SAINT LUCIA

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV 2010/0121

BETWEEN: FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LIMITED

Claimant

AND

[1] CHEMICAL MANUFACTURING AND INVESTMENT LIMITED
[2] THE ROSERIE COMPANY LIMITED

Defendants

Appearances:

Ms. Clemar Hippolyte and Mr. Jonathan McNamara of Counsel for the Claimant/Respondent
Mrs. Cynthia Hinkson-Ouhla of Counsel for the Defendants/Applicants

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2012: February 2nd

2013: September 27th

2014: January 17th May 15th

DECISION

[1] TAYLOR-ALEXANDER, M: This is a striking out action brought by the defendants in relation to paragraph 1 of the claimant's reply to defence. The application is brought under Part 26.3(1) (c) of the Civil Procedure Rules 2000 (CPR) which provides for a statement of case or part of it to be struck out as an abuse of the process of the court or as likely to obstruct the just disposal of the proceedings.

[2] The defendants' have advanced two contentions:—

(1) paragraph 1 of the claimant's reply to defence violates section 110 of the Evidence Act No. 5 of 2002 (the Act). It seeks to adduce evidence of communication relating to the negotiation of a settlement of a dispute, in order to defeat the defence of prescription; and

(2) in so far as the reply relies on such communication it is irrelevant to the issue of prescription which is triggered only by judicial demand. The admission of the debt to which paragraph 1 of the reply relates is not sufficient to amount to civil prescription.

[3] The application is supported by the affidavit of Mr Thomas Roserie the Managing Director of the defendant companies, who deposed that in reply to the defendants' pleading of prescription pursuant to Art 2121 of the Civil Code of the Revised Laws of St. Lucia Cap 4.01 (the Civil Code), the claimant disingenuously and in abuse of process has sought to adduce as evidence of acknowledgment or admission of the debt claimed, acts of negotiation entered into by the parties in relation to this action.

[4] Not surprisingly the action is opposed. Submissions were filed by the defendants/ applicant on the 11th November 2010 and by the Respondent on the 25th November 2010. I directed the filing of authorities in support of the submissions which were both filed on the 30th January 2012.

Brief Facts

[5] The claimant and the defendants entered into various commercial loan agreements whereby credit facilities were extended by the claimant to the defendants under specified terms and conditions.

[6] The claimant asserts that the defendants owe the sum of $ 4918.68 as at 14th October 2009 and $241,179.34 together with interest accruing thereon being the

balance on a Hypothecary Obligation, Mortgage Debenture and Floating Charge in favour of the claimants dated the 28th August 1995.

[7] The defendants filed an amended defence on the 31st March 2010 asserting inter alia, that while there were various discussions between the parties on whether there were outstanding amounts owed, the customer relationship was effectively terminated on the 28th October 2003 by virtue of correspondence issued by the claimant on that date. Consequently, the claimant's cause of action is prescribed it having commenced after the expiration of a period of six years from when the cause of action accrued on the 28th October 2003.

[8] By its reply the claimant challenges the allegation of prescription, averring that the customer relationship continued beyond the stipulated date of the 28th October 2003. The claimant relies on circumstances of direct acts of acknowledgement of the debt and the conduct of the parties.

The Issues

[9] The following are the identified issues:—

(a) Whether the reference in the reply to communication of negotiations between the parties amounts to a violation of section 110 of the Evidence Act of St. Lucia No. 5 of 2002 which specifically exempts from evidence certain communication between persons in dispute.

(b) Are the acts of negotiation, in any event, to which the claimant refers in paragraph 1 of its reply, sufficient to amount to an acknowledgment of the debt and thus cause an interruption of prescription?

The Defendant's/ Applicants Submissions

[10] Mrs. Ouhla for the defendants submit that the same policy principles which underlie the without prejudice rule at common law, has been encapsulated in Section 110 of the Evidence Act, No. 5 of 2002 (the Act) but it is a wider provision than the rule at common law. Section 10 (c) (ii) of the Act expressly

excludes as evidence, a communication made between persons in dispute, except when the communication or document began or continued an attempt to settle the dispute and includes a statement to the effect that it was not to be treated as confidential. The without prejudice rule is a canon of the common law which over the years and by the intervention of judicial reasoning has developed various exceptions. The defendant asserts that these exceptions should not be used to augment the Act which speaks to its own exceptions.

[11] One of the exemptions to the without prejudice rule, to which the Act refers is communication or a document that had been prepared in connection with an attempt to negotiate a settlement of a dispute, where the dispute to which the Act refers is one for which relief may be given in proceedings. In its ordinary meaning the defendants submit the definition of a dispute is an argument or disagreement.

[12] The defendants' submit that the claimant, in commencing an action against the defendants has acknowledged the existence of a dispute and as such any communication between the parties in the negotiation of that dispute is excluded from evidence. Consequently, the claimant's submission that time began to run afresh after the negotiations, must be struck out and disclosure of the referenced documents disallowed.

[13] The defendants further contend that the communication to which the reply refers, in any event, is incapable of causing an interruption of prescription under Article 2088 of the Civil Code. Article 2088 must be read conjunctively such that prescription is only interrupted by (i) renunciation of the benefit of the period elapsed and (ii) acknowledgment by the debtor of the creditor's right. Acts of negotiation, submit the defendants is not sufficient to qualify as a renunciation of time elapsed and as an acknowledgment of the debt.

The Claimant/ Respondent's Submissions

[14] The claimant contends that Section 110 of the Act largely codifies the common law rule and is governed by the same basic principles. The common law cases

that clarify the common law principle are relevant to and do assist in understanding the implications of the Act.

[15] The claimant submits that its reply does not offend section 110 of the Act, as the statement in the reply was in direct response to paragraph 2 of the defence and goes to show by reference to the conduct of the parties, the continued existence of the relationship between the parties, well after the 28th of October 2003, as well as the continued existence of the contract.

[16] In so far as the defendants allege that the claim is prescribed, the claimant submits that it is entitled to rely on Article 2088 of the Civil Code which provides for civil interruption. The claimant is entitled to admit any evidence which goes to the existence of the fact of the acknowledgment of the debt. The correspondence upon which the claimant intends to reply is open communication designed only to discuss the repayment of an admitted liability, rather than to negotiate or settle a disputed liability.

[17] Section 110 of the Act does not restrict the use of a document as an acknowledgment of a debt under Article 2088 of the Civil Code. It operates to only lift the procedural bar on the bringing of the action.

Analysis of the Law and Submissions

[18] The Civil Code of Saint Lucia provides for extinctive or negative prescription to be a bar to any action for the fulfilment of an obligation or the acknowledgment of a right when the creditor has not preferred his claim within the time fixed by law. If a debtor successfully raises the defence of extinctive prescription, then the claim against him or her is made permanently unenforceable. This will be the case regardless of whether the claim is legally valid in all other respects, or the creditor enforcing the claim has ample or even irrefutable evidence proving his or her claim. The defence becomes available as a result of a period of time set out in the law having passed, since the claim came into being.

[19] There are exceptions or causes that interrupt the operation of law provided for in Articles 2083 to 2092 of the Civil Code.

[20] Article 2083 provides that prescription may be interrupted either naturally or civilly. Article 2084 to Article 2092 provides for those circumstances that would operate to create a natural interruption and a civil interruption and the following articles are instructive:—

> " 2085. A judicial demand in proper form, served upon the person whose prescription it is sought to hinder, or filed and served conformably to the Code of Civil Procedure when a personal service is not required, creates a civil interruption.
>
> Seizures, set-off, interventions, and oppositions are considered as judicial demands.
>
> No extra-judicial demand, even when made by a notary, and accompanied with the titles, or even signed by the party notified, is an interruption, if there be no acknowledgment of the right demanded.
>
> 2088. Prescription is interrupted civilly by renouncing the benefit of a period elapsed, and by any acknowledgment which the possessor or the debtor makes of the right of the person against whom the prescription runs."

[21] Renunciation may be either express or tacit. Article 2048 and 2049 of the Civil Code is instructive:—

> "2048. Prescription cannot be renounced by anticipation. That acquired may be renounced, and so may also the benefit of any time during which it has been running.
>
> 2049. Renunciation of prescription is express or tacit. Tacit renunciation results from any act by which the abandonment of the right acquired may be presumed."

[22] Evidently prescription can be interrupted civilly only by (1) judicial demand or (2) an express or tacit renunciation of the benefit of the elapsed period and with an acknowledgment which the possessor or the debtor makes of the right of the person against whom the prescription runs.

Is the communication and negotiation to which the reply refers sufficient to interrupt prescription.

[23] A fundamental feature of this application is the communication whose privilege is questioned and an investigation of the preliminary questions of whether the communication traversing between the parties in 2004 and following was sufficient to interrupt prescription would require my examination of the communication and its impact. I note with surprise, that neither of parties saw it fit to disclose the correspondence as part of the application. Even if it is the allegation of the defendant that the correspondence is entitled to discovery from disclosure, it is an issue incapable of resolution unless I had sight of the correspondence. My ruling would have had the effect if in the defendant's favour of removing the document entirely from the record and from disclosure under the trial process and of any reference thereto to the trial judge. But without the communication being exhibited, or its content disclosed, attempting to gather an appreciation of its effect is an exercise in futility, and detrimental to the application of the defendant.

[24] The defendants refer to a number of American authorities of Vavuris v Pinelli [147 Cal. App 2d 390], Milkulecky v Marriot Corporation No. 87-3600 and Whitney National Bank v Demarest No. 91-3029, and the claimant to the authorities of Arkansas Louisana Gas Co. v Thompson et al No. 40511, Marathon Insurance Company v Warner No. 11557 and Mitchell Kalichman v Feldman and Sanger 2010QCCQ 3069 none of which are useful to me at this time when I have not had the benefit of sight of the challenged correspondence. I therefore make no order on the question of whether the documents referred to in the reply operated as a civil interruption.

Is the reference in the reply to correspondence and discussions had between the parties an abuse?

[25] Rule 26(3) (c) provides that the court may strike out a statement of case or part of a of case if it appears to the court that —

"(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;…. "

[26] The defendant submits that the action of the claimant referencing privileged correspondence in support of its pleading of express or tacit acknowledgment and renunciation of the benefit of the period of time that had elapsed is adducing evidence of communication between the parties that is subject to privilege, indicative of abuse, which warrants the court's sanction of striking out the offensive part of the reply. Section 110 of the Evidence Act although of some length warrant reciting to assess its impact on the application:—

"EXCLUSION OF EVIDENCE OF SETTLEMENT NEGOTIATIONS

(1) Evidence may not be adduced of—

(a) a communication made—

(i) between persons in dispute, or

(ii) between one or more persons in dispute and a third party, being a communication made in connection with an attempt to negotiate a settlement of the dispute; or

(b) a document that has been prepared in connection with an attempt to negotiate a settlement of a dispute, whether or not the document has been delivered.

(2) Subsection (1) does not apply where—

(a) the persons in dispute consent to the evidence being adduced or, if one of those persons has adduced the communication or document in evidence in some other proceedings, all the other persons so consent;

(b) the substance of the evidence has been disclosed with the express or implied consent of all the persons in dispute;

(c) the communication or document—

(i) began or continued an attempt to settle the dispute, and

(ii) included a statement to the effect that it was not to be treated as confidential;

(d) the communication or document relates to an issue in dispute and the dispute, so far as it relates to that issue, has been settled, and the document forms part of the chain of events which led to the settlement;

(e) the evidence tends to contradict or to qualify evidence that has already been admitted about the course of an attempt to settle the dispute;

(f) a party to the dispute knew or ought reasonably to have known that the communication was made, or the document prepared, in furtherance of a deliberate abuse of a power conferred by or under an enactment;

(g) the communication was made, or the document prepared, in furtherance of the commission of—

(i) an offence, or

(ii) an act that renders a person liable to a civil penalty; or

(h) a party to the dispute knew or ought reasonably to have known that the communication was made, or the document prepared, in furtherance of a deliberate abuse of a power conferred by or under a law in force in Saint Lucia.

(3) …….

(4) …….

(5) A reference in this section to—

(a) a dispute is a reference to a dispute of a kind in respect of which relief may be given in proceedings;

(b) an attempt to negotiate the settlement of a dispute does not include a reference to an attempt to negotiate the settlement of a criminal proceedings or anticipated criminal proceedings; and

(c) a party to a dispute includes a reference to an employee or agent of such a party." (emphasis added)

Were the parties in dispute at the time of the communication and/or negotiation?

[27] The principle covered by the Act has its genesis in the common law principle traditionally referred to as "without prejudice rule" which protects from disclosure offers of compromise bona fide entered into for the settlement of disputes. The classic description of that privilege is set out in Phipson on Evidence, (16th edition) at paragraph 24-14. It provides:—

> "Written or oral communications which are made for the purpose of a genuine attempt to compromise a dispute between the parties may generally not be admitted in evidence."

[28] The Applicants caution reliance on the common law principles to interpret or otherwise to augment the act, especially where the exceptions to the common law differ or are more flexible than the act. This they caution may ultimately encourage the import into the statute of an interpretation unintended by its mischief. The submission is well reasoned and it is with some circumspection that I draw reference to the common law principles. But certainly in so far as the principles share similarity in its wording as does the general principle, I am satisfied that I can, in reasoning the application of the statute, have recourse to the guidance of the common law principles.

[29] In this case a necessary preliminary consideration to the application of the rule must be whether the rule applies at all. The Applicant states that the correspondence and documents to which the reply refers at paragraph 1 offends section 110, the implication being that the documentation arose out of negotiations to settle a dispute. At the time of the communication, a cause of action of the defendant had accrued but there had been no proceedings yet commenced for recovery. I have not been guided on whether there had been any demand issued. Legitimately, I question whether the parties were in dispute.

[30] The act offers some assistance in the definition of a dispute as being of a kind for which relief may be given in proceedings. The Oxford English Dictionary, provides the following ordinary definition:— "a disagreement or argument" The Applicant submits that the fact the claimant has now brought proceedings against the defendant is indicative of the fact that the parties were disputing. I disagree with that reasoning. The use of the word dispute in the Act refers to the character of the discussions which the parties were having at the time of the communication and/or discussions. It may well have been, that at that time, there was no disagreement or argument but merely discussions with a view to a non-contentious settlement of the Applicants' accounts.

[31] In Re Daintrey ex p Holt [1893] 2 QB 116, Vaughan Williams J reasoned the approach under the common law as follows:—

> "In my opinion, the rule which excludes documents marked "without prejudice" has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation…"

[32] In The Modern Law of Evidence (6th edition) by Keane, the author at page 664 says:—

> "The essential pre-condition for a claim to without prejudice privilege is the existence of a dispute. The privilege, therefore, will not protect correspondence designed to prevent a dispute arising."

[33] I find that reasoning to be sound and equally applicable to the section 110 of the Act. I adopt the view expressed, that the rule cannot apply in the absence of an existing dispute between the parties to the communication in question. I accept that the Act affords a broader construction of the word which does not limit it to situations in which litigation has either been commenced or threatened, but despite this there is nothing in this case to suggest that there was an actual dispute between the parties at the time the correspondence came into being.

Conclusion

[34] I rule dismissing the application to strike out paragraph 1 of the reply of the claimant and award the claimant's costs on the application in the sum of $750.00.

V. GEORGIS TAYLOR-ALEXANDER

HIGH COURT MASTER