

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

**CIVIL APPEAL NO P249 OF 2020
CLAIM NO CV 2019-02443**

BETWEEN

THE CEPEP COMPANY LIMITED

Appellant

AND

COROZAL TRADING LIMITED

Respondent

Panel:

Pemberton J.A.

Boodoosingh J.A.

Date of Delivery: 9th December 2020

Appearances:

for the Appellant: Mr. Prescott S.C. and Mr. F. Masaisai instructed by Ms. J. Tull

**for the Respondent: Mr. J. Singh, Mr. K. Taklalsingh and Mr. L. Kalicharan instructed
by Ms. K. Singh**

JUDGMENT

1. This is an appeal from the decision of Wilson J where she disallowed CEPEP's application to dismiss Corozal's claim on the basis that it is statute barred.

Background

2. Corozol and CEPEP entered into two contracts for the performance of certain works. The Letter of Award dated 5 December 2014 evidenced the first contract. That contract mandated that Corozol carry out construction, remedial and maintenance work on the Caura Valley Health Centre for the sum of \$11,034,073.10 ("the Caura Contract"). The Letter of Award dated the same 5 December 2014 evidenced the second contract. In that contract, Corozol was to carry out maintenance work on the Santa Cruz, Las Cuevas, Maraval and Woodbrook Health Centres for the sum of \$9,077,316.56 ("the multiple contract"). It was a material term under both contracts that payment to Corozal was to be effected within 90 days of CEPEP's approval of the works completed and Corozal's submission of invoices.
3. Corozol satisfactorily completed the works under both contracts as evidenced by the Payment Certificates issued by CEPEP's Engineer. The Payment Certificate dated 5 May 2015 was issued by CEPEP's Engineer with respect to the Caura contract. Another Payment Certificate dated 23 April 2015 was issued similarly, with respect to the multiple contract. In addition, having submitted the invoices for the Caura contract on 8 May 2015 and the multiple contract on 24 April 2015, payment ought to have been made to them within 90 days of the submission of

these invoices. However, to date CEPEP has refused to pay the sums due under either of the contracts.

4. Accordingly, on 14 June 2019, Corozal instituted the instant claim to recover the payments due under the both contracts, together with damages for breach of contract, interest and costs.
5. In its Defence, CEPEP averred that Corozol's claim is statute barred and denied the claim on several grounds, which are not necessary to set out for the purposes of this appeal. CEPEP stated that Corozol's claim is statute barred because the cause of action accrued when the works were completed, which they assert is the relevant date for these purposes. The relevant date is shown on the Payment Certificates as 22 April 2015 in the case of the Caura contract and 8 April 2015 in relation to the multiple contract. Therefore, the action became statute barred on the 8 April 2019 and 22 April 2019 respectively. Accordingly, the instant claim is out of time by eight weeks since it was filed on 14 June 2014.
6. In its Reply to the Defence, Corozal averred that the claim was not statute barred because the cause of action accrued when CEPEP failed to pay within 90 days of the approval of the works and the submission of the invoices as provided for in the contract.
7. Subsequently, CEPEP applied pursuant to CPR 26.1(k) and (w) for the court to dismiss the claim on the basis that it is statute barred on the same grounds as set out in its Defence.

8. Corozal opposed the application and the parties made oral and written submissions before the trial judge.

Judge's Reasons

9. The trial judge found that the contract comprised several documents, the material ones for these purposes, being the Letters of Award. The interpretation of those documents is critical to the determination of the date on which the cause of action accrued.

10. The trial judge's interpretation of the contract was that the Letter of Award makes the payment of the contract sum to Corozal contingent upon its satisfactory completion of the works. The issue of the Payment Certificate established the satisfactory completion of the works. Once this occurs, CEPEP must make payment within 90 days. Corozal's obligation to provide invoices preceded the issue of the Payment Certificate because it is implicit in the request for payment by the contractor to the engineer who prepares the Payment Certificate that the invoice and other information would be required to prepare it. Accordingly, in the case of Contract 1, the Caura contract, the Payment Certificate having been issued on 5 May 2015, the deadline for payment would have expired on or around 3 August 2015. In the case of Contract 2, the multiple contract, the Payment Certificate having been issued on 22 April 2015, the deadline for payment would have expired on or around 21 July 2015. Therefore, the four-year period of limitation would have expired on 2 August 2019, in the case of the Caura contract and on 20 July 2019, in

the case of multiple contract. Since Corozal's claim was filed on 14 June 2019, the claim is therefore within the limitation period in both instances.

11. Furthermore, the trial judge found that the cases relied on by CEPEP were irrelevant because the causes of action arose from the statutes. The question as to what is procedural and what is an inherent element of the cause of action was one of construction of the particular statutes. That is not the case here.

The Appeal

12. CEPEP appealed on the ground that the trial judge was wrong to find that the claim was not statute barred because the Letters of Award upon which she based her decision did not form part of the agreement between the parties. Furthermore, the trial judge's interpretation of those Letters is wrong. In addition, Counsel based his displeasure with the result of the application by encouraging me to dismiss the claim in its entirety. The submission was that since the cause of action accrued from the date that the works were completed the right to bring action based on the arrangement between the parties, the claim would have run its course by the time that the action was filed.

Submissions

13. CEPEP renewed its submission on appeal that the claim is statute barred because time began to run from the date of the completion of the works, which is 22 April 2015 in the case of the Caura contract and 8 April 2015 in the case of the multiple contract. In this regard, CEPEP relied on the cases of *Reeves v Butcher*, Swansea

City Council v Glass, Coburn v College, ICE Architects Ltd v Empowering People Inspiring Communities and Jaspal Bhogal & Associates v The Urban Development Corporation of Trinidad and Tobago¹ .

14. Corozal submitted that the cases relied on by CEPEP are irrelevant and that the cause of action arises from the date of the breach. The date of the breach is the date on which CEPEP failed to pay the sums due under the contracts. The sums became due within 90 days of CEPEP'S approval of the work and Corozal's submission of its invoices. CEPEP did not pay within 90 days of the aforementioned events and so they are in breach of the contract. Four years did not elapse since the contract was breached so the claim is not statute barred. Furthermore, since the point was being dealt with as a preliminary point, CEPEP knew it would have been treated with on the basis of the pleadings and affidavit evidence. The trial judge did not make any findings of fact. She merely interpreted the contract, which is a question of law. If the court were to disallow the appeal, the matter should go to trial. The trial judge was right to find that the letter of award formed part of the contract.

Analysis and Discussion

15. One must be mindful of the role of the Court of Appeal. This time honoured rule can be summarised as a court of appeal will interfere with a trial judge's decision

¹ Reeves v Butcher [1891] 2 QB 509, Swansea City Council v Glass [1992] 1 QB 844, Coburn v College [1897] 1 QB 702, ICE Architects Ltd v Empowering People Inspiring Communities [2018] EWHC 281 (QB) and Jaspal Bhogal & Associates v The Urban Development Corporation of Trinidad and Tobago CV2014-01724

only if it is found to be plainly wrong as a matter of law or in the exercise of a discretion or the findings of fact were not in keeping with the body of evidence².

16. The only issue for determination in this appeal is whether the trial judge was wrong to find that Corozal's claim can continue this action as it is not statute barred. CEPEP challenges the trial judge's determination on the basis that it is wrong both in fact and in law. I say that challenge is fruitless for the reasons that follow.

LAW

17. **Section 3(a) of the Limitation of Certain Actions Act Chap 7:09** provides that:

*"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 [my emphasis]** (other than a contract made by deed) on quasi-contract or in tort"*

18. A cause of action is a factual situation which allows one party to obtain a remedy against the other see **Letang v Cooper [1964] 3 WLR 573** at 580. In cases for breach of contract the cause of action arises at the date of the breach of the contract **Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 02) [1997] 1 WLR 1627** at 1630.

² See **BEACON INSURANCE COMPANY LIMITED v MAHARAJ BOOKSTORE LIMITED [2014] UKPC 21**

19. The issue of limitation is a question of mixed law and fact which may be best left for determination at trial.³ I associate myself with Nelson JA in the **A-Z SUPPLIES LIMITED CASE**, where the learned Justice of Appeal stated,

...7. Limitation is almost always a mixed question of fact and law. The untimely basis of the action or appeal must be established by facts before the relevant law as to limitation can be applied.

8. On the other hand, a preliminary point of law is either based on agreed facts or on the assumption that all the allegations in the pleadings or the evidence of the party against whom the point is taken are true.: see ANDERSON v MIDLAND RAILWAY COMPANY [1902 1 Ch. 369, 374 per Buckley JA.

9. ...

10. ... the point of law should have been dealt with after hearing all the evidence in the case, unless the parties agreed the facts.

20. In this case, the trial judge based her decision on the alleged contract between the parties, as evidenced by the Letters of Award in both the Caura contract and the multiple contract. This approach would have been correct had there not been a stated defence, which sought to question whether the parties had entered into a legally binding and enforceable contract at all. This needed to be determined and because of that determination, its terms and what would have amounted to a breach of contract would have been decided. In this case, the date at which the breach if any would have occurred and finally whether the matter had not offended the **LIMITATION OF CERTAIN ACTIONS ACT**⁴.

21. In addition, the parties were at odds in determining the relevant date for the crystallising of the right to bring action to recover any sums due and owing for

³ See Nelson JA in **BOARD OF INLAND REVENUE v A-Z SUPPLIES LIMITED CA No. 126 of 2002.**

⁴ Chap. 7:09 Laws of the Republic of Trinidad and Tobago

works done and services performed. I must comment though, that each case is to be viewed in its own dwelling, that is, the parties' particular operating environment. In this case, it is a contract for building maintenance services.

22. To my mind, the trial judge erred in hearing and deciding whether this action was statute barred as a preliminary point because of varying stances on the efficacy of the contractual and operating environment between the parties were at variance.
23. Having come to this conclusion, I must consider whether to allow this appeal on all of the grounds set out by CEPEP in its Notice of Appeal.

GROUND

24. *A. The decision is against the weight of the evidence.*

The trial judge accepted the veracity of the Letters of Award as pleaded by Corozol. CEPEP took issue with this. The trial judge therefore erred in treating the Letters of Award as agreed and uncontroverted fact. This approach was expressly frowned upon by Nelson JA and therefore, in agreeing to and applying that dicta, I can come to no other conclusion than that the trial judge was plainly wrong on this issue. The trial judge ought not to have regarded the Letters of Award as uncontroverted evidence. That stage of fact-finding and reliance ought not to have been engaged without testing on cross-examination.

25. *B. The learned Judge erred in law by failing to hold that the cause of action arose at the moment (that) the works are completed.*

If I apply the learning espoused by Nelson JA, it is clear that this ground of appeal is unmeritorious. The determination of the time when the cause of action fructified is clearly one of mixed law and fact. The issue with respect to when monies were due and owing is determined by the intention of the parties at the time of the agreements. In the same way that Counsel for CEPEP urged

1. that the trial judge erred in relying on the Letters of Award;
2. further that those documents ought not to have been considered and
3. that there should be no finding made on their veracity,

similarly, I cannot follow Counsel's lead to determine that the cause of action arose at the moment that the works were completed. I ask the question, where is the tested evidence to base that conclusion? The trial judge was correct in not following that course and I too must respectfully decline the invitation to do so. The appeal fails on this ground.

26. C. The learned judge erred in law and/or procedure by failing to consider that the Letter of Award does not constitute a material part of any agreement between CEPEP and Corozol.

D. The learned judge erred in law and procedure by considering and applying the provisions of Corozol's Letter of Award as being the contract or a material part of the contract.

Again, these grounds are based on Counsel's interpretation of the trial judge's decision and clearly involve findings of facts, which as I said have not been tested by cross-examination. My thinking on these two grounds appears above and for the avoidance of doubt is grounded in Nelson JA's dicta quoted above.

27. Further, there is no issue of breach of procedure in the sense advanced by CEPEP.

The cases cited by CEPEP are based on the interpretation of particular statutes in the particular jurisdiction. Those are not statutes of Trinidad and Tobago. The Letters of Award that determine the parties' rights and obligations in this case do not derive from any statute. The intention of the parties in this case is to be gleaned from the documents to be interpreted and the surrounding circumstances, the evidence to be led at trial. That intention will manifest as an expression of the will of CEPEP and Corozal with no parliamentary input.

28. *E. The findings of the learned judge are irrational as against the law and the evidence in this matter.*

I have a certain misgiving with describing a trial judge's findings to be "irrational" as against the law and evidence. Counsel has not demonstrated what is to be considered "irrational" about the trial judge's decision. Whilst Counsel may challenge the trial judge's findings or application of relevant law, to say that the trial judge's findings are "irrational", that is, "*not logical or reasonable*" without proffering some rational basis for that opinion, is not condoned. In the premises, this ground is unsupported and too must fail.

29. Accordingly, the appeal is allowed on one ground only. The matter is remitted to the assigned trial judge for her continued management and hearing of the case.

30. I invite further submissions from the parties on the question of costs should the parties not agree between themselves.

ORDER

- 1. The Procedural Appeal filed on the 16 September 2020 is allowed on one ground only. The other grounds of appeal are hereby dismissed.**
- 2. Should the parties agree on costs, they shall notify the court of same on or before 11th January, 2021 of the details of the settlement.**
- 3. Should the court not receive notification of agreement by that date, the costs shall be determined assessed in the following manner:**
 - a. The Appellant to file and serve its written submissions and authorities, together with its statement of costs on or before 18th January, 2021, indicating its costs incurred – time spent by Advocate Attorney in reading and researching the application and submissions and presenting submissions in reply x the bandwidth of the Advocate Attorney = total amount claimed.**
 - b. The Respondent shall file and serve its responses on or before 27th January, 2021.**
 - c. Both sets of submissions are limited to 200 words inclusive of authorities.**
 - d. No enlargement on word limit will be permitted.**
 - e. Thereafter, Decision reserved.**

/s/ C. Pemberton

Justice of Appeal

/s/ R. Boodoosingh

Justice of Appeal