JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 116/2005

BEFORE: THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A.

BETWEEN: RICCO GARTMANN APPELLANT

AND: PETER HARGITAY RESPONDENT

Stephen Shelton and Maliaca Wong instructed by Myers Fletchers and Gordon, for the Appellant.

Ian Wilkinson and Sashawah Grant instructed by Ian Wilkinson and Company, for the Respondent.

March 6, 7, and 15, 2007

COOKE, J.A.

1. Ricco Gartmann (the appellant) and Peter Hargitay (the respondent) are non-nationals of Jamaica. It appears that the parties communicated with each other (at least with respect to correspondence) in the German language. This is a factor of some significance which will shortly be revealed. However, for now, without embarking on a historical excursion I think

it is necessary to relate some steps which have been taken in this litigious journey.

2. (a) On the 31st January, 2002 the appellant filed a specially endorsed writ as it was then known. In so far as it is relevant the statement of claim averred that:

> "The Plaintiff's claim is against the Defendant to recover the sum of 2,623,942.65 Swiss francs being the balance owed by the Defendant to the Plaintiff as at 31st December 2001 being money loaned by the Plaintiff to the Defendant."

It was the finding of the learned trial judge that the date of the loan was 12th December, 1991.

(b) There was an order for substituted service on the offices of Ian G. Wilkinson and Company, Attorneys-at-Law made on the 14th November 2002.

(c) On the 24th February, 2003 the respondent filed a summons to dismiss the action against him on the ground that:

> "the instant action filed by the Plaintiff be dismissed or struck out for reason that this Honourable Court is not a proper forum as it does not have any jurisdiction to hear the said matter."

This summons was dismissed on the 16th December 2003.

(d) There was a Notice of Application for Court Orders filed on 6th February, 2004 seeking leave of the court to extend time in which to appeal against the dismissal of 16th December, 2003 (supra). This was not pursued.

(e) It would seem from the record that the appellant initiated process to secure judgment in default of defence for the sum of 3,296,817.45 Swiss Francs. (This sum included interest). This was filed on the 19th February, 2004. There is no indication that this judgment was perfected and for the purposes of this appeal I shall assume it was not.

3. We now come to the immediate litigation which began with a Notice of Application for Court Orders by the respondent dated and filed on the 10th November, 2004. The respondent sought the following orders:

> "(1) the Applicant be granted leave to file his Defence out of Time, and
>
> (2) the Applicant be granted leave to file his Defence within **fourteen (14)** days of the date hereof;
>
> (3) that leave be granted to the Defendant to amend his Defence upon receipt of the Claimant's response to Request for Information filed herein;
>
> (4) there be no Order as to costs, and
>
> (5) there be such further and/or other relief as may be just."

This application was supported by an affidavit of Shawn Steadman an associate of Ian G. Wilkinson and Company. A draft defence was exhibited to that affidavit. It was as follows:

"1. The Defendant denies owing the sum claimed in the Statement of Claim or any sum at all to the Claimant.

2. The claim does not disclose any, or any reasonable cause of action, as, **inter alia**, it does not indicate how, when and/or where the alleged debt was incurred.

3. Save and except as hereinbefore admitted the Defendant denies every allegation in the Statement of Claim as if same were herein set out and specifically traversed **seriatim**.

I certify that all the facts set out in this Defence are true to the best of my knowledge, information and belief."

4. Then on 3rd February, 2005 the application of 10th November, 2005 was subject to an Amended Notice of Application for Court Orders. The amendments are set out below:

"i. the Writ of Summons fails to disclose the date of the alleged debt or contract;

ii. the Affidavits filed on behalf of the Claimant disclose that the alleged debt was incurred more than **six (6)** years prior to the filing of the instant claim and the claim is therefore statute – barred;

iii. the Applicant had filed an application to dismiss and/or strike out the instant action on the basis that this Honourable Court had no jurisdiction to hear the instant matter on the basis that neither the Claimant nor the Defendant were Jamaica citizens or residents and the alleged contract was not a Jamaican contract on the face of the Writ of Summons."

There was no supplemental affidavit as regards the amended orders sought.

5. On the 25th October the court below ordered that the claim of the appellant was statute barred and accordingly struck out. The court also ordered that the application for extension of time to file defence was dismissed. There is no appeal against the second order regarding the extension of time to file defence. The appeal before this court is as to the order that the appellant's claim is statute barred. This court is only concerned with this issue.

6. By section 46 of the Limitation of Actions Act, the Limitation Act 1623 of England:

> "has been recognised and is now esteemed, used, accepted and received as one of the statutes of this island."

By that Act of 1623 the appellant had to bring his claim.

> "within sixe yeares next after the cause of such accions or suit, and not after."

The court below ordered that the specially endorsed writ of the appellant filed on the 31st January, 2002 was not so done within the prescribed statutory period of 6 years since the cause of action arose. This appeal challenges that order. In this court there was some discussion as to when in a claim for a debt where the debtor has started to pay, the cause of action arises. Mr. Shelton submitted that it was from the time of the last payment, which according to the statement of account in an unofficial translation provided by the appellant was 21st July, 1994. The court does not have to make a definitive pronouncement of this submission,

for even assuming it was sound the appellant would still be caught by the vice of the prohibition of bringing his action outside of the limitation period. The court below was therefore correct in holding that the appellant's action was brought beyond the limitation period.

7. However, the Limitation Act does not provide for an absolute bar against the initiation of a suit after the expiry of 6 years from the date when the cause of action for a debt arose. If there is an acknowledgment by the debtor time begins to run afresh from such acknowledgment. The court below recognised this principle. The appellant urged that court to say there was evidence of an acknowledgment by the respondent of the debt claimed. Here is how the learned trial judge initially dealt with the effort of the appellant.

> "The claimant sought to rely on letters dated March 10, 1992 and June 10, 1999 as well as the statement of account as proof of the acknowledgment of the debt. These documents are written in German. Purported English translations of only the letters were exhibited.
>
> In my view, the claimant is obliged to place before the court documents, which the court could deem authentic, in support of allegations made by him. When it is desired to rely on a document in foreign language the usual course is to obtain a translation of such document by a qualified translator and exhibit the translated document together with an affidavit or a certificate of the translator verifying the translation. This was not done by the Claimant.
>
> It cannot be disputed that the cause of action arose on December 12, 1991. Eleven years before the action was brought. An action in simple contract may

> not be brought after the expiration of 6 years from the date on which the cause of action accrued. However, an action of recovery of debt may be pursued notwithstanding the six-year time limit, if a debtor acknowledges the debt. In **Hyleing v. Hastings** 1699 Ld Rayn 389 it was held that the recovery of a statute barred debt was revived by the subsequent promise of a debtor to pay.
>
> The claim would have been statute barred on December 30, 2001 when the action commenced. Those documents on which the claimant seeks to place reliance, as the acknowledgment of the debt, have not been authenticated. This court, therefore, ought not to take cognizance of them. It follows that the claim has been substantiated and should be struck out."

8. The learned trial judge also found "if I am wrong" on the admissibility on the reception of the letters relied on by the appellant as an acknowledgment of the debt she would nevertheless strike out the action because "such acknowledgment must not only be clear and unequivocal but it must be pleaded". Later in her judgment there is this curious statement:

> "It is clear that the defendant acknowledged owning a debt to the Claimant."

and then immediately following the sentence just quoted there is the statement:

> "However, the sum he has admitted owning is less than that claimed."

9. Although in the judgment in the court below there was no mention of the Civil Procedure Rules 2002, there must be reference to those Rules as it pertains to striking out a statement of case, hitherto, described as "statement of

claim" for this was what was done in the court below. The relevant rule is 26.3 (1) (b) which states that the court may strike out a statement of case if it appears:

> "that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;"

10. The striking out (dismissal) of a claimant's statement of case (in this case statement of claim) is a draconian order. Such an order, while compelling in suitable circumstances, should be informed by caution lest litigants are deprived of access to the "judgment seat". In my view this drastic step of striking out a statement of case should only be considered when such statement of case can be categorized as entirely hopeless. With these preliminary observations I will now turn to the reasoning of the learned trial judge which has been challenged by the appellant.

11. The learned trial judge was not presiding over a full scale trial. No defence had yet been filed. She had to determine whether or not at a future trial the appellant's contention that there was an acknowledgment of the debt by the respondent was entirely hopeless. She had before her an English translation of a correspondence in 10th June, 1999 in German with an unofficial translation in English. The English translation tendered to the court is as follows:

> "Mr. Ricco Gartmann
> Luetzelsee 12
> 8634 Hombrechtikon

Basel, June 10, 1999

Debts

Dear Ricco

As of 31.12.1991 there existed a debt in your favour in the amount of CHF 1'164'00.—.
This amount was then only used to buy back the shares in the Hargitay Group Holding AG, Zug, from the IPT, AG, Baden, a subsidiary of BBC.

According to your accounting I paid back the amount of totally CHF 509'125.95 between 31.12.1991 and 21.7.1994. Thus as of 21.7.1994 there would have been capital balance of CHF 654'874.05 to be booked as remainder of debt.

During 31.12.1991 and 30.6.1999 interests in the total amount of CHF 1'540'639.80 were accumulated despite of my repayments mentioned above. This increases the balance calculated by your accounting to CHF 2'049'919.75 as to today.

In summary, this means that the actual capital debt amounts to totally CHF 654'872.05; the accumulated interest payments you charged me at a rate of 10 percent per annum amount to CHF 1'540'993.80.

With respect to the above period of 7.5. years these amounts tally with an accumulated interest growth of 235 percent, i.e. an average interest rate of 31.33 percent p.a.

Because of reasons which are known to you in detail I was not able to make further payments in the above mentioned matter between 1995 and 1999.

Since beginning of 1999 things are back to normal so that I will soon be able to dispose of liquid funds again.

> I am pleased to confirm to you that I will start to make further repayments as soon as possible.
>
> As far as the capital interests and the compound interests are concerned you have told me, that "a solution will be found." I herewith formally ask you to
>
> a) freeze the interest as of today's date (moratorium of interest); and
>
> b) cancel the accumulated interests partially after I will have again started to pay back the capital in installments, if this seems possible for you.
>
> I like to thank you indeed for your continuing support."

It is to be noted that in the unofficial English translation of a statement of account tendered by the appellant there is harmony between this correspondence and that account. By his affidavit the appellant swore that what he exhibited was a English translation of this letter. The respondent had been sent by letter 31st December, 2003 had the following:

> "1. Copies of letters (English & German) dated June 10, 1999 from Peter Hargitay to Ricco Gartmann
>
> 2. Copy statement showing balance of debt
>
> 3. Copy acknowledgement of Debt (English & German) dated March 10, 1992 from Peter Hargitay to Ricco Gartmann
>
> 4. Copy statement showing balance as of December 31, 2001"

Therefore from December, 2003 (approximately) the respondent had in his possession what the appellant regarded as an English translation of the documents on which the appellant would be placing reliance. There has been no suggestion from the respondent that these translations were not faithful. In **Ronex Properties Ltd. v. John Laing Construction Ltd. and Others** [1983] 1.Q.B. 399 at p. 405 A and B Donaldson L.J. said:

> "Where it is thought to be clear that there is a defence under the Limitation Acts, 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 circumstances can he seek to strike out on the ground that no cause of action is disclosed."

This is not "a very clear case". What I understand the appellant to be saying is that if this case proceeded to trial he is possessed of potential evidence of substance which will demonstrate that the Limitation Act is inapplicable. It is my view that at this stage of the proceedings he had done enough. The court below was in error in holding that at this stage it was necessary for the appellant to have exhibited:

> "a translation of such document together with an affidavit or a certificate of the translator for verifying the translation."

This evidential requirement is pertinent to the trial of the action. If the respondent had raised the prohibition provided by the Limitation Act in its defence (which as of now does not exist) the appellant would have countered

that there was acknowledgment of the debt based on documents which he held. It would then be for the trial court to determine the admissibility of those documents to construe those documents and ultimately to determine if there was indeed an acknowledgment within the meaning of the law.

12. I will now address the view held by the court below that acknowledgment "must be pleaded" in the statement claim and it was not so done in this case. The court excerpted a passage from **Bullen and Leake's Precedents of Pleadings** (11th Edition) page 884 which stated:

> "The fact as to acknowledgment or part payment should be expressly pleaded in the statement of claim or reply."

The court below does not appear to have given any or sufficient impact of the words "or reply". The appellant could not have pleaded acknowledgment in a reply as there was nothing to reply to. En passant it is to be observed than in the draft defence (par 3 supra) the issue of the appellants claim being statute barred is not pleaded. The learned trial judge quoted a passage of the judgment of Lawton J. in **Busch v. Stevens** [1962] 1 All ER 412 at page 416. This reads:

> "The facts relating to the acknowledgment are material facts upon which the plaintiff intends to rely when he starts an action for the recovery of a debt or other liquidated sum which, but for the acknowledgment, would be statute barred, and as such should be in the statement of claim."

Perhaps the entire relevant passage of the judgment of Lawton J. should be reproduced. It reads:

> "The facts relating to the acknowledgment are material facts upon which the plaintiff intends to rely when he starts an action for the recovery of a debt or other liquidated sum which, but for the acknowledgment, would be statute-barred, and as such should be in the statement of claim. If they are kept out of the statement of claim and put in a reply, one or other of the parties will ultimately have to pay for the cost of that document and will for a certainty be surprised how much a few words in a reply can cost. As one of the objects of the modern rules of pleading is to inform the court what it is being asked to try, it seems to me to be a matter of indifference to the court whether the issue of acknowledgment is raised in the first pleading or the last – but it is a matter of concern to the parties that the costs of litigation should be kept down; and if costs can be kept down by making a reply unnecessary, so much the better." (emphasis mine)

So it is not imperative that the acknowledgment "must be pleaded" in the statement of claim and that failure to so do will result in fatal consequences. The statement of claim, therefore, should not have been struck out on this basis.

13. Finally I turn to consider whether there is any disastrous consequence to the finding of the court below that "the sum he has admitted owing is less than that claimed". The learned trail judge thought so and that view was erroneous. In **Dungate v. Dungate** [1965] 3 All ER 818 at page 820. Diplock, L.J. said:

> "There is clear authority that an acknowledgment under the Limitation Act, 1939, need not identify the

> amount of the debt and may acknowledge a general indebtedness, provided that the amount of the debt can be ascertained by extraneous evidence."

It is my view that "the sum he has admitted owing is less than that claimed" is not by itself conclusive of the issue of whether or not this letter is evidence of acknowledgment of the debt claimed. An examination of any rival positions as to accounting will, if it arises, be done at the trial.

13. It is only left to be said that I would allow the appeal and set aside the order of the court below striking out the claim of the appellant as being statute barred. The appellant should have his costs to be agreed or taxed, both here and in the court below.

HARRISON J.A:

1. This is an appeal from the judgment of Harris J. (as she then was) in an action which the appellant sought to recover the sum of 2,623,942.65 Swiss Francs that was owed by the respondent. The debt was incurred on December 12, 1991 and sums of monies were allegedly paid by the Respondent up to July 21, 1994. The Writ of Summons was issued on January 31, 2002.

2. No defence was filed in answer to the claim but the respondent made an application for court orders, contending that the debt was statute-barred. Harris J., who heard the application, agreed with the submissions of Mr. Wilkinson and ordered that the claim be struck out. The learned judge found inter alia that the cause of action arose eleven years before the action was brought and as such, "the claim would have been statute barred since more than six (6) years had elapsed on December 30, 2001 when the action commenced".

3. The plaintiff now appeals this judgment and has filed seven grounds of appeal which are set out below:

> (a) The learned judge erred in summarily striking out the claim for being statute barred when the law is that the Statute of Limitations is a defence and not a bar to an action proceeding and in light of the fact that no defence has been filed and judgment in default of defence having been filed on November 18, 2005.
>
> (b) The learned judge erred in failing to take account of the acknowledgement of debt contained in letter dated June 10, 1999 written in German by the Defendant to the Claimant on

the basis that the Claimant's English translation was not authenticated, when there is no procedural rule requiring that such a translation be authenticated or the method for any authentication, the letter was exhibited to affidavits filed in opposition to the application to strike out and no notice was given to the Claimant or any objection to the translation or alternative translation put forward by the defendant or any translator appointed by the Court;

(c) The learned judge erred in finding that the sum admitted in the acknowledgement of debt letter dated June 10, 1999 is less than that claimed as the amount in that letter and the amount in the claim are stated to be owed at different dates and in any event it is not necessary to specify the amount of the debt in the acknowledgement if it can be ascertained from other means (extrinsic evidence being admissible to identify the debt to which the acknowledgement refers and to ascertain the amount of the debt). The amount stated in the claim could be ascertained from the figure in the June 10, 1999 acknowledgement either by reference to the statement of account exhibited to the affidavit of Ricco Gartmann dated June 18, 2004 or by calculation of the interest rate and the amount stated in the June 10, 1999 acknowledgement of the debt to the date stated in the claim;

(d) The learned judge erred in finding that the Statement of Claim did not sufficiently particularize the debt when it contained the amount owed, the date at which the amount was owed, and the basis on which it is owed being monies loaned and in addition, the Defendant had by his attorney's letter dated December 17, 2003 requested further information about the basis of the claim and copies of documents were forwarded to the defendant's attorney by letter dated December 31, 2003.

(e) The learned judge erred in finding that the Statement of Claim must plead the acknowledgement of debt when the authorities cited stated that it could be pleaded in the Reply.

(f) The learned judge erred in finding that the Statement of Claim could not be amended to plead the acknowledgement of debt as it would deprive the defendant of the Defence of Limitations when the Defendant did not have a defence of

limitation in light of the June 10, 1999 acknowledgement of debt.

(g) The learned judge further erred in striking out the Claim in a summary manner as there was no determination that the claim has no prospect of succeeding, and indeed there could be none in light of the Affidavit evidence and in light of the fact that there is no defence filed to the action and no leave to file defence out of time was granted.

4. Three issues arise for consideration in my view, in this appeal. They are:

(a) Pleading the acknowledgment of debt;

(b) Whether the English translation of the acknowledgement of debt must be authenticated; and

(c) Whether the claim should be summarily struck out.

The submissions

5. Mr. Shelton submitted that the learned judge erred in hearing the application to strike out the claim on the basis that it was statute barred. He argued that the judge fell into error by failing to take into account that there was a written acknowledgement of the debt contained in a letter dated June 10, 1999 and which was exhibited to the Affidavit of the Appellant dated June 18, 2004. The said Affidavit exhibited the original letter written in German by the Respondent addressed to the Appellant and was signed by him.

6. Most importantly, Mr. Shelton submitted that the judge further erred in striking out the Claim in a summary manner as there was no determination that the claim has no prospect of succeeding, and indeed that there could be none in

light of the Affidavit evidence and in light of the fact that no defence was filed to the action and no leave to file defence out of time was granted.

7. Mr. Wilkinson submitted on the other hand, that the claim was statute-barred and this provided an absolute defence to the Appellant's claim. Consequently, he said, that the learned trial judge had no choice but to terminate the proceedings by dismissing the Appellant's claim. He asked:

> "... what useful purpose would it have served to allow the claim to continue when it would have inevitably failed to this absolute defence?"

The Law

8. With the above background in mind, I now turn to the law. It should be pointed out from the very outset that the expiry of a limitation period provides a defendant with a complete defence to a claim and as Lord Griffiths said in ***Donovan v Gwentoys Ltd*** [1990] 1 WLR 472 at 479:

> "The primary purpose of the limitation period is to protect a defendant from the injustice of having to face a stale claim, that is, a claim with which he never expected to have to deal".

9. Limitation, it is said, is a procedural defence. It will not be taken by the court of its own motion, but must be specifically set out in the defence. This is not to say that the court cannot strike out a claim which is statute barred at any stage of the proceedings. It is recognized that an application to strike out a claim which is an "abuse of the court" process may be made at any stage of

the proceedings under the Civil Procedure Rules 2002 ("the CPR"). See Rule 26.3(1)(b) CPR.

10. Section 46 of the Limitation of Actions Act provides as follows:

> "In actions of debt, or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence in any of the Courts of this Island, of a new or continuing contract, whereby to take any case out of the operation of the United Kingdom Statute 21 James I. Cap. 16, which has been recognized and is now esteemed, used, accepted and received as one of the statutes of this Island, or to deprive any party of the benefit thereof unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby, or his agent duly authorized to make such acknowledgment or promise; and where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor or administrator shall lose the benefit of the said enactment, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them:
>
> Provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment, of any principal or interest made by any person whatsoever:
>
> Provided also, that in actions to be commenced against two or more such joint contractors, or executors, or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by the United Kingdom Statute aforesaid as to one or more of such joint contractors or executors, or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given, and costs allowed for the plaintiff, as to such defendant or defendants against whom he shall

> recover and for the other defendant or defendants against the plaintiff."

11. In ***Halsbury Laws of England Vol. 24*** (3rd Ed.) at p. 208 para. 376 the learned authors state inter alia:

> "Where there is an acknowledgment in writing or part payment, a fresh cause of action accrues".

12. It is abundantly clear therefore that so long as there is a sufficient acknowledgement in relation to the plaintiff's claim, time under the Limitation of Actions Act would run afresh from the date of the acknowledgement. See ***Dungate v Dungate*** [1965] 3 All ER 818; ***Spickernell v Hotham*** 69 ER 285.

Pleading the acknowledgement

13. In dealing with the issue relating to the need for an acknowledgement of a debt to be pleaded the learned judge said:

> "Although a statute barred debt may be revived by the debtor's acknowledgement such acknowledgement must not only be clear and unequivocal but it must be pleaded".

14. The learned judge also stated:

> "it is clear that the defendant acknowledged owing a debt to the Claimant. However, the sum he has admitted owing is less than that claimed. It may be that his admission relates only to a part of the indebtedness to the claimant.
>
> The fact that the claimant pleaded that the claim is for a specified sum, being the balance owed by the

> defendant, is insufficient. In my view it was incumbent on the claimant to have particularized the sum loaned, the amount repaid, the interest charged, and the acknowledgment of the debt".

15. In ***Busch v Stevens*** [1963] 1 QB 1 Lawton J made the following observation at pages 7 – 8 of the judgment:

> "Should the facts relating to the acknowledgment have been pleaded in the statement of claim at all? There are observations in ***Dismore v Milton***, (1938) 55 T.L.R. 20; [1938] 3 All E.R. 762, C.A. which support the view that the proper place for facts which take a case out of the statement is in a reply. The Court of Appeal seems, however, to have had in mind facts relating to disabilities rather than facts relating to acknowledgments.
>
> All the editions of Bullen & Leake, before the 7th, suggested that the facts relating to an acknowledgment should be pleaded in a reply. In the 7th ed. (1915) which was edited by W. Blake Odgers K.C. and Walter Blake Odgers, the following note was put in at p. 638; "Under the present rules of pleading the facts as to the new promise or part payment constituting the acknowledgment should be expressly pleaded in the claim or reply, though possibly this might be held to be not strictly necessary." The same note appeared in the 9th ed. (1935) which was edited by A. T. Denning and A. Grattan-Bellew. I have already referred to the note in the 11th edition of Bullen & Leake. In my judgment the statement in paragraph 376 of the current edition of Halsbury, volume 24, sets out the desirable practice. The facts relating to the acknowledgment are material facts upon which the plaintiff intends to rely when he starts an action for the recovery of a debt or other liquidated sum which, but for the acknowledgment, would be statute-barred, and as such should be in the statement of claim. If they are kept out of the statement of claim and put in a reply one or other of the parties will ultimately have to pay for the cost of that document and will for a certainty be surprised how much a few words in a reply can cost. <u>As one of the objects of the modern rules of pleading is to inform the court what it is being asked to try, it seems to me to be a matter of</u>

> indifference to the court whether the issue of acknowledgment is raised in the first pleading or the last - but it is a matter of concern to the parties that the costs of litigation should be kept down; and if costs can be kept down by making a reply unnecessary so much the better.
>
> Occasionally there may be special circumstances which justify pleading the facts relating to acknowledgment in a reply; in such cases it would not be wrong to deliver a reply".
>
> (Emphasis supplied)

16. The authorities are therefore clear that the acknowledgment can be pleaded in either the statement of claim or the reply. In the instant matter a defence has not been filed to date. It is also of interest to note that a draft proposed defence that was filed along with an application to file the Defence out of time did not mention the statute of limitations defence. The learned judge was therefore in error when she struck out the appellant's claim on the basis that the acknowledgment was not pleaded in the statement of claim.

17. I now turn my attention to the issue whether or not it makes a difference that the respondent has admitted owing a sum less than that claimed.

18. In ***Dungate*** (supra) it was held that an acknowledgment for the purposes of section 23 (4) of the Limitation Act, 1939, need not identify the amount of the debt and that it was sufficient if the general indebtedness was acknowledged provided that the amount of the debt could be ascertained by extrinsic evidence.

19. In ***Spickernell v Hotham*** (supra) the headnote reads:

> "A gave to B a promissory note, dated October 1834 for £837, 1s. 6d., payable on demand. In December 1834 demand was made, and A. then promised to pay interest, and signed an unstamped memorandum, dated 2nd December 1834 as follows:- "I promise to pay to B. £837, with £4 per cent interest thereon. - A." Neither principal nor interest was paid; but, in January 1848, A. wrote to B. a letter referring to a promissory note for a debt which he acknowledged, and promised thereby to pay.
>
> **Held**: that the memorandum of December 1834, and a letter accompanying it, shewed that interest was running; and that, though in form a promissory note, and unstamped, it could be looked at to see what debt this interest was to be referred; and that, as no other debt was proved to exist, the £837 there mentioned was to be assumed to be part of the £837, 1s. 6d. secured by the former promissory note.
>
> Held, also, that, in the absence of proof of the existence of any other promissory note to which it could relate, the letter of 1848 must be taken to refer to the promissory note of October 1834, and thus to take it out of the Statute of Limitations".

20. I would therefore agree with Mr. Shelton when he submitted that the fact that the amount in the letter from the Respondent to the Appellant differs from the amount stated in the statement of claim, is really of no moment. It is not necessary to have an acknowledgement that a debt is actually due; but it is sufficient if there is an acknowledgement that the account is pending, and a promise to pay the balance.

The authentication issue

21. In ***Re Saifi*** [2001] 4 All ER 168 it was said that the fact that a deposition is recorded in a foreign language, but unaccompanied by a certified translation, may not necessarily lead to the deposition being inadmissible, although, generally speaking, a certified translation is necessary. The fact that there is no certification of the translation does not end the matter there. There is no set procedure in the CPR as to how the translated document should be received in evidence but it is generally accepted that the English translation of a foreign language is usually certified by someone who is capable and qualified to speak the foreign language. It is also an accepted practice that documents in a foreign language can be agreed to. If there is no agreement, then translators are usually called at the trial.

Whether the Claim should be summarily struck out

22. In order to arrive at a just result, it is necessary to bear in mind that a Judge exercising his or her discretion to strike out a claim which is said to be statute barred especially before trial or before a defence is filed, must pay regard to the overriding objective in Rule 1.1 of the CPR, that is to say, the need to deal with cases justly. Dealing with a case justly includes, so far as practicable, saving expense; dealing with a case in a way which is proportionate to the amount of money involved; ensuring that it is dealt with expeditiously and fairly; and, importantly, allotting to it an appropriate share of the court's resources

while taking into account the need to allot resources to other cases. See ***Christofi v Barclays Bank Plc*** [2000] 1 WLR 937 at page 949.

23. Mr. Shelton submitted that, the learned judge having found that there was an acknowledgement of the debt by the Defendant, justice would have been better served if the court had ordered that there be an agreed translation rather than to dismiss the Claimant's claim because the translation of the admission was not in a certain form. He also submitted that once a prima facie case of acknowledgement of the debt arose, then the rest is a matter for the trial judge to determine after evidence has been adduced.

24. The learned judge said in her judgment:

> "...Those documents on which the claimant seeks to place reliance, as the acknowledgement of the debt, have not been authenticated. This court, therefore, ought not to take cognizance of them. It follows that the claim has not been substantiated and should be struck out".

25. It is my view that a Judge in Chambers would not be acting justly if he or she were to summarily strike out a claim because a translated letter which the claimant relies upon has not been authenticated or certified. Once the documents in foreign language have been exhibited but the learned judge finds that there was no authentication of the English translation and that statements of account were not translated, issues of fact would be raised which required a determination of them by oral evidence before a trial judge. In ***Wenlock v***

Maloney and Others [1965] 2 All E.R 871 Dankwerts LJ said in relation to the inherent power of the court to strike out a claim:

> ".... This summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power."

26. It is further my view therefore that if an application to strike out a matter which is claimed to be statute barred, involves serious arguments as to whether or not there is an acknowledgement of a debt by a debtor, a judge hearing the application to strike out should, as a general rule, decline to proceed with arguments unless he not only harbours doubts about the soundness of the pleading and documentation but, in addition, is satisfied that striking out will obviate the necessity for a trial or will substantially reduce the burden of preparing for the trial or the burden of the trial itself.

Conclusion

27. It is clear from the evidence presented that the respondent made payments towards the debt up to July 1994. Suit was filed eight (8) years after the last payment so on the face of it this would make the claim statute barred. Once it is established however, that there was an acknowledgement of the debt

in 1999, the appellant's claim would be commenced within the time when suit was filed in 2001.

28. I would be inclined therefore, to hold that it would be contrary to the overriding requirement of fairness that this case should be decided simply on the affidavit evidence.

I therefore hold that justice requires that the Appellant be given an opportunity to present his case at trial so that its merits may be assessed in the light of the evidence. The appeal should therefore be allowed with costs to the Appellant.

McCALLA, J.A:

1. This is an appeal against the decision of Harris J (as she then was) in her written judgment handed down on October 25, 2005, whereby she struck out a claim brought by Ricco Gartmann (the appellant) against Peter Hargitay (the respondent). The sole issue for determination in this appeal is whether or not the learned judge was correct in exercising her discretion to strike out the appellant's statement of claim pursuant to the respondent's Amended Notice of Application for Court Orders, which came before her on September 30, 2005.

2. These are the relevant circumstances in which she made the order:

On January 31, 2002 the appellant Ricco Gartman commenced an action in the Supreme Court by Writ of Summons. The Writ was specially endorsed with a statement of claim which reads as follows:

> "The plaintiff's claim is against the defendant to recover the sum of $2,623,942.65 Swiss Franks being the balance owed by the defendant to the plaintiff as at 31st December, 2001 being money loaned by the Plaintiff to the Defendant."

The plaintiff also claimed interest on the outstanding amount and costs.

3. The respondent challenged the jurisdiction of the Court on the basis of the nationality of the parties and the absence of any agreement by him to submit to the Jamaican courts, as the transaction which gave rise to the suit was not based on any activity which had taken place in Jamaica. This challenge was unsuccessful and an application was made

by the respondent to extend the time within which to appeal against that decision. The Application to Extend Time was discontinued and the parties sought, apparently unsuccessfully, to resolve the matter.

4. On November 10, 2004 the respondent filed an Application For Leave to File a Defence out of Time, supported by the affidavit of Shawn Steadman, which stated at paragraph 18 that the defendant had a good defence to the claimant's claim. A draft defence was exhibited in which the respondent denied owing the amount stated in the statement of claim and alleged that the statement of claim did not disclose "any or any reasonable cause of action, as, inter alia, it does not indicate how, when and/ or where the alleged debt was incurred."

5. On February 3, 2005 the respondent filed and served on the appellant an amended Notice of Application for Court Orders, as set out hereunder:

> "The Applicant PETER HARGITAY seeks the following orders:
>
> (1) The instant action/claim be dismissed or struck out as being statute – barred;
>
> (2) Further, or alternatively, an order that this Honourable Court has no jurisdiction to hear the instant action/claim having regard to the age of the alleged debt which forms the basis of the said action/claim ;
>
> (3) Alternatively, that the Applicant be granted

leave to file his Defence out of Time, that is, within **fourteen** (14) days of the date hereof;

(4) that leave be granted to the Defendant to amend his Defence upon receipt of the Claimant's response to Request for Information filed herein;

(5) there be no Order as to costs, and

(6) there be such further and/or other relief as may be just.

The ground on which the Applicant is seeking the orders is as follows:

The Orders are being sought for the following reasons:

i. the Writ of Summons fails to disclose the date of the alleged debt or contract;

ii. the Affidavits filed on behalf of the Claimant disclose that the alleged debt was incurred more than **six** (6) years prior to the filing of the instant claim and the claim is therefore statute-barred;

iii. the Applicant had filed an application to dismiss and/or strike out the instant action on the basis that this Honourable Court had no jurisdiction to hear the instant matter on the basis that neither the Claimant nor the Defendant were Jamaican citizens or residents and the alleged contract was not a Jamaican contract on the face of the Writ of Summons;

iv. the Applicant's application was refused by

this Honourable Court and the Applicant sought leave to appeal to the Court of Appeal against the said Order;

v. the Applicant, after discussions with the Claimant, decided not to pursue the application for leave to appeal;

vi. the Applicant requested that the Claimant consent to his Defence being filed out of Time;

vii. the Claimant has refused to Consent to the Applicant filing his Defence out of time, and

viii. the Defendant has a good Defence to the action and has excellent prospects of successfully defending the Claim."

It was pursuant to the above application that Harris J struck out the appellant's claim on the basis that it was statute barred, and consequently dismissed the respondent's Application for Extension of Time to File the Defence.

Before dealing with the Grounds of Appeal filed by the appellant I must make reference to certain correspondence which had passed between the attorneys-at-law for the parties. By letter dated December 17, 2002 the respondent's attorney-at-law had made a request "without prejudice" of the appellant's attorney-at-law to provide the following documents:

"(a) a copy of the alleged agreement between the parties;

(b) If no agreement is available, details of the transaction between the parties, and

(c) details of any payments made by our clients on account, including the date of the last such payment."

A formal "Request for Information" was also filed on behalf of the respondent.

The appellant's attorneys-at-law responded to the request by letter dated December 31, 2003 and forwarded the following documents:

(1) Copies of letters (English and German) dated June 10, 1999 from Peter Hargitay to Ricco Gartmann.

(2) Copy statement showing balance of debt.

(3) Copy acknowledgment of debt (English and German) dated March 10, 1992 from Peter Hargitay to Ricco Gartmann.

(4) Copy statement showing balance as of December 31, 2001.

An affidavit filed by Francine Fletcher disclosed that a bundle of documents was forwarded in response to the respondent's request.

6. On June 18, 2004 the appellant swore to an affidavit in respect of the above mentioned documents in which he states at paragraph 4 as follows:

> "Further the documents have all been translated to English and there is therefore no need for translators. Even if there was a need for translators that would not be a cost to the Jamaican courts. The cost of translators would fall on the parties."

and at paragraph 6 he states:

> "Despite acknowledgement of the debt the Defendant has not sought to settle the outstanding balances owed and has since the filing of the claim in Jamaica sought to evade the process of the Court."

The appellant seeks to rely on the letter dated June 10, 1999, referred to in his affidavit, as an acknowledgment of the debt. The English translation of that letter, also exhibited to his affidavit, is in the following terms:

> "Mr. Ricco Gartmann
> Luetzelsee 12
> 8634 Hombrechtikon
>
> Hasel, June 10, 1999
>
> Debts
>
> Dear Ricco
>
> As of 31.12.1991 there existed a debt in your favor in the amount of CHF 1,164,000. This amount was then only used to buy back the shares in the Hargitay Group Holding AG, Zug, from the IPT AG, Baden, a subsidiary of BBC.
>
> According to your accounting I paid back the amount of totally CHF 509,125.95 between 31.12.1991 and 21.7.1994. Thus, as of 21.7.1994 there would have been a capital balance of CHF 654,874.05 to be booked as remainder of debt.
>
> During 31.12.1991 and 30.6.1999 interests in the total amount of CHF 1,540,693.80 were accumulated despite of my repayments mentioned above. This increases the balance calculated by your accounting to CHF 2,049,919.75 as of today.
>
> In summary, this means that the actual capital debt amounts to totally CHF 654,874.05; the

accumulated interest payments you charged me at a rate of 10 percent per annum amount to CHF 1,540,693.80.

With respect to the above period of 7.5 years these amounts tally with an accumulated interest growth of 235 percent i.e. an average interest rate of 31.33 percent p.a.

Because of reasons which are known to you in detail I was not able to make further payments in the above mentioned matter between 1995 to 1999.

Since beginning of 1999 things are back to normal so that I will soon be able to dispose of liquid funds again.

I am pleased to confirm to you that I will start to make further repayments as soon as possible.

As far as the capital interests and the compound interests are concerned you have told me, that "a solution will be found." I herewith formally ask you to

(a) freeze the interests as of today's date (moratorium of interest); and
(b) cancel the accumulated interests partially after I will have again started to pay back the capital in installments, if this seems possible for you.

I like to thank you indeed for your continuing support.

Yours,
(signature)
Peter J Hargitay"

Section 46 of the Limitation of Actions Act is as follows:

" In actions of debt, or upon the case grounded upon simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence in any of the Courts of this Island, of a new or continuing contract, whereby to take any case out of the operation of the United Kingdom Statute 21 James I. Cap. 16, which has been recognized and is now esteemed, used, accepted and received as one of the statutes of this Island, or to deprive any party of the benefit thereof unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby, or his agent duly authorized to make such acknowledgment or promise; and where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor or administrator shall lose the benefit of the said enactment, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them:

Provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment, of any principal or interest made by any person whatsoever:

Provided also, that in actions to be commenced against two or more such joint contractors, or executors, or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by the United Kingdom Statute aforesaid as to one or more of such joint contractors or executors, or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given, and costs allowed for the plaintiff, as to such defendant or defendants against whom he shall recover and for the other

defendant or defendants against the plaintiff. "

By virtue of the provisions of section 46 of the Act, the Writ of Summons must be filed within a period of six years from the date that the cause of action arose. In this case the appellant filed suit on January 31, 2002 and the statement of accounts, also exhibited to his affidavit, shows that the last payment was made on July 31, 1994, a period of eight (8) years before the commencement of the suit. When the appellant commenced the suit on January 31, 2002, his claim would therefore have been statute barred. Section 46 stipulates that an acknowledgement of the debt in writing would make time begin to run afresh from the date of such acknowledgement. The appellant sought to rely on the letter dated June 10, 1999 as a written acknowledgement of the debt and also on the statement of accounts exhibited to his affidavit.

7. It is convenient at this point to set out the Amended Notice and Grounds of Appeal which have been stated in the following terms:

"1. The details of the order appealed are:

(a) The Claimant's action is struck out;
(b) The Defendant's application to file Defence out of time is dismissed;
(c) Costs to the Defendant to be taxed if not agreed.
(d) Leave to appeal granted.

2. The following findings of fact, law, and mixed facts and law are challenged:

i. The action is statute barred;

ii. The acknowledgement of debt contained in letter dated June 10, 1999 and the statement of account are inadmissible in evidence because the translation of the June 10, 1999 letter was not authenticated and no English translation of the statement of account was exhibited:

iii. The acknowledgement of debt should be pleaded in the Statement of Claim and that the Statement of Claim could not be amended to plead the acknowledgement as such an amendment would deprive the Defendant of the Defence under the Statute of Limitations;

iv. The acknowledgement of debt dated June 10, 1999 does not refer to the amount in the claim in that the Claimant failed to particularize details of the debt claimed in the Statement of Claim;

3. The grounds of appeal are:

(a) The Learned Judge erred in summarily striking out the claim for being statute barred when the law is that the Statute of Limitations is a defence and not a bar to an action proceeding and in light of the fact that no defence has been filed and judgment in default of defence having been filed on November 18, 2004:

(b) The Learned Judge erred in failing to take account of the acknowledgement of debt contained in letter dated June 10, 1999 written in German by the Defendant to the Claimant on the basis that the Claimant's English translation was not authenticated, when there is no procedural rule requiring that such a translation be authenticated or the method for any authentication, the letter was exhibited to affidavits filed in opposition to the application to strike out and no notice was given to the Claimant or any objection to the translation or alternative translation put forward by the defendant or any translator appointed by the Court;

(c) The Learned Judge erred in finding that the sum admitted owing in the acknowledgement of debt letter dated June 10, 1999 is less than that claimed as the amount in that letter and the amount in the claim are stated to be owed at different dates and in any event it is not necessary to specify the amount of the debt in the acknowledgement if it can be ascertained from other means (extrinsic evidence being admissible to identify the debt to which the acknowledgment refers and to ascertain the amount of the debt). The amount stated in the claim could be ascertained from the figure in the June 10, 1999 acknowledgement either by reference to the statement of account exhibited to the affidavit of Ricco Gartmann dated June 18, 2004 or by calculation of the interest rate and the amount stated in the June 10, 1999 acknowledgement of the debt to the date stated in the claim;

(d) The Learned Judge erred in finding that the Statement of Claim did not sufficiently particularize the debt when it contained the amount owed, the date at which that amount was owed, and the basis on which it is owed being monies loaned and in addition, the Defendant had by his attomev's letter dated December 17, 2003 requested further information about the basis of the claim and copies of documents which said information and documents were forwarded to the Defendant's attorney by letter dated December 31, 2003.

(e) The Learned Judge erred in finding that the Statement of Claim must plead the acknowledgement of debt when the authorities cited stated that it could be pleaded in a Reply;

(f) The Learned Judge erred in finding that the Statement of Claim could not be amended to plead the acknowledgement of debt as it would deprive the Defendant of the Defence of Limitations when the Defendant did not have a defence of Limitation in light of the June 10, 1999 acknowledgement of debt;

(g) The Learned Judge further erred in striking out the Claim in a summary manner as there was no determination that the claim has no prospect of succeeding, and indeed there could be none in light of the Affidavit evidence and in light of the fact that there is no defence filed to the action and no leave to file defence out of time was granted;

4. Orders sought:

(a) The appeal is allowed and the Order of the Honourable Mrs. Hazel Harris J made on October 25, 2005 to strike out the Claim with costs to the Defendant to be taxed if not agreed is set aside;

(b) The judgment of the Honourable Mrs. Hazel Harris J made on October 25, 2005 dismissing the Defendant's application for leave to file defence out of time is upheld;

(c) Judgment in default of Defence for the Claimant in the amount claimed with interest pursuant to the Law Reform (Miscellaneous Provisions) Act.;

(d) The costs of this appeal and of the proceedings below be the Appellant's/Claimant's. "

In Halsbury's Laws of England Volume 24 (3rd Edition) at page 208 paragraph 376, the learned authors state:

> "Where there is an acknowledgment in writing or part payment, a fresh cause of action accrues. Where the title would be extinguished but for such an acknowledgment of part payment, it seems that the acknowledgement or payment should be alleged in the statement of claim as part of the cause of action. That course would also seem desirable where only the remedy is barred; but in such a case an alternative course, which would not, it is thought, be wrong; would be to plead the acknowledgement or part payment in reply."

In ***Busch v Stevens*** [1962]1All ER 412 at 416, the Court observed that the facts relating to acknowledgement are material facts on which the plaintiff intends to rely for recovery of a debt, which, but for acknowledgement would be statute barred and as such should be pleaded in a statement of claim, although "occasionally there might be special circumstances which would justify pleading the facts in a reply."

Section 26.3(1) (b) of the Civil Procedure Rules 2002 confers on a judge of the Supreme Court the power to exercise his discretion to strike out a claim in a proper case, even before case management has been held. Mr. Wilkinson, Counsel for the respondent, agrees with the proposition that except in the clearest of cases the issue as to the application of the Limitation Act should be left to the trial court which would, after due consideration of the evidence relevant to that issue, arrive at its decision.

9. The arguments advanced by Mr. Wilkinson in support of the learned trial judge's decision to strike out the claim may be encapsulated as follows:

(1) The claimant ought to have set out his case fully by alleging the acknowledgement of debt in the statement of claim so as to enable the defendant to know the nature of the claim he needs to meet.

(2) When the Amended Notice of Application dated February 3, 2005 was filed, the appellant would have been aware of the respondent's application to strike out its claim, had knowledge

of its defence and could have made an application to amend its statement of claim.

(3) There was no admissible evidence of an acknowledgement of the debt before the learned judge as the document relied on was a foreign document and there was no certification of the English translation of the letter dated June 10, 1999.

(4) Harris, J was also justified in refusing to grant the appellant's oral application for amendment having regard to his delay in seeking it.

10. Mr. Steve Shelton, Counsel for the applicant submitted that no issue had been taken in respect of the authenticity or translation of the documents which had been exhibited. He said that on those documents it could clearly be construed that the respondent owed money to the appellant which he was unable to pay.

Mr. Shelton argued that a prima facie case of acknowledgement of the debt had arisen on the material placed before the Court and the learned judge ought to have left the relevant issues to be determined at trial. He accepted that generally certification of a foreign document was a prerequisite for its admissibility, but he argued that the learned judge was in error in striking out the claim at that stage of the proceedings as the question of admissibility, is evidential and should have been left to be determined at trial. He relied on the case of ***Re Saifi*** [2001] 4 All ER 168 in support of that submission.

11. In so far as the appellant places reliance on the fact that he had filed judgment in default of defence on November 18, 2004, as there is

nothing on the Record of Appeal to indicate that the judgment was perfected, I therefore take no cognizance of it. At the time the respondent's amended application came before Harris J, no defence had been filed. The learned judge in her judgment (at page 131 of the record) making reference to the letter of June 10, 1999 states:

> "It is clear that the defendant acknowledged owing a debt to the Claimant. However, the sum he has admitted owing is less than that claimed. It may be that his admission relates only to a part of his indebtedness to the claimant. But the statement of claim does not disclose particulars of the debt. Its lacking in particularity limits the claim and deprives the defendant from knowing the precise nature of the case he should meet in the event of a trial."

In ***Dungate v Dungate*** [1965] 3All ER 818 a defence that a claim was statute barred failed because a letter had made it plain that there were accounts owing and outstanding to the plaintiff and so it was a sufficient acknowledgement of the plaintiff's claim to make time begin to run afresh from the date of acknowledgement. There, Lord Diplock, L.J. who delivered the judgment of the Court said:

> "There is clear authority that an acknowledgement under the Limitation Act, 1939 need not identify the amount of the debt and may acknowledge a general indebtedness, provided that the amount of the debt can be ascertained by extraneous evidence."

12. Harris J was also of the view that the acknowledgement of debt "must" be pleaded in the statement of claim.

The learned judge refused the appellant's oral application for amendment of his claim on the basis that an amendment to include the acknowledgement of debt would have deprived the respondent of a defence under the Statute of Limitation.

At page 884 **of Bullen and Leake Precedent of Pleading (11th Edition)**, the authors state:

> "The facts as to acknowledgement or part payment should be expressly pleaded in the statement of claim **or reply**." (Emphasis supplied).

The acknowledgement of debt could therefore have been pleaded in a reply. If the documents were admissible at trial and found to be authentic the statutory defence could not avail the respondent. I am in agreement with Mr. Shelton that the learned judge was in error in not taking cognizance of the documents on which the appellant sought to place reliance, in support of his claim.

The appellant had exhibited to his affidavit a written document with an English translation, which he deponed was an acknowledgment of the debt which he said the respondent owed. There is no evidence of any other debt owed by the respondent to the appellant. The documents on which he relied in respect of his claim had been sent to the respondent from December, 2003 and no issue had been taken by him in respect of their authenticity. The respondent was therefore well aware of the case he had to meet and had filed no defence.

13. In the circumstances of this case, it is my view that the appellant had raised sufficient issues on a prima facie basis for the matter to have proceeded to trial for a determination of those issues.

I am therefore of the opinion that the learned judge erred in striking out the appellant's claim. For the above reasons, I would allow the appeal and set aside the orders made below with costs to the appellant to be taxed if not agreed.

ORDER:

COOKE J.A:

The appeal is allowed. The order made by the court below is set aside. Costs to the appellant to be agreed or taxed both here and in the court below.