THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

Claim No. ANUHCV2014/0628

Between:-

MARILYN RICHARDS

Claimant/Respondent

and

[1] THE BANK OF NOVA SCOTIA
[2] VERONICA CRUMP

Defendants

Before:
Master Jean M Dyer (Ag)

Appearances:
Mr. Lawrence Daniels and Ms. Judith Dublin for the Claimant/Respondent
Ms. Nelleen Rogers-Murdoch for the First-named Defendant
Dr. David Dorsette for the Second-named Defendant/Applicant

2017: January 17;
May 5

(Civil Practice and Procedure – Pleadings - Striking out – Part of claim alleged to be statute barred – Rule 26.3(1)(c) - Whether part of claim to be struck out as an abuse of process – Section 4 of Limitation Act 1997-)

JUDGMENT

[1] **DYER M [AG]:** By this application the Second-named Defendant ("the Applicant") seeks (i) an order striking out certain items of relief sought by the claimant in her claim filed herein on 28th November, 2014 as an abuse of process and also on the ground that no useful purpose would be served by granting some of the relief claimed, namely, certain declarations; and (ii) costs at 45% of the prescribed costs

based on the claim for damages to be struck out. It was filed on 5th January, 2015 and is supported by an Affidavit sworn by the applicant.

[2] The strikeout application at bar was supported by the first-named defendant who had filed a defence to this claim on 29th December, 2014 wherein it *inter alia* raised the limitation point as a procedural defence. The first-named defendant therefore cannot be said to have acquiesced to the parts of the claim which are now seemingly under 'attack'.

[3] The claimant sought to stave off this attack by filing submissions wherein she relied on section 32(1) of the Limitation Act 1997 ("the Act"). She contended that a cause of action founded in fraud is not statute barred as time did not run until she discovered the fraud. Specifically section 32(1) provides:-

> *"Subject to subsection (3), where in the case of any action for which a period of limitation is prescribed by this Act, either:-*
>
> *(a) the action is based upon the fraud of the defendant; or*
> *(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or*
> *(c) the action is for relief from the consequences of a mistake;*
>
> *The period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be)* ***or could with reasonable diligence have discovered it****". (Emphasis added)*

[4] The claimant also adduced an affidavit in response on 28th January, 2015 wherein she sought to address whether she knew or ought to have known of the applicant's alleged fraud. She deposed therein that she discovered the fraud in June 2013 *"upon my return to Antigua from the United States of America when I approached*

the [applicant] and asked her for my balance on my account when she supplied me with a piece of paper with the sum of $51,000.00. I immediately told her that balance was incorrect since my rent for my two (2) properties which was $1,300.00 and $800.00 respectively came to a total of $2,100.00 per month for ten (10) years".

Outline of the claim

[5] To put the application in context, the short background to the claim giving rise to this application as gleaned from the Statement of Claim is as follows: - The claimant is seeking damages in the sum of $289,773.92 being monies she claims were fraudulently and/or negligently removed by the defendants from certain accounts she held with the first-named defendant during the period 1995 to 2013. The applicant was at all material times a senior officer employed by the first-named defendant. She was also the claimant's friend from in or around 1978. The claimant and her deceased husband owned certain properties, two of which were rented from in or about 2003. The claimant relocated to the US that same year. Prior to her departure she instructed the applicant to collect the monthly rental income of $2,100.00 from certain tenants and to deposit the balance (which was left after she made certain annual insurance payments and certain payments on a credit card number 5467 8450 1001 6890 which was issued on account number 24817). During the period the claimant was residing overseas she kept in regular contact with the Applicant. She however seemingly did not require her to account to her in respect of the rental income collected by her. It appears that she did not request and/or was not afforded sight of the bank statements issued by the first-named defendant in respect of the account.

[6] The claimant returned to Antigua in 2013. She attended the bank and tried to conduct business on account number 24817. She was informed that this account was closed. It is her position that she did not instruct the first-named defendant and/or its servants or agents to close that account. She accordingly requested that

the applicant provide her with an update of her accounts. The applicant presented with a printout in respect of account #90331 which indicated that its balance as at 28th June, 2013 was $51,064.29. When she challenged the balance on the account, the applicant indicated that the claimant had obtained a loan from the First-named defendant in September 2004 to pay miscellaneous bills. The applicant disputes this. It is her pleaded case that although she visited Antigua in September 2004 she never attended the bank as the purpose of her visit was to attend a funeral. The claimant pleads that she discovered upon subsequent enquiries that this loan was to refinance a loan she had supposedly obtained in 2003 to finance her relocation to the US. She denies that she obtained any such refinancing and has accordingly instituted the claim at bar.

[7] The grounds of the strike out application are as follows-

(i) The items of relief sought by the claimant are statute barred by virtue of section 4 of the Limitation Act in that the cause of action would have arisen when damage was sustained on account of the alleged tortious acts;

(ii) The claim was filed on 28th November 2014 which was more than 6 years after the cause of action arose with respect to the items of relief in question; and

(iii) Maintenance of a statute barred claim constitutes an abuse of process of the court.

Issue

[8] The narrow issue which is before the court on this strikeout application is thus whether the claimant could with reasonable diligence have discovered the alleged fraud earlier than in June 2013.

The Submissions

[9] The limitation defence advanced by the applicant is that the claim is founded in tort and therefore subject to the limitation periods under section 4 of the Limitation Act 1997. Dr. Dorsette relies on the English case of **Cartledge v. E. Jopling & Sons Ltd**[1]**.** Counsel contends that for torts, the cause of action accrues at the date of the loss or damage when there was a wrongdoing by the defendant from which loss or damage (not being insignificant) is suffered by the claimant, irrespective of his knowledge of such loss or damage. Dr. Dorsette further submits that the claimant would have suffered loss when the tortious acts would have been committed by the defendants. Dr. Dorsette rightly notes that although much of the claimant's cause of action occurred prior to 28th November 2008, the claimant did not institute these proceedings until some six (6) years later in late November 2014.

[10] As aforementioned, the claimant contends that as her action was "founded in fraud" the limitation period did not run until she discovered the fraud upon her return to Antigua in June 2013. Mr. Daniels in essence contended that the claimant's claim was not an abuse of process because her absence from the jurisdiction (from 2003 until her return in 2013) triggered section 32 of the Limitation Act. Mr. Daniels however conceded at the hearing that the strikeout application at bar had "*merit with regard to the aspects of the claim from 1995 to 2002, that is, to the period when the claimant was on island and as such the application should be upheld*" because the claimant would have been in a position to discover any fraud and unlawful activities with regard to her account.

DISCUSSION

Abuse of Process

[11] Rule 26.3(1)(a) of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 ("CPR 2000") gives this Court the power to strike out a statement of case or part thereof which is an abuse of the court's process. It is generally accepted that

[1] [1963] AC 758

this is a power "*which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people*" (per Lord Diplock in **Hunter v. Chief Constable of the West Midlands Police**[2]). In **Citco Global Custody NV v Y2K Finance Inc**[3], our Court of Appeal however emphasised that the jurisdiction to strike out should be used sparingly. Likewise, in **Tawney Assets v East Pine Management Limited et al**[4], striking out is described as a drastic step which is only to be taken in exceptional cases. Carrington JA (as he then was) noted in **Myrna Norde v. Jacqueline Mannix**[5] that this is moreso where the ground for striking out is that the claim is an abuse of the process of the court, which is an extremely serious allegation in light of the general right of access to justice.

[12] Generally, a claim that is issued after the expiry of limitation may be struck out as an abuse of process (see **Myrna Norde v. Jacqueline Mannix)**. It cannot however be struck out on the ground of there being no reasonable cause of action. This is because the limitation point is a procedural defence; as such it bars the remedy and not the claim. It therefore does not prevent there being a cause of action (see **Ronex Properties Ltd v. John Laing Construction Ltd [1983] QB 398** at 405A, (an authority cited by the applicant). As Stephenson LJ said at page 408:-

> "*There are many cases in which the expiry of the limitation period makes it a waste of time and money to let a plaintiff go on with his action. But in those cases it may be impossible to say that he has no reasonable cause of action. The right course is therefore for a defendant to apply to strike out the plaintiffs' claim as frivolous and vexatious and an abuse of the process*

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[2] **[1982] AC 529 at p. 536**

[3]

[4]

[5]

of the court, on the ground that it is statute-barred. Then the plaintiff and the court know that the Statute of Limitations will be pleaded; the defendant can, if necessary, file evidence to that effect; the plaintiff can file evidence of an acknowledgment or concealed fraud or any matter which may show the court that his claim is not vexatious or an abuse of process; and the court will be able to do, in I suspect most cases, what was done in Riches v. Director of Public Prosecutions [1973] 1 W.L.R. 1019: strike out the claim and dismiss the action".

Reasonable Diligence in discovery of concealed fraud

[13] It is not any and every fraud which will elude the provisions of the Limitation Act and keep alive a right to seek relief. It must be a concealed fraud, that is, one which was not known to the claimant and to those through whom she claims. It must also be one that could not with reasonable diligence have been discovered by her or them much earlier. This is because the Limitation Act provides that in the case of concealed fraud, the time is to run alternatively from when it is discovered or from when by reasonable diligence it might have been discovered. The latter displacing the former if it is first in time.

[14] The cases establish that the onus is on the claimant to show that she could not with reasonable diligence have discovered the fraud or concealment much earlier. The standard of diligence which the claimant needs to prove is high. If a considerable interval of time has elapsed between the alleged fraud and its discovery that of itself may be reason for inferring that the fraud might with reasonable diligence have been discovered much earlier (see **Lawrence v. Lord Norreys**[6]).

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[6] **(1890) 15 App Cas 210 at 221.**

[15] The court has to look at the pleadings and the evidence before it to see if it finds anything which in its opinion puts the claimant upon the knowledge or showed that with reasonable diligence she might have ascertained this fraud which she says has been committed upon her (see **Sturgis v. Morse**[7]). The court in so doing must have regard to "*the nature and character*" of the wrongdoing alleged (see **Beaman v. A.R.T.S., LTD**[8]), an authority which was provided by the first named defendant).

[16] It would appear from the pleadings that the claimant was oblivious to the fact that she bore this legal and evidential burden. Indeed, as Dr. Dorsette submitted in his Skeleton Arguments, the statement of claim [sic] "*does not disclose any allegation of fact relevant to the claimant's right of action which has been deliberately concealed from the claimant by the 1st defendant [or even the 2nd named defendant] which would enable the claimant to invoke section 32 of the Limitation Act as it relates to the allegations of fraud*". Similarly, the evidence adduced by the claimant in response to this strike out application does not assist the claimant in staving off the applicant's attack.

[17] Nonetheless the court at the hearing invited Mr. Daniels to refer it to the facts on which theclaimant was relying to show that she had been reasonably diligent. Mr. Daniels referred the court to paragraph 12 of the Statement of Claim wherein it was pleaded that "[*t]he claimant while residing overseas maintained regular contact with the second defendant. At no time during claimant's stay overseas from 2003-2013 was the claimant ever notified of any problems/issues with any of her accounts*". This submission clearly begs the question: if as the claimant contends she was defrauded by the defendants, could the claimant have reasonably expected the applicant to inform her of such alleged fraud if she was complicit in same as the claimant alleges. Put differently, could the claimant be said to be reasonably diligent

[7] (1857) 24 Beav 541.
[8] [1949] 1 All ER 465 at 471.

in circumstances where she migrated to the United States in or about 2003 and left no one "'*to guard the guard*'? Mr. Daniels surprisingly informed the court that the "*claimant did not have anything in place save for being in contact with the 2nd defendant*". He also told the court (at the hearing) that the claimant was not as diligent as she ought to have been and that he recognized that she could have done more.

[18] Mr. Daniels however submitted that the claimant "*put some trust in the banking system*". This was not pleaded and as such no weight will be given to this allegation. It would however appear to the court on the pleadings before it that the claimant put her trust and confidence in the applicant.

[19] Similarly, no weight will be given to Mr. Daniels' submission that the applicant had a duty to provide the claimant with regular bank statements. This is because implicit in this submission is that the first-named defendant breached this duty. It was however not part of the claimant's pleaded case or the evidence adduced in opposition to the strikeout application at bar by her that the first-named defendant failed to provide her and/or the applicant with regular bank statements. Indeed, as Ms. Rogers-Murdoch reminded the court, the claimant "*has not given any evidence of any effort taken by anyone to conceal the fraud*". In fact, the pleadings before the court establish the contrary in that it is apparent from the first named defendant's Amended Defence that statements and debit memos were issued in respect of the claimant's accounts. Moreover, it is apparent from the claimant's own pleadings that (most if not all of) the transactions which she now seeks to impugn are shown on the said documents. It therefore seems that the claimant did not require the applicant as her agent to provide her with sight of same.

[20] Ms. Rogers-Murdoch also contended that even if there was concealment, the claimant would have difficulty because the law requires the limitation period to extend until such time as the fraud could have reasonably been discovered. Ms. Roger-Murdoch pointed out that the claimant was "*here on the ground*" most of the time or she has an agent on the ground. Ms. Rogers-Murdoch contended that the claimant is fixed in law with the knowledge of all matters regarding the accounts of which the applicant had knowledge or of which the applicant with reasonable diligence could have become aware. Ms. Roger-Murdoch did not (and was not invited by the court to) address whether this principle also applied in a situation such as the instant where the agent has allegedly defrauded the principal. I am in this regard mindful of Mitchell J's 'tart caveat' in **Genevieve Joyce v. Antigua Public Utilities**[9] about the wisdom of the court embarking on its own research and therefore propose to say nothing further on this.

Court's findings and conclusions

[21] On the evidence before the court, it is apparent that the claimant migrated to the United States in or about 2003 and took no steps while she was there to have her passbooks updated. The court is fortified in this finding as it was her pleaded case that her passbook for:-

(i) Account # 24817 indicated a balance as at 30 April 1999; and

(ii) Account # 70243 indicated a balance as at 27 October 1997.

The claimant was therefore not in the habit, even before her relocation, of regularly updating her passbooks. It appears that she also was not in the habit of examining the account statements issued by the first-named defendant. The court accordingly accepts Ms. Rogers-Murdoch's submission that the claimant prior to authorizing the

[9] **Civil Suit No. ANUHCV1998/0112 at para. 13**. In that case no legal authorities had been called by either party for use by the Court. Mitchell J noted that *"[i]t is usually a bad practice for the Court to do its own research after the case has ended into legal authorities on which is has not had the benefit of comment and advise of counsel in the case"*.

applicant to deal with her account in 2003, would with ordinary diligence of examining her "*account statements have discovered any discrepancies regarding deductions from her accounts or fraudulent dealings as she alleged in [her] statement of claim, and would have had an opportunity to address them*". Further, as aforementioned, the claimant seemingly did not require the applicant to provide her with sight of the debit memos and/or statements which were issued in respect of her accounts during her absence from Antigua.

[**22**] In the circumstances, I accordingly find that the claimant has not pleaded and/or deposed to any matters which show that she has a real prospect of countering the limitation defence raised by the applicant and the first-named defendant. Whilst it is appropriate in some cases to direct that the limitation point be determined as a preliminary point or at trial, I do not consider such course to be appropriate in this case in light of my foregoing finding. I accordingly:-

(i) Find that **section 32 of the Act** does not apply. As such any claims which predate 28 November, 2008 are now statute barred; and

(ii) order that:-

(a) Reliefs 1 to 6 and 8[10] of the Claim Form; and

(b) Paragraphs 9 (the part of the claim which predates 28 November, 2008); 23 to 28; 30 to 32; 34; 37, 38, 42 of the Statement of Claim be struck out on the ground that the prosecution of the claims contained therein would be an abuse of this Court's process; and

[10] The First named Defendant submitted that the sum of $6,866.11 which is being claimed for credit card payments is not statute barred. A review of the pleadings and in particular paragraph 42 would however reveal that the Claimant alleges that the said credit card payments were made between the period July 2006 to May 2007. As such that claim is now statute barred.

(iii) Grant leave to the claimant to amend reliefs 8, 10 and 11 in the Claim Form and paragraph 9 of the Statement of Claim to remove the portions thereof which concern matters prior to 28th November, 2008 and as such are now statute barred.

Costs

[23] The applicant sought costs at 45% of the prescribed costs on damages to be struck out. Dr. Dorsette was invited by the court at the hearing to justify the costs being sought and in particular to address whether the cap in **Rule 65.11(7)** would not apply to the application at bar. Dr. Dorsette submitted that as parts of the claim would be struck out, the applicant would get costs on the entire claim. Dr. Dorsette however urged the court to award such costs as are proper.

[24] A useful starting point on the issue of costs is **Rule 65.11** of the CPR 2000 which applies to **all** applications except for (i) those made at a case management conference, pre-trial review or the trial; and (ii) specific applications listed in Rule 65.11(3). As Barrow JA notes in **Norgulf Holdings Ltd and Incomeborts Ltd v. Michael Wilson & Partners Ltd**[11] Rule 65.11 sets out guidelines the court must consider when it is making an assessment on costs to be awarded on an application. Specifically the court hearing an application must decide the issues of costs, including who is to pay, how much and when. The court in deciding which party should pay the costs of the application should be mindful that the general rule is that the unsuccessful party must pay the costs of the successful party. The applicant is the successful party and her assessed costs should be paid by the claimant. The court is unfortunately not in a position to assess such costs at this juncture because the applicant has not supplied the statement (bill of costs) mandated by Rule

[11] Civ. App. NO. 8 of 2007.

the applicant has not supplied the statement (bill of costs) mandated by Rule 65.11(5). I accordingly direct that costs of the application are awarded to the applicant which are to be assessed if not agreed within 21 days.

Conclusion

[**25**] In the circumstances, it is hereby ordered as follows:-

1. Any claims which predate 28 November, 2008 are now statute barred.

2. Reliefs 1 to 6 and 8 of the Claim Form and paragraphs 9 (the part of the claim which predates 28 November, 2008); 23 to 28; 30 to 32; 34; 37, 38, 42 of the Statement of Claim are hereby struck out on the ground that the prosecution of the claims contained therein would be an abuse of this Court's process.

3. Leave is hereby granted to the claimant to amend reliefs 8, 10 and 11 in the Claim Form and paragraph 9 of the Statement of Claim to remove the portions thereof which concern matters prior to 28th November, 2008 and are now statute barred.

4. Costs of the application are awarded to the applicant, which are to be assessed under Rule 65.11 if not agreed within 21 days.

[26] I am grateful to Counsel for their submissions. The delay in hearing this application is regrettable but appears from the record to be due to counsel for the applicant's illness and the claimant having changed counsel several times.

Jean M. Dyer
Master [Ag]

By the Court

Registrar