IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 142 OF 2016

BETWEEN:

WILLESLEY ANTHONY LALOR

PLAINTIFF

AND

MARLON RALSTON MATTHEW COLLINS

DEFENDANT

Appearances:

Mr Clayton Phuran of Sonia Bush & Associates on behalf of the Plaintiff

Mr Kerrie Cox of HSM Chambers on behalf of the Defendant

Before:	**The Hon. Justice Kawaley**
Heard:	**1 May 2019**
Date of Decision:	**1 May 2019**
Reasons Circulated:	**7 May 2019**
Reasons Delivered:	**27 May 2019**

HEADNOTE

Defendant's application for summary judgment-limitation defence-Plaintiff's application for consolidation of time-barred action with pending prior proceedings-Plaintiff's application for summary judgment in consolidated action-costs issues

REASONS FOR SUMMARY JUDGMENT

Introduction and Summary

1. The Plaintiff commenced the present action on July 28, 2016 seeking to recover a debt of $77,000 due under an agreement relating to the purchase of land dated July 18, 2007. Reliance was placed on the collateral agreement evidenced in part by a letter dated June 23, 2008 from the Defendant's former attorneys admitting certain monies due and asserting a cross-claim in respect of rent. The Defendant's "Affirmative Defence" was that the Plaintiff's claim became time-barred six years after June 23, 2008.

2. By a Summons filed on January 18, 2019, the Plaintiff applied for summary judgment. The Plaintiff's Summary Judgment Summons was initially heard on February 25, 2019 before Mrs Justice Nova Hall (Acting). It was adjourned for substantive hearing. On March 11, 2019, the Defendant filed a Summons seeking summary judgment under Order 14 on the grounds that the Plaintiff's claim was time-barred.

3. On March 12, 2019, the Plaintiff filed a Summons seeking to consolidate cause No GO490 of 2008 (the "First Action") with the present action ("Consolidation Summons"). The Plaintiff's Consolidation Summons was supported by the Plaintiff's Second Affidavit sworn on March 11, 2019. It appears from that Affidavit that the Plaintiff's counsel in preparing for the February 25, 2019 hearing appreciated the force of the Defendant's limitation arguments and was prompted to investigate whether any earlier proceedings had been commenced. He discovered that the First Action had been commenced by the Plaintiff's former attorneys on October 16, 2008, well within the limitation period. The Consolidation Summons was apparently filed in a creative (but unrealistic) attempt to pursue the timely First Action without having the present time-barred proceedings formally dismissed with costs.

4. The various Summonses were listed for effective hearing before me on May 1, 2019. After a short hearing I dismissed the Plaintiff's Summary Judgment and Consolidation Summonses and granted the Defendant's application for summary judgment on its limitation defence. The present action was accordingly dismissed, although I invited written submissions on costs. The result is that that Plaintiff is in principle entitled to pursue the First Action in which pleadings have been exchanged and liability (subject to a Counterclaim) has been partially admitted. Having signified my decision, however, the Defendant's counsel indicated that he proposed to apply to strike-out the First Action for want of prosecution.

5. I now give brief reasons for granting the Defendant's summary judgment application and dismissing the Plaintiffs' Summonses.

The Defendant's limitation defence

6. The Plaintiff's initial Skeleton in support of his own Summary Judgment Summons accepted that the limitation period would have expired on June 24, 2014, but contended that the limitation period was extended until 2022 by a payment made by the Defendant on September 1, 2016. However, the Defendant, apart from disputing that any payment was made by him in 2016 as alleged, submitted in his Skeleton that any payment in 2016 was too late, by virtue of section 34 (7) of the Limitation Law.

7. The Plaintiff's April 29, 2019 Skeleton, without formally conceding his primary limitation position, submitted (at paragraph 8(g)):

> "*(g) Further or in the alternative, the clock in relation to limitation stop*[ped] *counting with the issue of process. The Plaintiff through his previous attorneys issued a Writ on October 16, 2008 unbeknown to his present attorneys. Therefore, in relation to the claim of the Plaintiff, the clock stop*[ped] *counting on October 16, 2008. The Consolidation of the two matters or the continuation of Cause 490 of 2008 means that the Defence arguing limitation fails.*"

8. This submission was, subject to one important qualification, sound. The First Action was clearly <u>not</u> time-barred because it was commenced well within the limitation period in October 2008. There was no impediment to that action being continued in limitation terms. However, it was difficult to see (a) why consolidation was necessary at all, or (b) how consolidation could, as if by magic, make the limitation bar to the present action disappear. The mystery deepened rather than unravelled when Mr Phuran in his oral submissions beat a very sensible tactical retreat and conceded that the present action was indeed time-barred. Invoking the Overriding Objective and the underlying merits of his clients claim, the Plaintiff's counsel urged the Court to focus on adjudicating the underlying merits of his client's claim. That point was well made. It was nonetheless difficult to discern what legally recognised justification there could be for consolidating a valid action, which <u>could</u> in its own right be pursued, with a time-barred action that could in its own right only be dismissed. It was easy to perceive that the Plaintiff would like to avoid the usual costs consequences of having the present action dismissed.

9. GCR Order 4 provides in salient part as follows:

> "***Consolidation of causes or matters (O.4, r.4)***

4. (1) Where two or more causes or matters are pending in the same Division of the Court and it appears to the Court that –

(a) some common question of law or fact arises in both or all of them; or

(b) the rights or relief claimed are in respect of or arise out of the same transaction or series of transactions; or

(c) for some other reason it is desirable to make an order under this Rule,

the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.

(2) When the Court makes an order under paragraph (1) that two or more causes or matters are to be tried at the same time but no order is made for those causes or matters to be consolidated, then, a party to one of those causes or matters may be treated as if he were a party to any other of those causes or matters for the purpose of making an order for costs against him or in his favour.

(3) Nothing in this rule shall prevent two or more causes or matters being consolidated pursuant to Order 50, rule 1(6)."

10. In *Omni Securities-v-Deloitte & Touche* [2001 CILR 68], Smellie CJ (at page 71) stated:

"*5 This is the third time that this court has had to consider the question of whether these actions should be consolidated. On June 13th, 1997, Harre, C.J. adjourned the plaintiff's application having accepted submissions that it was premature. On March 16th, 1998 I refused the restored application on similar grounds. In that ruling, I concluded as follows:*

'I consider that there is still a real possibility of one party or the other being prejudiced by having to participate in a purely formal way during weeks of trial on issues which do not go to that party's liability or defence.

For the same reason, I am as yet unable to assess to what extent, if at all, there are to be 'common questions of law or fact bearing sufficient

importance in proportion to the rest of the action to render it desirable that the whole of the matters be disposed of at the same time.'

That passage adopted the guiding principles on joinder of parties and causes of action, as they were given by the English Court of Appeal in Payne v. British Time Recorder Co. Ltd. (3) ([1921]2K.B. at 16, per Scrutton, L.J.). They are the principles which guide the court in the application of Grand Court Rules, O.4, r.3 as it applies to the consolidation of causes of action."

11. In my judgment it is obvious from the express terms of the relevant GCR rule that the jurisdiction to consolidate actions is intended to be exercised where it will be procedurally beneficial to have more than one connected proceeding tried at the same time. The commentary to the corresponding pre-CPR English rule (Order 4 rule 9) in the 1997 White Book notes: "*the main purpose of consolidation is to save time and costs*" (paragraph 4/91). It is implicit that both (or all) of the actions being consolidated are actions which are suitable for determination in a similar manner. It is inherently inconsistent with the rationale of consolidation to consolidate one action which is not fit for trial with another action that is.

12. Perhaps another reason for the Plaintiff's counsel opting to pursue consolidation was the understandable desire to sidestep another procedural trip-wire which impeded his client's path to substantive justice. The Plaintiff's Summary Judgment application had been made in the present action, not in Cause No. 490 of 2008. No corresponding application had been made in the First Action; on the contrary, directions had been given for trial by Henderson J on February 20, 2009, over ten years ago. Based on those pleadings the Plaintiff was admittedly a net creditor of the Defendant in respect of a comparatively modest sum of less than $50,000. I canvassed with Mr Cox whether his client would consent to the Plaintiff's Summary Judgment application being treated as having been filed in the First Action.

13. That conciliatory query was met with a full-blooded contentious response, in which an application to strike-out the First Action for want of prosecution was foreshadowed. On reflection, such an application is not an illogical one to consider making, as unattractive as it initially appeared to me to be in substantive justice terms. However, its merits are impossible to assess at this stage and are probably evenly balanced.

14. The fact that the merits of the underlying commercial dispute appeared to favour the Plaintiff to some extent could not alter the fact that the present action was admittedly time-barred and that the Defendant was entitled to have the action summarily dismissed.

The Plaintiff's Summonses

15. It followed that the Plaintiff's Consolidation Summons and Summary Judgment Summons both had to be dismissed.

Costs issues to be addressed

16. It might seem obvious that costs should follow the event and that the Defendant should have its costs in relation to each of the Plaintiff's Summonses which has been dismissed. I reserved costs and invited written submissions because a controversy arose at the hearing which it was not possible to resolve. That was whether or not the Plaintiff's counsel had, at the directions hearing on February 25, 2019, conceded the limitation point so that the Defendant had in effect wasted costs in preparing for an application which it was clear was not being opposed. As Mr Cox pointed out in the course of argument, any such concession was in any event contradicted by the stance taken by the Plaintiff's counsel in his Skeleton, combined with the pursuit of the Consolidation Summons as an indirect means of defeating the limitation defence.

17. A more difficult issue which I would now invite counsel to address (the Plaintiff was given 21 days from May 1, 2019 to file written submissions on costs and the Defendant 21 days thereafter) is the following. Has the Defendant conducted his vigorous defence of the present action in a disproportionate or unreasonable way so as to disentitle him from recovering all of his costs? The background is both an unusual and familiar one.

18. The Plaintiff has explained through evidence that he switched lawyers because he was "*unable to continue instructing*" them. He was also unable obtain his former lawyers' files. He instructed his present lawyers to pursue the debt and they were unaware of the First Action. This is highly unusual, almost incredible (as the Defendant's counsel implied); but Mr Phuran sought to portray his client as a simple man pitting his wits against a more sophisticated adversary. Be that as it may, the general picture painted by the evidence is in other respects an all too familiar one. A claimant of modest means commences litigation hoping to achieve speedy justice; the case drags on; costs mount; he is unable to continue to instruct his lawyers and mounts a fresh legal 'horse', opening up a new fees account. The previous lawyers then enforce a lien against the former client's files in respect of unpaid fees. This is at least a plausible provisional view as to what must have occurred. If it has any accuracy at all, it is picture which would not infuse the man on the Caymanian Minibus with admiration for the way in which the wheels of justice turn in service of the common man. It is important to remember, of course, that managing civil litigation efficiently is problematic in many parts of the world.

19. The Defendant, like the Plaintiff, has also been represented by different lawyers in both the First Action and the Second Action. It appears, on the face of it, and admittedly with the benefit of hindsight, that the Defendant's strategy in the present action was to lure the Plaintiff down a dead-end litigation street. Rather than raising the issue of the present action being duplicative of the First Action and an abuse of the process of the Court as soon as the Writ was served on or about August 5, 2016, the Defendant filed a substantive Defence in March 2017. In fact, judgment in default was entered in October 2016 and the Defendant swore an affidavit in support of an application to set it aside complaining that he was only actually served in December and exhibiting a draft Defence. And yet neither that pleading nor the Defendant's First Affidavit makes any mention of the First Action. Were the Defendant's lawyers also not told by their client about the First Action? Lightning does not normally strike in the same place twice. Was the Defendant too "unable to continue to instruct" his initial attorneys and

also forced to mount a new litigious horse, and also denied access to his files by his former lawyers?

20. In the Defendant's Case Summary and Written Submissions dated April 29, 2019, it is complained that the present action was superfluous and that the Consolidation Summons was an abuse of process. It is implied that it was the Plaintiff's counsel who first raised the existence of the First Action in Court on February 25, 2019, without explaining why the Defendant did not raise the abuse of process complaint earlier, in particular, before filing a Defence and advancing a far more elaborate summary judgment application. A short letter demanding that the Plaintiff elect which action he wished to pursue as soon as the Defendant first had notice of the present proceedings was arguably the most reasonable and proportionate way to respond to service of the present proceedings, having regard to the parties' duty to assist the Court to achieve the Overriding Objective. The full picture will doubtless be revealed when the costs submissions are filed.

21. The observations set out above are not recorded as findings but to assist counsel to address the matters of concern to the Court in their written submissions[1] on costs. I also wish to place on record the fact the present case has many of the hallmarks of a case where the global legal costs will ultimately exceed the net amount in dispute if a pragmatic settlement cannot be reached in relation to the still pending but uncertainly destined First Action.

HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT

GRAND COURT - CAYMAN ISLANDS

[1] The Defendant is granted leave, if so advised, to file a short Affidavit dealing with any relevant facts.