

COMMONWEALTH OF THE BAHAMAS 2018/CLE/gen/0953
IN THE SUPREME COURT
Common Law and Equity Division

B E T W E E N

YURI STAROSTENKO

First Plaintiff

AND

IRINA STAROSTENKO

Second Plaintiff

AND

CREDIT SUISSE AG, NASSAU BRANCH

Defendant

Before: Madam Justice Ruth Bowe-Darville

Appearances: Plaintiffs: Pro Se

Defendant: Christopher Jenkins with McFoughlin Bowleg and
Jody Lashley

Hearing Dates: 27th July 2020; 11th September 2020; 14th October 2020;
19th November 2020; and 5th February 2021

RULING

Pleadings/ RSC Order 18/19 – Striking out/ frivolous and vexatious and an abuse of the process of the Court/Document under seal

The Writ of Summons herein was filed on 21 August 2018.

1. The Defendant in this action filed a Summons on 13 September 2018 seeking inter alia an Order that:

“The Plaintiff’s Writ of Summons filed in this action herein on the 21st day of August A.D. 2018, be struck out pursuant to Order 18 Rule (19)(1) (b) and on (d) of the Rules of the Supreme Court on the grounds that it is scandalous, frivolous or vexatious and/or it is otherwise an abuse of the process of the

court on the basis that the causes of action asserted therein are statute barred pursuant to Section 5 (1) of the Limitations Act, 1995 Chapter 83 (Strike Out Application).

2. It should be noted that the parties were earlier before Thompson J. (Retired) on another application seeking to set aside the Plaintiff's Judgment in Default of Defence. At the hearing on 17 December 2018 the Honourable Justice heard in full and made a determination in respect of the setting aside application. The strike out application was only part heard. Thompson, J. ordered further that the Defendant file and serve on the Plaintiffs a Defence on or before 18 January 2019; and that the Plaintiffs serve any Reply to the Defence before the expiration of fourteen days after service of the Defence.

3. The Defendant filed its Defence on 18 January 2019 and served the Plaintiffs. Thereafter the Plaintiffs filed their Reply to the Defence on 8 February 2019. The Plaintiffs also on the same day filed a Summons seeking to strike out various paragraphs of the Defence. This application was some one hundred pages in length and it was estimated that the hearing of the same would be for a full week at most.

4. Considering the best use of the Court's time and the possible consequences of the Defendant's application it was proposed that the Defendant's strike out application should be heard first. The Plaintiffs also sought an Order that the Defendant's two applications (setting aside and strike out) be removed.

5. On 1st December 2020 post the hearing of the Defendants' Summons the Plaintiffs filed yet another Summons for the hearing of a preliminary issue of the limitation period as it related to the cause of action herein. Also of note is the fact that the Plaintiffs continued to file interlocutory summonses with supporting Affidavits during the currency of the hearing of other applications. In this case the question of the applicability of the limitation period was raised in the strike out application. The Court was uncertain as the Plaintiffs' intent whether it was to progress the action or to distract. The Plaintiffs continued to file Affidavits throughout the currency of the present application and without the Court's leave. It seemed that each time the Plaintiffs felt challenged on a point an Affidavit was filed to refute or present their position on issues in dispute. For reference the Plaintiffs filed the following:

- (i) Affidavit Three - Concealed Fraud, Proprietary Remedy and Intentional Creation of Financial Disability on the Plaintiffs and the Claim is not to be held to be Timed Barred, filed 4 December 2019 and sworn by the Second Plaintiff.

- (ii) Fourth Affidavit - Strike the Defence Pleaded the Limitation Point filed on 4 December 2020 and sworn by Yuri Starostenko.
- (iii) Affidavit 8 – Arguments and Facts on Issue of Limitation filed 8th October, and sworn by Yuri Starostenko.

6. The Plaintiffs presented:

- (1) Skeleton Arguments for the Strike Out application by the Defendant – Abuse of Process;
- (2) Skeleton Arguments – Strike Out the Defence on Limitation Point;
- (3) Skeleton Arguments – Strike Out the Defence on Limitation Point II.

7. When the matter came on for hearing on 27 July 2020 it was established that the instant application would be heard de novo. The court had for reference:

- (i) The Defendant’s Submissions;
- (ii) The Plaintiffs’ Skeletons, Submissions, and Affidavits.

8. The Writ of Summons (21 August 2018) is forty-one pages in length. By its Introduction the Statement of Claim relates to:

- “(a) banking and exchange transactions dealing in securities (trading), market prices and clearing facilities, regulatory instruments, clearing and settlement of securities, reporting service;
- (b) requires particular expertise in the financial markets; and
- (c) raises issues of general importance to the financial markets.

“The Plaintiffs expect to recover more than US\$5 million in respect of claims for recoverable loss, damages, actual and further profits, wasted expenditure, unjust enrichment and other losses capable of assessment in money terms.”

9. Although misplaced in the pleading the Plaintiffs describe themselves as “persons who have deposited money with the Defendant who performed financial services for the Plaintiffs, such as giving investment advice, purchasing and selling securities on stock exchanges for them, holding documents in safe deposits, etc.

10. As to the Defendant, the Statement of Claim described it as:

1. "... the Defendant, the firm, and individuals who played key roles in the conduct of financial services business and who represented the Defendant's directing mind and will, acting in a common design to make representations to and conspiring against the Plaintiffs, even though the agreement of the Plaintiffs was with the Defendant."
11. This is a specially endorsed Writ of Summons with the following claims:
- Claim 1 - Damages for Breach of Duty to be careful and of conduct of Business Rules. This claim was derived from a written agreement between the parties dated 21 May 2008. Full details of the agreement; its breach; consequent misrepresentation; negligence; and breaches of conduct regulations and Business Rules.
2. Negligence in excessive Trading and Breaches of Excessive Trading; loss in Excessive Trading. It is notable that the interaction between the parties transpired between March to May 2009.
 3. Negligence in Advisory Relationship.
 4. Negligent Advice 1; Negligence in giving Advice 1; loss due to Advice (January – February 2009).
 5. Negligent Advice 2; Negligence in giving Advice 2; and losses due to negligent advice (24 April 2009).
 6. Investment in FAZ.
 7. Further Negligent Advice (15 April 2009/28 April 2009/4 May 2009).
 8. Breaches of Rules of Best Execution and Losses due to Breach.
12. The resultant claim is at Paragraph 178 of the Statement of Claim:
- (1) An Order that the Defendant do pay the Plaintiffs sums which are found due and owing to the Plaintiffs as aforesaid;
 - (2) An Order that the Defendant do pay the Plaintiffs unliquidated damages incurred or sustained by the Plaintiffs, together with interest on the damages awarded pursuant to the Civil Procedure (Award of Interest) Act 1992 at such rate and for such period as the Court shall think fit;
 - (3) Further or other relief; and
 - (4) Costs.
13. Claim 2 - For damages for Breach of Terms and Conditions of Agreement and as to Fitness for purpose of that Agreement.

14. The resultant claim at Paragraph 234 of the Statement of Claim:

- (1) An order that the Defendant do pay the Plaintiffs US\$571,959 or such sums which are found due and owing to the Plaintiffs, together with the compound interest or that sum of sums awarded which accrued on from June 2009 to July 2018 and continuing until judgment or sooner payment as aforesaid.
- (2) An Order that the Defendant do pay the Plaintiffs unliquidated damages incurred or sustained by the Plaintiffs due to deprivation of the said monies together with interest on the damages awarded pursuant to the Civil Procedure (Award of Interest) Act 1992 at such rate and for such period as the Court shall think fit;
- (3) Further or other relief:
- (4) Costs.

15. Claim 3 - Damages for Breach of Trust and Fiduciary Duty (made in the alternative).

The resultant claim:

- (1) An order that the Defendant do pay the Plaintiffs US\$571,959 or such sums which are found due and owing to the Plaintiffs, together with the compound interest or that sum of sums awarded which accrued on from June 2009 to July 2018 and continuing until judgment or sooner payment as aforesaid.
- (2) An Order that the Defendant do pay the Plaintiffs unliquidated damages incurred or sustained by the Plaintiffs due to deprivation of the said monies together with interest on the damages awarded pursuant to the Civil Procedure (Award of Interest) Act 1992 at such rate and for such period as the Court shall think fit;
- (3) Further or other relief:
- (4) Costs.

16. Claim 4 - Reversal of Unjust Enrichment (in the alternative).

(I must be noted that the claimed period was February – June 2009)

The resultant claim:

- (1) An order that the Defendant do pay the Plaintiffs US\$571,959 or such sums which are found due and owing to the Plaintiffs, together

with the compound interest or that sum of sums awarded which accrued on from June 2009 to July 2018 and continuing until judgment or sooner payment as aforesaid.

- (2) An Order that the Defendant do pay the Plaintiffs unliquidated damages incurred or sustained by the Plaintiffs due to deprivation of the said monies together with interest on the damages awarded pursuant to the Civil Procedure (Award of Interest) Act 1992 at such rate and for such period as the Court shall think fit;
- (3) Further or other relief:
- (4) Costs.

17. The Statement of Claim was repetitive and for the most part contained the evidence by which the fact should be proved and the law. While it is the Plaintiffs' claim, there is only a shadow of conformity to the prescribed rules of pleading.

18. I agree with the Defendant's counsel when he says that in review of the Statement of Claim it is difficult to discern what the claim/s are. The four (4) claims as set out are supported by the Skeleton Arguments presented. In summarizing the claims counsel rightly assessed each as follows: -

- (a) Claim 1 is a tortious duty claim which relates to February – June 2009.
- (b) Claim 2 (Paragraph 179) is a claim for breach of contract and incorporates the same facts as in Claim 1.
- (c) Claim 3 was based on the same facts as in the contract and tort claims.
- (d) Claim for Breach of Trust (Paragraph 235).
- (e) Reversal of Unjust Enrichment/Restitution (Paragraph 235).

The two latter claims mirror each other.

19. The Defendant maintains its present action pursuant to Order 18 Rule 19 (b) and (d) on the ground that the action is statute barred and is contrary to the Limitation Act. It was important for the Defendant to state that its ground for striking out was not because the Writ of Summons does not disclose a cause of action but rather that the cause of action is statute barred. As such Order 18 Rule 19 (b) and (d) applies in this action.

20. The Defendant referred directly to the relevant sections of the Limitation Act, 1995 namely Sections 2, 5, 13 (with its noted exception), 33, 36 and 41.

21. Counsel for the Defendant submitted that when considering the Statement of Claim as a whole the Plaintiffs' only claims were those for breach of contract or tort and under the Limitation Act 1992 the specified time for bringing a claim in either is six (6) years. He went on further to point out that on reading the allegations against the Defendant the last interaction between the parties was in 2009.

22. The Plaintiffs repeatedly claimed that the Defendant was negligent in various aspects of their financial arrangement from over trading to following their instructions, giving advice and exerting undue pressure and influence. In continuing his submission, the Defendant's counsel acknowledged that there was a common ground in that the claim is in negligence and if so, would result in a limitation bar. Such tortious conduct, as asserted, by the Defendant would be subject to the Limitation Act. However, the Plaintiffs insist that their cause of action did not arise until they received the letter of 3rd September 2015 as exchanged between the parties' respective counsel. Even at this point (2015) the Plaintiffs, knowing that their account had gone awry since mid-2009, were subject to the Limitation Act. There was nothing in the letter of response from counsel for the Defendant that to even suggest an acknowledgement of any debt owed the Plaintiffs by the Defendant.

23. Counsel for the Defendant in submitting on Claim 2 firstly, described that claim as "submissions" and more or less dismissed the claim. It was as he put it and expansion of Claim 1 and stipulated that it was only a claim for unliquidated damages for breach of the Agreement. His strong point was that if there was a breach of contract, such cause of action accrued since 2009.

24. The Defendant strongly denied that there was a trust relationship and that the Defendant was not holding as a constructive trustee. He submitted that the Plaintiffs held a brokerage account with the Defendant. The bank was obliged to hold clients' monies separately as opposed to hold monies on trust. Further, he stated that the relationship between the parties was the agreement signed on 21 May 2008. It has an agreement and represents a simple contract. It is not an expressed trust and there was no need to imply any other terms. As such and by virtue of that agreement there was no trust. There was he submitted, no need to apply the Limitation Act in reference to a trust.

25. The Counsel for the Defendant went on to submit that Claim 3 was merely a restatement of Claim 2, even if presented as an alternative claim. It is again perverse in its pleading and offends the Limitation Act. Proceeding with the claims, malfeasance (a wrong doing) was likewise subject to the limitation period of six (6) years. Counsel was baffled at the claim for "knowing assistance" as there was no clear indication as to how it arose.

26. Counsel directed the Court to the Claim for breach of fiduciary duty which he maintained arose from the same facts as the claims for tort and contract. Even if applied by way of analogy it was likewise impugned by the specific provisions of the Limitation Act.

27. In analyzing Claim 4 Defendant's counsel summarized the same as being a claim for breach of contract (breach of fiduciary duty). Although the claim is framed in the alternative it is merely a repeat of the same facts. Even the claim for unjust enrichment seemed senseless. The Court's attention was drawn to the case of **Diplock Estate v Wintle [1948] Ch 465 (CA)**.

28. It is the Defendant's submission that the application will turn on determining the date of the breach, if any, as asserted in the Plaintiff's several claims. The Plaintiffs, by the Defendant's understanding, claim that their position and cause of action falls under the exception to the Limitation Act. In opposing the Plaintiffs' allegation that the delay of eleven weeks (February 2009 – 20th April 2009) in responding to them was "concealment". Regrettably, the Defendant said that there was no allegation/s of concealment contained in the Statement of Claim. It is the Defendant's case that the alleged damages were fees rightly taken from the Plaintiffs' account and such charges were known to the Plaintiffs since 2009. As a result, the Writ of Summons should be struck on the ground that it is frivolous, vexatious and an abuse of the process of the Court.

29. The Second Plaintiff responded on behalf of the Plaintiffs. She referred the Court to the several affidavits filed opposing the application and the submissions. Strangely, she began by stating that the Defendant's strike out application was not supported by any evidence. She continued saying the relationship between the parties was one of a Trust. The Plaintiffs claimed that their money was misappropriated by fraud and that their claim was in negligence because the Defendant made an extra-ordinary mistake.

30. She confirmed that the Defendant was executing their trades and doing so on their advice. She maintained strongly that the agreement/contract was regulated by a relationship of Trust. In submitting she stated the last time a trade was made on their behalf was in 2009. They received a termination letter on 29 July 2013. Between 2009 – 2013 the Plaintiffs were waiting for a response to their enquiries. In claiming three sets of damages from the Defendant the Plaintiffs wished to rely on Section 14 Limitation Act (*Actions in respect of Latent Damage not Involving Personal Injuries*) as it relates their claim for damages for negligence.

32. The Plaintiff made it her sure suit to emphasize that the claims cannot be statute barred by virtue of Section 5 of the Limitation Act because the 2008 agreement established a trust relationship between the Defendant as brokers

and the Plaintiffs as clients. As such there was an expressed trust relationship. She was also sure to point out that Section 33 of the Limitation Act had no fixed time for claims of fraud.

33. In submitting further, the First Plaintiff insisted that the 2008 Agreement was not a simple contract but a statutory relationship within the jurisdiction of the Securities Industries Act, 199 between the parties. The Plaintiffs lost profits; were charged exorbitant fees; suffered untailed oppression and undue hardship. Attention was drawn to Exhibit 5 of the Affidavit No. 3 of the Plaintiffs' account mandate. Her clear assertion was that this agreement/contract was properly executed and that it is a contract under seal and that it possessed all the necessary elements and that such a deed has a limitation period of twelve years as per Section 5 (2) of the Limitation Act. As such the Defendants have the benefit of having commenced their action in 2015. Section 5 (2) states:

“An action upon an instrument under seal shall not be brought after the expiry of twelve years from the date on which the cause of action accrued: Provided that this subsection shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.”

34. The Second Plaintiff recounted their initial interaction and exchanges with the Defendant. She explained that there were two initial periods of trading February – March 2009 and April to June 2009. It was her submission that as early as March 2009 there was difficulty with the account statements. Post their complaint in March 2009 they never received any statements.

35. She then referred to the account opening document. She insisted that it must have been executed in order to activate the loan. Yet the pleading (i.e., Statement of Claim) did not specify that the document was a Deed under seal.

36. The Court has been called upon to determine the following:

(1) Was the agreement of 1 May 2008 a simple contract or a document under seal?

(2) What was the effective date of the alleged breach or breaches?

37. The Defendant in its submissions say that the Writ of Summons should be struck out as being frivolous and vexatious and an abuse of the process of the Court and reasoned that the Plaintiffs' cause of action offends the limitation period as per the Limitation Act. The court has two jurisdictions to strike out pleadings for breaches of the Rules namely pursuant to Order 18/19 or under its inherent jurisdiction. The Court can either strike out or give leave to amend. It is important to state frankly that this is not a pleading for an amendment.

38. Courts are generally reluctant to strike out an action. The ability/discretion to strike out is used sparingly as the Court does not want to deprive a party of his right to fair trial. The Court is also mindful of the relevant Court procedures and the availability of interlocutory assistance that can be had, namely, requests for disclosure, further and better particulars and witness statements which affect the outcome of a case. The Court is guided by the principles laid down in the case of **W&M Trademarks (Jersey) Ltd v WH Trademarks (Jersey) Ltd. (1986) AC 368** and were later approved in **Three Rivers District Council v Bank of England (No. 3) (2003) AC 1 at pages 96 – 97.**

39. The guiding principle laid down and enunciated therein was that striking out is appropriate only in plain and obvious cases and Lord Templeman in explaining the principle said thus:

“... if an application to strike out involves a prolonged and serious arguments the judge should as a general rule, decline to proceed with the argument unless he not only harbours doubt about the soundness of the pleading but, in addition, is satisfied that striking out will obviate the necessity of a trial or will substantially reduce the burden of preparing for trial or the burden of the trial itself.”

40. The Rules of The Supreme Court at Order 18/19 provides:

19. (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgement to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1)(a).

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.

41. The application under determination does not reference the first ground of no reasonable cause of action. The Court has the power to strike out a claim which is an abuse of the Court's process. The Court must possess the power to prevent misuse of its rules and procedure. Claims issued after the expiration of its relevant limitation period are considered an abuse of the process of the court. It is as the Defendant submitted the application is not that there is no cause of action but that the cause of action is statute barred. **See Ronex Properties Ltd v John Laing Construction Limited (1983) QB 398**. In essence the Defendant in asserting the limitation offence would have a good Defence to the claim (See also **West Island Properties Ltd v Sabre (2012) 3BHS57** and **Dave Beckford v Registrar of Trade Unions (2014) (2BHSJ 48)**).

42. There has been no harm done in hearing this application to strike out and not have the parties entertain the same as the hearing of a preliminary issue. In fact, the Defendant can seek to strike out on the ground of the claim being frivolous, vexatious and an abuse of the process of the Court. (See **Ronex Properties Ltd v John Laing Construction Ltd (1983) Q.B. 398** as per Lord Donaldson M.R.:

“Where it is thought to be clear that there is a defence under the Limitation Act, the defendant can either plead that Defence and seek the trial of a preliminary issue or, in a very clear case, he can seek to strike out the claim upon the ground that it is frivolous, vexatious and an abuse of the process of the court and support his application with evidence. But in no circumstance can he seek to strike out on the ground that no cause of action is disclosed.”

43. A Statement of Claim can be an abuse of the process of the court where it is frivolous, vexatious or ill-founded, made before the Defence is filed and should be made before the Defence is filed. An instance be issuing a claim after the expiry of the limitation period. (See **Girten v Andrew (1998) Bahamas Supreme Court No. 692 of 1997 (unreported)**). The application to strike out should be on the ground that the claim is frivolous and vexatious. This ground is readily available for cases which are obviously unsustainable. See **AG of Duchy of Lancaster v L NW Railway (1892) 3 Ch. 274, 277**.

44. Further in citing abuses a claim can be struck out for being prolix and not complying with the rules/principles of pleadings. (See **Dennis P. Chong v The Jamaica Observer Limited, CL 578 of 1995 and heard in 2007.**)

45. In striking out claims or Defenses or any part thereof the court must be careful to consider the overriding objective and if the abuse can be aired then so order an amendment. **Reckitt Benkinser (UK) Ltd v Home Pairfum Ltd (2004) EWH C 302**. The Court has an unqualified discretion to strike out a claim or

Defence. However, there may be alternatives to striking out and which might prove more appropriate. The Court can award costs on an indemnity basis to be paid immediately; ordering payment into court and awarding interest at a specified rate (**Biguzzi v Rank Leisure PLC (1999) CA 26**).

46. The Limitation Act provides a defence to an action commenced past the expiry of the relevant limitation period for the stated cause of action. Firstly, Section 5 of the Act prescribes a period of six (6) years for contract and tort 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.

(2) An action upon an instrument under seal shall not be brought after the expiry of twelve years from the date on which the cause of action accrued: Provided that this subsection shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.

(3) An action shall not be brought upon any judgment after the expiry of six years from the date on which the judgment became enforceable, and no arrears of interest in respect of any judgment debt shall be recovered after the expiry of six years from the date on which the interest became due.

47. It goes further to state at 5(2) that actions upon an instrument under seal maintain a twelve (12) year limitation period.

48. Secondly, Section 33 as it relates to trust property

“33. (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action —

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or Limitation of actions in respect of trust property.

(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to the trustee’s use.

(2) Where a trustee who is also a beneficiary under the trust receives or retains trust property or its proceeds as that

trustee's share on a distribution of trust property under the trust, that trustee's liability in any action brought by virtue of subsection (1)(b) to recover that property or its proceeds after the expiry of the period of limitation prescribed by this Act for bringing an action to recover trust property shall be limited to the excess over that trustee's proper share.

(3) Subject to subsection (1), an action by a beneficiary to recover trust property or in respect of any breach of trust; not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiry of six years from the date on which the right of action accrued; and for this purpose the right of action of a beneficiary entitled to a future interest in trust property shall not be deemed to accrue until the interest falls into possession. (4) No beneficiary as against whom there would be a good defence under this Act shall derive any greater or other benefit from a judgment or order obtained by any other beneficiary than such beneficiary could have obtained in an action brought by such beneficiary in which this Act had been pleaded in defence.

49. Thirdly, Section 36 as it relates to extension of the limitation period in case of disability, acknowledgement, part payment, fraud, mistake:

"36. (1) If, on the date when any right of action for which a period of limitation is prescribed by this Act accrues, the person to whom it accrues is under a disability, the action may be brought at any time before the expiry of six years from the date when the person ceased to be under a disability or died, whichever event first occurred, notwithstanding that the period of limitation has expired.

(2) Subsection (1) shall have effect —

(a) in the case of actions to which subsection (1) of section 8 applies, with the substitution of the words "two years" for the words "six years";

(b) in the case of actions to which section 9 or subsection (2) of section 11 applies, with the substitution of the words "three years" for the words "six years";

(c) in the case of actions to which section 12 applies, with the substitution of the words "twelve months" for the words "six years".

(3) This section shall not affect any case where the right of action first accrued to some person not under a disability through whom the person under a disability claims.

(4) When a right of action which has accrued to a person under disability accrues, on the death of that person while still under

a disability, to another person under a disability, no further extension of time shall be allowed under this section by reason of the disability of the second person.

(5) No action to recover land or money charged on land shall by virtue of this section be brought by any person after the expiry of thirty years from the date on which the right of action accrued to that person or some person through whom that person claims

(6) This section shall not apply to any action to recover a penalty or forfeiture, or sum by way thereof, by virtue of any written law, except where the action is brought by an aggrieved party.

This section also speaks to define disability and the limitation period attached to it.

50. Lastly, Section 41 (s.1 and 2)

Fraud, Mistake and Deliberate Concealment 41. (1) 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.

2) Subject to subsection (4), where in the case of any such action any fact relevant to the plaintiff's right of action has been deliberately concealed from the plaintiff by the defendant, the period of limitation shall not begin to run until the plaintiff has discovered the defendant's concealment of the fact in question or could with reasonable diligence have discovered it.

51. To determine the relevant limitation period, it is necessary to determine whether the Agreement of 1st May, 2008 was a “simple contract” or a “contract under seal”. The Defendant asserted that the agreement was a simple contract and the Plaintiffs insisted that their agreement with the Defendant was a contract/document/deed under seal and if such their limitation period would be twelve years. The legal requirements for a deed under seal are:

1. The document must be in writing.

2. The document must make clear that it is intended to be a deed. This must be shown on the face of the document the document must be described as a deed.

3. The Document must be properly executed as a deed i.e. The signatories must sign before a witness who will then attest to the respective signatures.

4. The document must be delivered It is only when it is delivered that the deed actually takes effect. It is only delivered when the parties give an indication of their intention to be bound by it. The deed is usually delivered on the date written at the start of the deed.

52. There is, however, the incidence of The Property (Execution of Deeds and Documents) Act 2020 which removed the requirement for a seal to be affixed in order for a document to constitute a deed. The deed which is executed by a Bahamian incorporated company must in addition to the abovementioned requirements must be signed by a director or person acting with either the expressed or implied authority to act on behalf of its principal and to do so in the presence of a witness. It can also be sealed with the company's seal and witnessed by the person/s authorized to do so by the corporate documents (Articles of Association) to witness and attest the impression or use of the company's seal by the authorized company officer whose signature is also witnessed.

53. The Singapore Court of Appeal affirmed in **Lim Zhipeng v. Seow Suat Thin et al [2020] SGCA 89 ("Lim Zhipeng")** that the sealing remained an essential requirement for the execution of a deed and that "signed seal and delivered" strictly defines a deed under seal and is the only indication that a deed has been properly executed.

54. The Court had for reference the "written" Individual Account Agreement and Mandate called "Mandate for Sole Account - Appointment Banker" executed by the Plaintiffs on 21st May, 2008 as exhibit to the Affidavit 3 filed on 4th December, 2019 as Exhibit 1. Regrettably, on close examination, the document presented does not meet the requirements of a deed under seal. At best it is a contract to provide services. It is a simple contract and does not meet the criteria.

55. When did the cause of action accrue on this simple contract? By the Plaintiffs' own admission, they ceased trading through the Defendant's bank sometime in mid-2009. At Exhibit 2 of the Plaintiffs' Fourth Affidavit - Strike the Defence Pleaded the Limitation Point, the Plaintiffs exhibit the 2013 email narrative with the Defendant bank officer, Steve Mackey. The First Plaintiff chronicled the exchanges and complaints with the Defendant's officers. There were discrepancies in fees charged etc. which began almost from the start of the relationship and, particularly, February - May 2009. The last time statements were run for the Plaintiffs. The exchange concluded with a query of a response from the Defendant's legal department.

56. By letter dated 23rd July, 2015, the Plaintiffs' counsel wrote to the Defendant demanding the return of \$ 571,959.75, a sum charged to them as transaction fees. Of note is the fact that the sum *"has been outstanding since July 2009 and that our client has informed you of the said debt from the same*

date.” The letter went on to say “... our clients have made numerous requests for repayment of the same and to date the debt has not been satisfied.” There is no doubt that the Plaintiffs were dissatisfied with the manner in which the Defendant was charging fees and the Plaintiffs no longer gave instructions for trades post 2009. Without more the breach of contract, whether by the Plaintiffs’ or Defendants, gave rise to a cause of action in or about mid-2009 and not when the Defendant’s counsel responded to the July 2015 letter on 3rd September, 2015.

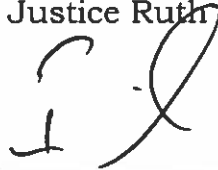
57. The resultant finding is that the cause of action proffered in this claim is statute barred pursuant to s. 5 of the Limitation Act. Winder, J. in **L. Shepherd v. The Attorney General of The Bahamas and others [2008] IBHS J. No.6**, having reviewed notable cases dealing with the striking out of actions where the Limitation Act applied, concluded that the Court is empowered in appropriate cases to strike out actions which offend the Limitation Act. Indeed, th7 instant case is one such action.

58. In conclusion the Writ of Summons filed herein on 21st August, 2018 is struck out in its entirety as the cause of action is statute barred. There be no further consideration of the other legal issues posed, especially as they relate to other provisions of the Limitation Act.

59. The Defendant shall have the cost of his Application to be taxed if not agreed.

Prepared by:

Madam Justice Ruth Bowe-Darville (Ret.)



Delivered by:

Hon. Chief Justice Sir Ian R. Winder

DATED this 8th day of May A.D., 2023