GRENADA

IN THE COURT OF APPEAL

HCVAP 2008/003

BETWEEN:

IN THE MATTER OF THE APPLICATION OF

THE NATIONAL COMMERCIAL BANK OF GRENADA LIMITED
(Not a party to the appeal)

Claimant

and

[1] IAN FRANCIS
[2] JULIANA FRANCIS

Appellants/Defendants

and

[1] RENWICK & PAYNE, a Firm
[2] MARGARET BLACKBURN
[3] MICHELLE EMMANUEL–STEELE
[4] NIGEL STEWART

Respondents/Ancillary Defendants

Before:
The Hon. Mde Ola-Mae Edwards — Justice of Appeal

On Written Submissions of
Mr. Dwight D. Horsford for the Appellants/Defendants
Mr. Gregory Delzin instructed by Renwick & Payne
for the Respondents/Ancillary Defendants

_____
2009: February 5.
_____

Civil Appeal – Restrictive covenants – whether due diligence should have been exercised when giving legal advice - counterclaim – tort of negligence – limitation period – when a statement of case should be struck out – when is actual damage sustained – when does time run in tort –

This is an appeal against the decision to strike out the appellants' counterclaim against the claimant and the respondents on the grounds that the limitation period in which to bring an action in negligence had expired and that it did not disclose any reasonable grounds for bringing the claim.
The appellants purchased a plot of land encumbered by restrictive covenants which prevented them from building a dwelling house on the property. The property was purchased with loan funds from the claimant bank. The first deed of conveyance was prepared and registered by the first respondent and the appellants were not aware of the restrictive covenants. Two other loans were subsequently obtained from the claimant bank to construct and complete a dwelling house on the property by the appellants. Further charges were prepared and registered by the first respondent for those additional loans taken in 1999 and 2002 respectively. The appellants alleged that upon their request for the loan in 1999 the claimant imposed a condition that the claimant's disbursement of funds would depend on the first respondent being instructed by the appellants to prepare a certificate of clear and unencumbered title to the land. In 2000 in another suit the court restrained the first appellant from further construction until trial whereupon the appellants ceased to pay their mortgage debt. The appellants' counterclaimed that the solicitors were under a duty to bring to their attention that the restrictive covenants would affect their right to build on the property and that they were negligent in the performance of that duty. The respondents' case is that the first appellant was aware since he was informed when the documents were read and executed at their offices when purchasing the property and they deny that they were negligent in any way in the discharge of their duty. Further they argue that the appellants are statute barred from bringing this claim.

Held: allowing the appeal, setting aside the decision to strike out the counterclaim and awarding costs and costs of the appeal to the appellants:

1. That the trial judge gave little or no weight to the date when the damage was sustained on the pleaded facts, and did not apply the correct principles in striking out the appellants' counterclaim.

2. That in a claim against a solicitor for negligent advice, actual damage is suffered when the advice is acted upon, such as by executing a document.

Forster v Outred and Co. [1982] 1 WLR 86 cited

JUDGMENT

[1] EDWARDS, J.A.: The appellants/defendants appealed against the decision of the learned judge made on 23rd February 2007, to strike out the appellants' counterclaim against the claimant and the respondents dated 9th June 2005, on the grounds that the limitation period within which to institute the appellant's cause of action for negligence had expired before the filing of the counterclaim; and the counterclaim discloses no reasonable grounds for bringing the claim. The judge's decision was made in keeping with the application of the respondents dated 23rd September 2006.

[2] The stated ground in the application was that the time for bringing an action for negligence has expired and the appellants are barred from bringing the counterclaim. The learned judge awarded costs in the sum of $1500.00 to the respondents.

[3] The appellants argued in the court below that this issue of limitation is one of mixed fact and law requiring the production of evidence; and is therefore a triable issue not to be disposed of summarily on the respondents' application to strike out the counterclaim. They argued further on the authority of Ronnex Properties v Liang[1] that the claim cannot be struck out on the ground of the expiration of the limitation period because this is a procedural defence which does not prevent the existence of a cause of action.

The Basis of the Counterclaim

[4] The counterclaim was brought because the appellants had ceased paying their mortgage debts to the claimant bank, owing to court orders in 2 suits which they understood prohibited them from occupying the house they had built upon a plot of land owned by the first appellant which was subject to a mortgage in favour of the claimant bank.

[5] These court orders were made because of existing restrictive covenants encumbering the plot. The restrictive covenants did not permit the appellants who are spouses to construct a dwelling house on their plot. The first appellant's plot was part of a larger parcel of land known as Lot 5 at Corinth Estate in the parish of St. David which was purchased by Mr. Simeon Francis from Mr. Elisha Baptiste under a registered conveyance in August 1992. Mr. Simeon Francis' deed of conveyance included restrictive covenants binding on him and his successors in title. One of these covenants stipulated that only one principal dwelling house of a specified size and value could be built on Lot 5. Mr. Simeon Francis subdivided Lot 5 and sold approximately one half of Lot 5 to Ms. Hyacinth Hypolite who had built a dwelling house on her portion. Thereafter, Mr. Simeon Francis sold the remaining portion of Lot 5 to the first appellant who bought his plot with loan funds from the

[1] [1982] 3 All ER 961

claimant bank in July 1997.

[6] The first respondent is the firm of solicitors for the claimant bank while the other respondents are joined as partners in the said law firm. It is undisputed that the first respondent had received instructions from the first appellant for his purchase of the plot with the loan funds from the claimant. The first respondent had prepared and registered the first appellant's deed of conveyance dated 4th July 1997 and the mortgage instrument.

[7] The restrictive covenants which were binding on Mr. Simeon Francis and his successors were not disclosed in the Deed of Conveyance dated 4th July 1997. The first appellant's deed merely referred to them as follows :

> " TO HOLD the same UNTO and TO THE USE of the Purchaser in fee simple SUBJECT to the Covenants Restrictions and Stipulations contained in the said Conveyance so far as the same are still subsisting and capable of taking effect and affect the said hereditaments and the Purchaser with the object and intention of affording the Vendor a full and sufficient indemnity in respect of the said Covenants Restrictions and Stipulations and at all times indemnify the Vendor his heirs executors and administrators against all actions claims and demands whatsoever in respect of the said Covenants Restrictions and Stipulations or any of them so far as the same still exist and affect the said hereditaments hereby assured."

[8] In 1999 the appellants obtained a second loan from the claimant to commence the construction of their dwelling house on their plot. In 2002 the appellants obtained another loan from the claimant bank to complete the construction of their house. The first respondent prepared and registered the further charges made on 19th July 1999 and 26th April 2002 for these additional loans.

[9] Paragraph B7 of the appellants' statement of case alleges that in or about the month of July 1999, they requested from and were given a further loan by the Claimant for the purpose of constructing a dwelling house on their land. It was a condition of the claimant's disbursement of funds that the firm of Renwick and Payne, Solicitors for the claimant, be instructed by the appellants to prepare a certificate of clear and unencumbered title to the land, and a deed of further charge on the aforesaid mortgage. Both appellants executed

the deed of further charge. The claimant debited $1925.00 from the appellants' bank account as a consequence of the invoice dated 19th July 1999, which the first respondent submitted to the claimant for preparing and recording the previously mentioned documents.

[10] At paragraphs B10 and B11 of their pleadings the appellants allege that the service of claim No. GDAHCV 1999/0582 by Mr. Elisha Baptiste (the claimant) on the first appellant in or around December 1999 was the first time the appellants became aware that restrictive covenants might exist which might affect their right to build on their plot. "No such restriction was brought to their attention by the claimant or by the claimant's agent, Messrs Renwick and Payne or by Messrs Renwick and Payne in their capacity as Solicitors for the Defendants as a result of the title search performed by Messrs Renwick and Payne in July 1999." On 21st January 2000, in claim No. GDAHCV 1999/0582 the court restrained the first appellant from further construction until trial or further order.

[11] By way of counterclaim the appellants allege the following:

> "C3. In consequence of … [the respondents'] acceptance of the instructions of the Defendants and the payment of their fees on three occasions, the … [respondents] were contractually bound to the … [appellants] to provide competent legal services. By failing to discover and communicate to the …[appellants] the existence of a restrictive covenant on the title of their land, prior to the …[appellants] entering into a Second and Third Deed of Extra Charge, the …[respondents] are in breach of the said contract and are liable for the losses and damage thereby caused to the …[appellants].
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> C4. As a result of their giving legal advice to the…[appellants] the … [respondents, and in consequence of the foregoing, were negligent in the performance of that duty, and are liable for the losses and damage thereby caused to the…] appellants."

The Reply and Defence to the Counterclaim

[12] The respondents along with the claimant pleaded the Limitation of Actions Act as a defence to the counterclaim. The claimant denied that the first building loan was conditional upon the appellants instructing the first respondent to prepare a certificate of clear unencumbered title. The claimant alleged that it has been advised by its solicitors

and verily believe that in the absence of a system of registered land in Grenada such a certificate is not obtainable.[2] The respondents pleaded that the mortgage and the two deeds of further charge were prepared by the respondents on behalf of and on the instructions of the claimant.[3] While denying paragraphs C3 and C4 of the counterclaim, the respondents also denied that they are contractually bound to the appellants with regard to the preparation of the security documents. Both the claimant and the respondents pleaded that the first appellant who purchased the land was aware of the covenants affecting the land as the conveyance in his favour which he read and executed at the offices of the respondents expressed that the land was conveyed subject to covenants.[4]

[13] In paragraph 8 of their statement of case the respondents admitted that they owed a duty of care to the first appellant in respect of the preparation of the conveyance as they were retained by him for this service only. The respondents contend further that the conveyance prepared by them effectively conveyed good title in the land to the first appellant and therefore they deny that they were negligent in any way in the discharge of their duty. They aver that the existence of the restrictive covenants did not render the title to the lot being purchased defective.

The Grounds of Appeal

[14] The appellants contend in ground 3(b) that the learned judge erred in considering that the period of limitation for the respondents' alleged negligence commenced when the first mortgage and conveyance were prepared by the respondents in July 1997. Ground 3(a) urges that the learned judge ought to have held "that the first occurrence of actual damage or loss to the appellants was when the Deed of Further Charge was executed by the appellants on 19th July 1999 wherein they incurred a mortgage debt for the purpose of building their family home on the land which they had purchased, the construction of which the restrictive covenants prohibited, … so that the cause of action in negligence was therefore complete no earlier than July 1999; so that the counterclaim against the … respondents was duly filed on 9th June 2005…five years and eleven months after the

[2] See paragraph 3 (7)
[3] See paragraph 5 (25)

cause of action arose within the 6 year period prescribed by the Limitation of Actions Act …"

[15] Ground 3(c) reflects the appellants' contention in grounds 3(a) and 3(b) while indicating that the appellants had made these arguments fully as oral submissions at the hearing of the application to strike out the counterclaim.

The Judgment

[16] At paragraph 2 of her judgment the learned judge mentioned that the Deed of Further Charge was made on 19th July 1999. Then at paragraph 7 she considered the power of the court to strike out a pleading under CPR 26.3 which states:

> " 26.3(1) In addition to any other power under these Rules, the Court may strike out a statement of case or part of a statement of case if it appears to the court that-
>
> (a) …
> (b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;
> (c) the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings ."

[17] At paragraph 8 the learned judge referred to the respondents' written submissions (in support of the application) that the pleaded facts do not establish a duty of care owed to the defendants by the applicants in July 1999. Later at paragraph 10 the judge, having examined the common law, concluded that the appellants could maintain an action in tort even if they did not retain the respondents. At paragraph 11 the learned judge identified the issue before her to be whether the facts pleaded in the counterclaim against the respondents, if established, would entitle the defendants to succeed on the action based in tort.

[18] Learned counsel, Mr. Horsford repeated his written submissions in the court below before this court. He argued that one of the contentious issues was whether the respondents are

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[4] See paragraph 7

liable in tort for negligence in the performance of their duty as a result of them giving legal advice to the appellants; and that the question of the accrual of a cause of action in negligence should be determined upon the whole of the evidence to be adduced at a trial with mature deliberation. In such circumstances, and having regard to recent developments in the common law in the Commonwealth and England concerning the accrual of a cause of action for economic loss resulting from negligence, the appellants' counterclaim ought not to be struck out as an abuse of process.

[19] Learned counsel for the respondents submitted that the period of limitation for the negligence action in tort for failing to advise the appellants of the existence of the restrictive covenants affecting the land would run from the date when the conveyance was prepared having regard to the absence of a retainer of the respondents by the appellants in July 1999, the appellants' pleadings at paragraphs C3 and C4, and the existing banking and conveyancing practices. It seems to me, from the arguments of learned counsel for the respondents, that the success or failure of the appellants' case as to whether a cause of action accrued in July 1999 depends on the view that a court will make of the appellants case, in the light of the pleaded facts, the law, expert evidence concerning the loan practices of banking institutions, the proper practices of conveyancers in Grenada, and the credibility of the witnesses. This must necessarily depend on the evidence to be adduced by the appellants in discharging their burden of proof.

[20] Blackstone's points out that under the old rules it was well settled that the jurisdiction to strike out was to be used sparingly. The reason was, and this has not changed, that the exercise of the jurisdiction deprives a party of their right to a trial, and their ability to strengthen their case through the process of disclosure and other court procedures such as requests for information. Further, it has always been true that the examination and cross-examination of witnesses often changes the complexion of a case. It was accordingly the accepted rule that striking out was limited to plain and obvious cases where there was no point in having a trial. In McPhilemy v Times Newspapers Ltd[5] Lord Woolf MR speaking of the new regime under the English Civil Procedure Rules stated

[5] [1999] 3 All ER 775, CA Lord Woolf MR

that the powers of the court to restrain excesses do not extend to preventing a party from putting forward allegations which are central to its case. A judge may therefore refuse to hear a striking-out application if: (a) the application is unlikely to succeed; or (b) the application will not be decisive or appreciably simplify the eventual trial. It is generally improper to conduct what is in effect a mini-trial involving protracted examination of the documents and facts disclosed in any written evidence on a striking-out application.[6]

[21] In my judgment the learned judge inaccurately stated at paragraph 13 of her judgment that the counterclaim alleges negligence in the preparation of the mortgage and conveyance. On reading paragraphs B7, C3, C4 and B11 of the appellants' statement of case together, the appellants' counterclaim appears to allege negligence in the respondents' preparation of the Deed of Further Charge in July 1999 on the aforesaid mortgage[7] in my respectful view.

[22] The learned judge found that the appellants can maintain an action in tort against the respondents; and the general rule is that in addition to proving that the respondents are guilty of some wrongful conduct, liability in tort can only be established on proof of damage. "Usually, damage is the final matter to come into existence, so the usual rule is that time runs in tort from the date when damage is sustained. … In a claim against a solicitor for negligent advice, actual damage is suffered when the advice is acted upon, such as by executing a document *(*Forster v Outred and Co. [1982] 1 WLR 86)."[8]

[23] Mr. Horsford referred the court to page 92 in Forster where the Court of Appeal approved this formulation of what is meant by 'actual' damage: "…it is any detriment, liability or loss capable of assessment in money terms and it includes liabilities which may arise on a contingency, particularly a contingency over which the plaintiff has no control; things like loss of earning capacity, loss of a chance or bargain, loss of profit, loss incurred from onerous provisions or covenants in leases. They are all illustrations of a kind of loss which is meant by 'actual' damage."

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[6] Blackstone's Civil Practice 2002 at page 327, paragraph 33.5.
[7] See paragraphs 9 to 11 of this judgment.
[8] See Blackstone's Civil Practice 2002 page 99 at paragraph 10.13

[24] I have reached the obvious conclusion that there was a wrongful exercise of discretion by the trial judge. She gave little or no weight to the date when damage was sustained on the pleaded facts, and did not apply the correct principles in striking-out the appellants' counterclaim. For the foregoing reasons, I decided on 4th February, 2009 that the appeal should be allowed in terms of the following order:

Order

(1) The appeal against the decision of the learned judge contained in her judgment delivered on 23rd February, 2007 is allowed.

(2) The decision to strike out the counterclaim of the appellants is set aside and the application of the respondents to strike out the counterclaim is dismissed with costs $1500 to the appellants.

(3) The claim and counterclaim are to be set down for case management on a date to be determined by the court office.

(4) The respondents are to pay to the appellants the costs of this appeal being $1000.00 pursuant to CPR 65.13(b)

Ola Mae Edwards
Justice of Appeal