IN THE SUPREME COURT OF BELIZE A.D. 2017
(CIVIL)

CLAIM NO. 44 OF 2017
BETWEEN

(SCOTIABANK (BELIZE) LIMITED **CLAIMANT**

AND

(RONNIE KIE **1st DEFENDANT**
(YANNICKI KIE **2nd DEFENDANT**

Before: **Madame Justice Griffith**
Date of Hearing: **23rd October, 2017**
Appearances: **Mr. Yohhahnseh Cave, Cave Lochan Watson LLP for the Claimant and Mrs. Deshawn Arzu-Torres, McCoy Torres LLP for the Defendants.**

DECISION

Introduction

1. This is an Application by the Claimant, Scotiabank (Belize) Ltd. for Summary Judgment against the Defendants Ronnie Kie and Yannicki Kie. The application was made late in the day, but the Claimant was nonetheless entitled to make it. The claim is one for monies owed in the sum of $953,077.78 being principal and interest due on loans advanced by the Claimant bank to the Defendants under two separate agreements. The first is a promissory note dated 28th November, 2008 for $440,000 at 13% interest per annum and the other a credit line agreement, dated 18th April, 2008 in the sum of $35,000 at 18% interest per annum. The amounts advanced under both loans were repayable by monthly installments until repayment of the entire amounts of principal and interest. The Defendants defaulted on their repayments and the Claimants filed the instant claim. In response to the claim the Defendants denied liability in total by pleading that the causes of action arising under both agreements were statute barred or in the alternative that the Claimant has acquiesced to their failure to repay their loans. The application for summary judgment refutes the viability of both defences of limitation and acquiescence.

Issues

2. The issues herein are straightforward: –

   (i) In respect of the plea of limitation, when did the causes of action under the respective agreements arise?

   (ii) Has the Claimant acquiesced in the Defendants' non-payment of their obligations under the loan agreements?

Submissions of Counsel

3. Counsel for the Defendants averred that the promissory note executed by the Defendants was a demand promissory note and as such the cause of action accrued on the date of its execution which was in November, 2008. The Claimant contended that the promissory note was not a demand promissory note but one payable by installments so that the date of accrual of the cause of action was the date of first default of payment. With respect to the credit line agreement the Defendant contended that the right of action first accrued in December, 2009, being the first date of default of payment under the agreement. With respect to both agreements, the Claimant accepts that on the face of it, their respective periods of limitation of six (6) years, would have expired prior to the institution of the claim herein. This notwithstanding, the Claimant contends that the limitation periods of the loans were extended by virtue of section 29(3) of the Limitation Act, Cap. 170 insofar as that section provides that the accrual of a cause of action for recovery of debt owed, arises from the date of last payment of the debt owed and not before.

4. In this regard, the Claimant says that in relation to each loan, the respective causes of action arose (i) in August 2013, being the last payment on the promissory note; and (ii) in November, 2012, that being the last payment in respect of the credit line facility. Counsel for the Defendants refute this proposition of the Claimants, by referring to a document which she alleges to have supplanted the original loan agreements. In the witness statement of the Bank's officer, there is appended a document referred to as a 'Stipulation Agreement'.

Counsel for the Defendant asserts that this document amounts to a new agreement between the parties, and it is pursuant to this document, that the last payments of the Defendants were made and not the original agreements. Further, counsel for the Defendants contended that this Stipulation Agreement was not pleaded as the Claimant's cause of action, thus with the original agreements statute barred and the Stipulation Agreement not being pleaded as a cause of action, the claim would have to be dismissed.

5. Counsel for the Claimant's position in response to the submission regarding the Stipulation Agreement was that the document in no way amounted to a new agreement and that its purpose was to allow time for the Defendants to discharge their responsibilities, as opposed to replacing the original loan agreements. This was evidenced says counsel for the Claimant by the fact that the Stipulation Agreement referred to the promissory note and credit line agreement as the bases of liability of the Defendants and thereafter merely stipulated updated terms of payment in respect of the two loan accounts. The case for the Claimant therefore remained based upon the promissory note and credit line agreement, both as pleaded in the Statement of Claim. Counsel for the Claimant was also of the opinion that the submission on the Stipulation Agreement, being raised for the very first time at the hearing of the application for summary judgment, ought not to be allowed.

6. With respect to the defence of acquiescence which was pleaded by the Defendants, this plea was rejected outright by Counsel for the Claimants who pointed out that the Defendants had raised a bare assertion without pleading any particulars of the alleged acquiescence or providing any evidence which supported such a claim. With respect to this issue, Counsel for the Defendants stopped short of acknowledging that there were in fact no particulars pleaded or evidence provided in support of the plea of acquiescence. Instead, she left the issue in the hands of the Court for such determination as seen fit.

On a final note with respect to the Stipulation Agreement, Counsel for the Defendants also submitted that the question of the effect or otherwise of the agreement, was one of construction of the document for the Court to decide. The Court now considers these arguments in determining the Claimant's application for summary judgment.

Analysis by Court

7. As was stated before in the introduction herein, the application for summary judgment was made rather belatedly – in fact a few weeks before trial, after both the case management conference and pre-trial review were conducted. However, it is accepted that an application for summary judgment can be made at any stage of the proceedings, even during the course of the trial.[1] The effect of this application having been made later in the proceedings, is that the evidence the parties intend to rely on at trial is before the Court in the form of their witness statements. The Court is entitled to take these witness statements into account in assessing whether the Defendants meet the threshold of having an arguable case. However, the Court is mindful of the law regarding the Court's approach on an application for summary judgment which was accurately stated by both Counsel in their respective written submissions[2]. As was stated in the classic authority **Swain v Hillman et anor**[3], the Court heeds that it must not engage in a mini-trial in order to determine the application. In practical terms, this means that if there is competing evidence of fact, the Court is not at liberty to attempt to assess the credibility of any side as against the other, as that exercise is carried out in a trial when evidence is tried and tested by cross examination so as to enable the Court to make any finding of fact.

8. In this regard, Counsel for the Claimant draws the Court's attention to the fact that besides pleading limitation and acquiescence, the Defendants have not denied any of the facts pleaded by the Claimant in support of its claim.

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[1] **Khan v Nationwide Solicitors** [2014] EWHC 841 (QB) @ para. 12

[2] Submissions on behalf of the Claimant, paras 10-23; Submissions on behalf of the Defendants, paras 4-7.

[3] [2001] All ER 91

The Court still however, refers to another celebrated authority on the law relating to applications for summary judgment, namely **Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical**[4] per Lord Justice Mummery LJ who cautioned as follows[5]:-

> *"In my judgment, the court should also hesitate about making a final decision without a trial where, even though there is no obvious conflict of fact at the time of the application, reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case."*

With respect to the facts of the claim, Counsel for the Defendant has not put forward any defence on the facts, but instead has asserted that the claim turns upon legal issues and questions of construction of the loan agreements[6]. This notwithstanding, as a starting point to its determination of the application, the Court nonetheless considers whether there is any advantage to be had by a fuller consideration of the facts at trial.

9. In terms of the facts, the material facts are undisputed and establish that the Defendants executed the promissory note and credit line facility for the amounts and on the dates pleaded by the Claimant. Also undisputed, is the fact that the Defendants fell into default in paying the installments under both agreements and that the last payments in respect of the agreements occurred respectively in August, 2013 and November, 2012. These undisputed facts as to the dates of the Defendants' last payments under the two agreements to the claim are significant as they provide the basis upon which the consideration of the legal issue is hinged. In light of the fact that there is no dispute over these dates of last part payment, the issue is indeed a legal one as to the effect in law on the plea of limitation. In this first regard, the Court considers that there is no further investigation into the facts that is warranted by means of a full trial.

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[4] [2006] EWCA Civ 661

[5] Ibid @ para 18

[6] Submissions on behalf of the Defendant, para. 8.

These facts aside however, Counsel for the Defendant raises another issue arising from the document titled 'the Stipulation Agreement', which appears for the first time in the claim in the witness statement of the Claimant's witness, an officer of the Claimant Bank. This Stipulation Agreement, Counsel for the Defendants asserts, has replaced the two loan agreements (the promissory note and credit line facility) as the causes of action and having not been pleaded, the Claimant's action must be dismissed.

10. Counsel for the Claimant, as already stated, refutes that the Stipulation Agreement forms the basis of the cause of action and maintains the application of section 29(3) of the Limitation Act to the promissory note and loan facility, so that their respective causes of action accrued from the last dates of part payment. The question for the Court, is whether this issue presents a dispute of fact which ought to be ventilated at trial, or whether the question is one of construction of the document, that can properly be determined within this application for summary judgment. The submission of Counsel for the Claimant also bears repeating, that it was not open for the Defendant to raise this issue regarding the Stipulation Agreement for the first time in its submissions to the Court on the hearing of the application for summary judgment. With respect to this objection, the Court observes that it was not possible for the Defendant to have made any reference to the Stipulation Agreement in its defence, as the document was itself raised for the very first time after the close of pleadings and after the case management conference - in the witness statement of the Claimant's representative, which was filed based on an order to file and exchange witness statements.

11. Had this been a trial, the first opportunity the Defendants would have had to address this Stipulation Agreement would have been pursuant to CPR Rule 29.9(c). It is therefore not possible for Counsel for the Claimant to attack the submission with reference to the Stipulation Agreement not having been dealt with in the pleadings.

The submission is a legal one based upon a document that was brought to the claim by the Claimant, at a time when there was no possibility to make any factual response (other than in oral evidence), given the stage of the proceedings. The question for the Court is whether the submission is relevant to the issue under determination and to a lesser extent, whether there is any prejudice caused to the Claimant with respect to Counsel's ability to respond. As far as the Court is concerned, Counsel for the Defendant's submissions were filed within the time directed by the Court and there was more than sufficient time thereafter, for Counsel for the Claimant to formulate his response thereto, within time for the hearing of his application. The submission as to the legal effect of the Stipulation Agreement is validly raised and in answer thereto, Counsel for the Claimant has maintained the view that it is not relevant and did not create a new cause of action that the Claimant was required to specifically plead.

12. This leads the Court to examining the question of whether the Stipulation Agreement is properly to be considered within the application for summary judgment. In this regard, the Stipulation Agreement is certainly relevant, as it is a document which speaks to the agreements which form the basis of the claim as pleaded by the Claimant. It has been placed before the Court by the Claimant, who is not entitled to decry its relevance because of how the Claimant chose to plead its case. As to whether the Stipulation Agreement can properly be considered within the application for summary judgment as opposed to raising issues necessitating a full trial, the Court asks itself the same questions as alluded to above in the authorities cited at paragraphs 7 and 8 herein. On the question of whether the Stipulation Agreement raises any need for further investigation by way of facts, the Court is of the opinion that it does not. The issue raised by the document concerns its legal effect as relates to the promissory note and credit line facility. Does it amount to a new agreement? A variation to the original agreements? Was the Claimant obliged to base its cause of action in whole or in part on this document - and having not done so, what is the effect on its claim? These are all questions of law, and of construction of the document, which can properly be treated on this application for summary judgment.

13. In resisting the application for summary judgment in favour of a full trial, Counsel for the Defendant, submits that the legal issues raised of limitation and acquiescence, require detailed argument and mature consideration. Counsel cites the case of **Home and Overseas Insurance Company Limited v Mentor Insurance Company Limited**[7], in support of this contention. The judgment as highlighted by Counsel however, provides more support for the Claimant's position, insofar as the extracted portions iterate that it is not sufficient for a defendant to raise an arguable point of law, if that point could be readily demonstrated as unsustainable and so entitling the plaintiff to judgment there and then. In **International Private Equity Ltd v ABN Amro Bank NV**[8] it is stated that (emphasis mine):-

> *"The court can decide on a summary judgment application a point of law (including a point of construction of a contract), even a difficult point; the fact that the point of law is well arguable does not mean that the court cannot proceed to decide the point and thus determine whether a defence based on it is, or is not fanciful."*

It is considered that within the instant application, there is no detailed argument that is required to determine the construction of the Stipulation Agreement. It is also not a matter for detailed consideration what the effects of such construction are, namely - if the Stipulation Agreement amounts to a variation of or replacement to the original agreements, whether and how the fact that it was not pleaded arises for consideration. If on the other hand, the Stipulation Agreement has no bearing on the original agreements and the part payments of the monies outstanding are attributable to the original agreements as they were, then the Claimants are entitled to their judgment. These issues are not complex and in any event, in the absence of the application for summary judgment, would have properly been disposed of as preliminary issues.

[7] [1989] 3 All ER 74
[8] [2009] EWHC 2523 (CH)

The construction of the respective agreements

14. The Court must now consider the construction of the Stipulation Agreement and does so by considering its terms and provisions. It will then be compared to the original promissory note and credit line facility.

    (i) The document is titled 'Stipulation Agreement', which is unhelpful in its construction;

    (ii) The Defendants agreed their current liability as reflected in respective balances of four existing facilities with the Claimant, two of which by numerical identifiers, are the promissory note and the credit line facility;

    (iii) The Defendants agreed to payment of a monthly sum of $6000, via weekly instalments of $1000, with an effective date for commencement of payments of March 5th 2010. The Defendants also agreed payment of an additional monthly sum by way of rental income of $2000 commencing 31st March, 2010;

    (iv) The agreement also provided for all payments to be made to loan account 94001058, which is the loan account for the promissory note;

    (v) There was agreement for payment in respect of another loan facility, not part of these proceedings;

    (vi) Finally, the document ended by the Defendants agreeing that should they default on the terms of this agreement, the Bank will proceed with further legal action and power of sale on their mortgage. (The security by way of mortgage does not arise in these proceedings.)

15. The terms of the promissory note were for payment by 35 monthly installments from December, 2008 in the amount of $5342.13 each. The terms of payment of the credit line agreement are not stated on its face, but provision is made within the agreement itself for the maximum limit – under the heading 'Available Credit', the maximum amount is referenced as shown in an attached schedule or as shown on the statement of the account. The schedule attached to the credit line agreement did not specify the maximum credit but there is a statement showing the amount owed under this facility and the Defendants did not refute the amount incurred by this facility.

Additionally, the manner of repayment was stipulated in the credit agreement under the heading 'Making a monthly payment' and this was by formula of 3% of total debt owed or $50, whichever is greater. The statement incorporated into the agreement by the terms of the agreement specified the amounts due and payments to be made. The Defendants did not refute this fact either. These terms were illustrated to show that the terms of repayment under the original promissory note and credit line agreement were quite different from the terms brought into effect by the Stipulation Agreement.

16. The Court finds that the Stipulation Agreement can be construed as nothing less than a variation of the original promissory note and credit line facility, but only in respect of the terms of repayment established by both agreements. Correspondingly, post the date of the Stipulation Agreement, all payments made, bear reference to these altered terms of payment. On the other hand, the Court is of the view, that the underlying debts owed by the Defendants, remain those created by the promissory note and credit line facility. The question is therefore how does the variation to the terms of repayment of the same debt affect the claim as pleaded? The Court refers to a few authorities which speak to the operation of the English equivalent of section 29(3) of the Limitation Act of Belize. First, in **Surrendra Overseas Ltd. v Government of Sri Lanka**[9] the owners and charterers of a vessel held cross claims arising out of a charterparty agreement executed March of 1968. The owners claimed for balances of freight and demurrage and the charterers claimed for damage to their cargo. Their respective causes of action arose before July, 1968.

17. In March, 1970, the charterers wrote to the owners' agents setting out the former's statement of their account owed to the owners and paid what they acknowledged to be owed on the owners claim as set off against their own. In July, 1974, the owners attempted to have the matter resolved by arbitration (as was provided in the charterparty) but the charterers contended that the claims were statute barred.

[9] [1977] 2 All ER 481

The owners contended inter alia, that their claim was not statute barred as the charterers payment in March, 1970 amounted to part payment of the debt owed by the charterers to them, so that the limitation period was extended in accordance with section 23(4) of the Limitation Act 1939.[10] In its conclusion that the owners' claim was statute barred, the Court held that the charterer's payment was not a payment in respect of the owners' claim within the meaning of section 23(4) of the Limitation Act for it was not an admission that the owners' debt remained in existence despite the passage of time. The charterers' payment was an admission only of the sum they admitted to be true.[11] By way of further consideration, the Court refers to the case of **Re Footman Bower & Co. Ltd**[12]**,** which concerned a running account held by a supplier of goods to a company later subjected to a winding up order issued by the court. The facts need only be generally stated.

18. The goods supplied by the plaintiff to the defendant company were provided over a number of years and from time to time the company would pay to the plaintiff's account in different amounts without ever specifying which particular credit was being offset. In August, 1953 a receiver was appointed to manage the company's business and thereafter, there were several payments made by the receiver in respect of specific goods supplied. In March, 1959 the company was ordered wound up by the court and the plaintiff subsequently claimed the monies owed on its account over the years up to the date of the order for winding up. With reference to the limitation period, as at March, 1953 - six years prior to the order for winding up, there was a total of £815 owed on the plaintiff's account. The specific payments made after the appointment of the receiver totaled £300 which was deducted from the £815 and the last of these payments was made in July, 1953. Upon the plaintiff's claim in April, 1959 for the balance of the £515, the receiver disallowed this remaining balance on the basis that at the date of the winding up order in March, 1959, those amounts were statute barred.

[10] Section 29(3) of Cap. 170 of Belize is an exact replica of the UK's section 23(4).
[11] ***Surrendra***, supra @ pg 490.
[12] [1961] 2 All ER 161

19. Of the total amount accumulated from over the years, there would have been several specific items which were statute barred upon the recovery of debt and others not. The balance owed to the plaintiff dated back to January, 1952 whilst the last payment by the receiver was made in July, 1953. The company claimed that the £300 paid by the receiver (including the last payment in July, 1953) were according to law, to be applied towards the oldest payments on the account, so that the last payment in July, 1953, was applicable to the claims already statute barred. In relation to this contention, the operation of section 23(4) of the English Limitation Act arose for consideration by Buckley J. In rejecting the company's argument with respect to the application of the payment in July, 1953, Buckley J explained the state of the law prior to the existence of section 23(4) and the effect of the section thereafter, in the following terms (emphasis mine):-

> *"Before that Act there was no statutory provision that in the case of a simple contract debt part payment should stop time running under the Limitation Act, 1623. For a payment to have this effect it was necessary that it should amount to an acknowledgment of the debt and import a new promise to pay the outstanding balance. The mere act of the creditor appropriating a payment to a statute-barred debt could not have this effect, for such an acknowledgment and promise could only come from the debtor. Since the enactment of the Limitation Act, 1939, the position has been different, for s 23(4) now contains a statutory provision applicable to simple contract debts whereby any payment in respect of a debt will make time start to run afresh in respect of that debt. There is no longer need to establish a new promise to pay. In my judgment, however, one must still look at the act and intention of the debtor to see whether the payment is made in respect of the particular debt. Payment in s 23(4) is dealt with in close conjunction with acknowledgment. Just as an acknowledgment can only acquire that character by the act of the debtor or his agent, so also, I think, a payment, for the purposes of s 23(4), can only acquire the characteristic of being made "in respect of" the debt by the act of the debtor or his agent."*

20. It is useful at this juncture to extract the section 29(3) in full (with slight emphasis):-

> *(3) Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment.*

Section 23(4) of the English Limitation Act, 1939, is in the same terms section 29(3) of Cap. 170, therefore the application illustrated in the above cases is directly relevant to the case at bar. In relation to both of the above cases, the relevant point for application that finds favour with the Court, is that the part payment in question, must be intended by the debtor and referable to the debt in question. In other words, it is clear, that the debtor must intend the part payment to be applied towards the particular debt owed. Therefore where as in ***Surrendra Overseas Ltd v Government of Sri Lanka*** the debtor makes a payment which was not that or only part of that which was claimed, the payment not being made 'in respect of' the debt owed - the cause of action is not affected. The dicta of Buckley J in ***Re Footman Bower***, in the Court's view reinforces this point with clarity – (unless there is evidence to the contrary), the character of the payment is to be applied in the manner intended by the debtor.

21. In the instant case, the Court has found that the Stipulation Agreement amounts to a variation of the terms of payment under the promissory note and the credit line agreement, but that the underlying liabilities created by those agreements remain unchanged. It is considered that because the underlying liability remains unchanged, the debtor's intention in relation to the part payment renders the numerical terms of repayment irrelevant in terms of the operation of section 29(3). The Defendants in this case very clearly, by virtue of the Stipulation Agreement continued to make payments towards their existing debts by instalments, but in a manner varied from that provided in the original agreements. The claim brought against them, is not for breach of the manner of repaying the debts, but for failing to pay the debts themselves. Therefore, the last payments by the Defendants in November, 2012 in respect of the credit line facility and August, 2013, in respect of the promissory notes, became by virtue of section 29(3) of the Limitation Act, the dates of the accrual of the respective causes of action under the two agreements. The claim is therefore not statute barred and the Defendants are liable to the claimants for the balance owed under the promissory note and credit line facility.

22. The Court now turns to the other issue of the plea of acquiescence. Counsel for the Defendant has left this issue in the hands of the Court without commending to the Court what circumstances within her case are to be taken as constituting this equitable defence. Counsel for the Claimant has submitted and correctly so, that the plea has not been supported in any way by the Defendants and cannot be sustained. The Court will however, say a few words about acquiescence so that the Defendants' failure on this issue is properly illustrated. Acquiescence is defined in Halsbury's Laws of England[13] as an equitable defence used where a party with knowledge of an infringement of his or her rights, refrains from seeking any redress in relation to the infringement. It is similar to unconscionable delay (laches), but the distinction must be made that laches is available only in response to equitable claims, of which this claim is not. Additionally, acquiescence is also identified as similar in specie to estoppel by words or conduct in the sense that the inaction in the face of the committal of a wrong, may lead the wrongdoer to infer consent to their actions. Estoppel (by words or conduct) however and acquiescence are said not to be coterminous and they differ in that for the latter to be established, there need not be any representation made in relation to the conduct identified[14].

23. In the instant case, that the Defendants have made no assertion in respect of the acquiescence other than to plead the allegation. For example, the Defendants have not pleaded the specific length of time which they allege the Claimant to have failed to pursue the claim by taking no action at all. They have not pleaded what, if any consequences have arisen as a result of the alleged failure by the Defendants. On the other hand, there is evidence on the face of the proceedings to date, that the Claimant caused demand letters to be issued to the Defendants for payment of the outstanding debt in January, 2011; the debt had also been secured by mortgage which was eventually realised.

[13] Equitable Jurisdiction Vol 47 (2014) para 252
[14] ***Holder v Holder*** [1968] 1 All ER 665

In light of that evidence, as against the Defendants having pleaded nothing in support, there is no basis before the court upon which the plea of acquiescence could be considered in favour of the Defendants. In the circumstances, the plea of acquiescence fails and the Claimant's application for summary judgment succeeds.

Disposition

24. The pleas of limitation and acquiescence pleaded by the Defendants in response to the claim for monies due and owing under the promissory note and credit line facility fail and as such the Claimant's application for summary judgment is successful and the following orders are made:-

(i) Judgment is entered for the Claimant in the sums of $784,212.87 and $47,448.39, being the amounts owed by the Defendants on the promissory note and credit line facility dated 28th November, 2008 and 18th November, 2008, respectively.

(ii) Costs are awarded to the Claimant to be assessed if not agreed, but the parties are to report to the Court on the 15th November, 2017 to dispose of the issue of costs.

Dated this 13th day of November, 2017.

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Shona O. Griffith
Supreme Court Judge.