THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

FEDERATION OF SAINT CHRISTOPHER AND NEVIS

ST. CHRISTOPHER CIRCUIT

(CIVIL)

CLAIM NO. SKBHCV2011/0374

BETWEEN:

ST. KITTS NEVIS ANGUILLA TRADING AND DEVELOPMENT COMPANY LIMITED

Claimant/Respondent

And

JAMES BUCHANAN

Defendant/Applicant

Appearances:

Mr. Garth Wilkin for the Claimant/Respondent

Mr. Adrian Scantlebury for the Defendant/Applicant

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2012: February 10

2012: April 17

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DECISION

[1] THOMAS J. (Ag) Before the Court is an Application filed by the Defendant/Applicant, Mr. James Buchanan seeking an order that:

1. The Fixed Date Claim filed by the Claimant/Respondent on the 13th December, 2011 be dismissed.
2. Costs to be paid by the Claimant/Respondent.

[2] The grounds of the Application are that:

"1. Pursuant to Part 26.1 (2) (i) of the Civil Procedure Rules 2000 this Honourable Court has jurisdiction to dismiss a claim after a decision on a preliminary issue.

2. The cause of action alleged by the Claimant/Respondent is in breach of an agreement dated 8th July 1999. Based on a reading of paragraphs 3a and 5 of the Statement of Claim the cause of action would have arisen by January, 2010 being the period beginning one month from the last month, November, 1999 in which the Defendant/Applicant took items on credit from the Claimant/Respondent, *ceteris paribus* time (six (6) years) for the purposes of section 4 of the Limitation Act Cap. 5.09 would have begun to run from about January, 2010. However, section 22 (4) *ibid* provides that there is a fresh accrual of action on acknowledgment or part payment of debt. To this end, the Applicant/Defendant acknowledged the debt owed to the Claimant/Respondent by his letter of April 10, 2001 which is referred to at paragraph 7 of the Statement of Claim. It was also in 2001 that money was paid towards settling the debt and the last payment was made in 2001. Accordingly, time would have started to run from 2002 which would bring the end of the six year limitation period to 2007. This would render the Fixed Date Claim filed on 13th December, 2011 statute barred. The Respondent denies that he or anyone on his behalf made any payment as alleged by paragraph 8 of the Statement of Claim."

[3] Based on an Order of the Court, extensive submissions were filed by learned counsel on both sides. These submissions coupled with an oral hearing in Chambers gave rise to 3 issues for determination:

1. The extent of the Court's jurisdiction under Rule 26.1 (2) (i) of CPR 2000.
2. Whether the Applicant's Affidavits with exhibits fail to comply with Rules 30.4 (4) (c) and 30.2 (d) of CPR 2000.
3. Whether the Claimant's action is statute barred.

ISSUE NO. 1

The extent of the Court's jurisdiction under Rule 26.1 (2) (i) of CPR 2000.

Rule 26.1 (2) (i) of CPR 2000 provides that "Except where these rules provide otherwise, the Court may (i) dismiss or give judgment on a claim after a decision on a preliminary issue."

Submissions

[4] Learned Counsel for the Applicant sought to rely on a number of cases which concerned striking out a defence as disclosing no reasonable ground for defending the claim[1]. These cases involved the Court's powers under Rule 26.3 (1) (b) of CPR. Learned counsel went

[1] The cases are: John Bicar v Josephat Bicar and Timothia Bicar, Civil Appeal No. 22 of 2003 and Ernadette Hector and Vivian Hector v Neville Joseph (Dominica), Civil Appeal No. 6 of 2003.

on to submit that while there is a serious factual issue, there is the other question as to whether the Claimant's remedy by lapse of time. The further submission is that the issue being statute barred is preliminary in nature, and although there have been cases where the Courts have dealt with the issue on a preliminary basis, sometimes at a hearing of an application at this stage or at trial the issue is still preliminary in nature. This brings the case within the powers of this Court pursuant to CPR Part 26.1 (2) (i)

[5] On the other hand, learned counsel for the Respondent submits that having regard to Rules 8.1 (5) (a) and 15.3 (c) of CPR read concurrently, the application grounded in Rule 26.1 (2) (i) is not a sustainable application under the CPR 2000 when one considers Rule 15.3 (c). Another submission by learned counsel is that the Defendant's application is a cloaked Summary Judgment Application which is not contemplated by the procedures of this Court. For learned counsel the name of things does not matter only what they are.

## Analysis and conclusion

[6] There can be little doubt as to the import of Rule 26.1 (2) (i) of CPR as it gives the High Court a clear power to dismiss or give judgment on a claim on a preliminary issue.

[7] The Court does not accept that that application as a cloaked application for a summary judgment since for one thing the procedure for summary judgment are entirely different. And in any event summary judgment is not available in relation to a fixed date claim by virtue of Rule 15.3 (c).

[8] Having regard to the overriding objective of the Rules to deal with cases justly. And dealing justly includes saving expense and ensuring a case is dealt with expeditiously. As such powers of the Court under Part 26 readily fall into context.

[9] The application by the Defendant is really about jurisdictional law and the preliminary issue is whether the Court has jurisdiction to entertain the Claimant's case in light of the provisions of the Limitation Act[2]. The matter could not be clearer, and in like manner

[2] Cap 5.09 Revised Laws of Saint Christopher and Nevis

unless the Rules provide otherwise, the powers of the Court dismiss or give judgment after a decision on a preliminary issue is unlimited.

ISSUE NO. 2

Whether the Applicant's Affidavits with Exhibits fail to comply with Rules 30.4 (4) (b) and (c) and 30.2 (d) of CPR 2000.

[10] In essence Rules 30.4 (4) (b) and (c) of CPR provide that

> "Each exhibit or bundle of exhibits must be –
>
> (b) accurately identified by an endorsement on the exhibit or on a certificate attached to it signed by the person before whom the affidavit is sworn or affirmed; and
>
> (c) marked in accordance with rule 30.2 (d)".

Rule 30.2 (d) states that

> "Every affidavit must -
>
> (d) be marked on the top right hand corner of the affidavit (and of the back sheet) with
>
> i. the name of the party on whose behalf it is filed;
> ii. the initials and surname of the deponent;
> iii. (where the deponent swears more than one affidavit in any proceedings) the number of the affidavit in relation to the deponent;
> iv. the identifying reference of each exhibit referred to in the affidavit;
> v. the date when sworn;
> and
> vi. the date when filed . . ."

Submissions

[11] Learned counsel for the Applicant in addressing the contention by learned counsel for the Claimant regarding the affidavits filed by the Applicant submits the following:

> "13. The second legal challenge mounted at the hearing of the application by counsel for the Claimant is that the affidavits filed by the Defendant on 17th January, 2012 and the 7th February, 2012 failed to comply with CPR in that
>
> a. No certificate was attached to any of the exhibits in breach of Part 30.4 (4) (b), and
>
> b. Neither the affidavits nor the exhibits (Part 30.4 (4) (c) were marked in accordance with Part 30.2 (d).
>
> 14. I respectfully disagree with counsel's submission under "a" above. It is clear from a proper reading of Part 30.4 (4) (b) that two requirements for identification of exhibits are established in the alternative Part 30.1 (4) (b) provides.

> 'Each exhibit . . . must be accurately identified by an endorsement on the exhibit or on a certificate attached to it signed by the person whom the affidavit is sworn or affirmed.'

15. Thus, although it is true that the Defendant's exhibits were not accompanied by certificates it is also true that each one of the exhibits was 'accurately identified by an endorsement on the exhibit.' These endorsements were 'JB 1' to 'JB 6' and provided this … Court with sufficient assistance to allow your Lordship to accurately identify each exhibit and, by extension, match each to the relevant part of the evidence deposed to in the Defendant's affidavits. I therefore, respectfully, submit that the Defendant's exhibits are in compliance with Part 30.4 (4) (b).

16. Regarding the second limb of the argument made by counsel for the Claimant ('b') above it is true that neither the affidavits nor the exhibits of the Defendant comply with Part 30.2. Despite this I respectfully submit that the Affidavits can nevertheless be admitted in evidence and be relied on by your Lordship when deliberating on the substance of the Defendant's application".

[12] Learned counsel goes on to submit that the applicant's application should not be affected on account of a matter of form and that consideration of the substance should be preferred. Reliance is placed on the case of Intrust Trustees (Nevis) Limited v Naomi Darren[3]. There are other submissions but they will be mentioned in the stage of analysis.

[13] Learned counsel for the Claimant/Respondent basic submission is that the Applicant has tendered evidence to ground the application which is not properly before the Court.

The submissions continue in this way:

> "18. Rules of CPR 2000 are to be followed; even more so when an applicant party is applying for Draconian Orders such as striking out of a claim in its entirety, as is the Defendant in this matter.
>
> 19. Whereas a breach of Rule 30.4 (4) (c) may be aesthetic in nature (*de minimis non curat lex*) going to form rather than substance, it is submitted that the absence of the endorsement on exhibits signed by the person before whom the affidavit is sworn (a breach of Rule 30.4 (4) (b) is a significant breach going to the proper identification of the exhibits and therefore the substance of their admissibility.
>
> 20. It is therefore submitted that all of the exhibits of receipts purportedly tendered by the Defendant and relied up to a large extent in the Defendant's application are not properly before this Honourable Court and therefore should be expunged from this Honourable Court's consideration of the Defendant's application."

[3] Decided June 09, 2009

## Analysis and conclusion

[14] As noted from the submissions, the issues surround Rules 30.4 (4) (b) and 30.2 (d) of CPR 2000.

[15] As far as Rule 30.4 (4) (b) is concerned, it requires each exhibit to be accurately identified by an endorsement on the exhibit or on certificate attached to it signed by the person before whom the affidavit is sworn.

[16] As noted before too, learned counsel for the Applicant contends that while the requirements are disjunctive; he concedes that there is not strict compliance with the rule. He however contends that each exhibit was accurately identified by endorsements: JB1 to JB6. At the same time, learned counsel for the Claimant/Respondent regards the non-compliance as a significant breach going to proper identification.

[17] The Court is satisfied that the exhibits attached to the Applicant's two affidavits do bear the endorsements JB1 to JB6. But is this sufficient?

[18] For the Applicant the submission is that these are matters of form not substance and in this context the Intrust Trustees (Nevis) Limited case is relied on. This concerned the use of a claim form rather that a fixed date claim form as required in that subject context, and as such the matter was not struck out by the Master and upheld by the Court of Appeal. This is part of the reasoning of Justice of Appeal Janice George-Creque (as she then was):

> "10. Further, as correctly stated by the Master, it would be quite a draconian approach to strike out the claim in such circumstances and were it properly to have been brought by way of Form 2, it would have been quite right in the exercise of her discretion under CPR 29.6 (3) to order the matter to proceed as if by Fixed Date Claim and thereby put matters right. This would be wholly in keeping with the overriding objective of CPR. To sacrifice substance by way of slavish adherence to form for the purpose of defeating a genuine claim defeats the overriding objective of CPR rather than give effect to it."

[19] When the two contexts are compared, they appear to be different in that one involved an incorrect form with the matter proceeding to trial. In the other, it is a preliminary point and the absence of strict compliance with a rule.

[20] The Court considers that there is in fact no distinction and the authority stands for the proposition that the Court will not sacrifice substance for so as to defeat the overriding objective of CPR.

[21] The clear purpose of Rule 30.4 (4) (b) is accurate identification. And in this regard the exhibits are referred to in the Defendant's two affidavits by the endorsements already identified.

[22] Learned counsel for the Applicant also make the following submission:

> "All of the exhibits in question save on – 'JB 2' come from the office of the Claimant's attorneys in the matter thus it is evidence that the Claimant should be deemed to have been aware of and should not be taken by surprise. Additionally it might appear somewhat unsavoury for the Claimant to be allowed to resist evidence created by the Claimant itself by resorting to a technical rule of form. This will not accord with the overriding objective which is to enable the Court to deal with the case justly. 'JB2' although not created by the Claimant through its attorneys is pleaded at paragraph 7 of the Claimant's Statement of Claim in keeping with Part 8.7 (3) as amended."

[23] In all the circumstances the Court agrees with the submissions on exhibits of the Applicant that the exhibits are accurately identified coupled with the source of the vast majority of the said exhibits and the submissions thereon.

[24] In so far as Rule 30.2 (d) is concerned, this arises by virtue of Rule 30.4 (4) (c) which requires compliance therewith. In this regard learned counsel for the Claimant concedes this is aesthetic in nature going to form rather than substance. This accords with the submission by learned counsel for the Applicant. But he goes on to submit that the Court should exercise its powers under Rule 26.9 to put matters right by treating with the affidavits and exhibits as though they were filed in the correct form.

[25] Rule 26.9 of CPR gives the Court the power to make an order on or without an application by a party where there are errors of procedure, failure to comply with a rule and the like. But such an order can only be made where the consequences of failure to comply with a rule, practice direction, Court order or direction has not been specified by any rule, practice direction or Court Order.

[26] It is common ground that Rule 30.2 (d) goes purely to form. And there is a legal proposition which says that there should not be slavish adherence to form so as to defeat substance. In the circumstances the order of the Court is that the affidavits filed by the Applicant be treated as having complied with Rule 30.2 (d) of CPR 2000.

ISSUE NO. 3

Whether the Claimant's action is statute barred.

[27] The basic law in this connection is section 4 of the Limitation Act[4] ("the Act") which prescribes that.

[28] A further rule is that where goods are sold on credit time begins to run from the date the credit period expires.[5] And section 22 (4) of the Act also provides that a fresh accrual of action arises upon the acknowledgment or part payment of a debt.

Submissions

[29] Learned counsel for the Applicant makes the following submissions:

> "1. The defendant acknowledged the debt owed to the Claimant by letter dated April 10, 2001, referred to at paragraph 7 of the Statement of Claim. Time would have started to run from the date of that letter which would have brought the end of the six-year limitation period to April 10, 2007. This would render the Fixed Date Claim filed on 13th December 2011 statute barred.
>
> 2. The survival of the Claimant's Claim hangs on the Claimant's allegation at paragraph 8 of the Statement of Claim (certified as true) that the "Defendant last made a payment to the Claimant in relation to partial settlement of the debt described herein on or about 20th December 2006." At paragraph 5 of his sworn

[4] Cap. 5.09 Revised Laws of Saint Christopher and Nevis, 2002.
[5] Vol. 28 Halsbury's Laws (4th ed) para. 672

affidavit filed on the 17th January 2012 the Defendant denied that he or anyone on his behalf made any payment in 2006 as alleged by paragraph 8 of the Statement of Claim. The Claimant insisted that the payment was made in relation to the debt in question and filed two affidavits on the 2nd of February, 2012 in support of its contention."

[30] The following are the submissions on behalf of the Claimant/Respondent.

"22. The Claimant has pleaded that there was a part payment of the debt owed by the Defendant on 20th December 2006 which the Defendant denies.

23. There is an issue of fact as to whether the said payment was made towards the debt which is the basis of the claim or some other debt.

24. Evidence is filed by way of Affidavit in Support of each party's position on this issue of fact. The Defendant through his Attorney-at-Law in his oral submissions coined these as "questions of fact" but relies on the burden of proof with regard to part payments to support his application to dismiss.

25. In response, it is submitted that the legal burden of proof in relation to part payments has no import at this interlocutory stage of proceedings; it is a matter to be considered in the factual-legal matrix examined after trial.

26. Further, there is an inconsistency on the face of the Defendant's own purported evidence.

27. If considered by this Honourable Court to be properly before it for consideration, the receipts purportedly exhibited with the Defendant's second Affidavit contain language describing the payee as "TDC Rentals" or "TDC Rentals Ltd."

28. Whereas the Claimant's evidence in support by way of affidavit of Natasha Maynard exhibits a receipt stating the payee as "TDC".

29. There is also evidence already tendered by the Claimant (and to be tendered at trial by the Claimant) in support of its pleadings that there was a part payment by the Defendant to the Claimant, not to TDC Rentals Ltd.

30. It is this variance in evidence which distinguishes the case at bar from the case cited by the Defendant in support of his application, i.e. ***Francis Miller v Romeo Alfredo Parris***, decision of this Honourable Court dated 14th April 2011 Claim No. SKBHCV2010/0119.

31. The case at bar is not dealing with a matter as to *locus standi* and/or the legal status of a person in possession in a claim for trespass; this case is clearly distinguishable.

32. The decision of this Honourable Court in ***Francis Miller v Romeo Alfredo Parris***, to use the words of the learned Chief Justice afore-cited in paragraph 6 herein, appears to have been decided on the basis of the law in regard to the legal status of a possessor of land being "clear and obvious" and the claim therefore for trespass being "obviously unsustainable."

33. Here, in the case at bar, no such *status quo* exists.

34. This is a case on which there are varying evidential positions in relation to a part payment made by the Defendant. The issues of fact to determine the said preliminary issue (it is submitted) should be ventilated at trial to

test the veracity of each party's evidence; and should not be summarily determined.

35. Simply stated, there is a factual issue to be tried and therefore (using the words of Harris J as afore-cited) "the pre-emptive power of the Court should not be used."
36. It is therefore submitted that the Defendant's interlocutory application should be dismissed with costs to the Claimant and a date be set for the first hearing of the claim.
37. In conclusion, the Claimant relies on the general rule as stated in Rule 64.6 (1) of the CPR 2000 in which the unsuccessful party must pay the costs of the successful party; the latter it is submitted would be the Claimant and the former, the Defendant."

[31] In reality this issue turns on the receipt dated 20th December 2006, Exhibit NM1.

[32] This receipt shows a payment of $1530.00 on 20th December 2006 on behalf of James Buchanan with respect to a debt owed to "TDC" and shows a balance of $15,269.45. Two other receipts exhibited by the Applicant JB3 and JB4 are also in equation on account of what the Applicant deposes in his affidavit filed on 17th January 2012. This is what he deposes at paragraph 6: "I made no payment as alleged by the Claimant as far as I am aware no payment was made on my behalf in 2006". And this is the Claimant/Respondent pleads at paragraphs 7 and 8 of its Statement of Claim:

"7. The Defendant, by letter dated 20th April 2001 admitted that the aforementioned debt existed but neglected until 31 May, 2001 to make good on paying the outstanding amount due.
8. The Defendant last made a payment to the Claimant in relation to partial settlement of the debt described herein on or about 20th December 2006."

[33] The other two exhibits, JB3 and JB4 bear the following content in point:

JB3: Dated 22nd Nov 2006

Received from James Buchanan the sum of $1530.00 account on debt due to TDC Rentals Ltd

Bal "$16,799.45"

JB4: Dated 8th January 2008

Received from James Buchanan the sum of $4000 on debt due to TDC Rentals

Bal "$8,724.45"

[34] The Court wishes to note that following a demand letter (JB1) to the Applicant dated April 3, 2001, from the attorneys-at-law for TDC, the Applicant wrote to the said attorneys indicating that he intended to make good on paying this amount (being $16,136.58) in full by May 31st 2001."[6]

[35] On the evidence there was no such payment in full which, by inference gave rise to the claim filed December 13, 2011. This, to state the obvious, is some 10 years later. In the circumstances the following submissions on behalf of the Applicant/Defendant come with the equation:

> "I humbly invite Your Lordship to consider the following factors and infer from the nature of the similar payments made by the Defendant and exhibited to his affidavit in reply that the receipt exhibited as NM-1 and relied on by the Claimant to extend the life of its claim was not a receipt for payment of the debt which forms the subject matter of the Claimant's present claim.
>
> i. Firstly, receipt dated the 22nd of November, 2006 and exhibited as "J.B. 3" shows a balance of $16,799.45. When one applies the payment of $1, 530.00 made the following month and reflected in the receipt exhibited by Natasha Maynard to the said balance of $16,799.45 one would get the balance of $15,269.45 reflected in "NM-1".
> ii. Secondly, "J.B.3" clearly shows that the payment was in relation to the Defendant's debt owed to the Claimant's auto rentals department who the Defendant had owed for a Pajero Jeep purchased by the Defendant on hire purchase.
> iii. Thirdly, exhibits J.B.4 – J.B.6 show payments being made to the same TDC rentals account #21654 and the last payments shows a balance outstanding of $4,224.45. Were these payments made towards to debt forming the basis of this claim one would have expected that the statement of claim (certified as true) would not have claimed a principal balance outstanding of EC$8,914.27 after the "Defendant last made payment …"
> iv. Fourthly, the Claimant is described in paragraph 1 of the Statement of Claim as carrying on business, *inter alia* as a retailer and wholesaler of building materials. The use of the words '*inter alia'* is the way the Claimant indicates that it carries on several separate types of business activity separated by specific departments. This, no doubt, Your Lordship can take judicial notice of. Notably, however, only the retail and wholesale building materials is singled out by the Claimant for special mention as the Claimant's case is based on breach of a contract entered into in the course of the

[6] This date was subsequently clarified as being "May 31st 2001." - see

> Claimant's building materials business. It is worthy to note, therefore, that the receipts exhibited by the Defendant which are connected to "MN-1" speaks to TDC Rentals Limited" and not "TDC Building and Materials Limited"."

[36] Learned counsel for the Respondent is saying that a part payment was made towards the debt to the Claimant on 20th December, 2006 which is a question of fact for trial. And further in relation to the issue of burden of proof contends that "the legal burden of proof in relation to payments has no import at this interlocutory stage of proceedings, it is a matter to be considered in the factual – legal matrix examined after trial".

## Analysis and conclusion

### Preliminary determination/observation

[37] The Court wishes to make the clear point that the application being considered was made under Part 26 and as such the hearing and determination under Part 15 cannot be made applicable. In any event, as noted before, any conclusion that the Applicant is seeking a summary judgment is not in alignment with Part 15.3(c) of CPR 2000 which precludes summary judgment in relation to matters commenced by way of fixed date claim.

[38] Rule 26 is one of wide ambit so that the bases upon which the Court's power may be invoked would include both jurisdictional fact and jurisdictional law. This is where *locus standi*, *inter alia*, come in as bases upon which a claim may be struck out.

[39] The submission by learned counsel for the Respondent in relation to the issue of burden of proof and its state or stage of applicability is a matter of concern since there is not even any need to cite authority for the proposition that burden of proof is always present and rests on he who asserts.

[40] To return to the narrow issue of whether the Claimant's claim is statue barred, as noted before, boils down to two exhibits: NM1 and JB3.

[41] The point being made by counsel for the Applicant is that the payments of $1530.00 in relation to two different debts plus the coincidence of the balance of $16,799.45 in relation to the said debts bear on the Claimant's burden.

[42] There can be no doubt that receipts issued by the Claimant's attorneys-at-law reflect two entities being owed by the Applicant – TDC and TDC Rentals Ltd. so that payments are different. Added to this is the evidence of the Applicant that he did not make any such payment on 20th December, 2006; nor did he authorized any person so do her affidavit. For her part Ms Natasha Maynard in her affidavit, filed on 02 February 2011, deposes that the person who paid the money on behalf of the Applicant was known by her to be "a worker of the Defendant" but she could not remember his name. Certainty cannot be difficult in these circumstances, as the issue presents a case for reasonable inquiry.

[43] If it is that there was one credit account in the name of the Applicant this is contradicted by the balances shown on the receipts – JB3 dated 22nd November, 2006, Bal $16,797.45; NM1 dated 20th December 2006, Bal $15,269.45; JB4, dated 8th January 2008, Bal $8724.45; JB5, dated 29th February, 2008, Bal $7224.45.

[44] But while the balance shown on JB4 and JB5 add up in view of the payment of $1500.00 on 29th February, 2008, there is no evidence to show how the balance on JB3 moved from 16799.45 on 22nd November, 2006 to $8724.45 on 8th January 2008.

## Conclusion

[45] The Court agrees with the Applicant that the Claimant's action is statute barred the Respondent who has not discharged burden of proving[7] that the Applicant made a payment towards the debt on 20th December 2006 because of the following:

1. There is some doubt regarding the receipt dated 20th December 2006 (Exhibit NM1) when compared to the receipt dated 22nd November, 2006 (Exhibit JB3) which in

[7] Halsbury's Laws of England, Vol 28, para. 652

effect, have the same balance of $16799.45 although they are stated to be in relation to TDC and TDC Rentals Limited.

2. The demand letter of 3rd April 2001 refers to a balance of $14,669.92 owed to TDC, interest at the rate of 1.5% per month ("compounded on all overdue balances) plus legal fees of $1466.96 giving a total of $16,136.58, yet the receipt dated 20th December, 2006 in effect reflects a balance of $16,799.45 (balance of $15,268.45 plus the amount claimed to be paid of $1530.00).
3. The Applicant's evidence that he did not pay the money towards the TDC debt on 20th December 2006 and he did not authorize anyone so to do.
4. Natasha Maynard's evidence that she knew the person who paid the money on the Applicant's TDC account but could not recall his name leads to the inference of an absence of reasonable inquiry in this connection.
5. The balances shown on the exhibits in relation to the TDC Rental account shown accounting gaps which in turn bear on the TDC balance as shown above.
6. Given the Applicant manifest delinquency in making payments it is unlikely that he would have made two consecutive payments in the month of November and December 2006 in respect of his TDC and TDC Rental debt in the identical amounts of $1530.00 after requesting on April 20, 2001, until May 31, 2001 "to make good on paying his amount in full".

[46] In view of the foregoing the following learning from 28 Halsbury's Laws at para. 901 put matters to rest:

> "The payment must be made on account of the debtor claim the nature of the payment maybe inferred from the nature of similar payment made at other times; and although the plaintiff must in all cases give some evidence that the payment relied on account of some debt the circumstances attending the payment, even without direct evidence may be such as to render it improbable that the payment was made on account of some debt and no other debt other that the one sued for then existed, the inference may be drawn that the payment was in respect of the debt sued for. If more debt than one are due, and a payment is made is not specifically appropriated, it is a question of fact in respect of which debt the payment was made".

[47] With the receipt dated 20th December, 2006 ruled out, this brings into the equation the other evidence which would have caused time to run for the purposes of the Limitation Act. In this regard section 22(4) prescribes that an acknowledgment of a debt to be such an event - a fresh accrual of action. This is in fact the Applicant's letter of April 10, 2001, so that the six year limitation would have run from that time and ended in April 2007.

[48] The Court therefore agrees with the Applicant's contention that the Claimant's Fixed Date Claim is statute barred and is therefore dismissed.

## Costs

[49] Costs to the Applicant are assessed at $1500.00

## ORDER

[50] IT IS HEREBY ORDERED AND DECLARED as follows:

1. The Respondent/Claimant has failed to discharge the burden placed on it to show that the Applicant did make a payment towards his TDC debt on 20th December, 2006.
2. With the Applicant's acknowledgment of the TDC debt on April 2001, this gives rise to a fresh accrual of action and as such the six years limitation period began to run from that date and ended in April 2007 so that the Claimant's action filed on December 13, 2011 is statute barred
3. The Applicant's application succeeds and the Fixed Date Claim filed on 13th December, 2011 is struck out.
4. Costs to the Applicant in the amount of $1500.00.

Errol L Thomas
High Court Judge (Ag)