

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law & Equity Division

2014/FP/CLE/gen/00264



BETWEEN

BARRY MEADOR

Plaintiff

AND

TAINO BEACH LIMITED

Defendant

BEFORE: The Honourable Justice Petra M. Hanna-Adderley

APPEARANCES: Mrs. Kenra Parris-Whittaker for the Plaintiff
Mr. Dawson Malone along with Mrs. Ruby Gray for the Defendant

HEARING DATE: February 3, 2017

RULING

Introduction

1. The Court in its Ruling dated November 15, 2016 determined that the Defendant's application for the determination of a preliminary issue, that is whether the Plaintiff's cause of action accrued within the preceding six years of commencing the action herein or is statutorily barred by virtue of Section 5 of the Limitation Act, should be heard as a preliminary issue.
2. The Court stated in its Ruling at paragraph 47 that:-

"In conclusion, having read the Plaintiff's Writ of Summons and Statement of Claim, the Defence, the Statement of Facts and Issues, the Plaintiff's Witness Statement filed herein, the 3rd Affidavit of Peter Collins and the written submissions of Counsel, the authorities cited, in particular the cautionary principles

enunciated by Conteh JA (as he then was) at paragraphs 32 to 36 of *Moraes v Paulista Limited* (supra), and of Lyons J (as he then was) at paragraph 30 of his Judgment in *Arawak Homes* (supra) and for the reasons stated above at paragraph 46, I am of the view that a decision on the question of law which the Court will be required to decide is capable of disposing of this matter. Additionally, the hearing of the question of limitation as a preliminary issue would significantly reduce costs and save the Court time. I am of the view that it would be just to deal with the limitation defence as a Preliminary Issue at a preliminary hearing and pursuant to Order 33 r 3 of the RSC, and in the exercise of my discretion, I Order the issue of whether the Plaintiff's action is statute barred be tried as a Preliminary Issue. That until the determination of the preliminary issue all further proceedings in this action are stayed. The costs of and occasioned by this application shall be in the cause. I will now proceed with the making of a Directions Order so as to proceed expeditiously with the trial of the Preliminary Issue."

3. Further at paragraph 39 of the Ruling the Court noted that it was satisfied after a review of the Plaintiff's Statement of Claim, Defence, Statement of Facts and Issues filed that the facts set out at paragraphs 4-10 of the said Ruling were not disputed. These paragraphs are set out below:-

" 4. The following facts are relied upon by the Defendant and are not disputed on the pleadings by the Plaintiff. The Defendant operates a resort in The Bahamas. The Plaintiff entered into an agreement on August 7, 2002 for the purchase of 1 week in a 2 bedroom unit at the Resort. The Plaintiff subsequently entered into further agreements with the Defendant in 2003 and 2007. This claim relates to the alleged breach of the agreement in 2002 (**"the 2002 Agreement"**) by the Defendant by its failure to specifically perform it and to alleged fraudulent practices by the Defendant.

5. When the Plaintiff entered into the 2002 Agreement he also received a "Special Incentive Letter" which stated, *inter alia*:

"3. Purchaser will receive a premium bonus gift certificate which should equal their purchase price. This gift will consist of a certificate guaranteeing that their funds have been deposited into their name. Purchaser will receive these documents 90 days after TAINO BEACH has received the full purchase price of the Vacation Package."

6. The Plaintiff made full payment for the vacation package to the Defendant under the 2002 Agreement.

7. Further, the Plaintiff's Statement of Facts & Issues filed on April 14, 2015 also pleads the hereinbefore-mentioned facts.

8. The Defendant's Loan Ledger records that the Plaintiff paid off the balance of the membership on May 14, 2003. A letter was sent to the Plaintiff on September 25, 2003 **"to acknowledge that you have paid your membership in full and your account has been credited for the full amount"**.

9. The Plaintiff states at paragraph 12 of his Witness Statement (filed on 16 February 2016) that payment in full was completed by September 25, 2003.

10. The Plaintiff via correspondence on August 27, 2012 requested that the Defendant provide the Plaintiff with the Gift Certificate and Guarantee Certificate promised in the 2002 Agreement. The Gift Certificate and Guarantee Certificate were never furnished to the Plaintiff. The Plaintiff commenced this action on July 31, 2014."

4. The Defendant relies on its Written Submissions Hearing of the Limitation Issue filed January 27, 2017, the Defendant's Affidavit of Ruby E. Gray in Support of Defendant's Limitation Defence filed January 27, 2017; the 3rd Affidavit of Peter Collins filed April 12, 2016 and the Defendant's Written Reply Submissions Hearing of the Limitation Issue filed April 18, 2017.

5. The Plaintiff relies on the Plaintiff's Trial Submissions filed January 27, 2017 and amended with leave on February 3, 2017 and the Affidavit of Joel Arnett filed January 27, 2017.

Issue

6. The Court must determine whether the Plaintiff's cause of action accrued within the preceding six years of commencing the action herein or is statutorily barred by virtue of Section 5 of the Limitation Act.

Statement of Facts

7. The evidence of Ruby Gray in part is that the findings made in the Court's previous ruling on November 15, 2016 were not appealed although leave was given and therefore those findings stand. She also states in summary that the facts are the alleged cause of action (breach of contract) arose once 90 days had passed after completion of payment without a gift certificate being provided; the Plaintiff accepted that completion of payment occurred no later than 25 September 2003, and therefore the cause of action would have accrued at the latest by December 2003; the Writ of Summons was filed on 31st July 2014; that pursuant to Section 5 of the Limitation Act (which I have read), the limitation period for a claim for alleged breach of contract is 6 years; and by July 2014 the 6 year limitation period had long expired.
8. In his 3rd Affidavit which was relied upon by the Defendant in its application for leave for the determination of the preliminary issue Mr. Collins reiterated the Defendant's case that the alleged breach of contract would have taken place upon expiry of the 90 day period for compliance set out in the 2002 Special Incentive Letter and therefore 90 days after Mr. Meador paid for his membership in 2003. Also that Mr. Meador was required to bring any claim within 6 years of that date but did not issue proceedings until July 2014.
9. The Plaintiff in support of his submissions filed the Affidavit of Joel Arnett on January 27, 2017. The said Affidavit attempts to set out the Plaintiff's entire case inclusive of exhibited documents.
10. However, this application is for the Court to render a decision on a question of law which is whether the Plaintiff's cause of action accrued within the preceding six years of commencing the action herein or is statutorily barred by virtue of Section 5 of the Limitation Act, should be heard as a preliminary issue. The facts as set out in the Affidavit

of Joel Arnett are not the facts to which the Court made its finding in its previous Ruling. Those findings are the only facts to which the Court on this application can consider in its final determination on the preliminary issue.

Submissions Defendant

11. Counsel for the Defendant, Mr. Malone submits that under section 5 of the Limitation Act actions in contract and tort must be brought within 6 years of the date on which the cause of action accrued. It is the Defendant's case that the alleged breach of contract (which is denied) would have taken place upon expiry of the 90 day period for compliance set out in the 2002 Special Incentive Letter or shortly thereafter, and therefore (on Mr. Meador's evidence) on or around 24 December 2003. Mr. Meador was required to bring any claim within 6 years of this date. He did not do so until July 2014, well outside the limitation period. Further, Mr. Meador pleads in his Reply, at paragraph 13, that the cause of action herein arose in 2012 "when the Defendant declared it did not intend to perform under the terms of the 2002 Agreement." It is his submission that on the proper construction of the 2002 Agreement, there was no requirement for Mr. Meador to request the Gift Certificate or give notice to the Defendant that he wished to obtain it, the Defendant was obliged to deliver the Gift Certificate within 90 days of full payment without further reference to Mr. Meador.

12. Mr. Malone also submits that if a claim is statute-barred, its merits are irrelevant. Although the claim is not technically extinguished, the plaintiff is barred from obtaining any remedy. The court need not decide the merits because it no longer has the jurisdiction to grant a remedy to enforce the right. In that regard, he refers the Court to **C. & M. Matthews Ltd v Marsden Building Society** [1951] Ch. 758, at p 768 which states :

"...I am not prepared to hold that a person whose claim is statute barred, in the sense that he cannot bring any kind of action in any court to enforce it, can properly be described as a person entitled to the mortgaged property or authorized to give receipts for the proceeds of its sale...In the present case the relevant limitation has had the effect of depriving the plaintiffs of any claim at all in respect of the loan or any security for it which they can assert by any form of legal proceeding. Accordingly, the result in my view is simply this: the summons issued by the plaintiffs was a proceeding to enforce their security; but, the time prescribed

by s. 13 of the Act of 1927 having run, it was a proceeding which, by the express terms of the section, did not lie and was therefore rightly dismissed.”

13. Mr. Malone submits that in order to determine when the limitation period ends, the Court must first determine when the breach occurred and time began to run. The learned authors of McGee on Limitation, 7th edition, state at 10-002-10-003 as follows:

“The basic rule in contract is that the right of action accrues as soon as there is a breach of contract, notwithstanding that at that time no damage (beyond the purely nominal) has been suffered by the claimant. In *Gibbs v Guild*, Field J. traced this rule back to the action of *assumpsit*, which was one of the historical predecessors of contract:

“It was well settled that in actions on *assumpsit* the time ran from the breach of the contract, for that was the gist of the action, and the subsequent damage, though happening within six years next before the suit, did not prevent the application of the Statute.”

This principle is still good law with regard to contract actions, and it therefore follows that in an action based on contract time runs from the breach.”

14. He contends that the Plaintiff pleads that the cause of action did not accrue until 2012, when his request for the Gift Certificate was refused. However, he submits that the alleged breach occurred when the 90 day period for delivery expired without the Defendant fulfilling its obligation (or within a reasonable time thereafter).

15. Additionally, on the question of whether a breach has occurred Mr. Malone submits that the general principle is that if a party agrees to perform an obligation and fails to do so in the way agreed in the contract, this will be a breach. He refers the Court to Lord Diplock in **Photo Production Ltd v Securicor** [1980] AC 827 at 847-849 whereby he stated as follows:

“Where what is promised will be done involves the doing of a physical act, performance of the promise necessitates procuring a natural person to do it; but the legal relationship between the promisor and the natural person by whom the act is done, whether it is that of master and servant, or principal and agent, or of parties to an independent subcontract, is generally irrelevant. If that person fails to do it in the manner in which the promisor has promised to procure it to be done,

as, for instance, with reasonable skill and care, the promisor has failed to fulfil his own primary obligation...

Leaving aside those comparatively rare cases in which the court is able to enforce a primary obligation by decreeing specific performance of it, breaches of primary obligations give rise to substituted or secondary obligations on the part of the party in default, and, in some cases, may entitle the other party to be relieved from further performance of his own primary obligations.

Every failure to perform a primary obligation is a breach of contract.”

16. He also submits that there was an express term stating by what date performance was required (i.e. the Defendant must deliver the Gift Certificate within 90 days of payment). Moreover, he submits even if no time for performance was stipulated the Defendant still would have been required to act within a reasonable period, and ten years is surely well outside this. In that regard, he refers the Court to the learned authors of Chitty at 21-021 who opined that:

“Where a party to a contract undertakes to do an act, the performance of which depends entirely on itself, and the contract is silent as to the time of performance (or merely uses indefinite words such as “with all dispatch”) the law implies an obligation to perform the act within a reasonable time having regard to all the circumstances of the case.”

17. Therefore, he submits it cannot be said that 2012 is a reasonable period from 2003.

18. Mr. Malone also submits the Plaintiff’s pleading an alternate claim in deceit. He submits that there is no evidence suggesting a prima facie case of fraud and the pleading is embarrassingly vague, and that his case appears to be that at the time of the 2002 Agreement the Defendant never intended to honour the obligation and is therefore liable for fraudulent misrepresentation.

19. Therefore, he submits that the alternative allegation of deceit does not assist the Plaintiff in defeating the limitation defence. He refers the Court to section 41(1) of the Limitation Act, which states:

“Subject to subsection (4), where in the case of an action for which a period of limitation is prescribed by this Act either —

- (a) the action is based upon the fraud of the defendant; or
- (b) the action is for relief from the consequences of a mistake,

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it.”

20. The question he submits is therefore whether the Plaintiff could have discovered the alleged fraud earlier than six years prior to the issue of proceedings, i.e. by 31st July 2008. It is submitted that Mr. Meador could have discovered any alleged fraud at any time after 24 December 2003. If, on his case, if the alleged fraud was an intention by the Defendant not to deliver the Gift Certificate, this would have been evident as soon as he requested it and his request was denied.

21. Further, he submits, the burden of proof is on the plaintiff to show when the cause of action was reasonably discoverable and refers the Court to **Paragon Finance plc v DB Thakarar & Co** [1999] 1 All ER 400, at 418:

“The question is not whether the plaintiffs should have discovered the fraud sooner, but whether they could with reasonable diligence have done so. The burden of proof is on them. They must establish that they could not have discovered the fraud without exceptional measures which they could not have reasonably been expected to take.”

22. Moreover, he contends that the criteria for reasonable diligence in a fraud claim were considered by Webster J in **Peco Arts Inc v Hazlitt Gallery Ltd** [1983] 1 WLR 1315, a case dealing with a drawing by Ingres which turned out to be a reproduction rather than the original work. The vendor argued that it would have been ‘reasonable diligence’ for the purchaser to have the drawing independently authenticated once it was in her possession. The court rejected this submission, ruling that the test is what an ordinary prudent person would do having regard to all the circumstances (at 1322-1323):

“Taking into account these authorities I conclude, first of all, that it is impossible to devise a meaning or construction to be put upon those words [reasonable diligence] which can be generally applied in all contexts because, as it seems to me, the precise meaning to be given to them must vary with the particular context in which they are to be applied. In the context to which I have to apply them, in my judgment, I conclude that reasonable diligence means not the doing of everything possible, not necessarily the using of any means at the plaintiff’s disposal, not even necessarily the doing of anything at all; but that it means the

doing of that which an ordinarily prudent buyer and possessor of a valuable work of art would do having regard to all the circumstances, including the circumstances of the purchase.”

23. It is his submission that the Plaintiff's case requires the court to accept that it was reasonably diligent to wait 9 years to enquire about the matter however, this should be rejected.
24. Lastly, Mr. Malone submits that the letter of September 25, 2003 shows that the Plaintiff was given notice that the Defendant had received full payment and acknowledged it and an ordinary prudent person would have followed up on the matter at this time or certainly within the next year or so. He further submits that the Plaintiff had an ongoing commercial relationship with the Defendant and received two further Special Incentive Letters in 2003 and 2007 which could reasonably have been expected to jog his memory as to the Gift Certificate and he could have with reasonable diligence discovered the purported fraud before 2010.
25. It is his submission that once a claim is statute-barred the action ought to be dismissed as there is no jurisdiction to extend the period and refers the Court to **Lightbourne v Department of Public Health et al** 2010/CLE/gen/00023, Ruling of Barnett, CJ dated 31st May, 2013 at [13] to [14]; and **Neilly v Federal Management Systems (Bahamas) Ltd** 2009/CLE/gen/00223, Ruling of Barnett, CJ dated 24th June, 2011 at [34] to [39].

The Plaintiff

26. Counsel for the Plaintiff, Mrs. Kenra Whittaker submits that the Plaintiff's claims are not barred by Section 5 of the Limitation Act. While the Act does not directly address when a contractual cause of action accrues, under English law, any cause of action in contract accrues when the breach of contract occurs. The Defendant breached its contractual obligation to the Plaintiff in 2012, when the Defendant declared it did not intend to perform under the terms of the 2002 Agreement. Therefore, this action was brought within the appropriate period for breach of contract actions. Further, on the facts of the case the Defendant deliberately concealed the fact that it never intended to issue the gift certificate incentive under the 2002 Agreement. It was not until 2012 when the Defendant advised the Plaintiff that the special incentive was issued in error.

27. She refers the Court to The case of "**The Kriti Palm**" and submits it is instructive, in particular page 742 at [316] through [321]; page 756 at [380] through [381]. The Court in that case quoting the case of **Cave v Robison & Rilf (a Firm)** [2002] UKHL 18 provides that, "In my opinion section 32 deprives a Defendant of a limitation defence...where he takes active steps to conceal his own breach of duty after he has become aware of it...".
28. It is her submission that Section 41 of the Act provides six years to bring an action from when a Plaintiff discovered or reasonably should have discovered a fraud. As the Plaintiff did not discover the Defendant's fraud until the September 27, 2012 letter denying the Plaintiff the special incentives that he rightfully earned, the Plaintiff's claims are not barred.
29. She refers the Court to the case of **Peco Arts Inc v Hazlitt Gallery**, at page 1322 letter E, where the Court considers that, "...then it is said that in this case by reasonable diligence this fraud might have been discovered in 1864...Now this depends a great deal upon the inquiry a man is bound to make...Now was there anything to lead them to believe or suspect, or were they bound to suspect or make inquiries...". At Letter G, " However, what I have to decide is, whether what had been done constitutes reasonable diligence; and the meaning of such expression is not the doing of everything possible, but the doing of that which, under the ordinary circumstances and with regard to expense and difficulty, could reasonably be required". The Court goes on to conclude that, "I conclude first of all, that it is impossible to devise a meaning or construction to be out upon those words which can be generally applied in all contexts because as it seems to me the precise meaning to be given to them must vary with the particular context in which they are to be applied".
30. She refers to the case of the case of "The Kriti Palm" at page 742 at [316] The Court quoting the case of **Cave v Robison & Rilf (a Firm)** [2002] UKHL 18 provides that, "In my opinion section 32 deprives a Defendant of a limitation defence...where he takes active steps to conceal his own breach of duty after he has become aware of it... Lord Scott of Foscote...said (at [60]): 'deliberate concealment for s32(1)(b) purposes may be brought about by an act or an omission and that, in either case, the result of the act or omission, i.e. the concealment, must be the intended result...A claimant who proposes to invoke s32(1)(b) in order to defeat a Limitation Act defence must prove the facts necessary to bring the case within the paragraph. He can do so if he can show that some fact relevant to his right of action has been concealed from him either by a positive act of concealment

or by withholding of relevant information, but in either case, with the intention of concealing the fact or facts in question...The standard proof would be the usual balance of probabilities standard and inferences could of course be drawn from suitable primary facts....” .

31. In support of her submissions she refers the Court to paragraphs 14 and 31 of the Plaintiff's Witness Statement

“ 14 The only Item that has not been fulfilled under any of my special incentives is the provision of the premium bonus certificate. In fact I continue to receive my bonus weeks when requested as stipulated in the 2000 agreement and the water passes provided for in the 2002 agreement (the Special Incentive”).

31 “Shortly thereafter I received correspondence from Mr Kenneth Farino on behalf of the defendants dated September 27, 2012 in response to my queries on August 27 2012 advising as follows:- “The Special Incentive Letter dated 08/07/2012 that you provided to our office was not in your original file, therefore the gift certificate was never issued...”.

32. She also referred to paragraph 21 of the Peter Collins Affidavit filed May 22 2015 whereby he stated “...The Special Incentive Letter submitted by the Plaintiff provided that the Plaintiff would received a Gift Certificate which should equal the value of the Upgraded Membership. The Special Incentive Letter did not guarantee the Plaintiff the sum of \$24,999.00”.

33. In **Williams v Fanshaw Porter & Hazelhurst (a Firm)** [2004] EWCA Civ 1...'(iv) The requirement is that the fact must be deliberately concealed. It is I think, plain that, for concealment to be deliberate, the Defendant must have considered whether to inform the claimant of the fact and decided not to. I would go further and accept that the fact which he decides not to disclose either must be one which he would ordinarily have disclosed in the normal course of his relationship with the claimant, but in the case of which he consciously decided to depart from what he would normally have done and to keep quiet about it”...[381] “...In my judgment it is not possible to say either that the findings were not open to the Judge on the evidence before him or that they are undermined by his errors in relation to the case in deceit and his findings of dishonest or guilty knowledge. With regard to the latter point, the concealment, in order to be deliberate, did not have to be dishonest...”.

34. Lastly, at [439] the Court provides, "Not only was a duty to disclose the Cooper retests acknowledged by ITS, but also the existence of such a duty is a matter of common sense. We have seen the unchallenged evidence of AIC as to the importance to them of the accuracy of the statements of quality on the certificate...".
35. Mrs. Whittaker submits that in deliberately concealing the following facts from the Plaintiff the Defendants should be prevented from relying on its limitation defence:- that the Defendant was aware that it had taken a position that Item 3 of the special incentive was issued in error and failed to advise the Plaintiff until 2012 whilst complying with all other parts of the Special Incentive of 2002; that the Defendant adopted a principle that the terms of the Special Incentive did not guarantee the return of the amount paid under the Agreement; and that the Defendant considered any new agreement entered into by the parties an upgrade that would cancel out any previous special incentives under a previous agreement, (this has yet to be proven and is not agreed by the Plaintiff). (See paragraphs 24, 26 and 32 above and paragraph 21 of the Peter Collin's Affidavit filed May 22 2015 which sets out the above).
36. It is her submission that the Plaintiff has demonstrated that he has a valid claim and that there is no injustice to the Defendant where the Defendant was acting under the assumption that the Plaintiff had 1. not paid the full amount on the Agreement, 2. where the Defendant has stated the incentive was issued in error.
37. Mrs. Whittaker set out the elements of the tort of deceit as established in **Derry v Peek (1998) 14 App Cas 337, Angus v Clifford [1891] 2 Ch 449, Armstrong v Strain [1951] 1 TLR 865, The Kriti Palm [2007] 1 All ER (Comm) 667** and summarized them below:
- i) The Defendant must have made a representation which can be clearly identified.
 - ii) It must be a representation of fact.
 - iii) The representation must be false.
 - iv) It must have been made dishonestly in the sense that the representor had no real belief in the truth of what he stated: this involves conscious knowledge of the falsity of the statement.
 - v) The statement must have been intended to be relied upon.
 - vi) It must in fact have been relied upon.

38. In this matter, the Defendant made a clear representation of fact to the Plaintiff when it offered the 2002 Special Incentive in exchange for the Plaintiff's decision to enter into the 2002 Agreement. The Defendant indicated to the Plaintiff that it would provide a certain value, the Gift Certificate, in exchange for the Plaintiff's decision to enter into the 2002 Agreement on the day of the presentation. The case of "**The Kriti Palm**" at page 725, [252] states "At the basis of any claim in deceit is the representation in question. Its falsity, and the honesty of the representor, cannot begin to be considered until the representation in question has been identified. In the case of a written document, the representation can usually be pinpointed, but of course the context remains everything" and further at page 726 at [253] "Because dishonesty is the essence of deceit it is possible to be fraudulent even by means of an ambiguous statement, but in such a case it is essential that the representor should have intended the statement to be understood in the sense in which it is understood by the claimant (and of course a sense in which it is untrue) or should have deliberately used the ambiguity for the purpose of deceiving him and succeeded in doing so".
39. She refers the Court to the Affidavit of Joel Arnett filed January 27 2017, page 8, Special incentive of 2002 (which is a copy of the Special Incentive Letter) , "Purchasers will receive a premium gift certificate that should equal their purchase price..." and paragraph 21 of Peter Collins Affidavit filed May 22 2015 which states "The Special Incentive Letter submitted by the Plaintiff provided that the Plaintiff would receive a Gift Certificate which should equal the value of the Upgraded Membership. The Special Incentive Letter did not guarantee the Plaintiff the sum of \$24,999.00". It is her submission that the Defendant then allowed the Plaintiff to make payment in full under this Agreement with the knowledge that the Special Incentive was agreed to in error and that there was no intention by the Defendant to adhere to the agreement, and that the Defendant allowed the Plaintiff to enter into a subsequent agreement with the knowledge that they intended to breach the 2002 agreement with the Plaintiff by asserting that one agreement cancelled out the other, knowing that the result of such a breach would be that the Plaintiff would not receive a refund on the funds paid under the 2002 agreement. Mrs. Whittaker refers the Court to the case of **The Chesire Building Society and Dunlop Haywards (DHL) Ltd. et al** [2008] EWHC 51 (Comm) at paragraph 55, " Mr Farr (the surveyor who prepared the report relied on) can justifiably say that he cannot be 'certain' that Mr

McGarry (the party making false representations to the other party to the contract) acted dishonestly; but the law does not require certainty. In my view DH Reports, and the valuations they contained, cannot properly be viewed simply as the product of irrational thinking or of negligence. They contained false and material representations, in relation to which DH were at least reckless as to their truth. Mr. McGarry intended that Nationwide would rely on the representations and, in the event, it did and suffered significant loss and consequence. On the present material, I am satisfied that Nationwide has proved its action in deceit against DH”.

40. The Defendant’s representation was false and was made dishonestly she submits. As evidenced through the Defendant’s actions toward its other customers [See Witness Statement of Ming-Feng Tsai, Witness Statement of Chao-Ying Hsieh filed February 16 2016], the Defendant had no intention of honouring the 2002 Special Incentive at the time that it made this promise to the Plaintiff. [paragraphs 7-12] [See Meador’s Witness Statement at paragraph 33.] The Defendant’s representation to the Plaintiff was false and was made with fraudulent intent.
41. She refers the Court to “**The Kriti Palm**” at page 727, paragraph 259 which states “...Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof is higher. It means only that the inherent probability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance the event occurred...”
42. She also refers the Court to Tab 66 of the Bundle of documents of a letter from the Defendant to Ming-Feng Tsai which provides that, “No guarantee can be given that full payback of the purchase price for the year vacation plan will take place until the Investment matures”. See the Affidavit of Joel Arnett filed January 27 2017, page 8, Special incentive of 2002 , “Purchasers will receive a premium gift certificate that should equal their purchase price...”. See paragraph 21 of Peter Collins Affidavit filed May 22 2015 “The Special Incentive Letter submitted by the Plaintiff provided that the Plaintiff would receive a Gift Certificate which should equal the value of the Upgraded Membership. The Special Incentive Letter did not guarantee the Plaintiff the sum of \$24,999.00”.]
43. It is her submission that the Defendant never intended to provide the return of the Plaintiffs full purchase price as set out in the Defendants correspondence in 2012. Further

she submits that the Defendant intended for the Plaintiff to rely on the Defendant's statement; the Defendant intended for its statement to induce the Plaintiff to enter into the 2002 Agreement, and the Plaintiff did, in fact, enter into the Agreement, relying on the Defendant's fraudulent statement.

Defendant's Reply

44. Mr. Malone in reply to the Plaintiff submissions makes the following observations and/or submissions below:-

- a. the Plaintiff has argued completely beyond the scope of the issue before the court which is: Whether the Plaintiff's cause of action accrued within the preceding six (6) years of commencing the action herein or is statutorily barred by virtue of Section 5 of the Limitation Act, 1996, Statute Laws of the Commonwealth of The Bahamas." On this application the court is only concerned with identifying whether the cause of action pleaded is statute-barred or not; the relevant facts are not in dispute as they were determined by the ruling of this Court dated 15th November, 2016;
- b. the Plaintiff seeks to rely on facts outside the scope of his pleadings and the Defendant takes object to the same;
- c. the Plaintiff asserts that the Defendant concealed the alleged fraud such as to delay the point at which the limitation period began to run however there is no evidence of concealment whatsoever before this court. It is untenable to argue that if a person is owed a certificate, and they do not ask for it for 9 years, that this somehow constitutes concealment. The law on this is not in dispute, due diligence is required. The Plaintiff appears to have conflated the failure to grant the voucher with a concealment of that fact, this is misconceived. The letter of 25 September 2003 shows that the Plaintiff was given notice that the Defendant had received full payment and acknowledged it. An ordinary prudent person would have followed up on the matter at this time or certainly within the next year or so. The Plaintiff had an ongoing commercial relationship with the Defendant and received two further Special Incentive Letters in 2003 and 2007 which could reasonably have been expected to jog his memory as to the Gift Certificate. He could with have reasonable diligence discovered the purported fraud before 2010.

- d. the Plaintiff has also pleaded an alternate claim in deceit. Although there is no evidence suggesting a prima facie case of fraud and the pleading is embarrassingly vague, his case appears to be that at the time of the 2002 Agreement the Defendant never intended to honour the obligation and is therefore liable for fraudulent misrepresentation;
- e. once a claim is deemed to be statute-barred the action must be dismissed. The court has no jurisdiction to extend the statutory limitation period.

The Law

45. Section 5 of the Limitation Act, 1996 provides as follows:

“(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;”

46. Section 41(1) of the Limitation Act states:

“Subject to subsection (4), where in the case of an action for which a period of limitation is prescribed by this Act either —

**(a) the action is based upon the fraud of the defendant;
or**

(b) the action is for relief from the consequences of a mistake,

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it.”

Analysis

Statute Barred-Section 5 of the Limitation Act

47. My Ruling on November 15, 2016 was not appealed by any of the parties and therefore the facts set out in paragraph 3 above represent the starting point of my determination.

48. An action founded in simple contract or tort shall not be brought or commenced after the expiry of six years from the date on which the cause of action accrued. The basic rule in contract is that the right of action accrues as soon as there is a breach of contract, notwithstanding that at that time no damage (beyond the purely nominal) has been suffered by the plaintiff. See Limitation Periods, Second Edition by Andrew McGree, page 165.
49. Counsel for the Defendant has submitted (but not conceded) that the alleged breach occurred upon the expiry of the 90 day period upon which the Defendant ought to have delivered the bonus gift certificate which would have been on or around December 24, 2003. The delivery of the bonus gift certificate was contingent on the Plaintiff's full payment of the purchase price of the vacation package. It was accepted that the Defendant's loan ledger records reflected that the Plaintiff paid off the membership balance on May 14, 2003 and an acknowledgement letter of the same was sent to the Plaintiff by the Defendant on September 25, 2003. He also submitted that in determining whether the breach occurred the general principle is that if a party agrees to perform an obligation and fails to do so in the way agreed in the contract this will be a breach and that in this action the Defendant's obligation was to provide the bonus gift certificate 90 days after full receipt of the payment for the purchase of the vacation package.
50. Counsel for the Plaintiff however has submitted that the claim is not statute barred as the Defendant breached its contractual obligation to the Plaintiff in 2012 when it declared it did not intend to perform under the terms of the 2002 Agreement. This is the sum total of the Plaintiff's submissions as to when the Plaintiff's cause of action accrued and limitation.
51. Considering the above submissions and the undisputed facts in this action, I find that the cause of action accrued when the Defendant failed to deliver the bonus certificate 90 days after having received the Plaintiff's full payment of the purchase of the vacation package. In other words, while the Plaintiff has submitted that the Defendant breached its contractual obligation in 2012 by not honoring the special incentive in the 2002 Agreement (i.e. perform under the terms of the 2002 Agreement), the breach of the contract by the Defendant was in actually failing to provide the bonus gift certificate 90 days after receipt of the full payment of the vacation package price from the Plaintiff. The language of that provision is clear. The purchaser, i.e. the Plaintiff was to receive the documents (premium

bonus certificate and certificate guaranteeing that the funds had been deposited) 90 days after the Defendant received the full purchase price of the vacation package. The evidence/undisputed facts are that the Plaintiff upheld his end of the contract by paying the full purchase price of the vacation package however the Defendant's failure to deliver the said documents 90 days following receipt of the full payment is what constituted the breach. Subsequently, the Plaintiff's inability to utilize the bonus certificate/guarantee certificate as a result of the Defendant's refusal/unwillingness to honour the same some 10 years later relates to the damage now suffered by the Plaintiff.

52. Therefore, time would have begun to run from August 14, 2003 and expired in or around August 13, 2009. Further, if the Court accepts that the letter sent to the Plaintiff on September 25, 2003 indicating to the Plaintiff that the Defendant was in receipt of the full payment of the purchase of the vacation package and the Defendant was to provide the bonus certificate 90 days thereafter then time would have begun to run from on or about December 24, 2003 and expired in or around December 23, 2009.

53. In summary, the Plaintiff's filing of the action in or around July 31, 2014 places the Plaintiff outside of the six years in which he was able to bring an action as a result of the breach of the 2002 agreement and as such I find the action is statute barred.

Allegation of Fraud/Deceit

54. Section 41(1) of the Limitation Act makes provision for the postponement of the period of limitation to run until the plaintiff discovered the fraud or mistake or with reasonable diligence could have discovered the same.

55. The Plaintiff in his Statement of Claim has alleged that he relied on the representations made by the Defendant in the 2002 Special Incentive letter (i.e. receipt of bonus gift certificate/certificate guaranteeing that funds deposited in his name) and that the Defendant's letter of September 27, 2012 advising that it would not provide the Plaintiff with the same knowing that the representations made in the 2002 Special Incentive letter were false amounts to fraud/deceit. He further alleges that he relied on the promises made in the said Special Incentive Letter and the Defendant knew that those representations were false.

56. Section 41(2) of the Limitation Act also makes provision for the postponement of the period of limitation to run in an action where any fact relevant to the plaintiff's right of action was deliberately concealed from the plaintiff by the defendant, until the plaintiff

discovered the defendant's concealment of the fact in question or could with reasonable diligence have discovered it.

57. Mrs. Whittaker has submitted that the Defendant deliberately concealed the fact that it never intended to issue the gift certificate incentive under the 2002 Agreement and it was not until 2012 when the Defendant advised the Plaintiff that the special incentive was issued in error. She further submitted that the Defendant's deliberate concealment arises from the facts that the Defendant was aware that item 3 (bonus gift certificate/guarantee certificate) was issued in error and failed to advise the Plaintiff until 2012 but still complied with the other parts in the Special Incentive letter; that the terms of the special incentive did not guarantee the return of the amount paid under the Agreement; and that any new agreement entered into by the parties canceled out any previous special incentives under a previous agreement. Additionally, she submitted that the Defendant intended for its statement to induce the Plaintiff to enter into the 2002 Agreement to which the Plaintiff did so relying on the Defendant's fraudulent statement.
58. As I understand the Plaintiff's submissions the Defendant deliberately concealed a fact relevant to the Plaintiff's right of action however, the Plaintiff's Statement of Claim does not speak to any deliberate concealment by the Defendant and alleges that the representations made by the Defendant in the 2002 Special Incentive Letter were false, specifically that the Defendant would not honour its promise to provide the Plaintiff with the gift certificate and guarantee certificate. Therefore, based on the pleadings, I find that the Plaintiff cannot rely on deliberate concealment pursuant to Section 41(2) of the Limitation Act to postpone the time for commencing this action.
59. However, if I am incorrect in this finding, similar to Section 41(1) of the Limitation Act, Section 41(2) also provides that the period of limitation will not begin to run until the plaintiff has discovered the concealment or could with reasonable diligence have discovered it. The findings of this Court in its November 16, 2016 Ruling remain as the undisputed/agreed facts between the parties. As stated in my Ruling the Plaintiff had entered into agreements with the Defendant from 2000 until 2007 whereby he received special incentives with each agreement. It is evident from this finding and the undisputed history of the Plaintiff and Defendant's relationship that there was an ongoing commercial relationship between the parties as submitted by Mr. Malone in his submissions above in paragraph 24.

60. The ongoing commercial relationship from 2000 until 2012 consisted of the Plaintiff making the full payment for the vacation package under the 2002 agreement; that he paid off the balance of his membership on May 14, 2003; that a letter was sent to the Plaintiff on September 25, 2003 by the Defendant acknowledging that his membership had been paid in full and his account was credited for the full amount; that the Plaintiff states that the payment was made in full on September 25, 2003. It was not until August 27, 2012 that the Plaintiff sought to inquire or query or request the Defendant deliver the said certificates. The time between the Defendant's acknowledgment of the payment of the full purchase price and the Plaintiff's correspondence is some ten years. It is not disputed that the Plaintiff had entered subsequent agreements following the 2002 agreement and as such should have or could have with reasonable diligence (as done by correspondence in August, 2012) inquire about the said certificates. Perhaps regrettably for the Plaintiff the terms of the 2002 agreement only came to the fore at the time of the sale but that does not negate the burden placed on the Plaintiff to show that he could not with reasonable diligence have discovered the said concealment. Therefore, I find that the Plaintiff cannot rely on deliberate concealment pursuant to Section 41(2) of the Limitation Act to postpone the time for commencing this action.
61. Having considered the issue of fraud as pleaded by the Plaintiff I make the following observations from the principles gleaned from the leading authorities on fraud:
- a. To sustain an action of deceit, there must be proof of fraud. Fraud is proven when it is shown that a false representation has been made knowingly, without belief in its truth or recklessly, careless whether it be true or false. **See Derry v Peek (1889) 14 App. Cas. 337;**
 - b. A case for fraud must be clearly expressed and general allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice. **See Seaton v Seddon [2012] 1 WLR 3636 and Wallingford v. Mutual Society 5 App. Cas 697;**
 - c. The burden of proof is on the plaintiff and the standard of proof, whilst to the civil standard of the balance of probabilities, in a case such as this, where there are grave allegations, the law requires cogent evidence of serious wrongdoing

before the standard of proof is satisfied. **See H. Minors (1996) AC 563 and Re Dellow's Will Trusts [1954] 1 WLR 451;**

d. In this regard, the approach of the court in determining questions of fraud and dishonesty was set out in the English case of **Niru Battery Manufacturing C. v Milestone Trading Ltd [2003] EWCA Civ 1446 at paras 173 -175.**

62. As previously stated, under the Limitation Act, an action in contract must be brought within six years after the cause of action arose and an allegation of fraud only postpones the time for the commencement of time beginning to run for the purpose of a plaintiff's knowledge and the limitation period. (Sections 5 and 41 of the Limitation Act). Further, this provision only applies if the plaintiff's action is based on the fraud of the defendant or if a fact relevant to his right of action has been deliberately concealed from him by the defendant or if his action is for relief from the consequences of a mistake. **See Chitty on Contracts, Volume 1, General Principles, para 29-082**

63. The Plaintiff pleaded case is one which the Plaintiff alleges breach of contract and fraud/deceit. The Plaintiff however, in his Statement of Claim has not pleaded that the applicable limitation period should be extended or postponed as a result of the alleged fraud and the subsequent discovery made by the Plaintiff.

64. It is accepted as submitted by Counsel for the Defendant that the test to be applied by the Court in making such a determination is whether the plaintiff could with reasonable diligence have discovered the alleged fraud it asserts and the burden of proof is on the plaintiff to prove that it exercised reasonable diligence and that it could not have discovered the fraud alleged without exceptional measures. See **Paragon Finance v DB Thakerar & Co.** [1999] 1 All ER 400, 418 b and c.

65. As Millett, LJ in **Paragon Finance plc v D B Thakerar & Co (a firm); Paragon Finance plc and another v Thimbleby & Co (a firm) (supra)** opined: "The question is not whether the plaintiffs should have discovered the fraud sooner; but whether they could with reasonable diligence have done so. The burden of proof is on them. They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take."

66. Mr. Malone also submitted at paragraph 27 above that the Court in **Peco Arts Inc v Hazlitt Gallery Ltd (supra)** determined that the test for reasonable diligence in fraud

claims is what an ordinary prudent person would do having regard to all the circumstances.

67. The Plaintiff's case as I understand it is that the Plaintiff had entered into several agreements over the years with the Defendant beginning in 2000. It is alleged that each agreement (2000 Agreement, 2002 Agreement, 2003 Agreement and 2007 Agreement) included a "special incentive letter." The 2000 Agreement contained a special incentive to which the Plaintiff does not dispute receiving or acknowledging; the 2003 Agreement as alleged by the Plaintiff consisted of the same terms as the 2000 Special Incentive with the exception of only offering one bonus week, terms to which the Plaintiff does not dispute receiving or acknowledging and the 2007 Agreement as alleged by the Plaintiff consisting of a special incentive of receipt of 1 RCI bonus week every year upon request for 10 years, terms which the Plaintiff does not dispute receiving or acknowledging. In my Ruling at paragraphs 4-10 I found that the Plaintiff had entered into agreements with the Defendant from 2000 until 2007 whereby he received special incentives with each agreement. It is evident from this finding and the undisputed history of the Plaintiff and Defendant's relationship that there was an ongoing commercial relationship between the parties as submitted by Mr. Malone.
68. The ongoing commercial relationship from 2000 until 2012 consisted of the Plaintiff making the full payment for the vacation package under the 2002 agreement; that he paid off the balance of his membership on May 14, 2003; that a letter was sent to the Plaintiff on September 25, 2003 by the Defendant acknowledging that his membership had been paid in full and his account was credited for the full amount; that the Plaintiff states that the payment was made in full on September 25, 2003. It was not until August 27, 2012 that the Plaintiff sought to inquire or query or request the Defendant deliver the said certificates. The time between the Defendant's acknowledgment of the payment of the full purchase price and the Plaintiff's correspondence is some nine years. It is not disputed that the Plaintiff had entered subsequent agreements following the 2002 Agreement and as such should have or could have with reasonable diligence (as done by correspondence in August, 2012) inquired about the said certificates. Perhaps regrettably for the Plaintiff the terms of the 2002 agreement only came to the fore at the time of the sale but that does not negate the burden placed on the Plaintiff to show that he could not with reasonable diligence have discovered the alleged fraud.

69. Further, as I understand the Plaintiff's submissions the fraudulent act the Plaintiff alleges is that he was induced by the sole provision (i.e. receiving bonus certificate and guarantee certificate) to enter the 2002 Agreement. However, what is before the Court is that from receiving the acknowledgment letter from the Defendant and the Plaintiff's ongoing commercial relationship with the Defendant from 2000 and that the Plaintiff had entered into two contracts in 2003 and 2007 subsequent to the 2002 agreement, the Plaintiff had ample opportunity to have discovered with reasonable diligence that the Defendant did not deliver the said certificates. Therefore, I find that the Plaintiff has not satisfied this Court that between 2003 and August 2012 he could not have discovered the Defendant's failure to deliver the said certificates. Additionally, having regard to all of the circumstances surrounding the Plaintiff's ongoing commercial relationship with the Defendant, the failure of the Plaintiff to only make inquiries some 9 years after the Defendant's acknowledgment of the Plaintiff's full payment of the purchase price, cannot to my mind be what an ordinary prudent person would have done in the circumstances.
70. In conclusion, I find that the Plaintiff has not established that he could not have discovered the alleged fraud without exceptional measures which he could not have reasonably been expected to take and that his failure to inquire between the Defendant's acknowledgement in 2003 until 2012 cannot be what an ordinary prudent person would do in the circumstances.
71. Therefore, I accept the submissions of Counsel for the Defendant that the Plaintiff in exercising reasonable diligence could have discovered the alleged fraud before 2010.
72. Additionally, I find that Counsel for the Plaintiff in her submissions went beyond the scope of the issue before the Court on this application as submitted by Mr. Malone. Therefore, the Court in its consideration of the submissions laid over by Counsel must disregard the Plaintiff's submissions that do not pertain to the preliminary issue to be determined on this application.
73. In the circumstances, I find that the Plaintiff cannot rely on the allegation of fraud to circumvent the limitation period and subsequently finds that the Plaintiff's case is statute barred and is hereby dismissed.
74. On one final matter that of the delay in delivering this Ruling the Defendant submissions were filed on or about April 19, 2017 and the Court reserved the delivery of its Judgment to a date to be fixed regrettably, the extensive renovation to the Garnet Levarity Justice

Centre during most of 2019 and the disruption caused thereby, the disruption caused by Hurricane Dorian and the Covid 19 pandemic and the extended delay in the delivery of transcripts herein are events which greatly interfered with the Court's writing schedule. I apologize profusely for the delay in this matter.

75. Costs usually follow the event and I see no reason to depart from this principle. Costs are awarded to the Defendant to be paid by the Plaintiff to be taxed if not agreed.
76. Leave to the Plaintiff to appeal is hereby granted.

Dated this 22nd day of March A. D. 2022



Petra M. Hanna-Adderley
Petra M. Hanna-Adderley
Justice