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Re: *Carbaugh v. Woods on Herring Creek Homeowners Association*
C.A. No. 8715-VCN
Date Submitted: January 15, 2014

Dear Mr. and Mrs. Carbaugh and Counsel:

Utility Systems, Inc. ("USI") provided wastewater disposal services to the Woods on Herring Creek community ("WOHC") under a 1985 agreement.¹ By the late 1990s, operational problems were encountered, and USI designed the necessary corrective improvements. Those improvements, however, required

¹ Compl. ¶ 7.

additional funding, and the residents of WOHC were not willing to support USI's efforts.² The relationship between USI and Defendant Woods on Herring Creek Homeowners Association (the "Association") continued to deteriorate. The Association took over the wastewater treatment system (the "System") in May 2004.³ USI, without success, sued the Association in July 2004.⁴ In 2005, Delaware's Public Service Commission found that USI had abandoned the System and imposed substantial penalties.⁵ The Association transferred the System to Sussex County at no cost in 2008 and, in 2011, Sussex County incorporated the System into the Angola Neck Sanitary Sewer District.⁶

In 2003, Plaintiffs H. Clark Carbaugh, the president of USI, and Elizabeth D. Carbaugh loaned USI almost \$250,000 to meet the costs of managing and improving the System.⁷ They were not repaid by USI.⁸ In this action, they seek to

² *Id.* ¶¶ 9-10.

³ *Id.* ¶ 3.

⁴ *Id.*; see *Util. Sys., Inc. v. Woods on Herring Creek Homeowners Ass'n*, C.A. No. 558-VCN; see also *Pub. Serv. Comm'n v. Util. Sys., Inc.*, 2010 WL 318269 (Del. Ch. Jan. 21, 2010) (elaborating upon procedural history).

⁵ USI appealed that determination to the Superior Court, but its appeal was dismissed for lack of prosecution.

⁶ Compl. ¶ 23.

⁷ Compl. ¶¶ 1, 5, 9, 11, 26. The Association was not a borrower or guarantor of any of the loans made to USI by the Plaintiffs.

recover those loaned funds, together with interest, from the Association and from Defendant Sussex County (Delaware) Council (the “County”) under the doctrines of *quantum meruit* and unjust enrichment.

Defendants have moved to dismiss. They point to previous litigation and assert that the Plaintiffs’ claims are barred by *res judicata*. They also contend that the claims are time barred. The Court turns first to the time bar defense, in this instance, laches.

Laches, as an equitable defense, will frequently borrow from the analogous statute of limitations. Application of laches, however, requires more than just counting the years.⁹ It is necessary to consider whether barring the claims because of delay would be unjust. The inquiry includes the nature of the claims asserted, whether there is a comparable claim at law, and whether the defendant has changed its position in the interim and therefore would be prejudiced as a result of plaintiff’s delay.

⁸ USI filed for bankruptcy in 2006.

⁹ *Reid v. Spazio*, 970 A.2d 176, 183 (Del. 2009). See generally Donald J. Wolfe, Jr. and Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery*, § 11.06 (2013).

The analogous contract or debt statute of limitations, 10 *Del. C.* § 8106, prescribes a three-year period. Although not binding on equity, the statute serves appropriately in this instance. Plaintiffs' claims were known. They had loaned money and had not been repaid, and, after 2004, it was unlikely that USI would be repaying those loans from any charges collected at WOHC because, as they were well aware, the Association had assumed control of the System. In addition, the Association moved on—rightly or wrongly—without USI; the community dealt with its wastewater disposal problems; and the County became more involved and eventually acquired the System. In short, the circumstances changed significantly.

Because laches can be a fact-intensive defense, its application in the context of a motion to dismiss can be difficult.¹⁰ The facts are to be taken from the complaint, which, in this instance, provides a sufficient factual basis. Whether the claim is viewed as *quantum meruit* or unjust enrichment, the critical time was when the System was taken over by the Association and USI was ousted.¹¹ That was in 2004, approximately nine years before this action was filed on July 10,

¹⁰ See *Khanna v. McMinn*, 2006 WL 1388744, at *30 (Del. Ch. May 9, 2006).

¹¹ That is when the benefits of the System directly accrued to the Association. The System, as acquired by the Association, depended upon the funds loaned by the Plaintiffs to sustain USI and its management of the System.

2013. Another possible appropriate date, as alleged by the Plaintiffs, could be 2008—when the System was transferred to the County. That was roughly five years before this action was filed. Perhaps there is room for debate as to which is the more proper date for time-bar purposes, but the debate is irrelevant; from either perspective, Plaintiffs’ claims are time-barred.

The Plaintiffs argue that the proper date for consideration should be 2011 when the County incorporated the System into a sanitary sewer district. Although the Plaintiffs allege that the transfer occurred in 2008, they now argue that, for some reason, the transfer was illegal and improper, perhaps a fraudulent conveyance; nonetheless, the Complaint sets the transfer in 2008.¹²

¹² In any event, use of dates involving the actions of the County would be problematic. The County is the successor to the Association and claims title through it; if the County has liability, it can be in no worse position than the Association because a subsequent transfer will not start anew the running of a time-bar period for claims tied to conversion, and more specifically, as framed here, in terms of *quantum meruit* or unjust enrichment.

Moreover, although not in the Complaint, the Public Service Commission approved the transfer from the Association to the County in 2007. Plaintiffs seem to suggest that the transfer in 2008 was done somewhat surreptitiously. No facts in the Complaint support that conclusion and, as noted, the Public Service Commission approved the transfer earlier.

The Plaintiffs claim (Compl. ¶¶ 2, 11) to have taken security interests in the System to assure repayment of their loans. The efficacy of any such security interests is not before the Court.

The Plaintiffs also attempt to avoid laches by explaining their collection efforts leading up to 2013 when this action was filed. The factual background for this argument is not well-developed in the Complaint,¹³ and there is no suggestion that either Defendant somehow lulled them into a false sense of security. Without more, sporadic recoupment entreaties will not block application of a time-bar defense, even laches.

In sum, it is neither inequitable nor unreasonable to conclude that the Plaintiffs' action is barred by laches, and, accordingly, the Plaintiffs' action is dismissed.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

¹³ See Compl. ¶ 24.