[2015] JMCA App 4

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 87/2014

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA (Ag)

BETWEEN	**BERTRAM CARR**	**APPLICANT**
AND	**VON'S MOTOR & COMPANY LTD**	**RESPONDENT**

Lord Anthony Gifford QC and Mrs Emily Shields instructed by Gifford Thompson and Bright for the applicant

Gavin Goffe and Jermaine Case instructed by Myers Fletcher and Gordon for the respondent

26 January and 30 January 2015

BROOKS JA

[1] On 23 April 2014, Edwards J granted summary judgment to Von's Motor and Company Limited (Von's) in a claim that had been brought against it by Mr Bertram Carr, a bus operator. The claim asserted that Von's had sold Mr Carr a defective motor bus and that the defects had caused him loss and damage. Von's defence included an assertion that the limitation period had already expired when Mr Carr filed his claim. The limitation point was the platform on which it based its application for summary judgment.

[2] Mr Carr was aggrieved by the decision and wished to appeal against it. Edwards J refused his application for permission to appeal. He therefore made a fresh application to this court for permission. We heard the application on 26 January 2015 and granted him permission to appeal. The orders were as follows:

> "1. Permission is granted to the applicant to appeal the 23 April 2014 decision of Carol Edwards J.
>
> 2. Costs of the application to be costs in the appeal."

We promised at that time to reduce our reasons to writing and provide them to the parties. We now fulfil that promise.

The issues before Edwards J

[3] The limitation point arose after Mr Carr filed his claim on 1 March 2013. The limitation period in this jurisdiction in matters of contract is six years. The crux of the issue between the parties, in respect of Von's application, was the date on which the vehicle was delivered to Mr Carr. He asserted in his affidavit contesting that application, that it was "some time [sic] in early March and definitely after the 1st day of March, 2007". His evidence in support of this statement was not definitive. Firstly, he said "I know for sure that the bus was not delivered to me on the 27th day of February, 2007. I recall signing the warranty document on that day but not receiving the Golden Dragon bus". Secondly, the documentary evidence that he adduced in support of his position did not assist him in respect of the March date.

[4] In support of its application, Von's filed an affidavit of Mr Anthony Phillips in which he stated that "Mr Carr took delivery of the bus on the 27th of February 2007." Mr Phillips exhibited a document entitled "Approval to release vehicle" which he said was signed by Mr Carr on the delivery of the vehicle to him. According to Mr Phillips, although the document is dated 29 February 2007 (a non-existent date), it was in fact signed on the same day that Mr Carr also signed a document entitled "Warranty for new motor vehicles", which was dated 27 February 2007. Mr Phillips deposed that the 29 February date "is incorrect and should have been February 27, 2007".

[5] The learned judge, based on a note recording her oral judgment, which has been agreed between the parties, identified the issue of fact and pointed to some of the evidence in respect of that issue. She stated that the burden of proof in respect of the date was on Mr Carr. After referring to a document exhibited by Mr Carr, the learned judge found that it did not support his evidence as to the date on which he received the vehicle. She found that "he has failed on his own case". She held that Mr Carr's case "supports [Von's] case". Based on her analysis, the learned judge decided that the "limitation period [had] passed and [Von's] is entitled to rely on it".

[6] There was a secondary issue raised on the application before Edwards J. Von's asserted that even if the bus was delivered on 1 March 2007, the limitation period had already run when the claim was filed. The latter issue turns on the question of law as to whether the time for calculating the limitation period in sale of good cases, begins to run on the date of the delivery of the item or on the day after delivery. The learned

judge's finding on the first issue made it unnecessary for her to decide the issue of law as to when time would begin to run.

This application

[7] In this application, Lord Gifford, on behalf of Mr Carr, submitted that the issue of the date of the delivery of the bus was a live issue which had not been resolved by the documentary evidence. Despite that, he argued, the learned judge, based on her reasoning, had implicitly decided that question of fact. He submitted that she was therefore in error when she decided that the limitation period had passed. Accordingly, he submitted, permission to appeal ought to be granted.

[8] Lord Gifford argued that the question of law was one that also required determination by the court. He pointed out that each party had relied on authorities that were in conflict as to the date on which time would run. Mr Carr relied on the case of **Marren v Dawson Bentley and Co Ltd** [1961] 2 All ER 270 for the principle that time would begin to run the day after delivery, whilst Von's relied on **Gelmini v Moriggia and Another** [1913] 2 KB 549 for the principle that time begins to run upon delivery. Lord Gifford submitted that it was not a matter that could be resolved in this case without settling the factual issue.

[9] Mr Goffe, for Von's, argued that, the limitation point having been raised on the pleadings, the burden was on Mr Carr, both at the stage of summary judgment and at trial, to show that his claim had been brought within the prescribed limitation period. Learned counsel submitted that Mr Carr had not discharged that burden and that was

what the learned judge had correctly decided. He concluded that Mr Carr's case did not show that the bus was delivered in March and would not improve with time. It necessarily followed, he submitted, that it was bound to fail if allowed to go to trial and there was no need to incur further costs in order to arrive at that position. Mr Goffe submitted that the application for permission to appeal should be refused.

The analysis

[10] This court is guided by rule 1.8(9) of the Court of Appeal Rules 2002 (CAR), which stipulates the general rule concerning applications for permission to appeal. It states, in part, that permission will "only be given if the court or the court below considers that an appeal will have a real chance of success". In considering whether Mr Carr's proposed appeal would have a real chance of success, it is necessary to determine whether it is arguable that the learned judge erred in making a finding that the limitation period had expired.

[11] In determining that issue it must be borne in mind that the defence that a limitation period has expired is a procedural defence. It is normally one that has to be raised as a defence and resolved at a trial. If the defence is pleaded, it is open to the defendant, in a clear case, to apply to have the claim, or the affected part thereof, struck out as being an abuse of the process of the court. This principle was set out in **Ronex Properties Ltd v John Laing Construction Ltd and others (Clarke, Nicholls & Marcel (a firm), third parties)** [1982] 3 All ER 961. Donaldson LJ explained the point at page 965 of the report. He said:

> "Authority apart, I would have thought that it was absurd to contend that a writ or third party notice could be struck out as disclosing no cause of action merely because the defendant may have a defence under the Limitation Acts….it is trite law that the English Limitation Acts bar the remedy and not the right, and furthermore that they do not even have this effect unless and until pleaded. Even when pleaded, they are subject to various exceptions, such as acknowledgment of a debt or concealed fraud which can be raised by way of reply."

[12] He went on to make the point, at page 966, that the defendant who seeks to rely on a limitation defence may apply to strike out the claim as being an abuse of the process of the court:

> "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 on 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 circumstances can he seek to strike out on the ground that no cause of action is disclosed." (Emphasis supplied)

His Lordship relied on the authorities of **Riches v DPP** [1973] 2 All ER 935 and **Dismore v Milton** [1938] 3 All ER 762 in support of his view.

[13] Stephenson LJ expressed similar sentiments at page 968 of the report in **Ronex**. He said:

> "There are many cases in which the expiry of the limitation period makes it a waste of time and money to let a plaintiff go on with his action. But in those cases it may be impossible to say that he has no reasonable cause of action. The right course is therefore for a defendant to apply to strike out his claim as frivolous and vexatious and an abuse of the process of the court, on the ground that it is statute-

> barred. Then the plaintiff and the court know that the statute of limitation will be pleaded, **the defendant can, if necessary, file evidence to that effect, the plaintiff can file evidence of an acknowledgment or concealed fraud or any matter which may show the court that his claim is not vexatious or an abuse of process** and the court will be able to do in, I suspect, most cases what was done in **Riches v DPP** [1973] 2 All ER 935, [1973] 1 WLR 1019, strike out the claim and dismiss the action." (Emphasis supplied)

[14] The extract from the judgment of Stephenson J reveals that the parties should, if necessary, place evidence before the court supporting their respective positions. If, however, the case is not a clear one, the tribunal assessing the application is not permitted to, in the words of Lord Woolf MR in **Swain v Hillman** [2001] 1 All ER 91, conduct a "mini-trial" of that issue.

[15] The principles in **Riches** were approved by Rowe J (as he was then) in **Lloyd v The Jamaica Defence Board and Others** (1978) 16 JLR 252. His ruling in that case was approved by this court in **Lloyd v The Jamaica Defence Board and Others** (1981) 18 JLR 223 which also relied on **Riches**. This court also espoused the principle in **Riches** in **The Jamaica Flour Mills Limited v The Administrator General for Jamaica** (1989) 26 JLR 154. In **Flour Mills**, Rowe P, stated that the striking out of a claim on the basis of the limitation point should only be made in clear cases. He said at page 156 I:

> "We think that applying the principle that the point of law should be crystal clear and should be on the face of it unanswerable before the Writ and Statement of Claim ought to be struck out. The appellant [who sought to rely on the limitation point] has not met the standard of proof required

> because the matter is left in a state where it is unclear to the Court what is the applicable period of limitation where the claim is for a breach of statutory duty."

[16] In the instant case the learned judge did make a finding of fact that the limitation period had passed. It may be argued that she did so in the face of conflicting evidence as to the exact date of delivery of the bus. She made that finding of fact without specifically identifying that date, which would be the date that the cause of action arose and when time would have begun to run as a matter of law, for the purposes of the statute of limitation. It may credibly be said that the issue was not "crystal clear". Whether the learned judge was entitled to make the finding that she did, in those circumstances, is a matter that requires closer examination. Such an examination, we have found, should be carried out on an appeal. Consequently we ruled that Mr Carr should be granted permission to appeal against Edwards J's decision.

[17] It is for those reasons that we made the orders set out at paragraph [2] hereof.