found that limitation of the counterclaim was not

pleaded, it is unnecessary to consider the second plank of the appeal. The appeal is allowed and the order of the judge dismissing the counterclaim, is set aside. We will hear the parties on costs.

Nolan P.G. Bereaux
Justice of Appeal