EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA
COMMERCIAL DIVISION

CLAIM NO. SLUHCV2009/1067

BETWEEN:

FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LIMITED

Claimant/ Applicant

And

(1) THE ROSERIE COMPANY LIMITED
(2) THOMAS ROSERIE
(3) SONIA ROSERIE
(4) CHEMICAL MANUFACTURING AND INVESTMENT COMPANY LIMITED

Defendants/ Respondents

AND

CLAIM NO. SLUHCV2010/0121

FIRST CARIBBEAN INTERNATIONAL BANK (Barbados) LIMITED

Claimant/ Applicant

And

(1) CHEMICAL MANUFACTURING AND INVESTMENT COMPANY LIMITED
(2) THE ROSERIE COMPANY LIMITED

Defendants/ Respondents

Appearances:

Mr. Deale Lee with Ms Zinida McNamara for the Claimant/ Applicant
Mrs. Cynthia Hinkson-Ouhla with Ms Natalie Dabreo for the Defendants/Respondents

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2017: April 6
June 30

DECISION IN CHAMBERS

[1] **ST ROSE-ALBERTINI, J. [Ag]:** First Caribbean International Bank (Barbados) Limited (FCIB) has filed two civil claims against the respondents for recovery of alleged debts, interest and costs. The first claim was filed in 2009 against (1) The Roserie Company Limited (TRCL), (2) Thomas Roserie, (3) Sonia Roserie and (4) Chemical Manufacturing And Investment Company Limited (CHEMICO). The second claim was filed was in 2010 against (1) CHEMICO and (2) TRCL.

[2] Before the court are identical applications filed on 7th November 2014 by FCIB, in each of the claims, for determination of the preliminary issue of whether the alleged debts are prescribed.

[3] FCIB says the debts are not prescribed, the claims are valid and the limitation period could extend up to 30 years depending on the classification of the claims for prescription purposes and request that judgment be given in its favour in the event the court finds that the debts are not prescribed.

[4] The respondents say that the cause of action and remedy in each claim is now extinct because the written demands which triggered commencement of the prescriptive period for filing these actions was issued more than six years prior to the filing of both claims and asks that the claims be dismissed. They have also pleaded alternative defences in the event that the prescription issue fails.

THE ISSUES

[5] The issues for the courts consideration are

1. What is the applicable prescriptive period.

2. Are the debts claimed in each of the actions prescribed.

3. If the debts are not prescribed should judgment be given in favour of FCIB

ANALYSIS

Is the prescriptive period 6 or 30 years

[6] The contending provisions of law with respect to prescription are Articles 2121 (4) and 2103 of the Civil Code[1] (the Code). The Articles state-

> *"2121. The following actions are prescribed by 6 years:- ……..*
> *4. Upon inland or foreign bills of exchange, promissory notes, or notes for the delivery of merchandise, whether negotiable or not, or* ***upon any claim of a commercial nature, reckoning from maturity;*** *bank notes, however, being excepted from this prescription;*
>
> *2103. All things, rights, and actions, the prescription of* ***which is not otherwise regulated by law, are prescribed by 30 years****, without the party prescribing being bound to produce any title, and notwithstanding any exception pleading bad faith."*

[7] Learned Counsel for FCIB Mr Lee argues that the sums claimed fall within the realm of Article 2103 and are prescribed by 30 years because the claims are for damages for breach of contractual obligations, for which prescription is not regulated by law. He relies on the Privy Council decision in **Nelson & Others v First Caribbean International Bank (Barbados) Limited**[2] where the Board questioned whether Article 2121 (4) applies to a claim for damages arising from a contractual default, as the Article speaks of a six-year period running from "maturity". The Board said obiter, it was very arguable that claims for damages for breach of contractual obligation would be subject to the thirty-year

[1] CAP 4.10 of the Revised Edition of the Laws of Saint Lucia
[2] [2014] UKPC 30

prescription under Article 2103, because the Code does not specifically prescribe for breach of contract.

[8] Though not having decided that point, by way of analogy the Board referred to the case of **Senez v Montreal Real Estate Board in the Privy Council**[3] which concerned a similar issue in the Quebec Civil Code. A Canadian court ruled that unless the action in question is one of a commercial nature subject to the five-year prescription under the Quebec Code[4], such an action is prescribed by thirty years.

[9] FCIB also relies on **Darling v Brown et al**[5] in which the Supreme Court of Canada found that a claim for default in payment of a debt (which was a loan) was not of a commercial nature and the appropriate period was thirty years.

[10] Mr Lee submits that the burden falls on the respondents who rely on the defence of prescription to satisfy the court that the claims are of a commercial nature and the appropriate period is six as opposed to thirty years.

[11] Learned Counsel for the respondents Mrs Oulah submits that Article 999 of the Code outlines the methods by which a party can be placed in default. If it is by way of breach of a contractual obligation there is no need for a demand because a party is immediately placed in default once the breach is established. It is not disputed that FCIB issued written demands for the sums claimed on 28th October, 2003 which triggered the commencement of the prescriptive period hence the default arose by virtue of the demands issued by FCIB.

[12] She further submits that the cases relied on are not applicable. The **Nelson** case did not resolve the issue of prescription in relation to the respective Articles. **Darling** and **Senez** were in relation to contractual obligations not considered to be of a commercial nature. Since the debts are of a commercial nature Article 2121 (4) is the governing provision.

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[3] [1980] 2 S.C.S. 555
[4] The equivalent of Article 2121 (4) of the Code
[5] [January 1877]

[13] On examination of the authorities I agree that they were not very helpful to the court. The **Darling** case concerned recovery a very small sum of money loaned by a non-trader (an individual) to a commercial firm (a trader). The **Senez** case concerned a claim for damages for loss of income, humiliation and physical and mental suffering arising from the appellant's suspension and subsequent expulsion from a Real Estate Board, in circumstances which contravened the Board's by-laws and principles of natural justice. It is understandable that these actions by their very nature will be considered as non-commercial.

[14] In my view this issue will turn not on whether the claims are strictly for damages for breach of contract but whether they are debts which arose from contractual obligations relating to activities of a commercial nature. For this purpose the court must embark on an examination of the evidence as it relates to the origin and purpose of the debts.

[15] The respondent companies were the principal debtors and guarantors of each other's debts. Thomas and Sonia Roserie as their directors were guarantors. FCIB is a commercial bank engaging inter alia in lending to businesses involved in commercial activity. TRCL engaged in the business of importation and sale of used vehicles and CHEMICO in manufacturing of chemical and household cleaning products for sale to consumers. On the evidence the debts are substantial and are generally alleged to have arisen out of the business operations and transactions of the respondent companies. A portion of the sums claimed is in respect of payments made to the Customs Department on imported vehicles. Another sum is in relation to a business operating current account facility which was subsequently converted to a demand loan. I consider these to be in the nature of commercial loans to TRCL and CHEMICO as business entities, by FCIB. From the pleadings and affidavit evidence it appears that the loans were used to fund capital expenditure and operational costs in the course of trade and commerce undertaken by the respondent companies.

[16] On examination of the demand letters they required that several outstanding balances by way of loans to the respondent companies be paid within 14 days of the date of writing, failing which legal proceedings would be instituted without further notice. The pleadings

disclose that the sums claimed are debts which have remain unpaid despite demand having been made. In the **Nelson** case which also concerned recovery of debts by FCIB the Privy Council stated obiter, that if the Nelsons had wished to argue that the Bank had failed to sue for damages in a timely manner they would have had to explore in evidence when the bank demanded repayment of the loan. This seems to suggest that the demand would be the starting point for commencement of calculation of the prescriptive period for the debts claimed. There was no evidence of written demand for payment in that case, in contrast to the instant claims, where apart from the written demands there is no other evidence of maturation of the loans.

[17] In the circumstances I conclude that the alleged debts arose purely from actions upon claims of a commercial nature and falls squarely within the scope of Article 2121(4). I accept that the applicable prescriptive period is six years.

[18] It is worth mentioning here that CPR 69C which introduced the Commercial Division of the court in this jurisdiction now provides greater clarity on what constitutes claims of a commercial nature[6].

Are the debts prescribed

[19] The 2009 claim was filed on 31st December, 2009 and seeks to recover four separate sums of:- (i) $634,541.51, (ii) $1,571,645.11, (iii) $935,450.66 and (iv) $3,485,408.82. The 2010 claim was filed on 12th February, 2010 and seeks to recover two separate sums of $4,918.68 and $241,179.34.

Payment of Customs Duties

[20] The 2009 claim contains a sum of $1,597,731.28 as part of the larger sum of $3,485,408.82 which FCIB says is not prescribed because it arose in May 2009. It

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[6] CPR 69C 1(2)

represents a payment by FCIB to the Customs and Excise Department on behalf of TRCL under General Customs Bonds obtained by TRCL in favour of the Department. In support of this FCIB relies on a letter dated 6th May, 2009 from the Comptroller of Customs acknowledging receipt of the said sum, for which Receipt # R 19245 dated 4th May, 2009 was issued. FCIB's case is that the sum could not possibly become extinct by December 2009, when that claim was filed.

[21] The respondents say this sum is denied because there is no information in the pleadings to substantiate the source of the debt and no demand was issued to trigger commencement of the prescriptive period. The only reference to payment of customs duty is a letter dated 6th August, 2003 from FCIB's legal practitioners to the Managing Director of TRCL, although it appears that the payment was made in May 2009. They contend further that there is nothing in FCIB's pleadings by which the source of that debt could be determined and that the sum is prescribed because demand was first made in August 2003.

[22] FCIB's response is that the letter of 6th August, 2003 is not a demand but merely a letter informing the respondents that payment of the sum was required by law and the bank was obligated to do so having bound itself jointly and severally with TRCL, under the terms of the bond.

[23] I have examined the two letters and find merit in FCIB's position on this point. The contents of the letter of 6th August, 2003 is informative and cannot be classified as a demand The only reference to actual payment of the said sum to the Customs Department as far as I see is in the letter of 6th May, 2009 which speaks of receipt of the respective sum as at 4th May, 2009. There is no evidence of that particular sum having been demanded by FCIB however it was included as a sum due in the 2009 claim and FCIB's statement of claim refers to the sum as the payment of duties under a bond, on vehicles imported by TRCL and stored in a private warehouse.

[24] In the circumstances I accept that the sum was paid in May 2009 and could not have been prescribed seven months later, when that claim was filed.

The remaining sums in the two claims

[25] It is not disputed that concerning the remaining sums in both claims demand was made in two letters dated 28th October, 2003 with respect to debts owed by TRCL and CHEMICO.

[26] FCIB accepts that since the demands were served in October 2003 six years would have elapsed in October 2009, if nothing further had occurred and relies on Article 2088 to argue that in a civil claim any acknowledgment of the debt within the limitation period would operates as an interruption and prescription re-starts from the date of the acknowledgment. The Article states-

> *"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." (Emphasis Added)***

[27] FCIB submits that in a letter dated 29th November, 2004 penned by Mr Roserie to FCIB's legal practitioners concerning liabilities of TRCL and CHEMICO the debts were acknowledged and this had the effect of interrupting prescription. FCIB further contends that Mr Roserie was sufficiently authorized to act for the respondent companies, to bind them by his actions, thus the prescriptive period re-commenced in November 2004 and would have ended in November 2010, several months after the claims were filed.

[28] The respondents case is that Mr Roserie's letter of 29th November was an offer to settle as part of negotiations in which the parties engaged and cannot be classified as an acknowledgment. They say, the demand having been issued on 28th October 2003 and the fact of that the claim was filed more than six years later has caused these sums to be prescribed.

Issue Estoppel

[29] In the 2010 claim the respondents made an application to strike out paragraph 1 of the FCIB's reply to defence for violating section 110 of the Evidence Act[7] claiming that it sought to adduce evidence of correspondence relating to negotiations of a settlement between parties in a dispute, as a means of defeating the respondent's defence of prescription. In a reasoned decision rendered by a Master on 15th May, 2014 the application was dismissed because the Learned Master found nothing in the case to suggest that there was an actual dispute between the parties at the time the correspondence came into being. I note the Master's concern at not having had sight of the challenged correspondence, which precluded a determination on the issue of interruption of prescription.

[30] The letter of 29th November was alluded to in FCIB's reply in the 2010 claim which Mr Lee submits was determined as being admissible by virtue of the Master's decision. The same letter has also been referred to explicitly in FCIB's reply in the 2009 claim. Mr Lee submits that the respondents are estopped from re-litigating that issue in the 2009 claim and in the result the only remaining issue for the court's consideration is whether this letter constitutes an acknowledgment of the debts. The Master's decision was made available to the court as part of the application bundle.

[31] Mr Lee argued that the principle of estoppel is well known to this jurisdiction and cites the case of **Prospere v Prosper**[8] as the leading authority in relation to res judicata as stipulated in Article 1171 of the Code which says:-

> *"1171. The authority of a final judgment (res judicata) supplies a presumption incapable of contradiction in respect of that which has been the object of the judgment, when the demand is founded on the same cause, is between the same parties acting in the same qualities, and is for the same thing as in the action adjudged upon."*

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[7] CAP 4.15 of the revised Edition of the Laws of Saint Lucia
[8] [2007] UKPC 2

[32] The principle, he says, operates in two spheres, namely;- (1) the wider realm of res judicata which prevents a fresh claim from being brought because the subject matter has been determined between the parties and (2) the narrow realm of issue estoppel which is the relevant sub-specie for the purpose for dealing with a specific issue in a claim.

[33] He produced an extract from the learned authors of **Halsbury's Laws of England**[9] which says the doctrine requires (1) a final decision on the issue by a court of competent jurisdiction, (2) the issue raised in both proceedings must be the same and (3) the parties to the decision or their privies must be the same persons as the parties to the proceedings in which the estoppel is raised. The text goes on to say that deciding whether the issue is the same in both cases will depend on whether the court takes a narrow or wide view of the extent of the issue determined in the earlier proceedings. Where one party has raised an issue which his opponent alleges is barred by issue estoppel the opponent may either plead the estoppel and leave the matter to be dealt with at trial or attempt to have the offending plea struck out.

[34] Mr Lee argued further that the Master had competent jurisdiction to make the determination on the issue of whether evidence of settlement in the circumstances of these claims violated section 110 of the Evidence Act, the parties involved are identical or so closely related to be taken as being the same and the issue of admissibility is exactly the same as determined by the learned Master in the 2010 claim. TRCL and CHEMICO were principal debtors for various sums and their directors are their privies for the purpose of the 2010 claim because their liability is contingent on the liability of TRCL. He contends that the doctrine exists to protect the court from embarrassing situations where in identical circumstances between identical parties (irrespective that the quantum of the debts varies in each claim) the same evidence is admissible in one claim and omitted in the other. For this reason he says the respondents are estopped from re-litigating the issue of admissibility as a violation of section 110 of the Evidence Act.

[35] The respondents answer is threefold. The first is that in the **Prospere case** the Privy Council referred to the Quebec case of **Roberge v Bolduc** [1991] 1 SCR 374 in which the

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[9] Vol 11 at para 1624

Supreme Court of Canada identified a number of conditions which must be met before the judgment of one court is held to preclude re-litigation as being res judicata in a second court. They are:- (1) the first court must have jurisdiction, (2) the second proceedings must have culminated in a definitive judgment, (3) the first judgment must have been given in a contentious matter, (4) the principle only prevents re-litigation of an issue by those who were parties to or represented in and so bound by the first judgment and who act in the same capacity in the second judgment, (5) the object and purpose of the second proceedings must be the same as that of the first and (6) there must be identity of cause in the two actions.

[36] They contend that the Roseries are not parties to the 2010 claim. The defendants in that claim are TRCL and CHEMICO with CHEMICO as the principal debtor and TRCL as guarantor. Moreover they were sued in different capacities in the 2009 claim in which there are four defendants with TRCL as principal debtor and CHEMICO and the Roseries as guarantors.

[37] The second response is that the master's decision on admissibility in the 2010 claim was made on an interlocutory application and the case of **Janet Branch & Carolina Shoe Co v NC Insurance Guarantee Association formerly Reliance Insurance Co**[10] establishes that an order is not final and therefore interlocutory, if it fails to determine the entire controversy between all the parties.

[38] Mr Lee's counters this submission, suggesting that the test on the difference between an interlocutory and final decision in the **Janet Branch** case has been wrongly applied by Counsel for the respondents. The Master was dealing with a preliminary point and was not making an intermediate decision on something which would arise again later in the trial. She was asked to determine a preliminary issue which depending on the outcome would not arise again at trial. Therefore the decision is in fact a final decision on the issue of admissibility of correspondence between the parties in the 2010 case. No appeal has been made, the decision is final and the parties are bound by it.

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[10] Decision of North Carolina Court of Appeals filed on 16th August 2005

[39] The third response is that the English law principle of issue estoppel raised by FCIB does not accord with the res judicata principle in this jurisdiction, as stipulated in Article 1171 of the Code and the term privies have no place in the laws of this jurisdiction. In **Polinere v Felicien**[11] the Privy Council ruled that if in doubt about the interpretation of the provisions of the Code guidance should be sought from authority on the Civil Codes of Quebec and France. Additionally Article 917A (3) of Code directs that where a conflict exits between English Law and the express provisions of this Code or any other statute the Code or such statute shall prevail.

[40] Mr Lee's response is that Article 917A (3) does not convey that common law concepts such as issue estoppel are not applicable to this jurisdiction particularly as it is a sub-specie of the res judicata principle and there is nothing in the law to suggest that the concept of privies is excluded by the wording of Article 1171.

[41] I have considered the opposing submissions and find some merit in the issue estoppel point in so far as the cause of action in both claims is for recovery of debts of the respondent companies in the same set of circumstances. Moreover I am not persuaded that a different outcome would be derived from re-litigating that issue because essentially it concerns the same facts surrounding exchanges of correspondence which relates to both claims. It has been said that issue estoppel prevents in some cases an issue that has already been litigated and decided on the merits from being re-litigated even when the parties are different.

[42] Recognizing however that the particular letter was not before the Master when the admissibility issue was disposed, if I am wrong on the issue estoppel point, I do not believe that this Court is precluded in any way from assessing the letter of 29th November on its own merit in the 2009 claim, to arrive a finding on whether it contained an acknowledgment of the debts or is a proposal for settlement of a dispute between the parties. This is what I consider to be critical for determining the issue of interruption of prescription in both of the claims.

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[11] (2000) 56 WIR 264 at 267

[43] At this stage pleadings are now closed and the respondents did not plead or take issue with inadmissibility of the letter in the 2009 claim. They have chosen instead to address whether it suffices to interrupt prescription on these applications. The thrust of Mrs Ouhla's submissions is that the letter was issued in the course of negotiating settlement of a dispute and did not contain an acknowledgment of the debts and that the court should examine the wording of the letter in the context of the circumstances which preceded the claims.

Did the letter of 29th November, 2004 contain an acknowledgment of the debts

[44] I consider it necessary to reproduce the full text of the letter in question, which was issued on the letterhead of CHEMICO:-

November 29, 2004

Mr. C. Anthony McNamara Q.C.
McNamara & Co
Chambers
20 Micoud Street
P. O.Box 189
Castries
Saint Lucia

Dear Sir

RE: Outstanding Liabilities of (1)Chemical Manufacturing & Investment Company Limited and (2) The Roserie Company Limited to First Caribbean International Bank (Barbados) Ltd.

I refer to your letter of November 26, 2004 in connection with the above.

In the main our proposal for settlement of the outstanding balances owed by the two companies revolves around re-scheduling of the long term loan of the Roserie Company Limited, this to include the customs bond payment (consideration to be given to some reduction in the accrued interest), over the period which will allow for payment of an affordable amount per month and an advance of EC$250,000 to CHEMICO for purchasing addition plant and equipment necessary to operate the Chemical Plant at near full Potential to further enhance CHEMICO's Cash Flow.[Emphasis Added]

When we initially suggested this to First Caribbean's Mr. Jim Ross, the response was that one of the pre-requisites was that we obtain a letter of undertaking from Republic Bank not to proceed with their Judgment if a reasonable monthly sum, say EC$5,000.00 was paid by us against their outstanding balance.
Because of this, our assumption was that we had to first obtain Republic Bank's agreement before First Caribbean could proceed.

This was eventually received last week and a copy is attached for your information.

Our proposal has not changed from the initial request mentioned in the above paragraph and we are awaiting confirmation from First Caribbean before signing the undertaking to Republic Bank.

We are preparing CHEMICO's Budget for March, 2004 - February, 2005 and this will be ready by the latest December 12, 2004.

This will provide relevant information and details of the effects of the plans which we will be embarking on to facilitate servicing the necessary financial obligations.

A copy of this budget will be made available to Mr. Richard Peterkin and we would respectfully suggest that he begins his review with the benefit of the information, explanations and projections contained therein.

Once this is complete, we look forward to First Caribbean International providing us with the necessary facilities to regularize the outstanding issues.

Sincerely,

CHEMICAL MANUFACTURING &
INVESTMENT COMPANY LIMITED

THOMAS M. ROSERIE
Managing Director

Cc: Mr Jim Ross
Head of Special Services
Credit Risk management
First Caribbean International Bank (Barbados) Ltd

Mr Richard Peterkin
Price waterhouse Coopers
Point Seraphine
P. O. Box 195
Vigie
Castries

[45] FCIB's position is that the letter contains an acknowledgment of the debts and does not constitute evidence of attempts to negotiate in the course of settlement of a dispute between the parties and the effect of this acknowledgment is to interrupt prescription, the period re-started on 29th November, 2004 and the claims were duly filed in time.

[46] It relies on **Bradford & Bingley plc v Rashid**[12] in which the House of Lords examined the concept of acknowledgment at common law for the purpose of interrupting the statute of Limitation in England. Examples were provided of what constitutes such acknowledgment. Lord Hoffman explained that references to "outstanding balances" and "outstanding amounts" are plain acknowledgments of existence of a debt and nothing more is needed. The court also said all that is required is an acknowledgment and there is no requirement to admit a specific amount.

[47] Mr Lee argued that the caption of the letter addresses outstanding liabilities owed by both TRCL and CHEMICO and at paragraphs 1 and 2 it clearly refers to acceptance of amounts as owed by the companies to FCIB. The letter is signed by Thomas Roserie as director of the companies. It references a letter from FCIB's legal practitioners dated 26th November, 2004 following a meeting held by the parties in which a request for proposal was made for payment of the debts owed by TRCL and CHEMICO. That letter referenced two other letters of 8th and 12th October 2004 in which outstanding balances were again demanded from both companies. The letters are exhibited in the affidavit of Billie Sadoo in support of the instant applications, culminating in the final response from Mr Roserie on 29th November, 2004. The language is plain and the reference to "outstanding balance owed by the two companies" can only be an admission of the debts as being owed by TRCL and CHEMICO. FCIB says there was no dispute and the debts were acknowledged and serve to interrupt prescription, so that the expiration date for filing the claims would have been 28th November 2010, both claims were filed well ahead of that date and the actions are well founded.

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[12] [2006] 4 All ER 705 at para 1 to 6

[48] FCIB also relied on dictum from two Canadian cases. **Nancy Emrick v Brian Bailey**[13] in which a defendant admitted half of the debt and the court held that once a portion of the debt was admitted it was sufficient to interrupt prescription for the entire debt. The court confirmed that there is no requirement to acknowledge a specific amount. Again in **Irvin Mitchel Kalichiman LLP v Julien Feldman et al**[14] the court accepted that partial payment of fees and an email acknowledgment a debt was sufficient to interrupt prescription. In concluding FCIB says the words used do not convey conditional acceptance of the debt as the letter expressly says that the debts are owed and it explains how the respondents proposed to settle same. The request for consideration of a reduction in interest accrued does not mean that there is no debt owed.

[49] The respondents' case is that the use of the word "settlement" in paragraph 2 of the letter confirms that it an attempt at negotiating settlement of a dispute. Mrs Ouhla argued that the contents of all the correspondence between Thomas Roserie and FCIB must be examined and cannot be compared in isolation to the letters relied on in the **Bradford** case, which will show that this was a serious attempt to negotiate settlement of a dispute. This must be addressed in the context of the statement made in the 29th November letter which says "*in the main our proposal for settlement of the outstanding balances owed by the two companies revolve around……this time to include the customs bond payment"*. These debts were always disputed and in an effort to settle the letter includes an offer to include the bond payment. A condition was attached to this which was a further advance of $250,000.00 to CHEMICO. This she says cannot be considered as an unconditional acknowledgment but only as conditional offer to settle.

[50] The respondents rely on the authorities of **Vicki Mikulecky v Mariott Corporation**[15] and **1st National Bank of Commerce V Band** and **Whitney National Bank v Francis J Demarest**[16] These cases say that an acknowledgment must be unequivocal and a settlement offer is not sufficient to acknowledge a debt, so as to interrupt prescription. While examples in the **Bradford** case are clear acknowledgments of debt and an

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[13] 2010 QCCQ 1010 at paras 5 - 8
[14] 2010 QCCQ 3069 at paras 21 - 26
[15] 87-3600 US Court of Appeal 5th Circuit
[16] No. 98-CA-0288 Louisanna Court of Appeal, 4th Circuit.

indication of inability to pay, each case ought to be determined on its own merit taking into account the circumstances. The intention of the parties and the format of the letter written by Thomas Roserie on 29th November was an offer to settle as part of negotiations in which the parties had engaged and does not constitute an acknowledgment of the debt as required by Article 2088 of the Code. In the circumstances the demand letter issued on 28th October, 2003 caused the actions to be prescribed before the claims were filed in 2009 and 2010.

[51] Mr Lee submits in reply that the **Vicki** case is to be distinguished as it deals with a tort claim as opposed to a claim for a debt. The acknowledgment of a tort claim would comprise a combination of an acknowledgment of liability and quantum which is distinct from an outright acknowledgment of a debt, as captured in the plain wording of the letter.

[52] I have considered the competing submissions and authorities and juxtaposed the contents of the letters against the rulings in the authorities cited by both sides. I am more persuaded by FCIB's position that in particular the letter of 29th November, 2004 contains a clear acknowledgment of the debts. I interpret the use of the word "settlement" in the context of the letter to mean payment of the debts owed. On the authority of the **Bradford** case I accept that at paragraph 2 of the letter the acknowledgment of liabilities owed by the companies had the effect of an admission by the respondents of the right of FCIB to the sums claimed, as the person against whom the prescription runs and the remainder of the letter dealt with the extent to which TRCL and CHEMICO could meet these liabilities. I do not accept that the letter was conditional by asking for a concession on interest and a further advance to meet capital expenditure of CHEMICO.

[53] It appears that there is a clear divergence in the treatment of acknowledgment for interrupting prescription between the English and Canadian authorities when compared to the American Courts. On that point I considered the English and Canadian authorities to be more persuasive in this jurisdiction.

[54] I find that the acknowledgment of the debts in the letter of 29th November, 2004 was sufficient action on the part of the respondents to interrupt prescription and the period re-started as of that date. In the circumstances the actions are not prescribed.

Summary Judgment

[55] FCIB has requested that if the debts are not prescribed the remaining defences should be struck out and judgment given in its favour.

[56] In **Saint Lucia Motor & General Insurance Co. Ltd. v Peterson Modeste**[17] the Court Of Appeal held that summary judgment should only be granted in cases where it is clear that a defence on its face is clearly unsustainable or amounts to an abuse of the process of the court. The respondents have put forward several defences of which prescription is only one. The applications under consideration have substantially addressed the prescription issue only.

[57] Mrs Ouhla submits that summary judgment at this stage is inappropriate because full disclosure has not taken place and there are substantial points of law on the remaining defences which do not admit of a plain and obvious answer and relate to areas where the law is in a state of development. Additionally she says the strength of the remaining defences can only be fully ascertained after full investigation through the process of disclosure and other court processes and cross examination of witnesses. In support she relied on the Court Appeal decision in **Dr Martin Didier et al v Royal Caribbean Cruises Ltd**[18]

[58] I am satisfied that at this time all that is before the court on the remaining defences are the pleadings. I have considered Mr Lee's submissions on this point and disagree with the cursory approach adopted in addressing the remaining defences. While the court is

[17] HCVAP2009/008 delivered on January 11, 2011
[18] SLUHCVAP2014/0024 & SLUHCVAP2015/0004 delivered 6th June, 2016, unreported

empowered to give judgment on determination of a preliminary issue, I find myself constrained to do so without further examination of the evidence and legal arguments on the alternative defences.

[59] I conclude that further case management is required with a view to proceeding to trial on the remaining defences.

CONCLUSION

[60] I therefore make the following order:-

1. The actions are not prescribed.
2. The claims are scheduled for further case management on **July 20, 2017**.
3. Cost is reserved until determination of the substantive claims

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar