In The Supreme Court of Bermuda

CIVIL JURISDICTION
2016: No. 204

BETWEEN:

LYNDA SHARON SWAN

Plaintiff

-v-

CRAIG R CHRISTENSEN
(trading as Arthur Morris, Christensen and Company)

Defendant

EX TEMPORE RULING

(in Chambers)

Strike-out application-abuse of process-limitation defence – Limitation Act 1984 sections 7 and 10-meaning of action on a specialty-re-litigation of issues raised in prior proceedings-res judicata

Date of Ruling: October 24, 2016

The Plaintiff appeared in Person
Mr Kim White, Cox Hallett Wilkinson Limited, for the Defendant

Introductory

1. On the 17th of May 2016 the Plaintiff issued a Specially Endorsed Writ of Summons seeking damages against the Defendant for negligent work carried out under a letter of engagement dated on or about the 5th of July 2007. The complaint was that various conclusions that were reached[1] were incorrect.

2. The Defendant in this matter issued a Strike-out Summons on the 3rd of August 2016 under the inherent jurisdiction of the Court and/or Order 18 Rule 19 and supported that application by Affidavits sworn by Christopher Morris on the 27th July 2016 and by Craig Christensen on 26th July 2016.

The merits of the strike-out application: overview

3. The essence of the application was that the Plaintiff's claim was time-barred, and not only that. The claim related to the retention of the accounting firm in the Supreme Court action 2005/170, a proceeding which concluded in the Supreme Court in 2008 and which was unsuccessfully appealed by the Plaintiff in the present action to the Court of Appeal.

4. The broad picture that is presented by the evidence which is not in dispute is that the Plaintiff's complaints raised in the present action could have been advanced in the 2005 action but were not. And this picture was confirmed by the Plaintiff herself. Not only did she through her Affidavit in Reply agree that the retainer of the Defendant concluded on the 23rd December 2009, which is clearly more than six years before the present action was commenced. But in submissions to the Court she confirmed that she was aware of the complaints that she seeks to pursue in the present action while the earlier 2005 proceedings were on foot, via a separate accountant's report which could have been relied upon in those earlier proceedings but which her lawyer declined to advance on her behalf.

5. And so looking at the picture both technically in terms of the limitation defence which is raised as the basis for striking out this claim, but also looking at the broader picture of seeking to re-litigate issues which were or ought to have been advanced in earlier litigation, there are clear grounds for viewing the present proceedings as being an abuse of process.

6. Earlier this year the Plaintiff brought proceedings against the present defendant under a corporate umbrella. Those proceedings were struck-out by me primarily, as I recall, on the ground of the wrong Defendant had been sued although Mr White contends that the limitation issues were also engaged. But I assume in the Plaintiff's favour that

[1]In a financial report prepared pursuant to a Court Order.

she did not appreciate that the Court was dealing with the limitation issue in any formal sense.

The history of the earlier proceedings

7. The history of the earlier matter deserves brief mention because it elucidates the fact that the report which the Plaintiff seeks to impugn in present proceedings was indeed a report which was ordered by the Court and which was in that earlier proceeding effectively found by the Court to have been valid and formed the basis of the Court's decision. There was on the 10th of May 2007 in 2005/270 a directions Order made by Justice Wade-Miller and in paragraph 8 of that Order directions were given for the taking of an interlocutory account by duly qualified accountant agreed by the parties or, failing agreement, appointed by the Court. And pursuant to that order the Defendant firm was (jointly) retained and an initial report was prepared in or about 2007 which was then amended to correct certain errors on the 23rd of January 2008.

8. I should add that the Plaintiff, appearing as litigant in person in the present proceedings, was legally represented in the 2005 proceedings and clearly had an opportunity to critically review the report and to make any comments thereon.

9. On the 8th of April 2008 Justice Wade-Miller made a further Order in relation to the accounting evidence and that was in paragraph 2 of the order which indicated that by consent Arthur Morris Christensen are to provide a final accounting report to the Court by way of update to their interim report as well as a corrected report taking into account the overdraft facility issue in relation to transfers for mortgage payments and construction costs as raised by the Defendant's counsel. So the reports as they were being prepared were clearly being scrutinized by the Defendant and her council and the Court was taking note of the matters that the Plaintiff in the present action wished to have addressed.

10. A judgment was given in those earlier 2005 proceedings on the 3rd of September 2008 and in paragraph 8 of that judgment the Court indicated that there was some doubt as to precisely how the outstanding amounts which had to be paid to equalize payments between the parties needed to be calculated. And so the Court indicated that if the parties were unable to agree, Arthur Morris should carry out an assessment to determine which specific sums, if any, were due to avoid any inequality of payments. The Court also ordered that the costs of that further report were to be equally shared by the parties.

11. It then appears that the final report was prepared prior to the appeal on the 2nd of December 2008 and there was then an appeal to the Court of Appeal and on the 4th of December a further costs Order was made by consent in which the Defendant agreed to be wholly responsible for Arthur Morris Christensen's fees with respect to the issue of the overdraft facility. The Plaintiff in the present action appealed to the Court of

Appeal and that appeal was dismissed on the 2nd December 2009. The Court of Appeal ordered some updating accounting work to be done which work was seemingly completed in December 2009.

The Defendant's limitation defence

12. The limitation position as a matter of law is quite clear. Section 7 of Limitation Act 1984[2] provides that an action founded on simple contract shall not be brought after the expiration of 6 years from the date on which the cause of action accrued. It seems to me to be unarguably clear that the cause of action for the present claim accrued at the very latest in December 2009 when the final report was prepared and that the time for bringing any proceedings thus expires pursuant to section 7 in or about December 2015.

13. The Plaintiff has sought to defeat this application to strike-out on the grounds of a clear limitation defence in two ways. Firstly and most broadly, the Plaintiff has argued that she genuinely believes that she has been dealt with unjustly by an incorrect accounting report the impact of which was only fully apparent to her some years after the work was done. Secondly and more technically, she has sought to rely on section 10 of the Limitation Act 1984[3] which fixes a 20 year limitation period for an action upon a specialty. It is well recognized that an action upon a specialty is a claim based on a deed and that point is confirmed by the Privy Council decision in *Matadeen-v-Caribbean Insurance Co Limited* [2002]UKPC 69. Section 10 clearly does not apply to the present contract of retainer.

Alternative basis for striking out: res judicata

14. I should add that, putting aside issues of limitation, it would have been open to the Defendant in this action to argue, as is hinted at in the evidence filed in support of the application to strike-out, that this proceeding is an abuse of process because the Plaintiff is seeking to re-litigate issues which were or ought to have been decided in the earlier action. There are circumstances in which litigants can sue their advisors in relation to reports that are prepared for in context of legal proceedings. But where an expert is jointly retained pursuant to a Court order for the specific purpose of legal

[2] Section 7 provides:

"***Time limit; actions founded on simple contract***
7 An action founded on simple contract shall not be brought after the expiration of 6 years from the date on which the cause of action accrued."

[3] Section 10 provides:

"***Time limit; action upon a specialty***
10 (1) An action upon a specialty shall not be brought after the expiration of 20 years from the date on which the cause of action accrued.

(2) Subjection (1) shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act."

proceedings, and the contents of the report are under scrutiny in those proceedings, the litigant has a duty to raise any complaint about the relevant report in the context of that proceeding so that the professional preparing the report is able to deal with the matter and so that the Court itself can be assisted to reach the most accurate possible decision.

15. Where that does not happen it is difficult to avoid the view that a belated attack on the professional is not, in effect, anything more than a case of a litigant who has not achieved the result that they would have desired trying to indirectly attack an Order that has been made in earlier proceedings by raising in subsequent proceedings matters that ought to have been advanced in the earlier proceedings. This seems to me to be the sort of case where, even if the Plaintiff in this action had commenced her proceedings within the six year period, it would have been open to the Defendant to argue that the doctrine of *res judicata,* which is a public policy rule designed to prevent the re-litigation of issues over multiple sets of proceedings, applies. It could have been argued that this doctrine applied and that the proceedings were liable to be struck-out on that alternative ground.

Conclusion

16. And so for these reasons I am bound to grant the strike-out application and, having heard the parties as to costs, award the Defendant the costs of the application which I summarily assess at $8,000.00 with a view to saving the additional costs of a taxation hearing.

Dated this 24th day of October, 2016 ______________________

IAN RC KAWALEY CJ