COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2019/CLE/gen/00593

BETWEEN

ENOS R. MILLER

Plaintiff

AND

MCKINNEY, BANCROFT & HUGHES

First Defendant

AND

HARTIS E. PINDER

Second Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Enos Miller appearing pro se

Mr. Timothy Eneas and Ms. Knijah Knowles for the Defendants

Hearing Date: 20 February 2020

Breach of Contract – Negligence – Unjust Enrichment – Restitution – Stakeholder Agreement – Forfeiture of Deposit – Strike Out – Delay - Laches – Limitation Act, Ch. 83, 1995

In or about November 1997, the Plaintiff signed an agreement with Imperial Life Assurance Company of Canada ("Imperial") for the purchase of Lots 1, 2, 4, 5 and 6 in Block A in Englerston. Imperial purported to sell as mortgagee pursuant to its power of sale. Clause 3 of the Agreement for Sale provided for the payment of a deposit in the sum of $19,000.00 which deposit was to be paid by the Plaintiff and held by the First Defendant, Imperial's attorney, as Stakeholders. Clause 10 of the Agreement for Sale provided for the cancellation of the agreement upon the forfeiture of the Deposit in circumstances where the Purchaser failed to complete the purchase and pay the balance of the purchase price.

Following the expiration of in excess of one (1) year from the date of the Agreement for Sale, Imperial, gave notice to the Purchaser's then attorney, Messrs. Cooke-McIver & Co. to complete the sale within seven (7) days from the date of the notice, making time of the essence.

On 28 January 1999, the Plaintiff's attorney advised that the Plaintiff was unable to obtain the required financing to complete the Transaction and requested the return of the Deposit on the basis that the Transaction was subject to the Purchaser obtaining financing for the purchase of the Properties. On 3 February 1999, being seven (7) days following the letter dated 26 January 1999, Imperial forfeited the Deposit thereby cancelling the Agreement for Sale. The Second Defendant forwarded the deposit to Imperial by letter of the same date.

More than seven (7) plus years later, by a letter dated 16 October 2006, the Plaintiff wrote to the Second Defendant alleging that he was in breach of the Agreement for Sale and demanded a meeting between the parties for the purpose of settling the alleged debt. The Second Defendant subsequently wrote to one Sonia Gibson of Colina Imperial Insurance enclosing the Plaintiff's letter for her attention and advised Ms. Gibson that "*Our File reflects that the deposit moneys were forwarded to you*."

On 30 April 2019, the Plaintiff instituted the present action against the Defendants for the return of the deposit. His claims are many and multifarious. He claims relief in contract, tort and the restitutionary relief of unjust enrichment. On 5 June 2019, the Defendants filed their Defence denying these claims and contending that (i) Imperial was entitled to forfeit and cancel the Agreement for Sale and (ii) The Plaintiff's claims are barred by the law of limitation and laches..

HELD: The Plaintiff's Writ of Summons and Statement of Claim are dismissed on the ground that it fails to disclose a reasonable cause of action and/or is an abuse of the process of the Court. The Defendants, being the successful party in these proceedings, are awarded their costs to be taxed if not agreed.

1. The Plaintiff conceded that his claims in contract are statute barred under the provisions of the Limitation Act, Ch. 83 of 1995 ("the 1995 Act") as the present action was commenced a little more than 20 years after the forfeiture of the Deposit and cancellation of the Agreement for Sale which occurred on 3 February 1999..

2. The Plaintiff alleged that he suffered loss upon the alleged arbitrary expropriation of his deposit funds which occurred on 3 February 1999. Therefore, time for the purposes of the limitation of actions in relation to the Plaintiff's claims founded in tort also began to run on 3 February 1999. It follows that the Plaintiff's claims in tort have also long since been statute barred under the provisions of the 1995 Act prior to the commencement of this action on 30 April 2019.

3. It is generally accepted that there are no express limitation periods set out in the 1995 Act which deals with restitutionary claims.

4. There are four stages of the inquiry to any restitutionary claim that the plaintiff must prove namely: (i) the defendant was enriched; (ii) the enrichment was at the expense of the plaintiff; (3) the enrichment must have been unjust and (iv) consideration must be given to the applicable defences. There is a fifth stage to the inquiry namely the remedies which are available to the Plaintiff: Halsbury's Laws of England, 5th Ed. at para. 410.

5. One of the crucial stages to the success of a restitutionary claim for unjust enrichment is for the plaintiff to prove that the defendant has been enriched: Halsbury's Laws of England, 5th Ed. at para. 411.

6. The facts of this case demonstrate that the Second Defendant received the deposit of $19,000 from Imperial on 3 April 1997. Following the forfeiture of the deposit and cancellation of the Agreement for Sale, that sum was forfeited by Imperial. In view of that, there was no enrichment of the defendants which could be relied upon by the Plaintiff to establish a restitutionary claim against the Defendants. Further, Imperial informed the Plaintiff that the forfeited funds were ultimately applied to the Plaintiff's outstanding debt due to Imperial for rental arrears. In these circumstances, the Plaintiff has received the benefit of the Deposit thereby rendering his claim inequitable as against the Defendants. The Plaintiff's claim is an abuse of the process of the Court.

7. Causes of action which are grounded in restitution (such as a claim for unjust enrichment) are for the purposes of limitation either dealt with by applying the statutory limitation period by analogy and/or are subject to the equitable doctrine of laches.

8. It is well established that delay defeats equity. In the words of Lord Camden L.C. a court of equity "*has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the Court is passive, and does nothing". Delay which is sufficient to prevent a party from obtaining an equitable remedy is technically called "laches"*: Snell's Principles of Equity 31st Ed at page 99 paras 5-16.

9. The pleaded complaint of the Plaintiff relates to the Defendants' alleged breach of the stakeholder agreement which resulted from the delivery of the Deposit to Imperial on 3 February 1999. Further, the Plaintiff was represented by legal Counsel during the transaction and had knowledge of the forfeiture and termination of the Agreement for Sale. It cannot be disputed that the Plaintiff was aware of his right to seek legal redress in respect of his claims.

10. On the evidence presented as well as the documentary evidence, this case clearly establishes that the deposit was forwarded to Imperial on 3 February 1999 on the basis that Imperial was entitled to the same as a consequence of the Plaintiff's failure to complete the transaction. The evidence further establishes that the Plaintiff ultimately received the benefit of the Deposit funds when Imperial applied the same to his outstanding rental arrears. When one considers the equities of this case, the Plaintiff ought not to be permitted to enforce an alleged right some 20 years after its accrual in circumstances where he ultimately received the benefit of the Deposit. To do so would expose the Defendants to an unrecoverable loss (as a consequence of the limitation bars to proceeding against Colina). Further, the delay by the Plaintiff in commencing these proceedings after 20 years is inexcusable. It has caused real prejudice and injustice to the Defendants and as such, the Plaintiff's restitutionary claim is barred by laches.

RULING

Charles J:

Introduction

[1] On 12 December 2019, this Court ordered that the preliminary issue of whether the claims brought by Mr. Enos Miller ("the Plaintiff") in this action as alleged in the Writ of Summons filed on 30 April 2019 are either statute barred pursuant to the Limitation Act, Ch. 83, 1995 ("the 1995 Act") or violates the doctrine of laches should be heard on 20 February 2020.

[2] The First Defendant ("MBH") and the Second Defendant ("Mr. Pinder") (collectively "the Defendants") contend that the claims are barred by the law of limitations and/or by virtue of the operation of the doctrine of laches.

[3] In support of their defence, the Defendants rely on the Affidavit of Mr. Pinder sworn and filed on 3 December 2019 ("the Pinder Affidavit") and the Skeleton Arguments of the First and Second Defendants (in opposition to the Plaintiff's Order 14 and Order 18 rule 19 Applications) dated 6 December, 2019.

[4] On the other hand, the Plaintiff conceded that the claim in contract is statute-barred but asserted that the claim of unjust enrichment is not limited since sections 5 and 38(5) of the 1995 Act are inapplicable to an unjust enrichment claim. If I understood the Plaintiff well, he further alleges that the claim in tort is inextricably linked to the unjust enrichment claim so it is also not statute-barred. As he puts it, "*technically, you can't have an unjust enrichment unless you have a tort*."

Historical background

[5] This action is shrouded in antiquity. It involves a dispute arising from a transaction between the Plaintiff and Imperial Life Assurance Company of Canada ("Imperial") in which the Plaintiff agreed to purchase Lots 1, 2, 4, 5 and 6 in Block A in Englerston ("the Properties") from Imperial, as mortgagee, pursuant to its power of sale ("the Transaction").

[6] Mr. Pinder was at all material times a partner in the law firm of MBH and the attorney acting on behalf of Imperial.

[7] On or about 3 April 1997, Mr. Pinder received a cheque in the sum of $19,000.00 from Imperial representing a deposit in connection with the intended Transaction.

[8] In or about November 1997, the Plaintiff signed an agreement with Imperial for the purchase of the Properties ("the Agreement for Sale"): Exhibit "HP-2". Clause 3 of the Agreement for Sale provided for the payment of a deposit in the sum of $19,000.00 ("the Deposit") which Deposit was to be paid by the Plaintiff and held by Imperial's attorney as Stakeholders.

[9] Clause 10 of the Agreement for Sale provided for the cancellation of the agreement upon the forfeiture of the Deposit in circumstances where the Purchaser failed to complete the purchase and pay the balance of the purchase price. It provides:

> **"If the Vendor shall deduce such title to the said hereditaments as is provided for in this Agreement in accordance with the provisions hereof and shall be ready able and willing in accordance with such provisions to deliver the assurance hereinafter provided for and the Purchaser nevertheless fails to complete the purchase and pay the balance of the purchase price then and in that case the deposit together with all interest earned thereon shall be forfeited to the Vendor in complete liquidation of all damages caused by such failure whereupon this Agreement shall be cancelled without further or other liability by any party to the other save the Purchaser shall return or caused to be returned to the Vendor all documents of title and such other information as shall have been produced to the Purchaser or his Attorneys as hereinbefore provided."**[Emphasis added]

[10] Following the expiration of in excess of one (1) year from the date of the Agreement for Sale, Imperial, by letter dated 26 January 1999, gave notice to the Purchaser's then attorney, Messrs. Cooke-McIver & Co. to complete the sale within seven (7) days from the date of the notice, making time of the essence: Exhibit "HP-3".

[11] On 28 January 1999, the Plaintiff's attorney advised that the Plaintiff was unable to obtain the required financing to complete the Transaction and requested the

return of the Deposit on the basis that the Transaction was subject to the Purchaser obtaining financing for the purchase of the Properties: Exhibit "HP-4".

[12] On 3 February 1999, that is seven (7) days following the letter dated 26 January 1999, Imperial forfeited the Deposit thereby cancelling the Agreement for Sale. Mr. Pinder forwarded the deposit to Imperial by letter of the same date: Exhibit "HP-5".

[13] More than seven (7) plus years later, by a letter dated 16 October 2006, the Plaintiff wrote to Mr. Pinder alleging that he was in breach of the Agreement for Sale and demanded a meeting between the parties for the purpose of settling the alleged debt: Exhibit "HP-6".

[14] On 20 October 2006, Mr. Pinder wrote to one Sonia Gibson of Colina Imperial Insurance enclosing the Plaintiff's letter for her attention. In that letter, he noted that *"Our File reflects that the deposit moneys were forwarded to you."*

[15] On 30 April 2019, the Plaintiff instituted the present action against the Defendants.

[16] On 5 June 2019, the Defendants filed their Defence.

[17] As is readily seen from the chronology, these proceedings were commenced a little more than 20 years after the forfeiture of the Deposit and cancellation of the Agreement for Sale which occurred on 3 February 1999.

[18] It ought to be common ground between the parties that if the Defendants are successful in the preliminary issue, then the present application is tantamount to an application on the part of the Defendants to strike out the Plaintiff's pleadings pursuant to Order 18 rule 19 and the inherent jurisdiction of the Court on the ground that the pleading fails to disclose a reasonable cause of action or is an abuse of the process of the Court: See Order 18 rule 19 and the Notes to 1979 RSC under 18/19/5A which provides:

> **"Where the facts relied on show that the cause of action arose outside the current period of limitation and it is clear that the defendant intends to rely on the relevant Limitation Act and there is nothing**

before the Court to suggest that the plaintiff could escape from that defence, <u>it is open to the Court to strike out the statement of claim as disclosing no reasonable cause of action</u>."[Emphasis added]

The Plaintiff's Claims in the action

[19] The Plaintiff's claims for relief are as follows:

1. Damages for wrongful withholding of the Plaintiff's deposit with interest; for injury to the Plaintiff's reputation as to his creditworthiness and for harassment cause (sic) by the First and Second Defendants' gross negligence, misstatements and breach of duty of care;

2. Damages for negligent misstatement caused by the First and Second Defendant; interference with the Plaintiff's Agreement for Sale: Breach as a Constructive Trustees (sic) of the said deposit; Damages for information negligently given;

3. Damages as against the First and Second Defendants for conspiracy to induce a breach of the Plaintiff's Sale Agreement with Imperial Life Assurance Limited;

4. Damages for breach of Agreement by the First and Second Defendants and for injury suffered as a result as well as by the manner of the said breach;

5. Exemplary damages;

6. Interest thereon at such rate and for such period as the Court may deem just pursuant to the Civil Procedure Act;

7. Further or in the further alternative, damages;

8. Costs

9. Further or other relief as the Court seem (sic) just.

[20] It is beyond dispute that the Plaintiff's claims are many and multifarious. As the Defendants suggested, they may be properly categorized as:

1. **The claim for relief in paragraph 1 includes claims based upon the following:**

   (i) Damages for wrongful withholding of the Plaintiffs deposit with interest (**contract**)

   (ii) Injury to the Plaintiff's reputation as to his credit worthiness (**tort of defamation** – it was submitted that this claim for relief is not sustainable as there is no pleaded cause of action in the Statement of Claim relating to this relief)

   (iii) Harassment caused by the Defendants' gross negligence, misstatements and breach of duty of care (**tort**)

2. **The claim for relief in paragraph 2 includes claims based upon the following:**

   (i) Damages for negligent misstatement (**tort**)

   (ii) Interference with the Plaintiff's Agreement for Sale (**tortious interference**)

   (iii) Breach of Trust

   (iv) Damages for information negligently given (**tort**)

3. **The claim for relief in paragraph 3 includes claims based upon the following:**

   (i) Damages for conspiracy to induce a breach of the Plaintiff's Agreement for Sale with Imperial Life Assurance (**tort of conspiracy**)

4. **The claim for relief in paragraph 4 includes claims based upon the following:**

   (i) Damages for breach of Agreement by the Defendants and for injury suffered as a result as well by the manner of the said breach (**contract**)

5. **The claims for relief in items 5 through 9 are not causes of action and are incidental to the claims for relief in items 1 through 4.**

The Defendants' defence to the action

[21] By their Defence filed on 5 June 2019, the Defendants have answered the Plaintiff's claims contending that (i) Imperial was entitled to forfeit and cancel the Agreement for Sale; and (ii) each of the Plaintiff's claims are barred by the law of limitation and laches: see paragraphs 18-22 of the Defence.

[22] In paragraph 22, the Defendants raised the limitation point. They averred as follows:

> **"As a consequence of the contractual nature of the obligations on the part of the Defendants as stakeholder, described in paragraph 21 above, the Defendants contend (in the alternative to the matters set out in paragraph 18 above) that any alleged claim, cause of action, right or entitlement to relief or damages pleaded in the Statement of Claim resulting from any breach of the Agreement for Sale or the Stakeholder Agreement is barred by the provisions of the Limitation Act, 1995 or in the further alternative by the doctrine of laches. Additionally and/or alternatively, any claim set out in the Statement of Claim resulting from any alleged breach of a duty of care on the part of the Defendants or any other tortious claim is barred by the provisions of the Limitation Act, 1995."**[Emphasis added]

The legislative framework

[23] Periods of Limitation for different classes of action is covered in Part II of the 1995 Act. Section 5(1) provides:

> **"Actions of Contract and Tort and Certain Other Actions**
>
> **5. (1) The following actions shall not be brought after the expiry of six years from the date on which the cause of action accrued, that is to say —**

(a) **actions founded on simple contract (including quasi contract) or on tort;**

(b) **actions to enforce the award of an arbitrator where the submission is not by an instrument under seal;**

(c) **actions to recover any sum recoverable by virtue of any written law;**

(d) **actions to enforce a recognisance."** [Emphasis added]

[24] Section 38 provides:

> **"(4) 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 acknowledgement or the last payment:**
>
> > **Provided that a payment of a part of any rent or interest that is due at any time shall not extend the period for claiming the remainder then due, and any payment of interest shall be treated as a payment in respect of the principal debt.**
>
> **(5) Subject to the proviso to subsection (4), a current period of limitation may be repeatedly extended under this section by further acknowledgements or payments, but a right of action, once barred by this Act, shall not be revived by any subsequent acknowledgement or payment."**

Submissions and disposition

Contract claims

[25] The Plaintiff conceded that his claims in contract are statute barred: see page 31 of the Transcript of Proceedings dated 20 February 2020 ("Transcript of Proceedings")

Tortious claims

[26] The Plaintiff has not conceded to the tortious claims which, according to the 1995 Act, shall not be brought after the expiration of six years: section 5 (1)(a). If I

understood him well, he submitted that "*technically, you can't have unjust enrichment unless you have a tort*": page 30 of the Transcript of Proceedings.

[27] Further at page 30, the Plaintiff stated:

> **Mr. Miller: "What I'm saying, it's difficult to try to separate the two as it relates to tort and unjust enrichment because unjust enrichment is a wrong, so it's difficult. You see the connection between the tort and the unjust enrichment because they cross paths. The fact that it's unjust and my cause of action is under sound (sic) in unjust enrichment doesn't nullify the tort itself, it overlaps. So, it's difficult to separate the two as it relates legally. So technically, I'm still relying on tort insofar as it relates to restitution."**

[28] With regard to tortious claims, the cause of action is said to accrue when every fact which is material to be proved to enable the plaintiff to succeed and every fact which the defendant would have a right to traverse is identifiable (i.e the gist of the action is identifiable.) The principle is explained by the learned authors of the treatise, **Limitation of Actions** by Oughton, Lowry & Merkin 1998 at page 231 thus:

> **"The Limitation Act 1980, s 2 provides that:**
>
> > **"An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued."**
> >
> > **The six-year limitation period in tort actions therefore runs from the date of accrual of the cause of action, which requires identification of the gist of the action. When this date arises will depend on the nature of the tort committed by the defendant. Generally a distinction is drawn between torts actionable per se, those which require proof of damage and continuing torts.**
> >
> > **In the case of torts actionable per se, the gist of the action is the commissions of the wrong, with the result that there is no need for the plaintiff to show that any damage has been suffered. <u>However, the most important modern torts, namely nuisance and negligence, both require proof of damage, in which case the limitation period will not start to run against the plaintiff until damage has been suffered.</u>"**

[29] As the Defendants correctly asserted, the Plaintiff's claims in negligence are all predicated on an allegation that the Defendants owed the Plaintiff a duty of care (which they trenchantly refuted). They say that this purported duty of care was allegedly breached by them when Mr. Pinder forwarded the Deposit to Imperial.

[30] In paragraph 9 of the Writ of Summons the Plaintiff alleged that he suffered loss upon the alleged arbitrary expropriation of his deposit funds which occurred on 3 February 1999.

[31] Therefore, time for the purposes of the limitation of actions in relation to the Plaintiff's claims founded in tort began to run as of 3 February 1999 when Mr. Pinder forwarded the deposit to Imperial.

[32] As I see it, the Plaintiff's claims in tort have long since been statute barred under the provisions of the 1995 Act prior to the commencement of this action which was commenced on 30 April 2019, some 20 years after the alleged breach of the Stakeholder Agreement (3 February 1999).

[33] Furthermore the Defendants properly asserted that no issue concerning the Plaintiff's knowledge of the Defendants' alleged breaches can arise in this action having regard to the Plaintiff's Demand Letter to Mr. Pinder dated 16 October 2006 which clearly supports the Plaintiff's knowledge of the breach as of the date. Even if the six year limitation period is counted from the date of the 2006 Demand Letter, the action would have been statute barred by eight (8) years prior to the commencement of these proceedings.

The Plaintiff's equitable claim of unjust enrichment

[34] According to the Plaintiff, the equitable restitutionary claim of unjust enrichment is essentially at the heart of this action. He alleged that the claim asserted in the Writ of Summons is partly based on an allegation of unjust enrichment.

[35] The learned author of Halsbury's Laws of England, 5th Ed. dealt with the structure of a restitutionary claim at para. 410 as:

> **"It is now generally accepted that there are four stages to any restitutionary claim: (1) the defendant must have been enriched; (2) the enrichment must have been at the expense of the claimant; (3) that enrichment must have been unjust and (4) consideration must be given to any applicable defences. The claimant must satisfy the Court that the first three elements of the claim have been satisfied…. In addition to these four stages it has been argued that there is a fifth stage to the inquiry, namely the remedies which are available to the claimant."**

[36] One of the critical stages to the success of a restitutionary claim for unjust enrichment is for the plaintiff to prove that the defendant has been enriched. In **Halsburys Laws of England, 5th ed.** [supra] at paragraph 411, the learned author notes that:

> **"A restititutionary claim can only be brought where the defendant has been enriched as a result of something which the claimant has done for or given to him: Foskett v McKeown [2001] 1 AC 102 at 125. The absence of an enrichment is fatal to the existence of a restitutionary claim."** [Emphasis added]

[37] The facts of the present case demonstrate that Mr. Pinder received the Deposit of $19,000 from Imperial on 3 April 1997. Following the forfeiture of the Deposit and cancellation of the Agreement for Sale, that sum was forwarded to Imperial: Exhibit "HP-5". In view of this, there was no enrichment of the Defendants which could be relied upon by the Plaintiff to establish a restitutionary claim against the Defendants. I agree with the Defendants that the claim for unjust enrichment is woefully untenable.

[38] Ms. Knowles further submitted that, by letter dated 9 February 1999, Imperial informed the Plaintiff that the forfeited funds were ultimately applied to the Plaintiff's outstanding debt due to Imperial for rental arrears: Exhibit KM1 attached to the Affidavit of Kristina Miller filed on 9 December 2019. In these circumstances, says Counsel, the Plaintiff has received the benefit of the Deposit thereby rendering his claim inequitable as against the Defendants. Ms. Knowles submitted that, in the circumstances, the Plaintiff's claim is an abuse of the process of the

Court. On these facts, supported by documentary evidence, I agree with these submissions.

[39] The Defendants submitted that any claim for restitutionary relief is barred by the doctrine of laches. The Plaintiff submitted, in very comprehensive submissions, that the Defendants have not sufficiently or at all, pleaded laches, or acquiescence and/or delay. On this, I will say that the action has just begun and amendments to the Defence can still be made. But, that is not the issue. The quintessential issue is whether the Plaintiff, filing an action some 20 years later, is statute-barred.

The law of limitation relative to equitable remedies - laches

[40] It is accepted that there are no express limitation periods set out in the 1995 Act which deals with restitutionary claims. I also agree with the Plaintiff that the 1995 Act does not apply to restitutionary relief. However, causes of action which are grounded in restitution (such as a claim for unjust enrichment) are for the purposes of limitation either dealt with by applying the statutory limitation period by analogy and/or are subject to the equitable doctrine of laches: see **Limitation of Actions** [supra] at page 231 where the learned authors stated:

> **"Common Law or Equity as the Basis for Rules on Limitation of Actions?**
>
> **It is noticeable from the onset that the Limitation Act 1980 makes specific provision for limitation periods in contract actions and those which sound in tort, but that there is no specific provision for restitutionary claims. Instead, claims based on the reversal of an unjust enrichment have to be slotted in where they will fit. Accordingly, section 5 in respect of action on simple contract, section 9 in respect of sums due by virtue of an enactment, section 10 in respect of claims for contribution, section 29 in respect of acknowledgement and part payment of a debt and section 32(1) (c) in respect of mistakes have all been called into play where appropriate in dealing with the limitation issues raised by restitutionary claims. Moreover, many aspects of a restitutionary claims raise the issue of proprietary remedies, with the result that the provisions of section 15 regarding actions for the recovery of land and section 21 in respect of actions concerning trust**

> **property may also provide guidance on the appropriate limitation period.**
>
> **The major difficulty raised by the failure of Parliament to make express reference to the matter of limitation of actions in the case of restitutionary claims is that it is not entirely clear which direction should be taken. It is necessary to point out that the law of restitution consists of an amalgam of common law and equitable rules and as a result, it is possible that the applicable rules on limitation could have either a common law or an equitable flavor. It has been seen already that the Limitation Act 1980 section 36 specifies that the majority of limitation periods listed in the Act have no application to claims for equitable relief and that, as a general rule, equitable principles of limitation of actions based on the doctrine of laches tend to be rather more flexible, but provide less certainty. Arguably, so far as the matter of limitation of actions is concerned, it could be said that the common law approach, based upon fixed time limits which run from the date on which the cause of action accrues, is preferable, since rules which limit the time within which an action may be brought ought to set out clearly when an action is in time and when it is not. In contrast, the equitable approach foes have the value of being able to cope with the problem of injustice resulting from the strict application of a rigid time limit.** [supra]

[41] Ms. Knowles submitted that to the extent that the Plaintiff purports to raise any equitable claims (including a claim for resititutionary relief), the Defendants plead that any such claim will be barred by the doctrine of laches which requires equitable claims to be asserted promptly and without delay: see paragraphs 21 and 22 of the Defence. In **Snell's Principles of Equity 31st ed**. at page 99 paragraph 5-16, the General Editor stated:

> **"Delay defeats equity or equity aids the vigilant and not the indolent. In the words of Lord Camden L.C. a court of equity "has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the Court is passive, and does nothing." Delay which is sufficient to prevent a party from obtaining an equitable remedy is technically called "laches."**

[42] The pleaded complaint of the Plaintiff relates to the Defendants' alleged breach of the stakeholder agreement which resulted from the delivery of the Deposit to Imperial on 3 February 1999. In his Reply to the Defendants' Submissions dated 20 February 2019, the Plaintiff reiterated that the issue before the Court is whether the Defendants breached the Stakeholder Agreement. He submitted that the Stakeholder Agreement and its obligations are the crux of this action. He repeated that the Stakeholder Agreement is at the heart of this litigation.

[43] In passing, it appears to me that the Plaintiff has muddled up a claim in contract with the restitutionary claim of unjust enrichment. Anyhow, the Plaintiff was represented by legal Counsel during the transaction and had knowledge of the forfeiture and termination of the Agreement for Sale. It cannot be disputed that the Plaintiff was aware of his right to seek legal redress in respect of his claims.

[44] On the evidence presented as well as the documentary evidence, this case clearly establishes that the Deposit was forwarded to Imperial on 3 February 1999 on the basis that Imperial was entitled to the same as a consequence of the Plaintiff's failure to complete the transaction. Since that date Imperial was acquired by Colina Imperial Insurance Limited ("Colina") in or about the year 2005: paragraph 3 of the Writ of Summons.

[45] Ms. Knowles submitted that the Plaintiff's delay in instituting this action some 20 years later has caused real prejudice to the Defendants by reason of the fact that any claim against Colina (by way of third party proceedings herein or otherwise) pursuant to the Stakeholder Agreement is now statute barred; it being a claim in contract. Ms. Knowles next submitted that on this analysis the Defendants would thus be placed in the unenviable position of seeking to persuade a Court that there is some equitable entitlement which would allow the Defendants a right to recover the Deposit from Colina some 20 years following the alleged transaction.

[46] The evidence further establishes that the Plaintiff ultimately received the benefit of the Deposit funds when Imperial applied the same to his outstanding rental arrears.

When one considers the equities of this case, as Ms. Knowles asserted, the Plaintiff ought not to be permitted to enforce an alleged right some 20 years after its accrual in circumstances where he ultimately received the benefit of the Deposit. To do so would expose the Defendants to an unrecoverable loss (as a consequence of the limitation bars to proceeding against Colina).

[47] Ms. Knowles argued that the delay by the Plaintiff in commencing these proceedings after 20 years is inexcusable. It has caused real prejudice and injustice to the Defendants and as such, the Plaintiff's restitutionary claim is barred by laches. I agree.

Conclusion

[48] For all of these reasons, I will dismiss the Plaintiff's Writ of Summons and Statement of Claim on the ground that it fails to disclose a reasonable cause of action and/or is an abuse of the process of the Court.

Costs

[49] The Defendants are the successful party in these proceedings. They seek costs. I will order that costs are to be taxed if not agreed.

Dated this 19th day of November, A.D., 2020

Indra H. Charles
Justice