



**IN THE SUPREME COURT OF
THE TURKS AND CAICOS ISLANDS**

Action No. CL 19/20

BETWEEN:

**THE HON. ATTORNEY GENERAL OF THE
TURKS AND CAICOS ISLANDS**

Plaintiff

-and-

ANTHONY STEVE BEEN

Defendant



JUDGMENT

Before: **The Hon. Mr. Justice B. St. Michael Hylton QC (Ag)**

Appearances: **Ms. Ernette Kangal for the Plaintiff**
Mr. Stephen Wilson QC for the Defendant

Hearing Date: **30 August 2022**

Venue: **Court No. 5, Graceway Plaza, Providenciales**

Date Delivered: **31 August 2022**

Introduction

1. This is the Plaintiff's summons to amend the statement of claim. It is supported by an affidavit of Yaa McCartney which indicates that the Plaintiff's present cause of action is a claim in knowing receipt. After describing some developments since the action was filed and some evidence which has come to the attention of the Plaintiff, the deponent goes on to indicate that "the Plaintiff therefore wishes to add an alternative claim in dishonest assistance to deal with this factual case".
2. The Defendant opposes the application on two grounds. First, counsel submits that the originally pleaded claim is far out of time, having been filed nine years after the expiration of the relevant limitation period. The proposed new cause of action is therefore even further out of time and even more hopeless, and the court should not permit hopeless amendments.
3. I would not dismiss the summons on this basis. As I pointed out to the Defendant's counsel during oral submissions, if as they submit, the proposed new cause of action could be struck out as being frivolous, vexatious and/or an abuse of the process of the court, the same would apply to the present cause of action since the only basis for that submission is the statute of limitations point.
4. However, since statutes of limitation merely give rise to a defence, it would be difficult to strike out an action on that basis. I accept that there are authorities which indicate that the court can do so in a clear and obvious case. However, there would have to be a summons to strike out, affidavit evidence (if appropriate) and submissions before I would proceed on the basis that the present action or the proposed new cause of action would be struck out based on a statute of limitations defence.
5. The Defendant's second ground is that the amendments would raise a new cause of action after the expiry of the relevant limitation period, and that cause of action does not arise out of the same or substantially the same facts, as does the cause of action presently claimed by the Plaintiff.
6. The Plaintiff's counsel accepts that the effect of the proposed amendment would be to introduce a new cause of action, but contends that there is no applicable limitation period. Counsel goes on to

argue in the alternative that even if there is a limitation period and it has expired, the court should exercise its discretion in the Plaintiff's favour and permit the amendment.

Is there an applicable limitation period and if so, has it expired?

7. Section 69(1) of the Trusts Ordinance provides that:

“69. (1) No period of limitation or prescription shall apply to an action brought against a trustee –

(a) in respect of any fraud to which the trustee was a party or to which he was privy; or

(b) to recover from the trustee trust property, or the proceeds thereof—

(i) in his possession;

(ii) under his control; or

(iii) previously received by him and converted to his use.”

(Emphasis added)

8. The Plaintiff argues that the Defendant is a trustee for the purposes of that section, and this is an action to recover from him trust property which was in his possession and/or under his control and/or he previously received. There is therefore no applicable period of limitation. The difficulty with that submission is that the proposed claim is expressly not on that basis.

9. Paragraph 41A of the draft amended statement of claim states: “In the alternative, if the Defendant was not a recipient for the purposes of the unconscionable receipt claim, the Defendant is liable to the Plaintiff in dishonest assistance.” The draft pleading then goes on to give particulars of the alleged dishonest assistance, none of which are on the basis that the Defendant was a trustee or received trust property.

10. In fact, a claim in dishonest assistance is not a claim against a trustee for breach of trust; it is a claim against a third party who dishonestly assisted the trustee (or other fiduciary) to breach his duties. In **Williams v Central Bank of Nigeria** [2014] 2 ALL ER 489, Lord Sumption observed that¹ “A number of clear and considered judicial observations over the past two centuries seem to me to make it clear that a knowing recipient is not a trustee”. The learned Law Lord then continued²:

“In my judgment, given that knowing recipients are not constructive trustees, it must follow that dishonest assisters are not either. As Professor Mitchell observed in “Dishonest Assistance, Knowing Receipt and the Law of Limitation” [2008] 72 Conv 226 at 233, “it is harder to characterise dishonest assistants as “trustees” than it is knowing recipients”, not least because dishonest assisters do not take possession of any of the funds at issue (as if they did, they would be knowing recipients).”

11. In my view, the Plaintiff cannot rely on section 69(1) of the Trusts Ordinance, and the limitation period has therefore expired.

Does the court have a discretion to grant leave to make the amendment?

12. Given that finding, Order 20 rules 5 (2) and (5) of the Rules of Supreme Court apply. Those rules read:

(2) Where an application to the court for leave to make the amendment mentioned in paragraphs (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.

(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action

¹ At paragraph 57.

² At paragraph 66.

arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.

13. The Plaintiff argues that the court has a discretion as to whether to allow an amendment, and in considering how to exercise that discretion it should consider whether any prejudice will be caused to the other party. In this case, counsel contended that there would be no prejudice to the Defendant if the court allows the amendment.

14. However, the discretion only arises if the court is satisfied that the new cause of action arises out of the same or substantially the same facts as the original cause of action. The ruling on the Defendant's second basis of challenge will therefore depend primarily on one issue, and that is whether the proposed new cause of action would be based on the same or substantially the same facts as the one originally pleaded.

15. The draft amended statement of claim makes a number of factual allegations that were not made in the present statement of claim, and which may be necessary to ground the proposed cause of action in dishonest assistance but not the original cause of action of knowing receipt. These include the following:

(a) **Paragraph 5** – The sale relied on an out-of-date valuation, and the Defendant induced and/or assisted in the transfer of the Parcel to Navigation at a substantial undervalue.

(b) **Paragraph 18** – On 11 December 2006, the Defendant orally instructed Construction Advisory Services Limited to prepare a desktop valuation of the Parcel.

(c) **Paragraph 18A** – On 18 December 2006, Construction Advisory Services Limited provided the valuation to the Defendant stating a particular value and three days later, the Defendant indicated his acceptance of the offer of the Parcel.

(d) **Paragraph 24.3** – The Defendant was clearly in discussions with Ministers about the transaction and wrote certain letters.

16. Notably, the original statement of claim does not even mention this valuation.

17. In view of those new factual allegations, it cannot be said that the proposed new cause of action arises from the same or substantially the same facts. The Plaintiff's counsel points out that the Defendant disclosed the valuation so he cannot object to the Plaintiff pleading it, but that submission misses the point. The issue here is not whether the Defendant would be prejudiced but whether the proposed cause of action arises out of the same or substantially the same facts as the originally pleaded claim. It does not, and the power to permit an amendment pursuant to Order 20 rule 5 therefore does not arise.

18. For these reasons I dismiss the summons and direct that the Plaintiff pay the costs.

B. St. Michael Hylton QC
Acting Judge of the Supreme Court
31 August 2022

