THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV2011/0841

BETWEEN:

CPR EQUIPMENT SERVICES LTD.

Claimant

AND

KEITHLYN SAMUEL
T/A KD'S HEAVY DUTY EQUIPMENT AND SERVICES

Defendant

Before:

Master Charlesworth Tabor (Ag.)

Appearances:

Mrs. Cherissa Roberts Thomas for the Claimant
Mr. Peyton J. V. Knight for the Defendant

.....
2012: September 20
November 7
.....

RULING

[1] **TABOR, M (Ag.):** This is an application to strike out the defendant's defence and counterclaim and entering judgment for the claimant.

[2] By notice of application and affidavit in support filed 25th June, 2012 the applicant/claimant applied to the court pursuant to Civil Procedure Rules 2000 Part 26.3 (1) (b) for the defence and counterclaim of the defendant be struck out since there is no real prospect of the defence succeeding or conversely that the counterclaim is statute barred on the basis of section 7 of the Limitation Act no. 8 of 1997 of the Laws of Antigua and Barbuda, and in which event the defence should be struck out as there would no reasonable defence to the claim in the absence of the counterclaim.

Background Facts

[3] On 23rd September, 2005 the defendant purchased a Hyundai H70 Bulldozer from the claimant for a cost of $193,000.00. An initial deposit of $150,000.00 was paid with the balance to be paid by installments. Sometime in September, 2005 the defendant realized that the motion lever which causes the bulldozer to move backwards and forwards failed to go into gear.

[4] Discussions between the defendant and claimant continued on the need to have the bulldozer repaired or replaced. In paragraph 5 of his amended defence and counterclaim the defendant states that in discussions on or about September, 2007 with the claimant's representative it was suggested that he should purchase a backhoe to assist with the excavation work so as to avoid defaulting on the contractual obligation with Super Ridge Hotel.

[5] By written agreement between the defendant and claimant on 28th September, 2007 the defendant purchased a CASE 580 Super M Plus Series Z Backkhoe for $232,300.00 payable by an initial installment of $120,000.00 and the balance of $112,300.00 by eight monthly installments.

[6] The claimant avers that the defendant has since made two further payments on 26th May, 2008 totaling $18,000.00. As a consequence, the claimant filed a claim on 20th December, 2011 for damages for breach of the agreement.

[7] In reply to the claimant's claim, the defendant filed an amended defence and counterclaim on 18th April, 2012 on grounds that the claimant:

(a) Failed to repair or replace the bulldozer under the warranty period;
(b) Failed to ensure that the bulldozer supplied to the defendant was a new bulldozer;
(c) Failed to ensure that the bulldozer supplied was fit for the purpose;
(d) Failed to use his best endeavours to affect repairs to the bulldozer; and
(e) Failed to cooperate with the defendant so that the issue of the repair or replacement of the bulldozer was resolved.

Issues

[8] 1. Whether the defendant's counterclaim is statute barred
2. Whether the defence of the defendant should be struck out.

The Applicable Legal Principles and Procedural Rules

[9] With respect to issue number 1 as to whether the defendant's counterclaim is statute barred, the relevant legislation is the Limitation Act no. 8 of 1997 of the Laws of Antigua and Barbuda.

[10] Section 7 of the Limitation Act stipulates that:

> An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.

The important question to be answered is when does the cause of action accrues. According to the learned author of the textbook Chitty on Contracts[1] the general rule in contract is that:

> The cause of action accrues, not when the damage is suffered, but when the breach takes place.

It is stated further, that in an action for breach of warranty or condition against a seller of goods, the cause of action accrues when the goods are delivered and not when the defect is discovered.

[11] With respect to issue number 2 as to whether the defence of the defendant should be struck out, Part 26.3 (1) of the Civil Procedure Rules 2000 is instructive. This Part provides that:

> In addition to any 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) there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings;
> (b) the statement of case or 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 likely to obstruct the just disposal of the proceedings; or
> (d) the statement of case or the part to be struck out is prolix or does not comply with the requirement of Part 8 or 10.

[12] The striking out of a statement of case or defence is a very drastic step which a court would only take in rather exceptional circumstances. The reason for this being as Mitchell J.A. (Ag.) stated in **Tawney Assets Limited v East Pine Management et al**[2] is that:

> The exercise of this jurisdiction deprives a party of his right to a trial and of his ability to strengthen his case through the process of disclosure, and other procedures such as requests for further information. The court must therefore be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of case is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial.

---

[1] Chitty on Contracts (30th Edition Vol. 1, Sweet and Maxwell) paragraph 28-032

[2] Territory of the Virgin Islands High Court Civil, Appeal no. 7 of 2012 (On appeal from the Commercial Division)

[13] In **Baldwin Spencer v The Attorney General of Antigua and Barbuda et al (Civil Appeal no. 20 A of 1997)** Dennis Byron C.J. (Ag.) restated the seminal test that should be applied by the court on an application to strike out when he said:

> This summary procedure should only be used in clear obvious cases, when it can be seen on the face of it, that a claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court.

Finding on First Issue

[14] It is indicated in the defence and counterclaim of the defendant that the bulldozer was purchased on 23rd September, 2005. It is further indicated that on or about September, 2005 the defendant realized that the motor lever of the bulldozer did not go into gear. Clearly, one can infer from this that the bulldozer was delivered and in the possession of the defendant by the end of the year 2005.

[15] It follows, therefore, that the right to bring an action for breach of contract would have accrued from 23rd September, 2005 and certainly at the latest by the end of the year 2005. In the circumstances, the claim of the defendant would have to be brought in 2011 for it to fall within the Limitation Act. The action was commenced in 2012 after the expiration of six years from the date on which the cause of action accrued and is therefore statute barred.

Finding on Second Issue

[16] The claimant's claim against the defendant was for damages for breach of an agreement between the parties entered into on 28th September, 2007 for the purchase of a backhoe.

[17] The defendant in his defence and counterclaim focused entirely on the purchase of the bulldozer in 2005 and not on the purchase of the backhoe in 2007, which was the basis of the claimant's claim.

[18] The defendant has alleged that the agreement to purchase the backhoe in 2007 was conditional on the repair and replacement of the bulldozer purchased in 2005, although this is not indicated any where. The defendant's defence to the claimant's claim is that since the claimant did not repair or replace the bulldozer he discontinued payments on the backhoe.

[19] Clearly, the defence of the defendant has no real prospect of succeeding at trial since the contract entered into between the parties in 2007 has nothing to do with the earlier agreement in 2005. The defence is therefore struck out. In any event, the counterclaim of the defendant is statute barred and the defence would fall away as a consequence.

Conclusion

[20] In the circumstances and for the reasons outlined above, it is ordered that:

(1) The defence and counterclaim are struck out.
(2) Judgment is entered for the claimant.
(3) The defendant shall pay the claimant's costs of the application in the sum of $1000.00.

Charlesworth Tabor
Master (Ag.)