EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA
COMMERCIAL DIVISION

CLAIM NO. SLUHCV2009/0949

BETWEEN:

FIRSTCARIBBEAN INTERNATIONAL BANK (BARBADOS) LIMITED

Claimant

And

1. **SUNSET VILLAGE INC**
2. **MOSHE YOVEL**
3. **DIGBY AMBRIS**

Defendants

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini — High Court Judge

Appearances:
Mr. Sahleem Charles for the Claimant
Mr. Thaddeus Antoine for the Defendants

2019: May 23
October 10

DECISION

[1] **ST ROSE-ALBERTINI, J. [Ag]:** The claimant, FirstCaribbean International Bank (Barbados) Limited ("the Bank") filed a claim against the defendants in respect of a sum

allegedly due and owing, pursuant to loan agreement dated 18th October 2007. The agreement was between the Bank and the first defendant Sunset Village Inc ("SVI"). The loan was secured by:

1. A Deed of Undertaking dated 19th October 2007 from the second defendant ("Mr. Yovel") and the third defendant ("Mr. Ambris");
2. A Guarantee and Postponement of Claim dated 25th October 2007 from Mr. Yovel;
3. A Pledge of Shares by Mr. Yovel and Mr. Ambris of their shares in the SVI; and
4. A first registered Hypothecary Obligation, Mortgage Debenture and Floating Charge executed on 16th November, 2007 in favour of the Bank, over the property of SVI.

[2] The purpose of the loan was to finance construction of a residential development undertaken by SVI. Mr. Yovel and Mr. Ambris were the shareholders and directors of SVI. The Bank alleged that the defendants breached the loan agreement by failing, among other things, to progress construction and settle the loan account in accordance with the agreed terms and repayment period, despite its demand to do so. The Bank therefore sought the following relief:-

1. The sum of US$4,361,725.98 together with interest at the rate of 8.36% on the principal sum of US$4,325,610.84 from 24th October 2009 against SVI, and as against Mr. Yovel pursuant to the Guarantee and Postponement of Claim;
2. An order that it is at liberty to sell the shares of Mr. Yovel and Mr. Ambris pursuant to the Pledge of Shares;
3. An order that it is at liberty to exercise any of the powers conferred by the Hypothecary Obligation, Mortgage Debenture and Floating Charge without further order, including an order for assignment of all policies of insurance to and in favour of the Bank; and
4. Costs

[3] The defendants filed a defence and counterclaim. They alleged that their failure to progress construction and repay the loan from the proceeds of sale of the residences as agreed, was due to the delay and/or failure of the Bank to disburse funds for construction,

in breach of the agreement. They also alleged failure by the Bank to address certain administrative and substantive issues, including the calculation of drawdowns, what constituted cost overruns, and when cost overruns were payable. They say this resulted in their inability to complete construction and caused them to suffer loss and damage, including expenses associated with cancellation of purchase orders, breaches of employment contracts, and loss of use of material and equipment purchased for construction. In their counterclaim, they sought the following relief:

1. An order that the Bank repudiated and/or breached the loan agreement;
2. A declaration that the Bank's actions were unconscionable, unreasonable and done in bad faith;
3. Damages to be assessed;
4. Interest pursuant to Article 1009A of the Civil Code[1]; and
5. Costs

[4] The matter progressed to case management conference, directions were given and a date set for trial. At that stage, the Bank appointed a Receiver who in turn instituted separate proceedings to wind up SVI. Consequently, the instant claim was stayed until some 5 years later, when the Bank requested , that it be re-listed for further case management.

Issues

[5] The issues to be resolved are:

1. Whether a case management bundle and order containing the adjourned hearing date were properly served on Mr. Yovel by service at Mr. Antoine's Chambers; alternatively by leaving the documents with the desk receptionist at a specified address in Miami, pursuant to a court order directing service by courier at the specified address?

2. Can the Bank proceed with the claim against Mr. Yovel, in its current form?

[1] Cap 4.01 of the Revised Edition of the Laws of Saint Lucia

Chronology

[6] As far as can be gleamed from the record, the matter progressed over a period of ten years as follows:

1. Claim form and statement of claim were filed on 18th November 2009.
2. Defence and counterclaim were filed on 18th January 2010.
3. Case management conference ("CMC") was scheduled and heard on 30th March 2010, at which an order was made permitting the Bank to file a reply and defence to the counterclaim and further pleadings in accordance with the rules.
4. The reply and defence to the counterclaim were filed on 9th April 2010.
5. A reply to defence to the counterclaim was filed on 28th May 2010.
6. A further CMC was scheduled for 31st May 2010 and rescheduled to 1st June 2010.
7. At the request of counsel for the defendants, CMC was again rescheduled, and heard on 4th June 2010, when the parties consented to attend mediation. The matter was then adjourned to 21st October 2010.
8. On 21st October 2010, the parties indicated that they were in the final process of negotiating settlement and the matter was adjourned to 26th November 2010 for report.
9. On 26th November 2010, the parties indicated they were still in the final process of negotiating settlement and the matter was adjourned to 22nd December 2010 for report.
10. The parties were unable to conclude a settlement and on 3rd February 2011, the matter was returned to case management.
11. CMC was scheduled for 8th March 2011, rescheduled for 12th April 2011 and again rescheduled for 14th July 2011.
12. On 14th July 2011, the usual case management orders were made with dates set for standard disclosure, filing a list of agreed documents, witness statements and pre-trial memoranda. Pre-trial review was set for 11th June 2012 and trial was set for 17th to 18th October 2012.

13. On 11th June 2012 counsels for the respective parties were not present for pre-trial review and the matter was adjourned for status hearing to 25th September 2012.

14. On that day, only counsel for the Bank appeared and an order was made that the matter be stayed pending the liquidation of SVI.

15. The next event was not until 8th November 2017 when only counsel for the Bank appeared and an order was made transferring the matter to the commercial court.

16. On 24th May 2018 the matter came up for status hearing and was adjourned to 14th June 2018 at the request of counsel for the defendants who was off Island.

17. On 14th June 2018, both counsels indicated to the Court that further information was required on the whereabouts of Mr. Yovel to facilitate CMC. It was ordered that the Bank supplement the status hearing bundle for CMC and the matter was adjourned to 20th September 2018.

18. On that date, counsels again indicated that further information was still required on the whereabouts of Mr. Yovel and the matter was adjourned to 16th January 2019.

19. On 16th January 2019, the matter was again adjourned to 13th February 2019 at the request of counsel for the defendants, who was absent from the State.

20. On 13th February 2019, counsel for the Bank informed the Court that it had filed a case management bundle and was ready to proceed with the matter. Counsel for the defendants informed the Court that he had not communicated with Mr. Yovel in the last 7 years, and despite best efforts, has been unable to locate him and has no instructions to enable him to proceed with case management. Counsel for the Bank indicated that its investigations revealed that Mr. Yovel is alive and residing at an address in Miami, Florida. Both counsels agreed that due to the inordinate period over which the matter remained inactive, it was imperative that the case management bundle and the order containing the adjourned hearing date be served personally on Mr. Yovel. The Bank was ordered to serve the case management bundle and order on Mr. Yovel by courier service at a specified address and the matter was adjourned to 2nd May 2019.

21. On 2nd May 2019, the Bank informed that the case management bundle had been served on Mr. Yovel via FedEx by leaving it with the front desk receptionist at the address specified and an affidavit of service was filed. Counsel for the defendants

informed that he had prepared an application for removal from the record but anticipates difficulty serving it on Mr. Yovel as he was recently informed that he is no longer living at the address specified for service. This meant that he would be placed in the position of having to comply with directions without taking instructions; and the claim, having remained dormant while the Bank pursued liquidation of SVI, would have adverse implications for Mr Yovel, if pursued in its current form. The parties were ordered to file submissions on the issues of validity of service and whether the claim can proceed in its current form, and the matter adjourned.

22. On 23rd May 2019, the court heard oral submissions of the parties and reserved its decision.

Mr. Yovel's Case

[7] As advanced by Mr Thaddeus Antoine, the case for Mr. Yovel is that the claim as originally filed is no longer valid against him. If the Bank wishes to recover the sum claimed under the guarantee, a new claim must be filed and served personally on Mr Yovel. Counsel says that the Bank elected to stay the claim to pursue liquidation proceedings against SVI as the principal debtor. This amounts to a waiver of its right to pursue the claim against Mr. Yovel and renders continuation of this claim an abuse of process. Further, the delay or failure of the Bank to proceed with the claim against Mr. Yovel for some 7 years amount to inordinate and inexcusable delay, sufficient to bar the claim from continuing against him under the doctrine of laches and the claim should be dismissed for want of prosecution.

The Bank's Case

[8] Mr Sahleem Charles on behalf of the Bank contends that a petition for winding up of SVI was filed on 18th May 2012. The company is now in liquidation, with the result that all proceedings against it are stayed. Nonetheless, the Bank's is entitled to proceed with the claim against Mr. Yovel, who is liable under the guarantee for an unlimited sum, and as

such is jointly and severally liable for the debts of SVI. The Bank wishes to proceed against him for the full amount of the debt, which is due and owing under the guarantee.

Law and Analysis

Was the case management bundle and order properly served on Mr. Yovel by service on Mr. Antoine's Chambers; alternatively by leaving them with a front desk receptionist at the specified address in Miami.

Service on Mr Antoine's Chambers

[9] The Bank submitted that service on Mr. Yovel's legal practitioner on the record is proper service pursuant to rule 9.5(4) of the Civil Procedure Rules 2000 ("CPR") which requires the defendant to include in his acknowledgement of service an address for service in the jurisdiction where documents may be sent. Further CPR 6.4(1)(d) provides that if no address is given for service, a document may be served by leaving or posting it at the business address of any legal practitioner who purports to act for the party in the proceedings. The Bank relied on the case of **Development Bank of St. Kitts and Nevis v Michael Hanley and Cephus Audain**[2] where the court stated that an attorney retained in a matter by a client, even without express authority, has an implied authority as between himself and his client to compromise the suit without reference to the client, provided that the compromise does not involve matters extraneous to the subject matter. Similarly, an attorney has ostensible authority as between himself and opposing counsel. Mr Charles argued that this can be extended to having ostensible authority to accept service of documents, in the absence of express instructions from Mr. Yovel. Since Mr. Antoine has been Mr. Yovel's attorney on record from commencement of the suit, having acknowledged service and provided the address of his chambers for service, it is immaterial that the firm at which he practiced at the time was dissolved. Mr. Antoine has accepted service at the current address of his firm, has failed to remove himself from the record as legal practitioner for the defendants, and has continued to participate in the proceedings.

[2] Claim No.: SKBHCV2012/0273

[10] Mr Antione's response is that he has prepared the application for removal but the rules require the application to be served on the client. He is unable to do so as Mr Yovel has left the jurisdiction and he has not had contact with him for the past 7 years. He has not been able to obtain any information on his whereabouts, despite best efforts. Mr Antoine further says that the firm on record is Francis & Antoine, which no longer exists. His new firm TM Antoine Partners has not been formally retained or instructed in the matter. He has continued to appear out of courtesy to the Court.

[11] I have given due consideration to the contending positions. Parts 5 to 7 of the CPR deal with service. Part 5 deals with service of the claim form and statement of claim within the jurisdiction. Part 6 deals with service of documents other than the claim form and statement of claim within the jurisdiction, and Part 7, with service of court process generally outside the jurisdiction. As we are dealing here with service of a case management bundle and order, Parts 5 and 7 are not directly relevant.

[12] Part 6 of the CPR, so far as is relevant, provides as follows:

> ***"Who is to serve documents other than claim form***
> *6.1(1) Subject to paragraph (2) any judgment or order which requires service must be served by the court, unless –*
> *…*
> *(b) the court orders otherwise.*
> *….*
> *(3) Any other document must be served by a party …*
>
> ***Method of service***
> *6.2 If these Rules require a document other than a claim form to be served on any person it may be served by any of the following methods –*
> *(a) any means of service in accordance with Part 5;*
> *(b) leaving it at or sending it by prepaid post to any address for service in accordance with rule 6.3(1);*
> *…*
> *unless a rule otherwise provides or the court orders otherwise.*

Address for service

6.3 (1) Documents must be delivered or posted to a party at any address for service within the jurisdiction given by that party.

…

(3) If a party to be served has not given an address within the jurisdiction at which documents for that party may be served, documents must be served at the address indicated in rule 6.4.

Serving documents where no address for service is given

6.4 (1) If no address is given for service the document may be served by leaving it or posting it at or to –

…

(b) in the case of an individual – that person's usual or last known place of residence;

… or

(d) the business address of any legal practitioner who purports to act for the party in the proceedings.

(2) The provisions of Part 5 may be applied to such a document as if it were a claim form."

[13] Applying Rule 6.3(1), the relevant address for service of the case management bundle and order is the address given by Mr. Yovel, for service within the jurisdiction. That address is stated to be the address of the chambers of his legal practitioner, Mr. Antoine which at the time was the firm of Francis & Antoine. It is the case that the firm has now been dissolved and a new firm TM Antoine Partners has been established at a different address. However, even where no address for service is given, Rule 6.4(1) provides a route for the claimant to effect service. In the case of an individual, this includes leaving the document at, or posting it at or to the business address of the legal practitioner who purports to act for him in the proceedings. Both CPR 6.3(1) and 6.4(1)(d) allow for proper service by serving the documents on Mr. Antoine, whose business address was provided for service and who is stated to be Mr. Yovel's legal practitioner in his acknowledgement of service. He has appeared for him in the proceedings, remains his attorney on record and continues to appear on his behalf. Given those circumstances, proper service would be effected by leaving the documents at Mr. Antoine's business address. CPR 6.2 provides that such documents may be served by any means in accordance with Part 5. Rule 5.6 expressly provides for service upon the attorney at law of a party, as notified in the

acknowledgement of service filed on that party's behalf. In the circumstances, Mr. Yovel would be deemed properly served in accordance with Part 6.

[14] The question however remains, whether this method of service ought to be accepted by the Court, as sufficient to bring the continuation of the claim to Mr. Yovel's attention. In light of the period of time that elapsed since the last step was taken in the claim, and the acknowledgment by both counsels that Mr Yovel is no longer in the jurisdiction and his whereabouts are unknown, it seemed prudent that some further step be taken to bring the lifting of the stay to his attention.

The order directing service on Mr Yovel by courier at a specified address in Miami

[15] On an oral application, Mr Charles, informed the Court that the Bank had conducted investigations and ascertained that Mr Yovel was residing at an address in Miami. He proposed that the documents and order of the adjourned hearing date be served on him there, via courier service. There being no objection from Mr Antoine, an order was made to that effect.

[16] The Bank submitted that service on Mr. Yovel by delivering the documents at the address specified in the order constitutes proper service, notwithstanding that the documents were left at the reception desk. Mr Charles says the Court's order stated only that the documents be served by courier at the address specified therein, and the Bank has complied. Further, the rules on personal service do not automatically apply to an order permitting an alternative method of service, where the order does not state that personal service is required.

[17] It is useful to start with the terms of the order of the Court which stated:-

> *"The claimant will serve a copy of this order, together with the case management bundle on the second defendant by courier service at the following address:- 12973 SW 112th St. #351, Miami, Fl., 33186/4768 (Miami Dade County)"*

[18] In my opinion, leaving the documents with the front desk receptionist does not constitute compliance with the order and in all the circumstances, is insufficient to bring the continuation of the claim to Mr. Yovel's attention.

[19] While the body of the order does not specify that the documents ought to be handed to Mr. Yovel personally, it is clear that this is what was intended when the order is read in entirety, and in particular from the final preamble which stated:

> *"AND UPON Counsels **agreeing** that due to the inordinate period for which the claim remained inactive, it was imperative that the case management bundle and the order containing the adjourned date for case management be served **personally** on the second defendant to bring the continuing proceedings to his attention" [Emphasis added]*

[20] In granting the order, the Court considered that personal service was necessary in all the circumstances of the case to bring the continuation of the claim to Mr. Yovel's attention. It was determined that the documents were to be transmitted to him by courier at the address provided by the Bank. Therefore, leaving the documents with the receptionist is not what was intended by the order and does not accord with what was agreed in court by Counsel for the Bank.

[21] Considering the lapse of 7 years during which the claim was inactive, and the whereabouts of Mr. Yovel being unknown or at best speculated, the Court still considers it necessary for him to be served personally so as to deal with the case evenhandedly and achieve justice between the parties. The Court must be satisfied that the relevant documents have been brought to Mr Yovel's attention. The Bank has not taken the requisite steps to do so, and must either comply with the order as intended or reapply for an order for an alternative method of service, if the claim may be continued in its current form.

Can the Bank proceed with the claim against Mr. Yovel in its current form?

Defence of Laches

[22] Mr Antoine submitted that the Bank is estopped from continuing the very claim it essentially abandoned over 7 years ago when it appointed a receiver pursuant to the Mortgage Debenture. Counsel relies on the case of **Myrna Norde v Jacqueline Mannix**[3] where a court held that laches concerns not only delay, but prejudice to the party against whom enforcement is sought. He argued that allowing the Bank to continue the claim, in these circumstances would be prejudicial to Mr. Yovel who up to now has no knowledge of the continuance of the claim. It would further be prejudicial to have Counsel who last had conduct of the matter accept service on Mr. Yovel's behalf without further instructions, more so, as the firm initially instructed no longer exists and counsel's present firm has not been formally retained. Furthermore, the circumstances have changed, in that SVI's properties have been sold, and the Bank has not presented the Court or the defendants with a report on the status of the liquidation.

[23] On this issue, Mr Charles submits that it is immaterial that several years have elapsed since the filing of the claim. The Bank is now seeking new trial directions to pursue the claim against Mr. Yovel. The claim was never discontinued or abandoned by the Bank and the reason for the delay is that the claim had become dormant in the court system and was never relisted. He says the Bank ought not to be held accountable for the dormancy occasioned by the court office. Further, counsel states that the case of **Norde v Mannix** is inapplicable because it concerned a claimant sitting on the right to initiate a claim, as opposed to continuing a claim already filed. The Bank ought not to be prejudiced since the claim was filed within the requisite period and the Bank has never waived its right to pursue the claim. Thus, trial directions ought to be given for continuation of the claim.

[24] I have perused the exposition on the doctrine of laches in **Halsbury's Laws of England** where the author states as follows:

> *'A claimant in equity is bound to prosecute his claim without undue delay.* ***This is in pursuance of the principle which has underlain the statutes of limitation*** *'equity aids the vigilant, not the indolent' or 'delay defeats equities'. A court of equity refuses its aid to stale demands, where the claimant has slept upon his right and acquiesced for a great length of time. He is then said to be barred by his*

[3] Claim No.: ANUHCVAP2015/0034

unconscionable delay ('laches'). The defence of laches is, however, allowed only where there is no statutory bar.[4]

In determining whether there has been such delay as to amount to laches, the chief points to be considered are:

(1) acquiescence on the claimant's part; and

(2) any change of position that has occurred on the defendant's part.

Acquiescence in this sense does not mean standing by while the violation of a right is in progress, ***but assent after the violation has been completed*** *and the claimant has become aware of it. It is unjust to give the claimant a remedy where,* ***by his conduct, he has done that which might fairly be regarded as equivalent to a waiver of it****; or where by his conduct and neglect, though not waiving the remedy, he has put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted.*[5]

Regard must be had to any change in the defendant's position ***which has resulted from the claimant's delay in bringing his claim****. This may be, for example, because by the lapse of time he has lost the evidence necessary for meeting the claim. A court of equity will not allow a dormant claim to be set up when the means of resisting it, if it turns out to be unfounded, have perished… Any change in the defendant's position tells more strongly against the claimant if the claimant has been acquainted with the circumstance so as to make it inequitable for him to remain inactive. Laches will be imputed where the claimant, with knowledge of his rights, has allowed the defendant to expend money in the belief that no claim will be made."*[6] [Emphasis added]

[25] From the above, it is pellucid that laches relates to delay in bringing a claim, rather than the failure of a claimant to diligently proceed with a claim which has already been filed. I agree that once a claim is brought within the requisite period, the defence will not avail, regardless of the extent of delay in the proceedings thereafter. This can be inferred from the substance of the defence, which is conduct by a claimant that would give the defendant the appearance of assent to a violation. Where a claim is already filed complaining of the violation, a defendant cannot fairly believe that the claimant assents to

[4] Paragraph 253
[5] Paragraph 254
[6] Paragraph 257

his violation, even if the claimant delays with the progress of the proceedings. An aggrieved litigant is afforded other remedies to address delay in ongoing proceedings.

[26] In the circumstances, I agree that the case of **Norde v Mannix** is not applicable**.** It cannot be said that the Bank slept on its rights and thereby acquiesced or assented in any way to SVI's alleged failure to repay the debt which Mr Yovel guaranteed. The claim was filed promptly and it cannot be said that at the time of filing the claim, the Bank had delayed resulting in any change in Mr Yovel's position such as evidence being lost or expenses incurred in the belief that no claim would be made. Mr. Yovel filed his defence and counterclaim on time and the claim proceeded in the usual way. The doctrine of laches is therefore not applicable on these facts.

Abuse of Process by Instituting Receivership and Wind-Up Proceedings

[27] Mr Antoine submitted that the Bank filed and pursued the claim to the stage of pre-trial review with trial dates having been set. The parties engaged in mediation at which the Bank accepted a compromise position but subsequently settlement was unsuccessful. The Bank then appointed a Receiver under the mortgage debenture while trial of the claim was pending and such conduct amounts to an abuse of the court's process. Counsel submitted that the defendants had disputed the claim on substantial grounds and the Bank's appointment of a Receiver subverted the course of justice by preventing the matter from proceeding to trial. He relied on the case of **Stonegate Securities Ltd v Gregory**[7] to say that where a debt is disputed on substantial grounds, a petition for winding up amounts to an abuse of process and the Bank as petitioner ought to have been restrained from bringing the petition by injunction.

[28] Counsel further stated that by electing to appoint a Receiver, the Bank waived its right to continue to pursue the claim. He argued that it is axiomatic that in order to pursue a guarantee, the party must first exhaust its remedies against the principal debtor or at least pursue both the principal debtor and guarantor simultaneously.

[7] (1980) Ch. 576

[29] Mr Charles on behalf of the Bank submitted that the case of **Stonegate Securities Limited v Gregory** is not applicable as it concerned the grant of an injunction to restrain a winding up petition, which petition was held to be an abuse of process because it was presented in respect of a debt that was disputed on substantial grounds. He submits that the proceedings have been stayed against SVI only, as a result of the liquidation proceedings and there is nothing in law preventing the Bank from pursuing liquidation of SVI and the present claim under the guarantee against Mr. Yovel.

[30] I accept that **Stonegate Securities Ltd. v Gregory** is not applicable at this time. In that case, the Court of Appeal determined that where a company, in good faith and on substantial grounds disputes any liability in respect of a debt alleged to be presently due, the petition will be dismissed or restrained because a winding up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed. These are arguments which should have been raised in the wind up petition to restrain the Bank from bringing the petition or to secure dismissal of that action. The petition having already been determined, with the liquidation of SVI seemingly at an advanced stage, the principle is of no relevance here and would have no bearing on whether the claim may proceed against Mr. Yovel under the guarantee.

Joint and Several Liability

[31] Mr Antoine submits that given that the original claim filed against the SVI crystallized into receivership, followed by liquidation, the claim as filed no longer exists and cannot be pursued in its current form.

[32] The Bank says that because Mr. Yovel is jointly and severally liable for SVI's debt under the guarantee, it was well within its rights to pursue liquidation of SVI in separate proceedings, and to pursue Mr. Yovel under the guarantee in the instant proceedings. There is therefore no abuse of process or waiver of its right by agreement or otherwise. Under the terms of the guarantee, it was agreed by Mr Yovel that the Bank was not bound to exhaust its recourse against SVI or other securities before it became entitled to payment

of the debts owed by SVI from him. Counsel relied on **Halsbury's Laws of England**[8] where it states that where two or more persons make joint and several promises, each promisor incurs both joint and several liability. All or any of them may be sued at the option of the promisee and a separate action may be brought against each. Counsel also cited the case of **Development Bank of St. Kitts and Nevis v Brian Browne et al**[9] as authority for the proposition that where persons have agreed to be jointly and severally liable for a debt, judgment without satisfaction against one, does not bar action against the others. What bars the plaintiff from proceeding against the remaining debtors is full satisfaction or full release or discharge of the debt.

[33] The law on joint and several liability, extracted from **Halsbury's Laws of England** states:

> *"Joint and several liability arises where two or more persons join in the same instrument in making a promise to the same person, and at the same time each of them individually makes the same promise to that same promisee; for instance B and C jointly promise to pay £100 to A, but both B and C also separately promise A that £100 will be paid to him by either B or C. Joint and several liability is similar to joint liability in that the co-promisors are not cumulatively liable, so that payment of £100 by B to A discharges C; but it is free of most of the technical rules governing joint liability.*[10]
>
> ***Where two or more persons make joint and several promises to another, each of the promisors incurs both a joint and a several liability. All or any of the promisors may be sued, at the option of the promisee, in respect of a joint and several liability, and separate actions may be brought against each."***[11]

[34] In this jurisdiction, the Civil Code makes provision for joint and several liability and is similar in most material respects to the law as laid out in **Halsbury's**. The important distinction between the Code and English Law is that pursuant to article 1036 of the Code, there is a presumption of joint and several liability when there is more than one debtor. A surety or guarantor is considered a co-debtor, on a reading of article 1051. Therefore, it is

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[8] (4th Edition, Volume 9 at paragraph 621)
[9] Claim No.: SKBHCV2012/0084
[10] Paragraph 431
[11] Paragraph 436

to be presumed, as alleged by the Bank that Mr. Yovel is jointly and severally liable under the guarantee unless, on examination of the guarantee, it is found to stipulate otherwise.

[35] The **Brian Browne case** cited by the Bank dealt extensively with the effect of joint and several liabilities and the court accepted that there is a separate obligation and contract as regards each debtor giving rise to more than one cause of action, and therefore a joint and separate remedy against each.[12] Based on this, the Court concluded that the doctrine of election or merger of cause of action in a judgment had no place in cases involving joint and several liability for a debt. Rather, what bars the claimant from proceeding against the remaining debtors or defendants is a full satisfaction of the debt, or some form of full release or discharge. Even judgment without satisfaction against one is no bar to an action against the other.[13]

[36] Applying the above principles to the instant case, I agree that the Bank's decision to pursue liquidation against SVI did not amount to waiver of its right to continue the claim against Mr Yovel or to bring a separate action against him to recover the debt. There is no suggestion that the Bank has expressly released or discharged SVI of liability for full repayment of the debt. Further, the order to stay the proceedings does not amount to a discharge of liability as alluded to by Mr Antoine, given that the **Brian Browne case** also decided that a covenant not to sue and a notice of discontinuance do not necessarily constitute a discharge from liability, which would have to be clearly expressed.[14] The Bank therefore would have had the right to continue the claim or file fresh proceedings against Mr Yovel.

Dismissal for Abuse of Process or Want of Prosecution

[37] Mr Antoine submits that the Court has an inherent jurisdiction to dismiss an action for want of prosecution where there has been inordinate or inexcusable delay in prosecuting the claim, which has caused or is likely to cause serious prejudice to the defendant or a

[12] Paragraphs 27 and 29-30
[13] Paragraph 39
[14] Paragraphs 70-71 and 77

substantial risk that a fair trial would not be possible. On this point Counsel relies on the case of **Grovit v Doctors et al**[15] where it was held that the claimant's delay in proceeding with the case for some 2 years was an abuse of process for which the court had the power to dismiss the action, even if the defendant could not prove prejudice. He further submitted, relying on **Barrat Manchester Ltd v Bolton Metropolitan Borough Council et al**[16], that the court is entitled to draw an inference that a defendant would suffer serious prejudice, bearing in mind that the greater the delay, the less of a need to establish prejudice. He also cited the case of **Icebird v Winegardner**[17] in support. In the circumstances, Counsel submits that the Bank is required to file a new claim, setting out the amount of the original debt, the amount recovered by way of liquidation, the balance owed, the amount of any costs incurred since filing the original claim, and the reason for pursuing any outstanding amount by way of the guarantee.

[38] In **Grovit v Doctor**, the House of Lords accepted that the approach to an application to dismiss an action for want of prosecution is as set out by Lord Diplock in **Birkett v. James** [1978] A.C. 297, 318F–G as follows:

> *"The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g., disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party."*

[39] The court also said that in order to establish prejudice, a defendant is usually required to show that the delay has prejudiced him in the conduct of his defence. Lord Woolf in delivering the judgment stated:

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[15] [1997] 1 WLR 640
[16] [1998] 1 WLR 1003
[17] [2009] UKPC 24

> *"I am satisfied that both the deputy judge and the Court of Appeal were entitled to come to the conclusion, which they did, as to the reason for the appellant's inactivity in the libel action for a period of over two years. This conduct on the part of the appellant constituted an abuse of process.* ***The courts exist to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation, the party against whom the proceedings [are] brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution****. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in* ***Birkett v. James****.* ***In this case, once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings when there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings."*** *[Emphasis added]*

[40] In the Privy Council decision of **Icebird v Winegardner**, the Board agreed that **Birkett v James** remains the leading authority for the approach to be taken to an application to strike out an action for want of prosecution, and with the approach taken by the House of Lords in **Grovit v Doctor**, stating:

> *"As Lord Woolf noted, delay in prosecuting an action and abuse of process are separate and distinct grounds on which an application to strike-out the action may be made but may sometimes overlap. Want of prosecution for an inordinate and inexcusable period may justify a striking-out order but "if there is an abuse of process, it is not strictly necessary to establish want of prosecution."* ***Where, however, there is nothing to justify a strike out order other than a long delay for which the plaintiff can be held responsible, the requisite extent or quality of the delay necessary to justify the order ought not, in their Lordships' respectful opinion, to be reduced by categorising the delay as an abuse of process without clarity as to what it is that has transformed the delay into an abuse and, where necessary, evidential support.***" [Emphasis added]

[41] Their Lordships went on to assess the case before them against those principles in the following way:

> *"In **Grovit v Doctor** the added factor was the judge's finding, made on the evidence, that the plaintiff had lost interest in the libel proceedings he had commenced and had no intention of prosecuting them to judgment. No comparable finding had been made by Lyons J in the present case and the evidential basis for any comparable finding is not apparent to their Lordships…*
>
> *The present case is not one where there has been any contumelious default. It is a case where there has certainly been inordinate and inexcusable delay on the part of the appellant or its lawyers. But what else? There is no evidence of any serious prejudice to the respondent caused by the delay. Is this a case where the delay has given rise to a substantial risk that a fair trial will not be possible? ..."*

[42] Their Lordships then concluded that there was no reason why the appellant's delay in prosecuting the action should prevent a fair trial of any of the issues, and no severe prejudice, and allowed the appeal.

[43] **Barrat v Bolton** concerned the question of whether an inquiry as to the damages recoverable under a cross-undertaking in damages ought to be dismissed for want of prosecution. The Court of Appeal identified the distinguishing features peculiar to such an enquiry that justified a different approach to the question. I find that these distinguishing features render the extract from that case cited by Mr. Antoine inapplicable to the present case. However, the Court of Appeal did reaffirm that the presence or absence of prejudice was highly material to the question in an ordinary case. The Court emphasized that the fundamental and overarching reason for insisting that delay alone is insufficient and that the delay must have occasioned prejudice to the defendant, is premised on the fact that dismissal of an action is a draconian measure.

[44] On the authorities therefore, it is clear that in striking out a claim for abuse of process as distinct from want of prosecution, the Court would have to find more than just inordinate delay. The quality or nature of the delay must be such as to constitute an abuse of process.

[45] I have already concluded that the Bank was entitled to pursue both SVI and Mr. Yovel since he was jointly and severally liable under the guarantee. This in and of itself does not

amount to an abuse of process. However, the entitlement of the Bank to pursue both defendants is not the only matter which ought to be considered here. The conduct of the Bank in doing so and the effect of such conduct must also be subjected to scrutiny.

[46] Similar to **Grovit v Doctor**, I am of the view that there has been inordinate and inexcusable delay, and that the Bank had not demonstrated an interest in actively pursuing the claim against Mr Yovel. When the claim was filed, the defendants responded with an arguable defence, seemingly having a real prospect of success. Case management directions had been given, including dates set for pre-trial review and for the trial. The Bank neglected to comply with any of the directions in the case management order in preparation for trial: there was no standard disclosure, no witness statements or pre-trial memoranda were filed, and the Bank failed to attend the pretrial review hearing. When none of the parties or their Counsels attended pre-trial review, the court ordered that the matter be listed for a status hearing. At that hearing, only Counsel for the Bank appeared and informed the court of the liquidation proceedings and requested that the matter be stayed. The claim remained inactive for a period of 5 years, until the Bank took steps to have it re-listed in 2017. During this time, the Bank pursued recovery of the debt through the liquidation of SVI.

[47] The effect of a compulsory wind-up order against SVI would mean, pursuant to section 394 of the Companies Act[18] that any proceedings commenced against SVI are automatically stayed from the date of the order and may not be proceeded with, except with the leave of the court. The wind-up order would therefore have precluded the claim from proceeding against SVI any further and the Bank would have had to pursue recovery of the debt through the liquidation proceedings. In my view, when the Bank requested that the claim be stayed against all the defendants, that signaled that it no longer intended to actively pursue the claim against Mr Yovel, at least at that time. This coupled with the disregard for the case management order and 5 years of inactivity indicates that the Bank lost interest in pursuing the claim against Mr. Yovel, and had no immediate intention of bringing the claim to trial and conclusion.

[18] Cap 13.01 of the Revised Edition of the Laws of Saint Lucia

[48] In my view Bank's inertia while maintaining the claim therefore amounts to an abuse of process.

[49] Having found that the Bank's conduct amounts to an abuse of process, there is strictly no need to establish want of prosecution per the dicta of Lord Woolf in **Grovit v Doctor**. However, if I am wrong on this point I have proceeded to consider it. The law requires that if the claim is to be dismissed for want of prosecution, Mr. Yovel will have to satisfy one or the other of the limbs of Lord Diplock's test in **Birkett v. James.**

[50] For the reasons already stated at paragraph 46 above, I find that there has been intentional and contumelious default amounting to abuse of process, which is the first limb. There is nothing to suggest that Bank's disregard for the case management order and pretrial review hearing was not willful and intentional disobedience. I do not accept that the delay was the fault of the court office as alleged, as the record shows differently. By the time the matter came on for status hearing on 25th September, 2012 no documents had been disclosed, no evidence had been filed and no application had been made for extension of time and relief from sanctions. The Bank always had the option of applying to have the matter relisted to pursue the claim against Mr Yovel in a timely manner. Could it have been reasonable for the bank to keep the claim against Mr Yovel in abeyance while it waited to see how much of the debt could be recovered through the liquidation proceedings? I think not. That claim ought to have been discontinued, and if necessary a fresh claim filed against Mr Yovel within the requisite time and pursued diligently.

[51] As to the second limb, I am satisfied that there is a substantial risk that it would not be possible for Mr Yovel to have a fair trial of the issues in the action as a result of the delay. It is not disputed that a Receiver was appointed by the Bank and subsequently a Liquidator. This would have had the effect of removing Mr Yovel from the sphere of control and operation of SVI. His defence is inextricably linked to that of SVI, given that any and all acts, omissions and/or defaults giving rise to the claim would have been undertaken by, for and in the name of SVI. The effect of removing him from dealing with the affairs of SVI, is to preclude him control over and access to property, records, documents and information pertaining to SVI, which would be necessary to substantiate any viable defence he may

have had to the claim as filed. As such, it is inescapable that he would suffer prejudice in the conduct of his defence. I consider such change in circumstances highly prejudicial as Mr Yovel would no longer be in a position to defend the claim in the manner he would have been, prior to the receivership and liquidation proceedings.

[52] The issues upon which the defence is predicated are very technical and would require the Court to construe various agreements (loan, security documents), other communication, transaction records and accounts. It would further require resolution of certain financial and accounting issues pertaining to the transactions, which Mr. Yovel could not properly prepare for and put forward without access to SVI's records. Due to the lapse of time, any valuable evidence which Mr. Yovel may have managed to retain in spite of the receivership and liquidation would likely have been lost and tainted by these processes. Additionally, the nature and extent of the evidence required to defend such a claim cannot be produced and related from memory as was the case in **Icebird v Winegardner**.

[53] By virtue of the receivership, the Bank's appointee would have had the effective control over and access to the valuable evidence required for Mr. Yovel to mount his defence. Thereafter it would be the liquidator appointed by the court, on the recommendation of the Bank, to Mr Yovel's exclusion. Given that the Bank's interest is diametrically opposed to that of Mr. Yovel and the Bank has effectively intercepted the proceedings by giving control of such evidence to a third party, I am of the view that a fair trial cannot at this stage be had and that Mr. Yovel has been seriously prejudiced in the conduct of his defence.

[54] In all of the circumstances, I conclude that the claim against Mr Yovel ought to be dismissed for abuse of process and want of prosecution.

Conclusion

[55] I therefore make the following orders:-

1 That the claim against Mr Yovel is struck out for abuse of process and want of prosecution.

2. The parties will each bear their own costs.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar