THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVAP2013/0024

BETWEEN:

JAMES ENTERPRISES LIMITED

Appellant

and

THE ATTORNEY GENERAL

Respondent

Before:
The Hon. Mde. Louise Esther Blenman Justice of Appeal

On written submissions:
Mr. Horace Fraser for the Appellant
Mr. Deale Lee, Senior Crown Counsel, for the Respondent

_____
2014: April 22.
_____

Civil appeal – Proper party to institute proceedings against in claims involving public officials – Attorney General substituted as defendant in place of Comptroller of Customs – Article 28, Code of Civil Procedure, Cap. 243 – Whether notice of suit not having been served on Attorney General fatal to claim – Whether claim prescribed by virtue of article 2122(2) of Civil Code of Saint Lucia, Cap. 4.01

The appellant filed a claim against the Comptroller of Customs on 11th June 2012 in which he alleged that on 14th October 2009, customs officers unlawfully entered his premises and seized and removed documents and a computer that belonged to him. On 25th October 2012 the appellant filed an amended claim, in which the Attorney General was substituted in place of the Comptroller of Customs as the defendant. The appellant claimed, inter alia, that the customs officers having unlawfully entered his property, acting outside the scope of the Customs (Control and Management) Act, had violated his rights to his property. He sought a number of reliefs, including damages. The appellant also filed an application to strike out the Attorney General's defence. The Attorney General filed an application to

strike out the appellant's amended claim on the basis that the appellant had failed to comply with article 28 of the Code of Civil Procedure since he did not serve the Attorney General with notice of the suit, and also on the basis that the claim was prescribed by virtue of article 2122(2) of the Civil Code of Saint Lucia. The learned master found in favour of the respondent and struck out the appellant's amended claim. The appellant appealed the learned master's decision.

Held: dismissing the appeal and awarding the Attorney General the costs which were ordered in the court below, and on appeal, two thirds of those costs, that:

1. The wording of article 28 of the Code of Civil Procedure[1] is clear. In order to bring a suit against a public officer for damages, a claimant must serve notice of the suit on the public officer personally, or at his domicile. It will not suffice to instead serve the notice on another public officer who is not a proper party to the action.

   Castillo v Corozal Town Board and Another (1983) 37 WIR 86 applied; Peter Clarke v The Attorney General et al Saint Lucia High Court Claim No. SLUHCV1999/0475 (delivered 19th April 2004, unreported) cited with approval.

2. As a general rule, public officials are not suable in their official capacities in relation to acts or omissions that occur in the course of their duties. Pursuant to section 13(2) of the Crown Proceedings Act, the Attorney General is the proper party to all such suits. A civil action against the Comptroller of Customs is therefore a nullity as it does not comply with the imperative terms of section 13(2) of the Act.

3. There is a clear distinction to be made between the situation where a claim is prescribed and one where the limitation period has expired. When a claim is prescribed, not only is the right to bring the claim extinguished, but the remedy is also extinguished. Based on the conjoint effect of articles 2122(2) and 2129 of the Civil Code of Saint Lucia[2], the present claim became prescribed on 14th October 2012 and thus it was not possible for the appellant to maintain the claim after that date; making a substitution of a party to the claim after it became prescribed was of no effect.

   Norman Walcott v Moses Serieux Saint Lucia High Court Civil Appeal SLUHCVAP1975/0002 (delivered 20th October 1975, unreported) and Michele Stephenson et al v Lambert James-Soomer Saint Lucia High Court Claim Nos. SLUHCV2003/0138 and SLUHCV2003/0453 (delivered 19th April 2004, unreported) cited with approval.

[1] Code of Civil Procedure
[2] Civil Code of Saint Lucia

JUDGMENT

[1] BLENMAN JA: This is an appeal by James Enterprises Limited ("JEL") against the decision of the learned Master V. Georgis Taylor-Alexander in which she struck out the amended claim that JEL brought against the Attorney General on the basis that JEL did not comply with article 28 of the Code of Civil Procedure[3] and in any event that the claim is prescribed by article 2122 of the Civil Code of Saint Lucia.[4] JEL has appealed against the decision of the master and its appeal is vigorously opposed by the Attorney General.

I turn now the address the issues that arise for determination:

Issues

[2] (a) whether the learned master erred in holding that JEL had not complied with article 28 of the Code of Civil Procedure and that this was fatal;

(b) whether the learned master erred in striking out JEL's amended claim on the basis that it violated article 2122(2) of the Civil Code of Saint Lucia;

(c) whether the learned master erred in awarding costs to the Attorney General.

Background

[3] JEL is a company that is involved in the business of importing used and reconditioned vehicles into Saint Lucia. It has several business places.

[4] The Customs and Excise Department, acting in pursuance of the Customs (Control and Management) Act,[5] is responsible for collecting revenue and duties

[3] Cap. 243, Revised Laws of Saint Lucia 1957.
[4] Cap. 4.01, Revised Laws of Saint Lucia 2008.
[5] Cap. 15.05, Revised Laws of Saint Lucia 2008.

levied on goods imported into Saint Lucia. The Attorney General is sued as the representative of Crown pursuant to section 13(2) Crown Proceedings Act.[6]

[5] On 12th June 2012, JEL filed a fixed date claim together with a statement of claim against the Comptroller of Customs and Excise Department ("the Comptroller of Customs") seeking damages for unlawful trespass to its property and goods, causing loss to business by unlawful means and breach of statutory duty for the unlawful actions committed by the customs officers. In the statement of claim it was alleged that on 14th October 2009, a team of officers from the Customs Department unlawfully trespassed on JEL's property and unlawfully seized, removed and detained four vehicles and a number of its documents. JEL alleged that the vehicles were unlawfully detained for a long period and deteriorated as a consequence. It further alleged that it suffered damage and other losses due to the actions of the customs officers which were executed in bad faith.

[6] On 25th October 2012, JEL filed an amended claim form together with an amended statement of claim in which the Attorney General was named as the defendant instead of the Comptroller of Customs. In the amended claim, which had a statement of claim in support, it was alleged that on 14th October 2009, a team of customs officers unlawfully entered its business place and thereby trespassed on its property. In the amended statement of claim the company also complained that on the same day the Customs officers unlawfully seized four (4) vehicles and a number of documents that belonged to the company. It alleged that the unlawful detention of the vehicles caused them to depreciate and that it suffered losses and damage as a consequence.

[7] On 11th November 2009, JEL gave the Customs Department notice of its claim against forfeiture. The customs officers finally returned the vehicles to JEL in March 2011, without pressing any charges.

[6] Cap. 2.05, Revised Laws of Saint Lucia 2008.

[8] The Attorney General, in defence, admitted that the customs officers on 14th October 2009, entered JEL's business place. The Attorney General took issue with the allegation that the customs officers had entered JEL's business place unlawfully. To the contrary, it was asserted that the customs officers acting pursuant to section 94(1) of the Customs (Control and Management) Act had lawfully entered the premises in order to carry out investigations in relation to possible breaches of the Act. During the course of the investigations the officers seized four (4) motor vehicles which they formed the view were liable to forfeiture. In addition to denying that the vehicles unlawfully seized, the Attorney General denied that the customs officers acted in bad faith when they seized and detained the vehicles.

[9] More importantly, in defence, the Attorney General contended that the amended claim was prescribed by virtue of section 2122(2) of the Civil Code of Saint Lucia. The Attorney General maintained that no action could have been brought in relation to the alleged unlawful acts which allegedly took place on 14th October 2009 since three years had elapsed since the alleged torts or delicts had occurred.

[10] Further and in defence the Attorney General denied that JEL suffered any losses as alleged or at all.

[11] In addition, the Attorney General complained that JEL had failed to comply with the mandatory statutory requirement of article 28 of the Code of Civil Procedure. This was fatal to the instituting of the company's claim.

The Applications to Strike Out

[12] Two applications to strike out were filed. Indeed, by notice of application filed on 22nd November 2012, JEL applied to strike out the defence on the ground that it was doomed to fail since the Attorney General had no reasonable ground for defending the claim. JEL also sought an order for judgment in relation to the issue of liability with damages to be assessed. The application was supported by an

affidavit deposed to by Mr. Byran James who is a director of the company. By notice of application filed on 23rd November 2012 the Attorney General applied for an order that JEL's amended claim be struck out on the bases that: (a) it was filed on 25th October 2012 and was in relation to an alleged incident which occurred on 14th October 2009. Therefore, the amended claim has been filed in contravention of article 2122 of the Civil Code of Saint Lucia and therefore the Court had no jurisdiction to entertain the claim; (b) JEL has not served a notice of intended suit on the Attorney General as required by article 28 of the Code of Civil Procedure. This failure to comply with article 28 is fatal to JEL's claim.

[13] I will now briefly look at the relevant parts of the learned master's judgment.

[14] The learned master heard both applications together and in her careful and reasoned judgment stated at paragraphs 10 and 11 as follows:

> "[10] The test to [be] applied by the courts in this jurisdiction continues to be that applied by Byron CJ in Baldwin Spencer v The Attorney General of Antigua and Barbuda et al (Civil Appeal No. 20 A [of] 1997). Sir Byron said:
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> > "This summary procedure should only be used in clear obvious cases, when it can be seen on the face of it, that the claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court …"
> >
> > "… the operative issue for determination must be whether there is "even a scintilla of a cause of action". If the pleadings disclose any viable issue for trial then the court should order the trial to proceed but if there is no cause of action the court should be equally resolute in making that declaration and dismissing the appeal."
>
> "[11] In more recent cases of the court decided under the CPR 2000 the court's approach has remained consistent. In Julian Prevost v Rayburn Blackmore DOMHCV2005/0177, Rawlins J (as he then was) reasoned: –
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> > 'The court has always had jurisdiction to strike out actions on this ground if having examined the claim it finds that

the action will have no chance of success even if the pleading process were to continue and the matter goes to trial. This is a jurisdiction which the court exercises very sparingly and only in the most clear and obvious cases, for example when it is clear that the case has no legal basis. The is because the court errs on the side of having trials on the merit of cases.'"

[15] In relation to the Attorney General's application to strike out JEL's amended claim, the learned master, in disposing of the application, had this to say:

"[16] By further application of the defendant filed on the 23rd of November 2012, the defendant requests a dismissal of the action brought by the claimants on the ground that the statements of claim filed on the 25th of October 2012 in relation to an incident occurring on the 14th October 2009 was filed in violation of Art 2122. The defendant's submit [sic] that more than 3 years elapsed since the cause of action arose, to the date of filing and as such, the action is prescribed and the court is not seized with jurisdiction to hear the matter. Additionally the defendant applies that the claimants have failed to comply with the mandatory provisions as to service of the notice of intended suit of Article 28 of the Code of Civil Procedure, in fatality to his claim.

[17] Article 2122 of the Civil Code and Article 28 of the Code of Civil Procedure read as follows:-

2122. The following actions are prescribed by 3 years;

…

2. For damages resulting from delicts or quasi-delicts, whenever other provisions not apply;

…

Article 28:–

"No public officer or other person fulfilling a public duty or function can be sued for damages by reason of any act done by him in the exercise of his functions, not [sic] can any judgment be rendered against him, unless notice of such suit has been given him at least one month before the issuing of the writ of summons.

Such notice must be in writing, it must specify the grounds of the action, it must be served upon him

personally, or at his domicile and must state the name and residence of the claimant"

[18] The action of the claimants have [sic] been brought in trespass and unlawful detention of goods arising from events that occurred on the 14th November 2009 is in any event covered by Article 2122(2). Consequently the defendants argue that both the right and the remedy have both been extinguished.

[19] In relation to Article 28 the defendant submits that a failure to meet the mandatory requirement and to plead its compliance in the statement of claim is fatal to the claim. The defendant relies on the often cited authority of Castillo v Corozal Town Board and Ano (1983) 37 WIR 86, and Peter Clarke v The Attorney General SLUHCV1999/0475 which confirmed the reasoning in Castillo.

[20] There has been no response to the application of the defendant, perhaps with reason. The authority of Castillo is one either embraced or dreaded by practitioners of public law depending on the side you stand on. Its implications are dire for a person caught not in compliance. There is no latitude for flexibility or the exercise of a discretion, its provisions are inviolable. I am without flexibility and must dismiss the action for the failing of the claimants in this preemptive step."

Grounds of Appeal

[16] It is against the judgment of the master, the relevant parts of which are stated above, that JEL has appealed on the following grounds:

(a) The learned master misdirected herself and therefore erred in law by ruling that the appellant failed to comply with article 28 of the Code of Civil Procedure.

(b) The learned master erred in law and therefore erred by ruling that the appellant's claim is prescribed in accordance with article 2124 of the Civil Code of Saint Lucia.

(c) The learned master ought not to have awarded costs against JEL.

Appellant's Submissions

[17] Learned counsel Mr. Horace Fraser submitted that the master was wrong to strike out the amended claim on the basis that it violated article 2122(2) of the Civil Code of Saint Lucia. Mr. Fraser accepted that article 2122(2) provides that a claimant must file a claim for delict or quasi-delict within 3 years, after which the claim is prescribed. Indeed, the cause of action and all remedies are totally extinguished. Mr. Fraser also referred to Norman Walcott v Moses Serieux[7] and sought to distinguish that case from the facts of the case at bar, in arguing that in the latter case time did not run. Learned counsel Mr. Fraser submitted that the prescription period does not start running until there is a breach of some right which would have caused a cause of action to arise. He referred the Court to Halsbury's Laws[8] and Carlton Rattansingh (Legal personal representative of the estate of Joseph Rattansingh) v The Attorney General of Trinidad and Tobago and Another.[9]

[18] Learned counsel Mr. Fraser submitted that in accordance with the internal mechanism set out at sections 136-140 of the Customs (Control and Management) Act the court has no original jurisdiction in matters of seizures. He referred the Court to The Attorney General of Saint Lucia et al v Vance Chitolie[10] in support of this contention. Mr. Fraser therefore submitted that no cause of action arose on the 14th October 2009, but rather in March 2011 when it became clear that the Customs and Excise Department had no reason to seize the company's property. The filing of the claim was within one (1) year after the cause of action arose. At any rate, if JEL's contention as to the time the cause of action

[7] Saint Lucia High Court Civil Appeal SLUHCVAP1975/0002 (delivered 20th October 1975, unreported).
[8] 4th edn., vol. 28, para. 662.
[9] [2004] UKPC 15.
[10] Saint Lucia High Court Civil Appeal SLUHCVAP2003/0014 (delivered 10th January 2005, unreported).

arose is disputed, that would have raised a triable issue and therefore striking out the claim is without foundation.[11]

[19] Learned counsel Mr. Fraser argued that the changing of a party on 25th October 2012 is not changing of a party beyond the limitation period. Further, a claim cannot be defeated for reason of misjoinder or non-joinder of parties – to buttress his argument, he relied on Part 19 of the Civil Procedure Rules 2000 ("CPR 2000") and Joel Gumbs v Adina Garnes et al.[12]

[20] Mr. Fraser submitted that since JEL had served a notice of suit on the Comptroller of Customs prior to instituting the claim, and that this was sufficient to satisfy article 28 of the Code of Civil Procedure. He argued that the learned master erred in concluding that JEL's failure to serve the notice on the Attorney General was fatal to its amended claim. The appeal should therefore be allowed and the costs order set aside.

Respondent's Submissions

[21] Learned Senior Crown Counsel Mr. Deale Lee said that JEL in its amended claim sought damages for unlawful "trespass to property and goods, causing loss to business by unlawful means and breach of statutory duty allegedly arising from an incident on 14th October 2009" (emphasis added). The cause of action clearly seeks redress for alleged torts/delicts that occurred on the 14th October 2009. JEL, however, now seeks to claim that the cause of action arose in March 2011 when the goods were returned to Mr. Henry. This new position by JEL raises several issues:

(a) Firstly, this was not an issue that was raised before the learned master; it is inappropriate for it to be addressed now before this Court.

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[11] See Michael Christopher et al v PC 240 John Flavien et al (Saint Lucia High Court Claim Nos. SLUHCV2004/0502 and SLUHCV2006/0182 (delivered 25th July 2007)); Corporate-Pacific Heritage (M) SDN BHD v MRP Resources Limited (Territory of the Virgin Islands High Court Claim No. BVIHCV2002/0042 (delivered 26th March 2003, unreported)) per Rawlins J (as he then was) at paras. 22 and 28.

[12] Saint Vincent and the Grenadines High Court Civil Appeal SVGHCVAP2001/0015 (delivered 28th January 2003, unreported) at para. 8.

(b) More substantively, the tort of trespass to goods exists only as far as there is a direct, immediate interference with the plaintiff's possession of a chattel; the tort cannot arise where the chattels have been returned to the owner. JEL's contention that the cause of action arose in March 2011 when the cars were returned to it is contrary to law.

(c) Further JEL's reliance on the authority of The Attorney General of St. Lucia et al v Vance Chitolie is misconceived. The respondent in Vance Chitolie sought to challenge the rate of duty assessed in relation to a vehicle imported by him. The Court held that the legislation established a clear procedure for challenging the rate of duty assessed. The Act clearly conferred an appellate jurisdiction on the Court and not an original jurisdiction to hear the matter. In this case there is no issue as to the rate of duty chargeable; the goods were seized as liable to forfeiture and under section 130 and Schedule 4 of the Customs (Control and Management) Act. The appellant was entitled to appeal the forfeiture to a magistrate or to the High Court.

[22] Next, learned Senior Crown Counsel Mr. Lee advocated that JEL has failed to comply with article 2122(2) of the Civil Code of Saint Lucia and as a result the claim is prescribed. JEL's claim for trespass and unlawful detention of goods arose from events that occurred on 14th October 2009. The claim against the Attorney General was brought on 25th October 2012 by an amended claim. The claim sounding in delict has therefore been brought more than 3 years after the events that gave rise to the cause of action. Mr. Lee reminded the court that article 2122 of the Civil Code of Saint Lucia provides that the actions in question are prescribed by 3 years. He emphasised that article 2122(2) clearly established that delicts are prescribed by three (3) years. The effect of this prescription is that the right and the remedy are extinguished. He also referred to article 2129 of the Civil Code of Saint Lucia. Mr. Lee reminded the Court that it has been held that

where a claim is prescribed the Court has no jurisdiction to hear the matter and referred the Court to Walcott v Serieux and Michele Stephenson et al v Lambert James-Soomer.[13] The right and the remedy having been extinguished by the passage of 3 years prior to the filing of the claim against the defendant, the claim cannot be maintained.

[23] Mr. Lee asserted that JEL cannot rely on the filing of the claim against the Comptroller or Customs prior to end of the prescription period to save the amended claim against the Attorney General. Section 13(2) of the Crown Proceedings Act clearly states that proceedings against the Crown must be instituted against the Attorney General. A civil action against the Comptroller of Customs is therefore a nullity as it does not comply with the imperative terms of section 13(2) of the Crown Proceedings Act. Further, there is clear authority for the proposition that a party cannot be substituted after the prescribed period has elapsed. Indeed the authorities of Walcott v Serieux and Stephenson v James-Soomer clearly establish that a party cannot be substituted after the prescription period has elapsed. The matter against the Crown became prescribed on 14th October 2012, prior to the filing of JEL's amended claim. Mr. Lee posited that the fact that JEL has pleaded the issue of bad faith does not save JEL's claim because it failed to bring its claim within the three year prescription period required in any case.

[24] Next, Mr. Lee learned Senior Crown Counsel stated that JEL also seeks to rely on Part 19 of CPR 2000 as permitting the substitution of a party after the end of a relevant limitation period. This position however does not account for the distinction between a limitation period and a prescription period. The Courts in both Walcott v Serieux and Stephenson v James-Soomer were at pains to point out that a prescription period, unlike a limitation period, destroys the right and the

[13] Saint Lucia High Court Claim Nos. SLUHCV2003/0138 and SLUHCV2003/0453 (delivered 19th April 2004, unreported).

remedy. No action can be maintained if the action was not brought during the prescription period. Mr. Lee posited that JEL's reliance on Part 19 is misplaced.

[25] Next, learned Senior Crown Counsel Mr. Lee submitted that JEL has not complied with article 28 of the Code of Civil Procedure. Learned Senior Crown Counsel referred the Court to the provisions of article 28 of the Code of Civil Procedure which states:

> "No public officer, or other person fulfilling any public duty or function, can be sued for damages by reason of any act done by him in the exercise of his functions, nor can any judgment be rendered against him, unless notice of such suit has been given him at least one month before the issuing of the writ of summons.
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> "Such notice must be in writing must specify the grounds of the action, must be served upon him personally, or at his domicile, and must state the name and residence of the plaintiff."

[26] Mr. Lee referred the Court to Castillo v Corozal Town Board and Another[14] in which it was held that failure to comply with these mandatory notice requirements is fatal to the claim.[15] Further, in Castillo it was established that it was necessary for the claimant to plead the fact of service of notice in the statement of claim. Mr. Lee complained that JEL's amended statement of claim does not state that the notice required by article 28 of the Code of Civil Procedure was served on the Attorney General one month prior to filing the claim or at all. However, the Attorney General in her affidavit in support of the application to strike has positively stated that the JEL failed to serve the required notice. This evidence was uncontroverted before the learned master.

[27] Finally, Mr. Lee submitted that JEL cannot rely on service of notice of intended suit on the Comptroller of Customs as service on the Attorney General. The imperative terms of article 28 of the Code of Civil Procedure states that no public

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[14] (1983) 37 WIR 86.

[15] See also Peter Clarke v The Attorney General et al (Saint Lucia High Court Claim No. SLUHCV1999/0475 (delivered 19th April 2004, unreported)).

officer can be sued for damages or judgment entered against them unless they have been served personally or at their domicile with the notice. JEL admits that the Attorney General has not been served personally or at her domicile with notice of the intended suit. The law is clear. JEL having failed to comply with article 28 cannot maintain its claim against the respondent.

[28] Mr. Lee submitted that in view of the circumstances the learned master did not err in striking out JEL's amended claim and the appeal should be dismissed.

Court's Analysis

[29] It is the law that public officers are not suable in their official capacities. It is for that reason that section 13(2) of the Crown Proceedings Act makes provision for the Attorney General to be sued in a representative capacity for acts or omissions of public officers which cause harm, provided that they occur during the course of their duties. There is great force in the argument advanced by Senior Crown Counsel Mr. Lee that the initial claim by JEL against the Comptroller of Customs was unsustainable in so far as he cannot be sued in his official capacity. However, it does not appear that any issue was taken at first instance about JEL having substituted the Attorney General for the Comptroller of Customs by way of the amended statement of claim, I would therefore refrain from pronouncing on whether the original claim was a nullity as urged by Mr. Lee.

[30] I propose now to address fully whether there is any merit in the complaints made by JEL against the judgment of the learned master. In so doing I propose to address the first issue.

Issue No. 1: whether the learned master erred in law by holding that the appellant's claim is prescribed by virtue of article 2122(2) of the Civil Code of Saint Lucia

[31] I remind myself that the Attorney General had applied to strike out JEL's amended claim on the basis that it had not complied with article 28 of the Code of Civil Procedure and in any event that the amended claim was prescribed by 3 years in accordance with section 2122(2) of the Civil Code of Saint Lucia. It is noteworthy that the learned master at paragraph 20 of her judgment intimated that there had been no response to the application by the respondent.

[32] In the court of first instance and in this Court it is common ground that the customs officers entered the business place of JEL on the 14th October 2009 and seized the vehicles. These actions of the customs officers are the ones that JEL is seeking to impugn on the basis of alleged trespass/delicts. It is trite that trespass occurs when there is a direct, immediate interference with the defendant's possession or interest in the defendant's property, however slight that interference may be.

[33] The Attorney General's application to strike out the amended claim proceeded on the basis that the alleged unlawful seizure of the vehicles occurred on 14th October 2009. I have no hesitation in accepting the submissions of Mr. Lee learned Senior Crown Counsel in preference to those of learned counsel Mr. Fraser that the alleged cause action for trespass arose on 14th October 2009. It is clear that from the date of the seizure of the vehicles that JEL had the right to institute a claim for their unlawful seizure and this was separate and apart from any relief that he could have claimed under the requisite provision of the Customs (Control and Management) Act. In my judgment JEL cannot now seek to assert, on appeal, that the cause of action arose in March 2011 when at first instance the claim proceeded on the basis that it arose on October 2009. I accept Mr. Lee's objection in this regard in its entirety.

[34] In addition, I have no hesitation in preferring Mr. Lee's submission that it would make no sense for this court to proceed on the basis that JEL's cause of action arose in March 2011 in the face of the clear evidence that in March 2011 the vehicles were returned to JEL. I fail to see the wisdom of JEL attempting to launch a new case before this Court on the basis that the cause of action arose in March 2011 when the vehicles were returned to JEL at that date. In my judgment it would be quite inappropriate to allow JEL to prosecute an issue that was not before the learned master, as urged by Mr. Lee. But more critically, I agree with Mr. Lee that it would make no sense for JEL to now seek to utilise March 2011 as the date on which the cause of action arose when this allegation did not form part of the amended claim that engaged the attention of the learned master.[16]

[35] There is no doubt my mind that the only date that the learned master could have utilised as the date when JEL's cause of action arose was 14th October 2009 and this she quite correctly did. Therefore, I reject the submission of learned counsel, Mr. Fraser, that since the High Court did not have jurisdiction to entertain a claim based on sections 136-140 of the Customs (Control and Management) Act, that as a consequence time to bring that claim did not begin to run until March 2011. Also, I agree with the submission of Mr. Lee that Vance Chitolie is not authority for the above proposition and therefore Mr. Fraser cannot rely on this case to buttress his case.

[36] I have already concluded that JEL's cause of action arose on 14th October 2009, the only question that is left for me to determine is whether the learned master erred in holding that it was prescribed. I have no doubt that the learned master was correct to hold that article 2122(2) of the Civil Code of Saint Lucia is applicable to the appeal at bar.

[16] See para. 16 of the learned master's judgment.

[37] The law is clear namely that delicts (torts) are prescribed by 3 years. The learned master was quite correct to conclude that article 2122(2) of the Civil Code of Saint Lucia is applicable to the case at bar. Also of relevance to this appeal is article 2129 of the Civil Code of Saint Lucia; indeed, it is very instructive. It stipulates that:

> "In all cases mentioned in articles 2111, 2121, 2122, 2123 and 2124, the debt is absolutely extinguished and no action can be maintained after the delay for prescription has expired … ."

The conjoint effect of sections 2122(2) and 2129 of the Civil Code of Saint Lucia is that after a period of three years after a cause of action arises and no claim is brought the right and remedy are extinguished. See Walcott v Serieux; and Stephenson v James-Soomer which give judicial acknowledgment to article 2129.

[38] While it does not appear that article 2129 of the Civil Code of Saint Lucia was brought to the learned master's attention, in paragraph 18 of the judgment she indicated that the defendant had argued that both the right and the remedy were extinguished. The master accepted the argument that was advanced on behalf of the Attorney General. In my judgment and despite the learned master not having referred to article 2129 of the Civil Code of Saint Lucia, she nevertheless came to the correct conclusion when she held that JEL's right to bring a claim against the Attorney General was extinguished. I have no doubt that the decision of the learned master could stand notwithstanding there was no reference to article 2129 of the Civil Code of Saint Lucia specifically. The master did not err in relation to this issue.

[39] Accordingly, JEL fails to succeed in relation to the first issue.

Issue No. 2: whether the learned master erred by ruling that the appellant had failed to comply with article 28 of the Code of Civil Procedure

[40] What is striking is that nowhere in his submissions does learned counsel Mr. Fraser assert that notice of the suit was served on the Attorney General. This is so even in the face of Mr. Lee having pointed out in his submissions that the Attorney General in her affidavit in support of the application to strike has clearly indicated that JEL had not served the notice of suit on her. Quite interestingly, learned counsel Mr. Fraser takes issue with the findings of the learned master when she held that there was non-compliance with article 28 of the Code of Civil Procedure. Mr. Fraser, by way of supplementary submission, sought to persuade the Court that the master did not pay keen regard to the statement of claim since it clearly stated that the notice of suit was served on the Comptroller of Customs.

[41] I have reviewed the submissions of both learned counsel and I accept in its entirety the submissions of Mr. Lee on the full effect of article 28 of the Code of Civil Procedure. The cases of Castillo v Corozal Town Board and Another, and Peter Clarke v The Attorney General et al[17] are very instructive. I apply the principles enunciated in them to the case at bar. Mr. Fraser's position fails to take into account that what JEL was required to do is to serve the notice of suit on the officer against whom the suit is to be brought. I therefore reject his criticism of the learned master on this issue. I have no hesitation in preferring the submissions of Mr. Lee that the master was quite correct to dismiss JEL's amended claim on the basis of non-compliance. The master correctly applied Castillo and Peter Clarke to the case at bar and in my view the learned master cannot be faulted for the conclusion which she arrived at. JEL's appeal does not succeed in relation to this issue.

[42] For the sake of completeness, it is prudent to state that the learned master was cognisant of the powers given to her by CPR 26.3(b) to strike out the amended

[17] Saint Lucia High Court Claim No. SLUHCV1999/0475 (delivered 19th April 2004, unreported).

claim. Also, she properly applied the test enunciated by Byron CJ in Baldwin Spencer v The Attorney-General of Antigua and Barbuda et al[18] when she struck out JEL's amended claim on the basis that it did not disclose any reasonable ground for bringing the claim.

Issue No. 3 whether the learned master erred in awarding JEL to pay costs

[43] As a general rule costs follow the event. At first instance, the learned master directed that the parties agree on the costs that should be payable to the Attorney General. In view of the above conclusion, there is no basis upon which I could set aside the costs order that was made by the learned master. In my opinion the Attorney General is entitled to receive the costs that were ordered by the learned master. The only difficulty is what is to occur if there is no agreement on the issue of costs between the parties. The preferred order costs at first instance may well be costs to be assessed, if not agreed, within 21 days of this order. Be that as it may, the Attorney General, having prevailed in defending the appeal, is entitled to receive costs in relation to the appeal, which would be two-thirds of the costs below.

Conclusion

[44] In view of the foregoing, I would dismiss James Enterprise Limited's appeal against the decision of the learned master to strike out the amended claim. I also order that the Attorney General is entitled to have costs that were ordered at first instance, to be assessed, if not agreed, within 21 days of this order. I further order that in relation to this appeal, the Attorney General is entitled to receive two-thirds of the costs at first instance.

[18] Antigua and Barbuda et al (Antigua and Barbuda High Court Civil Appeal ANUHCVAP1997/020A (delivered 8th April 1998, unreported)

[45] I gratefully acknowledge the assistance of learned counsel.

Louise Esther Blenman
Justice of Appeal