CIVIL JURISDICTION
2002: No. 241

BETWEEN

DILTON MARTIN ROBINSON

Plaintiff

-and-

THE BANK OF BERMUDA LIMITED

Defendant

Mr Cottle for the Plaintiff
Mr Martin for the Defendant

RULING
(Strike Out)

This is an application brought by the Defendant from a consent order for directions dated the 15th January 2007. Said order provided for the trial of two preliminary issues raised by paragraph 34 of the Defendant's defence.

THE PRELIMINARY ISSUES

The issues being, with respect to paragraphs 4 and 7 of the statement of claim, whether the Plaintiff's claim is time barred; and whether the Plaintiff's claim should be struck out on the grounds that it discloses no reasonable cause of action and/or is frivolous or vexatious, and/or is an abuse of process; or whether it ought to be struck out under the inherent jurisdiction of the court.

THE HISTORY

The history of this action is well rehearsed in the judgments of this court that have previously been rendered.

THE FACTS

The facts are not in dispute, and in so far as they are, never the less, the facts borne out in the Plaintiffs pleaded case are taken to be indisputable for the purposes of the application.

The Plaintiff, at the relevant time was employed as an assistant manager in a mortgage company. He had valuable property and other assets but found himself in a cash crisis and sought the assistance of the Defendant in an effort to refinance various debts.

In the course of his dealings with the Defendant the Plaintiff entered into discussions with a servant of the bank, one John Fargey who after obtaining the Plaintiff's financial details advised the Plaintiff to include his wife in the refinancing; thereafter the Defendant caused to be drawn up a letter containing an offer to finance.

It is the Plaintiff's case that the Defendant's servant Mr Fargey gave advice and obtained the confidence and trust of the Plaintiff so as to create in the Plaintiff a belief that the Defendant was acting in the Plaintiff's interest, and that this gave rise to a fiduciary duty between the Plaintiff and the Defendant.

It is the Plaintiff's case that based on the financial advice it was necessary for the Plaintiff to realise certain assets; he would otherwise be able to service the newly created

mortgage and loan by income from his employment and rental income gleaned from some of his real properties.

The Plaintiff and his wife at first did not accept the offer made in the letter, and in effect the offer lapsed by its terms by effluxion of time. Unbeknown to the Plaintiff or his wife, Mr Fargey through the medium of email, aware that the Plaintiff might be involved in an investigation, sought the advice of a Senior Vice President of the Defendant, Mr Henry Smith, as to whether the offer of finance should in the circumstances be pursued.

Mr Smith by return email confirmed that he was aware of the investigation, advised that the refinancing ought to go ahead stating as his reason that it would ensure that the Defendant would have a more secure position before they passed information on to the police that could land the Plaintiff in trouble.

Unaware of this development, when actively approached by Mr. Fargey to take up the offer, on the advice of Mr Smith, the Plaintiff and his wife accepted the offer of finance and entered into a mortgage and loan arrangement with the Defendant and one of its subsidiaries securing to the Defendant the majority of the Plaintiff's assets as provided by the letter of offer.

In his pleaded case the Plaintiff asserts that several days later he was summarily dismissed from his employment as a result of the Defendant informing his employer of the Plaintiff's involvement in a certain property transaction. It is further pleaded that the information supplied to the Plaintiff's employer was supplied in direct response to a request by the employer. The Plaintiff further pleads that he was unaware and had no reason to suspect the deliberate course of action intended by the plaintiff which caused his dismissal.

The Plaintiff claims that not until he fortuitously discovered the emails could he have known of the Defendants intention to secure their own position before they undermined his ability to meet his commitments under the repayment scheme discussed with Mr. Fargey.

It is an accepted fact that the Defendant gave information to the Plaintiff's employer about a cheque drawn on the Plaintiff's account in which the employer had a particular interest.

THE ISSUES

The first attack that the Defendant launches against the Plaintiff's case is that the pleaded case shows no reasonable cause of action; secondly, the Plaintiff's case is assailed for lack of particulars of damage, and thirdly, that the Plaintiff's case in any event is statute barred.

NO REASONABLE CAUSE OF ACTION

The Defendant's primary contention is that the Plaintiff and Defendant were in a relationship of banker and customer and therefore they were in a contractual relationship which does not give rise to fiduciary duties on the part of the Defendant toward the Plaintiff.

Counsel for the Defendant contends that unless the Bank took on a role outside that of banker in relation to the Plaintiff as customer no fiduciary duty arose; for which principle he cites **White-v-CDP** Civ. Jur. 1993 No. 323 and **Tai Hing Cotton Mills Ltd.-v-Liu Hung Bank** [1985] 1 AC PC p80.

Such a duty is in any event denied by the Defendant. He argues that the decision in **Bird-v-Bank of N.T.Butterfield & Son** [2005] Bda L.R. 55, 1, limits the theoretical application of a fiduciary duty to the existence of very special circumstances, which he argues, on the Defendant's case did not exist.

Mr Martin for the Defendant asserts that the Plaintiff has failed to properly link the disclosure of information to the Defendant, and the consequent loss resulting from the loss of employment with L.P. Gutteridge Ltd (LPG). He further asserts that the Defendant in any event has not properly pleaded fraud or given sufficient particulars of undue influence and mis-statement among other complaints about the pleadings.

Mr. Cottle for the Plaintiff was frank enough to say that the Plaintiff's pleadings are imperfect. He admits that they can be improved upon however he argues that the essentials are there sufficient to found a claim, and are such that the Defendant has been able to fully plead a defence. In his view the Defendant's criticisms of the statement of claim are technical, of a drafting nature. Mr Cottle asserts that the Plaintiff never indicated that he would not seek any further amendment which could remedy such complaint.

In respect to the fiduciary duties owed by the Defendant bank to the Plaintiff, which take the relationship outside of the simple contractual one Mr. Cottle cites **Tournier-v-National Provincial and Union Bank of England** [1924] 1 KB 416 in which Atkin LJ had this to say of the duty of confidence:

> "It clearly goes beyond the state of the account, that is, whether there is a debit or credit balance, and the amount of the balance. It must extend at least to all the transactions that go through the account…I further think that the obligation extends to information obtained from other sources than the customers own account, if the occasion upon which the information was obtained arose out of the banking relations of the bank and its customers- for example with a view to assisting the bank in coming to decisions as to its treatment of its customers…".

The Plaintiff argues that the conduct of Mr Fargey took the Defendant beyond the realm of a contractual relationship with the plaintiff which gave rise to the fiduciary duties before the refinancing scheme was entered into, and that the bank thereafter abused its position for its own benefit by securing its own position.

It is the Plaintiff's case that rather than dismiss the Plaintiff's claim the allegations which include all of the facts surrounding the emails lends itself to a full examination that can only be undertaken in the context of a trial.

In my view the Plaintiffs claims may not be pleaded in the most succinct or pellucid fashion, however the ingredients alleging circumstances in which a relationship over and beyond a contractual one arose, and the pleadings raising issues of breaches of fiduciary duties are made out in the Plaintiff's statement of claim. The tortuous claims are plainly set out. Whether any of these claims are capable of proof would fall for a closer test in trial.

I would have to agree with Mr Cottle that Mr Martin's assertion that no cause of action founded in tort can be asserted where there is a contractual relationship is not supported by the authorities cited. Criticisms of the claim in fraud is like wise over stated as it is a trite principle of law that conduct constituting fraud must be specifically alleged however the word 'fraud' need not be pleaded.

LIMITATION DEFENCE

The Defendant contends that the Plaintiff was aware at the time of the termination of his employment that the Defendant had passed some information on to the Plaintiff's employers which precipitated the termination of his employment. The Defendant argues that the Plaintiff was aware of the role that the Defendant played in 1992. Further that notwithstanding that the email exchange came to his attention in or after mid 1997 but in any event before April 1998, the Plaintiff did not file his 2002 action until he knew that the 1998 action was faulty.

It is the Defendant's view that the Plaintiff's reliance on the emails does not save his case from offending the limitation period. He argues that the Plaintiff could have made the claim in 1992 having been in possession of all of the relevant facts at that time. For

this reason the Defendant contends that the claim is statute barred and there is no basis for an extension of the period pursuant to section 33 of the Limitation Act 1984.

Counsel for the Plaintiff contends that with the knowledge that the bank then had, the bank should have disclosed the nature of its investigation to the Plaintiff and advised him to seek independent legal advice. He contends that a conflict of interest arose and it is in that context that a fiduciary obligation arose on the part of the Defendant.

In **Bristol and West Building Society-v-Mowther** [1996] 4 All ER 698 Millet L.J. defined the characteristics of the fiduciary in this way:

> "A fiduciary is someone who has undertaken to act on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The Principal is entitled to the single-minded loyalty of his fiduciary. The core liability has several factors. The fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict. He may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristic of the fiduciary…he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary".

Millett L.J. went on to say that breach of fiduciary obligation connotes disloyalty or infidelity.

The allegation that the bank actively sought to encourage the Plaintiff to undertake the borrowing in circumstances where it knew it was participating in conduct that would frustrate the very scheme that they had proposed, if proved, would amount to strong evidence that a conflict of interest arose giving rise to a fiduciary duties. The fact that the allegations are strongly contested is no bar to the Plaintiff proceeding even in the face of a poorly drafted Statement of claim.

How does this affect the limitation defence? The Plaintiff has to show that there was concealment of essential facts that could have informed him of his cause of action. It is the case of the Plaintiff, not only that he had been unaware of the emails but also that he had been unaware of and in no position to discover the true nature of the Defendant's covert intention until he caught sight of the emails. That intention was to put the Bank's interest first, secure the Plaintiff's indebtedness to the Defendant, and then euphemistically pull the rug out from under his feet.

Mr. Cottle contends that Mr Martin has wholly misunderstood what the essential facts are because Mr Martin argues that the essential facts were that the Defendant informed the Plaintiff's employer of certain information and the plaintiff was aware of this because the disclosed information and its source were set out in LPG's termination letter to the Plaintiff.

If Mr Martin is correct then clearly the period relevant to the issue of limitation would have commenced, at the latest, at the date that the Plaintiff received the termination letter. If Mr Cottle is right, the period will have commenced on the date that the emails were discovered. The emails were discovered in 1997, although the exact month is in dispute as between the pleadings and the Plaintiff's affidavit sworn in these proceedings.

Mr Cottle's contention is that the Plaintiff could not have known that the bank intended to secure its own interest first; that gave rise to the fiduciary duties, and it was the subterfuge that prevented discovery of these essential facts until the emails were discovered. The Plaintiff pleads particulars of fraud, deceit and mis-representation. The covert facts were essential to those allegations on the face of it, if no others in my view.

PARTICULARS OF DAMAGE

In paragraph 45 of the Statement of Claim the Plaintiff merely states that particulars are to be delivered. Mr Cottle argues that this is not unusual and that this is an appropriate case for a split trial with the liability issue to be determined first and then damages.

He argues that if the claim for breach of fiduciary duty is successful the bank will have to disgorge all benefits received as a result as well as any additional damages for other loss. The difficulty in making that assessment now prevents the plaintiff from particularizing those losses. Mr Martin argues that in any event the Plaintiff cannot show loss because had he not entered into the refinancing with the bank he would have lost his property values in repaying what he already owed.

I accept that the loss portion of the Plaintiff's case is essential to his claim; however it is by no means straight forward.

In his earlier application before me for amendment of the pleadings in this case Mr Cottle presented a schedule of loss and damage. In my decision of the 10th April 2006 I indicated, albeit in a passive phraseology, that the schedule was not disallowed. Mr Cottle did not go on to amend the Statement of Claim by inserting the contents of the schedule. He relies on that schedule now although he appears to maintain that there should be a split trial.

This creates an untidy situation. In retrospect I should have made it clear that the Plaintiff had leave to amend by including the schedule of loss. To the extent that Mr Cottle has sought that leave I think he should be allowed the opportunity to amend.

CONCLUSION

I am not convinced that the Plaintiff's Statement of Claim shows no reasonable cause of action. Several distinct causes of action are made out in the pleading. Whether they will withstand the test of the rigours of a trial remains to be seen. Accordingly the Defendant's application to strike out the pleadings on this ground is refused.

Further the Plaintiff has raised a prima facie case on the pleadings of fraud and or unconscionable conduct on the part of the Defendant that potentially will avoid the Limitation Act. In those circumstances the Defendant's application to strike out the action for offending the limitation period is refused.

In the circumstances mentioned above the Plaintiff has been given the opportunity to re-amend his pleadings to include his schedule of loss and damage; accordingly the Defendant's application to strike out on this ground is refused.

In all of the circumstances the court will not exercise its inherent jurisdiction to strike out the Plaintiffs pleading.

An immense amount of time has been wasted since this action was commenced, and as I have indicated before there has been delay on both sides. There have been earlier attempts to amend the Plaintiff's pleadings; the possibility of another attempt faces the parties. This is not how one should expect a case to be prosecuted. However the issues involved in this case are of a serious nature and both parties should have those issues fully aired and finally resolved; a trial should accomplish that.

Dated this 11th day of July 2007

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Charles-Etta Simmons
Puisne Judge