In The Supreme Court of Bermuda

CIVIL JURISDICTION

2020: No. 274

BETWEEN:

HUNTS SANITATION SERVICES LIMITED

1st Plaintiff

HUNTS QUARRY SERVICES LTD

2nd Plaintiff

HUNTS FOOD AND SUPPLIES LIMITED

3rd Plaintiff

- and -

THE MINISTER OF FINANCE

Defendant

RULING

Application to strike out writ, no reasonable cause of action, frivolous or vexatious, abuse of process, quantum meruit, whether action is time barred

Date of Hearing: **29 March 2021**
Date of Ruling: **14 May 2021**

Appearances: **Michael Scott, Browne Scott, for the Plaintiffs**

Wendy Greenidge, Attorney-General's Chambers, for the Defendant

RULING of Mussenden J

Introduction

1. The Plaintiffs commenced these proceedings by a Specially Indorsed Writ of Summons ("**the Writ**") issued on 21 August 2020. The claim is for monies due for the provision of labour and equipment, in connection with a purported excavation agreement between the Plaintiffs and Defendant ("**the Minister**").

2. By Summons dated 11 December 2020 the Defendant seeks an Order that the Plaintiffs' Writ (a) be struck out pursuant to the Rules of the Supreme Court ("**RSC**") Order 18 r.19(1) on the grounds that it discloses no reasonable cause of action, it is frivolous and vexatious, and is otherwise an abuse of the process of the Court; and (b) be dismissed on the grounds that the Plaintiffs' alleged cause of action is time barred pursuant to section 4 and 7 of the Limitation Act 1984 ("**the 1984 Act**") . The Summons is supported by the Affidavit of the current Permanent Secretary ("**PS**[1]") for Public Works Randolph Rochester ("**PS Rochester**") sworn 4 December 2020 along with Exhibits "**RR1 - RR2**".

3. The Plaintiffs resist the strike-out application. They rely on the First Affidavit of Nelson Milburn Hunt ("**Mr. Hunt**") sworn on 3 February 2021 along with Exhibits "**NMH1 – NMH3**".

4. Having heard Mrs. Greenidge for the Minister and Mr. Scott for the Plaintiffs on the Defendant's Summons, I reserved my ruling which I now provide together with reasons herein.

[1] All References to 'Permanent Secretary' or 'PS' are in respect of the Ministry of Public Works unless otherwise stated.

Summary of the Plaintiff's Pleaded Case as set out in the Statement of Claim ("SOC")

5. The Plaintiffs are local companies incorporated in Bermuda. The 2nd and 3rd Plaintiffs are registered with the Department of Social Insurance and are obliged to pay employee and employer contributions in respect of the social insurance benefit. During the period January 2012 to August 2019, the 2nd Plaintiff and 3rd Plaintiff incurred debts of social insurance benefit payments in the amounts of $139,659.14 and $188,907.88 respectively for a total between them of $326,727.02 ("**the Social Insurance Debts**"). The Defendant commenced actions for the Social Insurance Debts in the Magistrates' Court ("**the Social Insurance Claims**") and on 20 January 2020 the Defendant obtained judgment in the Magistrates' Court against the 2nd and 3rd Plaintiffs in the amount of $139,659.14 and $188,907.88 respectively.

6. From on or about 20 January 2020, the 1st Plaintiff has had a viable claim against the Defendant for certain remediation and cleanup services it carried out at Morgan's Point, Southampton for the Bermuda Government ("**the Remediation Works**") in the sum of $908,766.60 ("**the Remediation Claim**"). The Remediation Claim existed as a counterclaim to the Social Insurance Claims. The Magistrate Court granted the Plaintiffs time to pursue the Remediation Claim against the Defendant in the Supreme Court such that in time it would stand as a set-off against the total Social Insurance Debts of $326,727.02.

7. The Remediation Claim arose as a result of some events beginning in or around 2009 based upon a land swap of property at Southlands, Warwick for property at Morgan's Point, Sandys. For financial investment purposes, the contaminated land at Morgan's Point had to be remediated to industry standards.

8. The then Minister of Public Works and the then PS requested the 1st Plaintiff to carry out the Remediation Works on a 'cost and charge' basis. In 2009 the 1st Plaintiff was not successful in securing a contract for the Remediation Works but in June 2011, the 1st Plaintiff began the Remediation Works. In December 2011 the Ministry of Public Works

verbally requested the 1st Plaintiff to cease its Remediation Works. However, it continued the cleanup work and in February/March 2012 it invoiced the Bermuda Government for $774,368. An April 2012 Cabinet Memorandum submitted by the then PS Horton recommending a retroactive contract award for $226,570 for the 1st Plaintiff was rejected by the then Minister of Finance. On 19 February 2015 the then PS O'Brien sent a letter to the Plaintiffs' Director Mr. Hunt stating that the Government had no evidence of an agreement with the 1st Plaintiff for the Remediation Works and that it was satisfied it was under no obligation in regards of the Remediation Claim ("**the Denial Letter**"). The evidence of PS Rochester and Mr. Hunt exhibited the Denial Letter.

9. The 1st Plaintiff relies on the facts of the visits to Morgan's Point to observe the Remediation Works by the then Minister of Public Works and his representatives (various Public Works officials including the Chief Engineer) and their encouragement as approval for the 1st Plaintiff to carry out the said Remediation Works notwithstanding the absence of formal Bermuda Government Cabinet approval.

10. The Plaintiffs assert their claims to set off and that they are owed the claimed amount of $908,766.60 on a quantum meruit basis in law.

Summary of the Defendant's Strike Out Application

11. The Defendant seeks to strike out the Plaintiffs' Writ in its entirety on several grounds.

Action is statute-barred under the 1984 Act

12. First, Mrs. Greenidge submits that the action against the Defendant is statute-barred pursuant to the 1984 Act on the basis that the cleanup work was carried out between 2011 and March 2012. Therefore the limitation period ended in March 2018. The proceedings were commenced by this Writ filed on 21 August 2020, some eight (8) years and five (5) months from the date on which the cause of action accrued. Mrs. Greenidge relies on section 4 and 7 of the 1984 Act which state as follows:

"Time limit; actions founded on tort

4 An action founded on tort shall not be brought after the expiration of 6 years from the date on which the cause of action accrued

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."

13. Mrs. Greenidge submits that based on the Statement of Claim and Mr. Hunt's affidavit that a cause of action on either contract or tort would have accrued before the limitation period of six years and therefore it was statute-barred unless it can be shown that the Plaintiffs' case falls within an exception under the 1984 Act. Also, as the Plaintiffs are seeking a remedy on the basis of quantum meruit, that is also time barred under section 37 of the 1984 Act.

14. Mrs. Greenidge submits that in his First Affidavit, Mr. Hunt seeks to rely on an email dated 15 January 2013 from the then PS Horton to extend the limitation period on the basis of acknowledgment of the debt ("**the Acknowledgement Email**"). However, Mrs. Greenidge submits, as supported by PS Rochester's evidence, that there is no debt owed by the Defendant and the said Acknowledgement Email is not an acknowledgment of debt for the purposes of section 30(5) and (7) and sections 31(1) and (2) of the 1984 Act. She relied on the case of *Global Construction Limited v Hamiltonian Hotel & Island Club Ltd* 2005 No. 226 [2005] Bda LR 81 at para 20 where Kawaley J stated:

"The law is clear that this type of statement is not an "acknowledgement" of debt. In Halsburys Vo1 28 para 1083 [Tab 4] commentary, it states:

"For there to be an acknowledgement of a claim there must be an admission that there is a debt or other liquidated amount outstanding and unpaid Good v Parry [1963] 2 ALL ER 59""

15. Mrs. Greenidge submits that although Mr. Hunt refers to the Denial Letter as the time when he became aware of his right to bring a claim against the Government, the Plaintiffs failed to bring the action before the Courts between February 2015 and March 2018, before the expiry of the limitation period. She relied on the case of *Harold Darrell and Richard Horseman* [2018] SC (Bda) 23 Civ at para 39 where Rihluoma AJ stated that Wade-Miller J ruled:

> *"Blaming the excessive delay upon erroneous legal advice is not an acceptable excuse in law".*

16. Mrs. Greenidge also relied on *Harold Darrell and Richard Horseman* at para 42 where Rihluoma AJ stated as follows:

> *"In the circumstances I find that Mr. Darrell's claim is hopelessly out of time and that section 33 of the Limitation Act and Rule 13 of the Barristers' Code of Conduct do not apply so as to enlarge the time for the bringing of these proceedings. Accordingly, I rule that Mr. Darrell's Writ and Statement of Claim be struck out as showing no realistic possibility of success."*

Action is frivolous and vexatious

17. Second, the Defendant submits that the Statement of Claim should be struck out on the basis that it is frivolous and vexatious as it is plain and obvious from the pleadings that the Plaintiffs' claim is statute-barred and the prospect of obtaining an extension or exception under the 1984 Act is highly unlikely. Mrs. Greenidge submits that the Denial Letter clearly sets out the Government's position in relation to the Plaintiffs' claim, however the Plaintiffs took too long to bring the matter before the Courts within the limitation period. She relied on the case of *Metropolitan Bank and another v Pooley* [1881-85] All ER Rep 949 where the House of Lords stated as follows:

"There is an inherent power in every court of justice to stay a manifestly vexatious suit and so protect itself from abuse of its procedure. An action is frivolous and vexatious where upon the face of the pleading it is manifest that it cannot be maintained."

18. Mrs. Greenidge also relied on the case of *Riches v DPP* [1973] 1 All ER at 942 where Stephenson LJ stated as follows:

"The object of RSC Ord 18 r 19 is to ensure that the defendant shall not be troubled by claims against them which are bound to fail having regard to the uncontested facts. One of the uncontested set of facts which arises from time to time is when on the statement of claim it is clear that the cause of action is statute-barred and the defendant tells the court that he proposes to plead the statute and, on the uncontested facts, there is no reason to think that the plaintiff can bring himself within the exceptions set out in the Limitation Act 1939."

Abuse of the process of the Court

19. Third, the Defendant submits that it would be an abuse of the process of the Court to allow the Plaintiffs' claim to proceed to trial as the cause of action is statute-barred. Mrs. Greenidge relied on *Riches v DPP* where Stephenson LJ stated:

"… He said that a stay or even dismissal of proceedings may often be required by the very essence of justice to be done. The white book, having called attention to that statement by Lord Blackburn, goes on to say that the object "is to prevent parties being harassed and put to expense by frivolous, vexatious or hopeless litigation".

Summary of the Plaintiff's Arguments against Strike Out

20. The Plaintiffs submitted various grounds in resisting the Defendant's strike out application. Mr. Scott relied on *Hubbuck v Wilkinson* [1899] 1 QB 86 per Lindley MR that "*it is only in plain and obvious cases that recourse should be had to the summary process under this rule".*

21. First, the Plaintiffs submit that there is a reasonable cause of action. He relied on the case of *Drummond-Jackson v British Medical Association* [1970] 1 WLR 688 per Lord Pearson that "*a reasonable cause of action means an action with some chance of success when only the allegations in the pleadings are considered*".

22. Second, Mr. Scott submits that the claim is a restitutionary claim in unjust enrichment and that the Plaintiffs are entitled to payment on a quantum meruit basis. He relied on the case of *Moorgate Capital (Corporate Finance) v H.I.G European Capital Partners LLP* [2019] EWHC 1421 to set out the requirements for when it will be possible for a claimant to rely on quantum meruit namely that the claimant must show (a) the Defendant has been enriched; (b) the enrichment was at the claimant's expense; (c) the enrichment was unjust; and (d) the possibility of any other legal remedies must have already been exhausted.

23. Mr. Scott submitted that it was within the Court's discretion as to whether or not to make an award on the basis of quantum meruit and there were myriad factors to take into account when exercising the discretion, including: (a) whether the services were of the kind that would normally be provided freely; (b) the nature of the benefit received by the defendant; (c) the risks the claimant has incurred in agreeing to provide the services and whether the reasons for non-payment exceed the scope of those services; and (d) whether the defendant has behaved unconscionably in declining to pay.

24. Third, Mr. Scott submits that there were three separate actions in the Magistrates Court, all dated 29 October 2019, against the Plaintiffs for non-payment of social insurance benefit. He refers to this date as the "**Operative Date**". The Plaintiffs settled their defence and counterclaim to the Magistrate Court actions when the Magistrate adjourned the proceeding in order for the Plaintiffs to file their restitutionary claim in the Supreme Court which they did by way of this Writ on 21 August 2020. He refers to this date as the "**Second Operative Date**". Mr. Scott submits that he relies on two legal positions in respect of the 1984 Act as follows:

a. The cause of action accrued on the legal basis found in *Sandals Resorts International Limited v Neville L Daley and Co Limited* [2016] JMCA Civ 35 where the Court stated that a claim for compensation on a quantum meruit basis may be used as an alternative to a claim for damages. He further submits that the Supreme Court cause of action is a related cause of action to the one in the Magistrates Court and is triggered by the plea of a substantive remedy of set off in the restitutional claim for quantum meruit dating back to the date the work was carried out at Morgan's Point in June 2011 and also dating back to the Acknowledgment Email dated 19 February 2013. He submits that the amount of the claim exceeded the jurisdiction of the Magistrates Court so it had to be pursued in the Supreme Court. Therefore, the limitation is not a bar to the action in the Magistrates Court which started on the Operative Date, 29 October 2019. Additionally, Mr. Scott submits that the cause of action accrued on the Second Operative Date, 21 August 2020 the date the Writ was filed.

b. Mr. Scott relies on the mistake provision of the 1984 Act section 33(1)(c), in particular that Mr. Hunt became aware of his own mistaken understanding that the Defendant was no longer interested to meet his claim for restitution notwithstanding the Acknowledgment Email, the Cabinet Memorandum dated April 2012 proposing the ex gratia payment to the Plaintiffs and the Denial Letter. He relied on the case of *Test Claimants in the Franked Investment Income Group Litigation and Others v Commissioners for HM Revenue and Customs* [2020] UKSC 47 in support of his arguments on mistake.

25. Mr. Scott submits that the plea of mistake was not as strongly pleaded as it could have been but that the factual basis of mistake is pleaded in paras 6 – 7 of the Statement of Claim. He submits that the Plaintiffs can cure any inadequacy in the pleadings by seeking leave to amend the Statement of Claim as allowed by the RSC. He relied on *Republic of Peru v Peruvian Guano Co*. (1887) 36 Ch.D 489t which states "*Where the statement of claim discloses no cause of action because some material averment has been omitted, the Court,*

while striking out the pleading will not dismiss the action, but give the plaintiff leave to amend unless the Court is satisfied that no amendment will cure the defect.".

26. Fourth, Mr. Scott submits that the Acknowledgment Email from then PS Horton is an acknowledgment of debt for the purposes of section 30(5) and (7) and sections 31(1) and (2) of the 1984 Act. The email as evidenced in Mr. Hunt's Exhibit **NMH-2** states as follows:

> *"Subject: RE: Remediation Works Hunts sanitation 220312.xlsx*
> *Hi Noriette:*
> *I can only report that the matter is now in the hands of the Permanent Secretary for Public Works, Mr. Randy Rochester.*
> *I pray that it is resolved soon."*
> *RKH"*

27. This was in response to an email dated 11 January 2013 in the same exhibit from the "Quarry Office" (of the 1st Plaintiff) to the then PS Horton as follows:

> *"Subject: FW: Remediation Works Hunts sanitation 220312.xlsx*
> *Good Morning Mr. Horton,*
> *How are you, just a short follow up with the status of payment to Nelson Hunt for the Remediation work at Morgan's Point.*
> *Thank you in advance.*
> *Regards,*
> *Noriette Simmons*
> *Project Coordinator*
> *Hunts Group of Companies"*

28. Mr. Scott submits that the Acknowledgment Email meets the effectiveness requirements of section 31(1) of the 1984 Act in that the acknowledgment is in writing and is signed by

the person making it, and the section 31(2) requirement is met in that the acknowledgment is made to an agent of Mr. Hunt, the person whose claim is being acknowledged.

29. Fifth, Mr. Scott submits that in light of the above events, the matter is not statute-barred as according to the evidence of Mr. Hunt, he was of the view that as a result of the Acknowledgment Email dated 15 January 2013, he would be paid for his services, until such time that he received the Denial Letter dated 19 February 2015. Therefore he says, the time runs from his date of realization, that is, 19 February 2015 for six years. By issuing his Writ dated 21 August 2020 he has commenced his proceedings within the six-year limitation period. Therefore, he is not statute-bared.

30. Sixth, Mr. Scott submits that once the Plaintiffs have satisfied the Court that the Defendant's efforts to rely on no reasonable cause of action and that the action is statute-barred has failed, then the Defendant's conduct is a relevant factor in that (a) the Magistrates Court actions triggered the Plaintiffs' right to set off and counter claim; (b) the Defendant has acted unconscionably in declining to compensate the Plaintiffs; (c) the Defendant has been unjustly enriched by the work of the Plaintiffs; and (d) the Defendant has exclusive possession and control of many documents that are relevant to the Remediation Works and the Remediation Claim.

The issue of whether settlement talks between the parties can extend a limitation period

31. During the hearing, the Plaintiffs asserted that there were some settlement discussions underway which had the effect of extending or disapplying any limitation period. At my invitation, counsel submitted case authorities after the hearing for consideration.

32. Mr. Scott submitted the case of *Horton v Sadler* [2007] 1 AC 307 wherein it was stated that the House of Lords had departed from a case *Walkley* and held that "*the discretion under section 33 of the UK Limitation Act 1980 was to be exercised … fairly and based on the circumstances of the case.*.". Mrs. Greenidge submitted that in that case, the court's discretionary powers under section 33 of the UK Limitation Act 1980 and the parallel

section 34 of the 1984 Act apply to personal injury claims and death and therefore would not apply in the instant case. I agree that that case was in respect of limitation periods in personal injury cases and does not apply to the present case.

33. Mr. Scott submitted the case of *Boyo and Lloyds Blank Plc* [2019] EWHC 2279(QB) for the point that the Court's discretion was largely unfettered. Mrs. Greenidge cited various extracts from the case and submitted that in that case, the claimant relied on section 32 and or section 32A of the UK Limitation Act 1980, which is section 33 of the 1984 Act, to extend the limitation period in a claim for defamation. In my review of that case, it deals with the UK Limitation Act 1980 which has a section 32A 'Discretionary exclusion of time limit for actions for defamation or malicious falsehood.' The 1984 Act does not have a similar section 32A discretion for defamation or malicious falsehood or any general discretion. Therefore, there is no need for further consideration of such a discretion or that case.

34. In any event, on analysis of all the facts, I do not see a factual basis that there were ongoing settlement discussions delaying filing the Writ, rather references to repeated requests for documents prior to the Denial Letter and references to requests for payment. Therefore, I do not give further consideration to whether any settlement talks existed and had any effect on extending the limitation period for filing the Writ.

The Law on Strike Out

Guiding Legal principles

The Law on Strike-Out Applications

35. In the case of *Fidelity National Title Insurance Company v Trott & Duncan Limited* [2019] SC (Bda) 10 Civ (5 February 2019), Subair Williams J set out the law on strike out applications which I now set out in some detail.

36. Subair Williams J set out the general approach and the Court's case management powers.

> *"General Approach and the Court's Case Management Powers*
> *50. In David Lee Tucker v Hamilton Properties Limited [2017] SC (Bda) 110 Civ I outlined the general approach and relevant legal principles applicable to strike out applications. As a starting point, at paragraph 11, I stated:*
>
> > *"The principles of law applicable to the strike-out of a claim were no source of contention between the parties. This area of the law has been well recited in previous decisions of this Court. In general synopsis, strike out applications ought not to be misused as an alternative mode of trial. It is not a witness credibility or fact finding venture and for good reason. The evidence before the Court at this stage is not oral and has not yet been tested through cross examination. A strike out application, in reality, is a component of good case management. Where the pleadings are so bad on its face and so obviously bound for failure, the Court should strike it out."*
>
> *52. At paragraphs 14-16 in David Lee Tucker v Hamilton Properties Limited I considered the Court's case management powers in the context of a strike out application:*
>
> > *"14. The Court's determination of a strike-out application is a component of active case management. Essentially, the Court is required to identify the issues to be tried at an early stage of the proceedings and to summarily dispose of the others. This is aimed to spare unnecessary expense and to ensure that matters are dealt with expeditiously and fairly.*
> >
> > *16. In Jim Bailey v Wm E Meyer & Co Ltd [2017] Bda LR 5 at paras 14-15 the learned Hon. Chief Justice, Ian Kawaley, examined the impact of the new CPR regime and the Overriding Objective on strike out applications:*
> >
> > > *"…In Biguzzi v Rank Leisure plc [1999] 4 ALL ER 934 (CA), Lord Woolf explained that the CPR introduced an entirely new procedural code. It is true that he stated that preCPR authorities would not generally be relevant. But that*

was in the context of contending that the new regime imposed greater case management powers on the court to prevent delay than under the old Rules. Trial judges, post-CPR, were expected to use these case management powers judicially, only striking out as a last resort. It is also important to remember that this reasoning was articulated in a statutory context in which an entirely new procedural code was in force. And the particular strike-out discretionary power which was under consideration in that case was an entirely new one, a power exercisable on grounds of mere non-compliance with the Rules. As Lord Woolf observed (at 939-940): "Under the CPR the keeping of time limits laid down by the CPR, or by the court itself, is in fact more important than it was. Perhaps the clearest reflection of that is to be found in the overriding objectives contained in Part 1 of the CPR. It is also to be found in the power that the court now has to strike out a statement of case under Part 3.4. That provides that: '(2) The court may strike out a statement of case if it appears to the court- (a) that a statement of case discloses no reasonable grounds for bringing or defending the claim; (b) that the statement of case is an abuse of the court's process…' [and, most importantly] (c) that there has been a failure to comply with a rule, practice direction or court order.'

Under Part 3.4(c) a judge has an unqualified discretion to strike out a case such as this where there has been a failure to comply with a rule. The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case. The advantage of the CPR over previous rules is that the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out."

53. At paragraph 13 in David Lee Tucker v Hamilton Properties Limited I cited Auld LJ's remarks in <u>Electra Private Equity Partners (a limited partnership) v KPMG Peat Marwick</u> [1999] EWCA Civ 1247 p.613 which were previously relied on by the

Bermuda Court of Appeal in Broadsino Finance Co Ltd v Brilliance China Automative Holdings Ltd [2005] Bda LR 12[2]."

37. Subair Williams J set out the case law on reasonable cause of action.

"54. The rule against the admission of evidence in support of the ground that no reasonable cause of action is disclosed is contained at RSC Order 18/19(2).

55. At paragraphs 18- 20 in David Lee Tucker v Hamilton Properties Limited I referred to the following authorities in support of the rule at RSC Order 18/19(2):

"18. This rule was recognized in Broadsino Finance Co Ltd v Brilliance China Automative Holdings Ltd [2005] Bda LR 12: "Where the application to strike-out (is) on the basis that the Statement of Claim discloses no reasonable cause of action (Order 18 Rule 19(a)), it is permissible only to look at the pleading.

19. In E (a minor) v Dorset CC [1994] 4 All ER 640 at 649, [1995] 2 AC 633 at 693-694, Sir Thomas Bingham MR stated:

'It is clear that a statement of claim should not be struck out under RSC Ord 18, r 19 as disclosing no reasonable cause of action save in clear and obvious cases, where the legal basis of the claim is unarguable or almost incontestably bad…I share the unease many judges have expressed at deciding questions of legal principle without knowing the full facts. But applications of this kind are fought on ground of a plaintiff's choosing, since he may generally be assumed to plead his best case, and there should be no risk of injustice to plaintiffs if orders to strike out are indeed made only in plain and obvious cases. This must mean that where the legal viability of a cause of action is unclear (perhaps because the law is in a state of transition) or in any way sensitive to the facts, an order to strike out should not be made. But if, after argument, the court can be properly persuaded that no matter what (within the reasonable bounds of the pleading) the actual facts the claim is bound to fail for want of a cause of

[2] See above where the Plaintiff relied on this case in her objections to the strike out application

action, I can see no reason why the parties should be required to prolong the proceedings before that decision is reached."

20. The White Book (1999 edition) provides at 18/19/10:

"A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered (per Lord Pearson in Drummond-Jackson v British Medical Association [1970] 1 WLR 688; [1970] 1 All ER 1096, CA). So long as the statement of claim or the particulars (Davey v Bentinck [1893] 1 QB 185) disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak and not likely to succeed is no ground for striking it out (Moore v Lawson (1915) 31 TLR 418, CA; Wenlock v Maloney [1965] 1 WLR 1238; [1965] 2 All E.R. 871, CA): …""

38. Subair Williams J set out the case law on scandalous, frivolous or vexatious.

"56. At paragraphs 21- 22 in David Lee Tucker v Hamilton Properties Limited I considered the meaning of these terms and made the following observations:

Scandalous

21. A complaint that a pleading is 'scandalous' necessarily imports an allegation that the pleading is grossly disgraceful, false and malicious or defamatory. Scandalous claims are irrelevant to the proceedings and are invariably liable to be struck out on the basis that they are improper.

Frivolous and Vexatious

22. Justice Meerabux in The Performing Rights Society v Bermuda Cablevision Limited 1992 No. 573 at page 31 considered the meaning of 'frivolous' and 'vexatious':

"…It is pertinent to mention that the words "frivolous or vexatious" mean cases which are obviously frivolous or vexatious or obviously unsustainable. Per

Lindley L.J. in Attorney-General of Duchy of Lancaster v L. & N. W. Railway [1892] 3 Ch. 274 at 277. Also when "one is considering whether an action is frivolous and vexatious one can, and must, look at the pleadings and nothing else… One must look at the pleadings as they stand." Buckhill L.J. in Day v William Hill (Park Lane) Ld. [1949] 1 K.B. 632 at page 642."

However, Day pre-dates the 1985 Supreme Court Rules and the new CPR regime which introduced the Overriding Objective. RSC O.18/19(2) only excludes the admissibility of evidence on the grounds that no reasonable cause of action or defence is disclosed. Evidence may now be filed in support of grounds that the pleadings are 'scandalous, frivolous or vexatious'."

39. Subair Williams J set out the case law on abuse of process.

"57. The term 'abuse of process' has long been explored and addressed by the Court. Having relied on the persuasive passages stated and approved by learned judges of this Court and those sitting in the English House of Lords, I cited the following at paragraphs 23- 25 in David Lee Tucker v Hamilton Properties Limited:

"Misuse of procedure

23. In Michael Jones v Stewart Technology Services Ltd [2017] SC (Bda), Hellman J considered the meaning of 'abuse of process' by reference to Lord Diplock's passage in Hunter v Chief Constable [1982] AC 529 at 536 C: "It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied…""

The Law on Limitation Periods

40. The 1984 Act provides as follows:

"Acknowledgement and part payment

30 (5) Subject to subsection (6), where any right of action has accrued to recover—

(a) *any debts [sic] or other liquidated pecuniary claim; or*

(b) *any claim to the personal estate of a deceased person or to any share or interest in any such estate,*

and the person liable or accountable for the claim acknowledges the claim or makes any payment in respect of it the right shall be treated as having accrued on and not before the date of the acknowledgment or payment.

(7) An acknowledgment or part payment made after the expiration of the relevant limitation period shall be capable of reviving a time-barred remedy.

Formal requirements for section 30

31 (1) To be effective for the purposes of section 30, an acknowledgment must be in writing and signed by the person making it.

(2) For the purposes of section 30 any acknowledgment or payment shall be made to the person whose title or claim is being acknowledged or, as the case may be, in respect of whose claim the payment is being made."

Fraud; concealment; mistake

"33 (1) Subject to subsection (3), where in the case of any action for which a period of limitation is prescribed by this Act, either—

(a) the action is based upon the fraud of the defendant; or

(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or

(c) the action is for relief from the consequences of a mistake,

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

Reference in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.

Equitable jurisdiction and remedies

"37. (1) The following time limits under this Act, that is to say—

(a) *the time limit under section 4 for actions founded on tort;*

(b) *the time limit under section 7 for actions founded on simple contract;*

...

shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any such time limit may be applied by the court by analogy in like manner as the corresponding time limit under any enactment repealed by this Act has heretofore been applied.

Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise."

41. In respect of the kind of 'mistake' referred to in the 1984 Act, in a case not cited by Counsel, in *Sampson v Estate of Joell* [2016] SC (Bda) 11 Civ, after citing extracts from Lord Goff in *Kleinwort Benson-v- Lincoln CC* [1999] 2 A.C. 349 at 388D-389C, Kawaley CJ stated as follows:

"24 It appears to have been accepted by the parties and judges as uncontroversial in the case from which this passage is taken, that the type of mistake which could potentially stop time running for limitation purposes was a mistake which formed the basis for a remedy under the law of restitution. Such remedies are designed to afford relief to parties who have entered into transactions usually involving the payment of money, but invariably involving the transfer of some form of property benefit, in

circumstances that make it inequitable for the recipient to retain the property transferred. Mistake in this narrow technical legal sense, it is very clear and obvious, is wholly different to mistake on the ordinary broad sense of the word. Further support for this construction of the doctrine of mistake under the Limitation Act is provided in the more pithy and somewhat qualified observations of Lord BrowneWilkinson in Deutsche Morgan Grenfell Group Plc-v-Inland Revenue Commissioners [2007] 1AC 558 (a case mentioned also by McGee):

> *"146…The rule that in order to come within section 32(1) a mistake must be an essential ingredient of the claimant's cause of action rests on a surprisingly uncertain basis, that is a view expressed by Pearson J in Phillips-Higgins v Harper [1954] 1QB 411, 419. Nevertheless it has been generally accepted (with some dissentient academic voices raised against it) for over fifty years."*

25. If one looks at the words of section 33(1)(c) of the 1984 Act again, with the benefit of the light shone upon it by the legal luminaries upon whom Mr Harshaw relied, the picture becomes far more clear. It is not any type of mistake which is contemplated by the statute, but only a mistake which provides a substantive ground for seeking relief. The section applies to circumstances where (a) the action is based on fraud, (b) the defendant has deliberately concealed facts from the claimant, and/or:

> *"(c) <u>the action</u> is for relief from the consequences of a mistake…""*

<u>Analysis of the legal issues</u>

42. In my view, the timeline in this matter is important and I have accordingly set out some material events and dates as follows:
    a. June 2011 – March 2012 - the 1st Plaintiff conducted the Remediation Works at Morgan's Point;
    b. December 2011 - the Ministry of Public Works verbally requested the 1st Plaintiff to cease the Remediation Works but it continued;

c. January 2012 – an Official "Cease and Desist" letter was sent to Plaintiffs to stop the Remediation Works;
d. February 2012 – the 1st Plaintiff invoiced the Bermuda Government for $774,368 for the Remediation Works;
e. April 2012 – A Cabinet Memorandum submitted by the then PS Horton recommending a retroactive contract award for $226,570 for the 1st Plaintiff was rejected by the then Minister of Finance;
f. 15 January 2013 - the Acknowledgement Email is sent by the then PS Horton to the Plaintiffs' group of companies;
g. 19 February 2015 – the Denial Letter is sent from the then PS O'Brien to the Plaintiffs' Director Mr. Hunt;
h. 29 April 2015 onwards – the Plaintiffs make various requests and demands to the Premier of Bermuda for payment;
i. 20 January 2020 - the Defendant obtained judgment in the Magistrates' Court against the 3rd Plaintiff. The Magistrate adjourned the matter in order for the counterclaim to proceed in the Supreme Court;
j. 21 August 2020 - The Plaintiffs commenced these proceedings by a Specially Indorsed Writ of Summons.

Magistrates Court Matters

43. Mr. Scott contends that the Supreme Court action is related to the Magistrates Court by the Defendant for social insurance benefit payment. This arises because the Plaintiffs had a defence and counterclaim to those claims, but because of the amount of the counterclaim, it exceeded the jurisdiction of the Magistrates Court and thus had to be filed in the Supreme Court. Therefore, the 20 January 2020 dates of the Magistrates Court judgment and the 21 August 2020 Writ date bring the Plaintiffs' Writ in the Supreme Court within the limitation periods. I disagree. In my view, this only has to be stated to be rejected. The claim for unpaid services for the Remediation Works is able to stand alone as an action, in this case because of the amount and jurisdiction, in the Supreme Court. The lead up to the litigation in the Writ matter was well underway before the Defendant obtained judgment in the Magistrates Court proceedings in January 2020. The 1st Plaintiff was always entitled to

bring the action in the Supreme Court independent of the Magistrates Court actions. In fact, Mr. Hunt's evidence was that he recognized that he would have to commence proceedings once he got the Denial Letter in 2015. Clearly, this was before the Defendant had commenced the Magistrates' Court claims for unpaid social insurance benefit.

44. In light of the above, I find that no Magistrates Court date has any effect to extend the limitation period for filing the Writ.

Quantum Meruit

45. The Plaintiffs have pleaded in para 9 of the Statement of Claim that they assert set-off to the Magistrates Court actions and are owed the sum set out in the Statement of Claim on a quantum meruit basis as a result of the Remediation Works that they did at Morgan's Point. Mr. Hunt has filed evidence that the Plaintiffs did the Remediation Works and he has issued an invoice to the Bermuda Government for such work. Quantum meruit, Latin for "*as much as he has deserved*" is an equitable remedy that provides restitution for unjust enrichment.

46. First, in my view, the 1st Plaintiff's case, based on the quantum meruit basis, stands apart from a set-off in the Magistrates Court matters and must in the Supreme Court meet the limitation periods or fall within the exceptions permitted by the 1984 Act. Again, similar to the point above, Mr. Hunt's evidence was that he recognized that he would have to commence proceedings once he got the Denial Letter in 2015.

47. Second, the 1984 Act section 37(1) provides for how statutory limitations operate by analogy for equitable remedies which would include quantum meruit. Counsel did not cite any case authority on this point. However, in the recent UK Court of Appeal case of *IGE USA Investments Limited and others v Commissioner for HM revenue and Customs* [2021] EWCA Civ 534, decided after the hearing in this case, Henderson LJ stated:

> *"56. The basic reason why statutory time limits could be applied by way of analogy to claims for similar equitable relief lies in the public interest which is served by statutory limitation periods. As Sir Richard Collins MR said, at 761:*

"The policy of the Statute of Limitations is based on the old maxim, Expedit reipublicae ut sit finis litium [it is in the public interest that there should be an end of litigation]. Therefore the object of it was really to put an end to actions after a lapse of time; and where a person knows the facts relating to his case, everybody being presumed to know the law, he is presumed to know all those limitations which arise to him by reason of knowing the facts."

57. It is a striking feature of the English law of limitation that, even in a case where fraud is alleged, the basic six-year time limit for claims in tort applies, in the same way as it would for claims based on conduct which falls short of fraud. The only relaxation of the basic rule lies in the provisions now contained in section 32(1) of the 1980 Act, which provides that where:

[section 32(1) of the 1980 Act]

Thus the public policy to which I have referred is served by the combination of a strict time limit, even in cases of fraud, coupled with specific provisions which postpone the running of time in cases of fraud, concealment or mistake until the claimant has discovered the relevant facts, or could with reasonable diligence have done so.

78. The second passage, upon which both sides rely, is one in which Moore-Bick LJ gave a helpful explanation of the rationale which underlies the application of statutory limitation periods by analogy. After referring to Knox v Gye (1872) LR 5 HL 656, Coulthard v Disco Mix Club Ltd [2000] 1 WLR 707 and the Cia de Seguros case, loc.cit., Moore-Bick LJ said at [45] that they:

"... are all cases in which the facts giving rise to the claim were sufficient to found an action at law and a suit in equity and in which substantially identical relief (an account in the first two cases and damages or equitable compensation in the third) was available in each case. In such circumstances one can well see why equity took the view that the limitation period applicable to a claim at law should also apply to

a claim in equity. To hold otherwise, even at a time in the 19th century when the jurisdictions of the common law courts and the courts of equity were separate, would have undermined the statutory provisions; in the modern legal world, in which the same courts apply the rules of both law and equity, the consequences would be even more anomalous and unacceptable. However, in cases where the facts capable of supporting a claim for equitable relief differ from those capable of supporting a claim at law, or where the equitable remedy differs in a material respect from that available at law, there is not the same reason to deprive the court of the power to grant equitable relief in an appropriate case by adopting the statutory limitation period by analogy."

48. In my view, applying the principles set out above in *IGE USA Investments Limited and others v Commissioner for HM revenue and Customs,* the limitation period for the claim based on quantum meruit is six years, the same as set out for a claim in contract and the time started from the primary limitation date as discussed below.

49. In light of the above, I find that no aspect of the quantum meruit basis has any effect to extend the limitation period for filing the Writ.

Primary Limitation Date

50. In light of the above timeline of significant events and disentangling the arguments about Magistrates Court matters from the Supreme Court Writ, in my view on the face of the documents, the time period for bringing the Writ starts at the end of the Remediation Works, that is, March 2012, a date that does not seem to be in any dispute. The 1984 Act section 7 sets the time limit for suing on a debt, namely that the Plaintiff had six years from the date on which the debt occurred in which to bring an action. I have already found that an action based on quantum meruit is subject to a similar six-year limitation period. It follows that the primary limitation date for commencing any claim would be March 2018. I am unaware of any specific end date in March 2012 for completion of the Remediation Works so I will use the last possible date of 31 March 2018 as the end of the limitation period. Any proceedings should have commenced by that date subject to any extension permitted by the 1984 Act.

Acknowledgement Letter

51. In my view, the Acknowledgement Letter does not meet the requirements of the 1984 Act although some elements of an acknowledgment are satisfied. In respect of section 30(5) it is a claim for a debt. In respect of section 31(1) the then PS Horton wrote the email and signed it as part of his email by adding his initials to it. In respect of section 31(2) the email was written to Mrs. Simmons, an agent of Mr. Hunt.

52. However, in my view, the Acknowledgment Letter fails in respect of the 'acknowledgement'. The context of the letter is that the then PS Horton was replying to the email request from Mrs. Simmons about the status of the payment for the Remediation Works. PS Horton's reply was to inform her that the 'matter' was now handed over to a successor PS Rochester and that he prays it could be resolved soon. It seems to me that in applying *Global Construction Ltd v Hamiltonian Hotel & Island Club Ltd* where it cited *Halburys*, it is clear that there is no admission of a debt outstanding and unpaid. It actually seems to be stating the opposite, that there is a matter that needs to be resolved.

53. If I were wrong that there was no admission of a debt, then any finding that there was an admission and acknowledgment would have an effect of extending the limitation period, but, in my view, to no avail. Based on the timeline I have set out above, the Acknowledgment Email is dated 15 January 2013 with the effect that the limitation period would be extended six years from that date to 15 January 2019. The Writ was filed on 21 August 2020 and thus after the end of the extended limitation period, if it was allowed.

54. In light of the above, I find that there was no acknowledgment of debt and no effect to extend the limitation period for filing the Writ.

The Denial Letter - Mistake

55. Mr. Scott contends that, as Mr. Hunt was of a mistaken belief that the Bermuda Government was going to pay him for the Remediation Works until he received the Denial Letter, then the 1984 Act section 33(1)(c) applies to extend or disapply the limitation period. I find no merit in this argument that the action is for relief from the consequences

of a mistake. In *Test Claimants in the Franked Investment Income Group Litigation and Others v Commissioners for HM Revenue and Customs* it was stated at para 140 as follows:

> *"… In relation to mistake, on the other hand, provision was made for only one situation: where "(c the action is for relief from the consequences of a mistake". In the judge's view, that wording "was carefully chosen to indicate a class of action where a mistake has been made which has had certain consequences and the plaintiff seeks to be relieved from those consequences". No provision was made for the situation where the right of action was concealed by a mistake. In the instant case, the plaintiff's claim was to recover money due to her under a contract. The fact that she had been unaware of the right of action by reason of a mistake was insufficient to bring her within the ambit of section 26(c). The judge expressed the opinion that "probably provision (c) applies only where the mistake is an essential ingredient of the cause of action". He added (ibid) that it was no doubt "intended to be a narrow provision because any wider provision would have opened too wide a door of escape from the general provision of limitation".*

56. In my view, in following both *Test Claimants* and *Sampson v Estate of Joell*, a mistaken misunderstanding by Mr. Hunt as to whether the Government was going to pay his fees for the Remediation Works does not fall within the ambit of the 1984 Act section 33 (1)(c) as the action is not for relief from the consequences of a mistake. The 1st Plaintiff is not saying that he entered into the contract for Remediation Works as a result of a mistake. He is saying that in his attempts to secure payment for his services, he had a mistaken understanding that he was going to be paid until he received the Denial Letter. In my view, there is a significant difference between those assertions, such that the Plaintiff's Writ is not an action seeking relief from the consequences of a mistake. It was after the Denial Letter that Mr. Hunt persisted for further payment to no avail when he then instructed his attorneys to commence proceedings. In the absence of evidence to the contrary, it appears to me that it was always open to Mr. Hunt to instruct his attorneys to commence proceedings within the limitation period whilst he persisted on payment.

57. In light of the above, I find that Mr. Hunt's mistaken understanding is not the kind of mistake contemplated in the 1984 Act section 33(1)(c) and it has no effect to extend the limitation period for filing the Writ.

Whether to strike out

58. I am invited to strike out the relevant pleadings on the basis that it discloses no reasonable cause of action on the face of the pleadings; that it is frivolous and vexatious; and an abuse of the process of the Court based on the Defendant's defence that the action is statute-barred.

59. I am obliged to be guided by the relevant cases cited above that the power to strike out a claim should only be exercised in plain and obvious cases[3] and that in an allegation of abuse of process, the strike out power ought to be used very sparingly and only in exceptional circumstances[4]. I am also guided by the principle that so long as the claim or the particulars disclose some cause of action or raise some issue fit to be decided by a judge or jury, the mere fact that the case is weak and not likely to succeed is no ground for striking it out[5].

60. In following *Riches v DPP*, the uncontested facts include the date of the end of the Remediation Works, the date of the Acknowledgment Email, the date of the Denial Letter and the date of the filing of the Writ. Although the Plaintiffs make arguments about those dates and other events, in my view, on the uncontested facts of the dates, there is no reason for me to think that the Plaintiffs can bring themselves within the exceptions set out in the 1984 Act. In my view, this is the kind of case that falls under the logic of Stephenson LJ in *Riches v DPP* when he stated "*the object of the RSC Ord 18 r 19 is to ensure that the Defendant shall not be troubled by claims against them which are bound to fail having regard to the uncontested facts.*"

[3] *Electra Private Equity Partners (a limited partnership) v KPMG Peat Marwick*
[4] *Lawrence v Lord Norreys and Others* 1890 15 AC 210
[5] *Moore v Lawson (1915) 31 TLR 418*

61. In following *David Lee Tucker v Hamilton Properties Limited* in the respect of the case being frivolous and vexatious, for the reasons and analysis I have set out above, I agree that the claims in the Writ are obviously frivolous or vexatious or obviously unsustainable based on the limitation defence. In my view, there is no escape from the limitation defence as the Acknowledgement Email and the Denial Letter are of no assistance in overcoming the limitation defence. In my view, therefore it is a clear and obvious case for a strike out on the grounds of the action being statute-barred. Similarly, I am of the view that it is an abuse of process for the matter to proceed to trial in light of the limitation defence.

62. Generally, in my view this is a case where it is plain and obvious that it should be struck out on the basis of an assertion that it is statute-barred and there is no chance of success in getting beyond the limitation defence.

Conclusion

63. The Defendant's application to strike out the Plaintiff's Specially Indorsed Writ of Summons is granted for the reasons stated pursuant to RSC Order 18 r 19(1)

64. The Specially Indorsed Writ of Summons is dismissed on the grounds that the Plaintiffs' cause of action is time barred pursuant to section 4, 7 and 37 of the 1984 Act.

65. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Defendant on a standard basis, to be taxed by the Registrar if not agreed.

Dated 14 May 2021

HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT