[2023 Gib LR 402]

CHOUKROUN, DOHNANSKY and KOESSLER v. GIBRALTAR HEALTH AUTHORITY

COURT OF APPEAL (Kay, P., Elias and Davis, JJ.A.):
May 16th, 2023

2023/GCA/007

Limitation of Actions—extension of time—acknowledgement of liability—alleged acknowledgement of liability by Gibraltar Health Authority during negotiations with appellants' union on different matter not acknowledgement of claim for purposes of Limitation Act—not made in writing nor made to appellants or their agents as required by s.30 of Act

The appellants brought proceedings against the Gibraltar Health Authority.

The appellants were consultant anaesthetists who were or had been employed by the GHA. On April 26th, 2021, they issued proceedings against the GHA claiming substantial sums to which they said they were entitled in relation to extra work carried out for the benefit of the GHA. The claims covered the period from April 2009 to late 2017. The pleaded cause of action in each case was restitution or unjust enrichment.

The GHA's defence stated that a six-year limitation period applied to the claims and the claims were therefore statute-barred insofar as they related to any period prior to April 26th, 2015. In para. 3 of the reply, the appellants said that in negotiations between the GHA and the appellants' union, the GHA acknowledged that the appellants had a pecuniary claim against it for historically worked, unpaid hours, which acknowledgement was made before any expiration of the period of limitation and, under s.31(5) of the Limitation Act, bound the GHA. In response to the GHA's request for further information, the appellants stated *inter alia* that the GHA admitted that the appellants had a pecuniary claim against the GHA, which was sufficient to engage the Limitation Act as opposed to admitting legal liability to pay the claims; the appellants did not know the date on which the GHA was alleged to have acknowledged the claims, although it was on one or more of the dates on which the negotiations took place; the appellants did not know the name of the person who acknowledged the claims on behalf of the GHA, although it was one of the GHA's representatives at the negotiations; and the alleged acknowledgement was made orally in the first instance.

The relevant provisions of ss. 29 and 30 of the Limitation Act provided:

"[29.](4) Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment."

"30.(1) Every such acknowledgment or payment as aforesaid shall be in writing and signed by the person making the acknowledgment.

(2) Any such acknowledgment or payment as aforesaid may be made by the agent of the person by whom it is required to be made under section 29, and shall be made to the person, or to an agent of 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."

In July 2022, Yeats, J. struck out parts of the appellants' pleaded case which sought to rely on s.29 of the Limitation Act by alleging an acknowledgement of the otherwise statute-barred claims. The judge also refused to permit the appellants to amend their pleadings so as to circumvent limitation, concluding that they were not in a position to put the defect right.

The appellants appealed on the ground that the judge was wrong not to allow them an opportunity to amend their case before para. 3 of the reply and the response to the request for further information were struck out. A draft amended reply and response to request for further information were produced. The draft amended reply provided in para. 3 that in negotiations between the GHA and the appellants' union, the GHA had acknowledged that it had a legal liability to pay the appellants for the historically worked, unpaid hours, which was not the subject of the negotiations between GHA and the union, that the acknowledgement was made before the expiration of the period of limitation, and that it bound the GHA. The appellants had not been present during those negotiations. The draft amended response to request provided among other things that the GHA and the union had not shared with the appellants the documents passing between them as part of their negotiations (including the alleged admission that the appellants had a claim) but those documents would fall to be disclosed by the GHA. It was also stated that the appellants understood and expected that the GHA's acknowledgement would have been reduced to writing but, pending disclosure, they did not know the date of the written acknowledgement or whether the person signing it did so on behalf of the GHA.

Held, dismissing the appeal:

On the material before him the judge was correct in his conclusion that the appellants were not in a position where they could put the defect in their pleading right. The recently proffered draft amendments had not rendered the proposed pleadings viable. There were striking differences between the original pleadings and the proposed amendments. First, whereas the original response expressly eschewed the notion that, to be effective, the alleged

acknowledgement had to amount to an admission of a legal liability to discharge the disputed claims, the proposed amendment to para. 3 of the reply positively asserted that the acknowledgement was of such a legal liability. Secondly, the vague assertion in the original response that the acknowledgement was made "orally in the first instance" was augmented in the proposed amendment by "the [appellants] have understood and expect that the acknowledgement will have been reduced to writing at or about the time of it being made orally (or sometime thereafter)." The negotiations between the union and the GHA went on for many years. They did not concern the appellants' historic claim which was the subject of the present litigation. An acknowledgement of legal liability in relation to the subject matter of the present litigation would have been improbable. Furthermore, in order to come within s.30(2) of the Limitation Act, an acknowledgement would have had to have been made in writing and "to the person, or to an agent of the person, whose . . . claim is being acknowledged . . ." No such acknowledgement was made to the appellants. There was nothing to support the submission that the union negotiators were the appellants' agents. The proposed amendments were a wholly speculative allegation of an acknowledgement of legal liability put forward in the hope that disclosure would produce something useful. The appellants' appeal would be dismissed (paras. 8–14).

Cases cited:
(1) *Josiya* v. *British American Tobacco plc*, [2021] EWHC 1743 (QB), considered.
(2) *Ross* v. *McGrath*, [2004] EWCA Civ 1054, referred to.
(3) *Surrendra Overseas Ltd*. v. *Sri Lanka Govt*., [1977] 1 W.L.R. 565; [1977] All E.R. 481, referred to.

Legislation construed:
Limitation Act, s.29: The relevant terms of this section are set out at para. 5.
s.30: The relevant terms of this section are set out at para. 5.

P. Coppel, *K.C.* assisted by *A. Christodoulides* and *C. Pitto* (instructed by Ullger Law Ltd.) for the appellants;
G. Licudi, *K.C.* assisted by *D. Martinez* (instructed by Hassans) for the respondent.

1 **KAY, P.:** The appellants are consultant anaesthetists who are or were employed by the Gibraltar Health Authority (GHA). On April 26th, 2021 they issued the present proceedings claiming sums of money to which they said they were entitled in relation to extra work carried out by them for the benefit of the GHA. The amounts claimed are in each case substantial six figure sums. The claims cover the period from April 1st, 2009 until late 2017. The cause of action in each case is pleaded as restitution or unjust enrichment. There is an issue about the appropriateness of that cause of

action which is the subject of a direction for hearing as a preliminary issue. That is yet to take place. At this stage, following the close of pleadings, we are concerned with the issue of limitation. This does not affect the part of the claims relating to the time after April 2015, but is concerned with whether the claims in respect of the period between 2009 and April 2015 are statute-barred. On July 21st, 2022, Yeats, J. struck out parts of the appellants' pleaded case which sought to rely on s.29 of the Limitation Act 1960, by alleging an acknowledgement of the otherwise statute-barred claims. He also refused to permit the appellants to amend their pleadings so as to circumvent limitation.

The pleaded cases

2 It is first necessary to set out the respective pleaded cases, in so far as they concern the issue of limitation. Paragraphs 1 and 2 of the defence read as follows:

> "1. The Defence herein is subject to the [respondent's] case that a six-year limitation period applies to this claim and that the [appellants'] claims are statute-barred insofar as they relate to any period prior to 26 April 2015 as more particularly set out in paragraphs 2 to 4 below.
>
> 2. The [appellants'] relationship with the [respondent] is a contractual one. The [appellants] are the [respondent's] employees. The [appellants'] claims herein are therefore founded on contract. The [respondent] will rely on section 4 of the Limitation Act."

This was responded to in para. 3 of the reply which stated:

> "3. Without derogating from the generality of paragraph 2.7 of this Reply, in negotiations between [the respondent] and Unite, the [respondent] acknowledged that the [appellants] had a pecuniary claim against the [respondent] for historically worked, unpaid hours, and that none of those claims was the subject of those negotiations, which acknowledgement was before any expiration of the period of limitation and, under s31(5) of the Limitation Act 1960, bound the Claimant."

Thereafter the respondents served a request for further information, and the appellants replied (RRFFI). The request and the corresponding RRFFI were as follows:

> "i. Whether it is alleged that the [respondent] has admitted legal liability to pay the [appellants'] pecuniary claims against the [respondent] and, if so, provide full particulars of the manner in which it is alleged such admission has been made;

Response:
The [respondent] admitted that the [appellants] had a pecuniary claim against the [respondent] for historically worked, unpaid hours (the quantum of which was fixed). That is sufficient to engage s31(5) of the Limitation Act 1960 as opposed to admitting 'legal liability to pay the [appellants'] pecuniary claims against the [respondent].'

ii. Which claim or which part of each of the [appellants'] claims are alleged to have been acknowledged by the [respondent];

Response:
The historically worked, unpaid hours of each of the [appellants] are all those claimed in the Particulars of Claim.

iii. On what date is the [respondent] alleged to have acknowledged the [appellants'] alleged pecuniary claims;

Response:
On one or more of the dates on which the negotiations took place (the exact one or more of which the [appellants] do not know but may know upon the [respondent] giving disclosure), which negotiations were protracted.

iv. Who, on behalf of the [respondent], acknowledged the [appellants'] alleged pecuniary claims;

Response:
One or other of the [respondent's] representatives at those negotiations (the name of which the [appellants] do not now know but may know upon the [respondent] giving disclosure).

v. Who was the alleged acknowledgement made to;

Response:
The [appellants'] representatives at the negotiations.

vi. Whether the alleged acknowledgment was made in writing and, if so, identify the written instrument by which the alleged acknowledgement was made;

Response:
Orally in the first instance.

vii. Whether the alleged acknowledgment was signed on behalf of the [respondent] and, if so, by whom;

Response:
N/A

viii. What the period of limitation referred to is, when did it start and when it is alleged it would have expired;

Response:
This is unnecessary for the purposes of the claim including the Reply. The acknowledgment was made before 26 April 2015, being the date alleged in paragraph 1 of the Defence as the end-top date for the statue barred claims."

The statutory provisions

3 On the assumption that the six year limitation period applies to the current claims (whether they be contractual or restitutionary, which has yet to be decided), the statutory provisions are to be found in s.29 and s.30 of the Limitation Act. The relevant parts read as follows:

"[29.](4) Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment."

"30.(1) Every such acknowledgment or payment as aforesaid shall be in writing and signed by the person making the acknowledgment.

(2) Any such acknowledgment or payment as aforesaid may be made by the agent of the person by whom it is required to be made under section 29, and shall be made to the person, or to an agent of 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."

This appeal

4 The judge refused the appellants permission to appeal, but on November 16th, 2022, following an oral hearing, the Chief Justice (sitting as an *ex officio* judge of this court) granted them permission to appeal on ground 2, but refused permission in relation to ground 1. Before us, we now have a renewed application for permission to appeal in relation to ground 1 and the substantive appeal on ground 2. Essentially, ground 1 is concerned with the substance of the limitation issue and seeks to challenge the judge's finding that the alleged acknowledgement of the appellants' claims did not meet the legal requirements for an acknowledgement pursuant to s.29(4) or the formal requirement pursuant to s.30(1). Ground 2 is in the form of a complaint that the judge was wrong not to allow the appellants an opportunity to amend their case before para. 3 of the reply, and the RRFFI were struck out.

Ground 1: the alleged acknowledgement

5 This died a death in the course of the hearing before us, as Mr. Philip Coppel, K.C. eventually conceded. This is because the case as pleaded in para. 3 of the reply and the RRFFI failed to assert an acknowledgement of a *legal liability* in relation to the claims, as the authorities require (see in particular *Surrendra Overseas Ltd.* v. *Sri Lanka (Govt.)* (3) and *Ross* v. *McGrath* (2)). As further particularized in the RRFFI, the pleaded case focused on the assertion that the GHA had admitted that a claim had been advanced rather than that it had acknowledged a legal liability to satisfy that claim. The judge's treatment of this issue was undoubtedly correct. I would refuse permission to appeal on this ground.

Ground 2: amendment

6 Mr. Coppel is correct to submit, and the judge accepted, that a respondent to a strike out application of this type:

> "should normally be given an opportunity to amend their statement of case before it is struck out if they are in a position where they can put the defect right." (judgment, at para. 39)

However, the judge concluded that the appellants were simply not in a position to "put the defect right." Neither before the judge nor in advance of the hearing before us was any draft amended pleading filed in court. However, in the course of the hearing before us, Mr. Coppel produced drafts of an amended reply and an amended RRFFI. The material parts are in the following terms: Paragraph 3 of the reply (as amended) states:

> "3 . . . in negotiations between the Defendant and Unite, the Defendant acknowledged that *it had a legal liability to pay the Claimants* for historically worked, unpaid hours, and that *this was not* the subject of those negotiations, which acknowledgment was before any expiration of the period of limitation and, under s31(5) of the Limitation Act 1960, bound the *Defendant*."

7 As regards the amended RRFFI, the material parts are as follows:

> "Replies:
>
> *By way of reiteration and context for all of the replies below:*
>
> . . .
>
> *(e) As alleged in paragraph 2(7) of their Reply, the Claimants' claim is not barred by the Limitation Act 1960. First and foremost, this is because a claim in unjust enrichment is not an action founded on simple contract or on tort (cf s4(1)(a) of the Limitation Act 1960) nor is it any of the other actions listed in s4 of that Act. But if the Claimants are wrong about that, then their claim is not barred by the*

Limitation Act 1960 because it is deemed to have accrued on the date that the Defendant, in negotiations between it and the Claimants' union (Unite), acknowledged that the Claimants had a pecuniary claim against the Defendant for historically worked, unpaid hours, which acknowledgment was less than 6 years before 26 April 2021.

1.1 The Defendant admitted that the Claimants had a pecuniary claim against the Defendant for historically worked, unpaid hours (the quantum of which *claim could be readily and precisely ascertained). The Defendant first made the admission during formal negotiations with the Claimants' union representatives, ie Unite Negotiating Team (UNT), over the terms and conditions in the New Consultant Contract (NCC) that was to be made between the Claimants and the Defendant. Although the Claimants were not personally present at those negotiations concluded on their behalf by the UNT, as part of the process of reaching agreement on the terms and conditions in the NCC the Defendant admitted to UNT that the Claimants had against the Defendant for historically worked, unpaid hours and made various proposals to the UNT for the payment of those hours. The negotiations between the UNT and the Defendant over the terms and conditions in the NCC were carried out over the period 2013 to 2015. The Defendant and the UNT have not shared with the Claimants the documents passing between them as part of their negotiations (including the Defendant's admission that the Claimants had a claim against the Defendant for historically worked, unpaid hours), but those documents will fall to be disclosed by the Defendant when meeting its disclosure obligations . . . In any event (contrary to what is alleged in paragraph 3 of the Defence) the action is not founded on contract (whether simple or a specialty). Consequently s4(1)(a) and (3) of the Limitation Act 1960 are inapplicable (and hence s4 is inapplicable). In the premises, as alleged in paragraph 2(7) of their Reply, the Claimants' claim is not barred by the Limitation Act 1960.*

I.2–1.6 [as before]

1.7. By reason of the solemnity of the negotiations between the Defendant and Unite during which the Defendant acknowledged the claim and the financial significance of the Claimants' claim for historically worked, unpaid hours, the Claimants have understood and expect that that acknowledgment will have been reduced to writing at or about the time of it being made orally (or some time thereafter); but pending disclosure by the Defendant the Claimants do not know the exact date(s) of that written acknowledgment and, assuming it to be relevant for the purposes of s30(1) of the Limitation Act 1960, do not know whether the person signing did so on behalf of the Defendant.

> *1.8 . . . As already set out above, the Claimants' claim is one of unjust enrichment for which they seek restitution; it is not a claim in contract. There is no period of limitation for a claim for unjust enrichment.* The acknowledgment was made before 26 April 2015, being the date alleged *by the Defendant (but not accepted by the Claimants)* in paragraph 1 of the Defence as the end-stop date for the statute-barred claims."

8 There are striking differences between the original pleadings and the proposed amendments. *First*, whereas the original RRFFI expressly eschewed the notion that, to be effective, the alleged acknowledgement had to amount to an admission of a legal liability to discharge the disputed claims, the proposed amendment to para. 3 of the reply positively asserts that the acknowledgement was of such a legal liability. *Secondly*, the vague assertion in the original RRFFI that the acknowledgement was made "orally in the first instance" is augmented in the proposed amendment by:

> "The Claimants' have understood and expect that the acknowledgement will have been reduced to writing at or about the time of it being made orally (or sometime thereafter)." (Paragraph 1.7)

As to the context, the assertion in para. 1.1 of the proposed amendment to the RRFFI is that the admission was first made (orally) in the course of negotiations between the appellants' union (Unite) and the GHA over the new consultant contract at a time when the appellants were not personally present.

9 As regards the escalation of the proposed pleading to an assertion of admission of legal liability, I remind myself that this issue of strike out does not require or permit an assessment of evidence. However, one is bound to experience at least scepticism about a proposed amendment that is so at variance with the original pleading—especially when it is not explained by reference to any material that was unavailable when the case was first pleaded, or at the time of the hearing before the judge.

10 The judge concluded that the appellants were: "not in a position where they can put the defect in their pleading right." On the material before him, I have no doubt that he was right for the reasons he gave. The question is whether the recently proffered draft amendments have rendered the proposed pleadings viable. It is important to consider them in their context to see whether they are still as speculative as the judge found the original versions to be.

11 The negotiations between Unite and the GHA went on for many years. It is common ground that they did not embrace the historic claim which is the subject of the current litigation. Indeed, in her witness statement the first appellant, with the authority of the second and third appellants, specifically states:

> "25. The working practice described [above] remained in place and unchanged from October 2006 until November 2017. The discussions for the new consultants contract had been underway since at least 2005/6. From 2006 onwards we had been raising with the parties all the issues arising out of the working practices that had been put in place if the GHA wanted to provide the 24/7 service. These included question of safety and the unpaid hours worked. In 2013–2014, new teams took over the negotiations of the NCC but unfortunately the lack of acknowledgment for our work through the years has resulted in this claim and a new consultants contract that, although welcome, is deficient in certain respects."

When the appellants fell into dispute with Unite, Peter Caruana & Co. (on behalf of Unite) wrote to the appellants' legal advisors as follows;

> "The draft negotiated . . . NCC . . . contained provisions (clauses 28 and 29) whereby, in exchange for an ex gratia payment (the NCC arrears), the Consultants would waive any other claims they had against the GHA. Several Consultants had claims for historically worked, unpaid hours, none of which were the subject of these negotiations. It was, nevertheless, a requirement of the GHA/HMGOG that the final package must include such provisions. They were therefore part of the negotiated package that emerged from the negotiation. A negotiation is necessarily a process of 'give and take.'"

12 All this tends to suggest that an acknowledgement of legal liability in relation to the subject-matter of the current litigation would have been at least somewhat improbable. However, the viability of the proposed amendments faces a greater and, in my judgment, insuperable difficulty. In order to come within s.30(2), any acknowledgement would have to have been made not only in writing but also "to the person or to an agent of the person whose . . . claim is being acknowledged." No such written acknowledgment was made to these appellants. Mr. Coppel is therefore driven to rely on a submission that the unidentified Unite negotiators were agents of the appellants in relation to a matter which fell outside the parameters of the ongoing negotiations. He is unable to submit that an agency of this sort was based on the conferment of actual authority. Accordingly, he seeks to rely on apparent or ostensible authority. In my judgment, there is absolutely nothing to support this. Indeed, the circumstances seem consistent only with the Union negotiators *not* being agents of the appellants for this purpose. It is not usual for a principal–agent relationship to exist between individual members and their union in collective bargaining. Here, the suggestion is fanciful. It amounts to saying that, in some unexplained and unspecified way, the appellants held out unidentified negotiators as having authority in relation to a matter which fell outside the boundaries of the continuing negotiations. Nor does the suggestion live easily with the contemporaneous documents which show

that the GHA was involved in negotiations about the terms and conditions of a new consultants' contract. To the extent that the question of arrears or backdating arose, this was evident only in relation to a concession of an *ex gratia* payment to take into account the protracted nature of the negotiations, rather than an acknowledgment of legal liability in relation to more historic matters.

13 It seems to me that the proposed amendments are a classic case of a wholly speculative allegation of an acknowledgment of legal liability put forward in the forlorn and fanciful hope that disclosure will, in the words of Mann, J., "throw up something useful." Mr. Coppel seeks to rely on *Josiya* v. *British American Tobacco* (1), where Martin Spencer, J. ([2021] EWHC 1743 (QB), at para. 51) distinguished between "the information required for a claim to be pleaded . . . and the evidence required to bring home at trial what has been pleaded." I accept that there is such a distinction but this case falls clearly on the other side of the line from *Josiya*. There is an irreducible minimum which must be included in a pleading, supported by a statement of truth, to make a claim viable at the outset. Here, in relation to acknowledgment, the appellants simply do not have it.

14 In my judgment, the appellants' case on limitation in relation to s.29 and s.30 of the Limitation Act is speculative litigation which they are attempting to plead on no more than a wing and a prayer. When confronted with some of the shortcomings in his lately proffered proposed amendments, Mr. Coppel accepted that the drafts would require yet further amendment. I cannot see that the appellants are in any more of a position to plead a viable case now than they were before the judge. I would dismiss this appeal.

15 **ELIAS, J.A.:** I agree.

16 **DAVIS, J.A.:** I also agree.

Appeal dismissed.