

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0002 OF 1997S

(High Court Civil Action No. HBC0228 of 1995S)

BETWEEN:

NEIL MALONEY

&

THE ATTORNEY-GENERAL OF FIJI

APPELLANTS

AND

TAM SUK-CHONG TAMMIE

RESPONDENT

Mr J.W. Greenwood QC & Mr J.N. Singh for the first Appellant
Mr N. Nand & Ms N. Baswaiya for the second Appellant
Mr. G. McCoy QC, Mr R. Haines & Ms V. Patei for the Respondent

Date and Place of Hearing: 25 August 1997, Suva
Date of Delivery of Judgment: 27 August 1997

JUDGMENT OF THE COURT

The respondent is the plaintiff in High Court Civil Action No. HBC0228 of 1995S. In that action she is claiming damages from both the appellants for assault, false imprisonment, unlawful arrest, misfeasance in public office and conspiracy to injure, allegedly committed between 9 and 12 November 1988. She commenced that action on 4 November 1994. She claims to have suffered humiliation, distress, injured feelings and loss of liberty. She also claims to have suffered contraventions of her constitutional rights, namely deprivation of personal liberty and of her right to leave Fiji and search of her person without her consent.

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The High Court dealt as a preliminary issue with the question whether her action was statute-barred, as contended by the appellants. Scott J. ruled that it was not statute-barred but gave the appellants leave to appeal against his decision; leave was required because it was interlocutory.

All parties are agreed that the answer to the question depends on the interpretation of proviso (i) to section 4(1) of the Limitation Act (Cap.35) ("the Act"). The relevant provisions of section 4 are as follows:

"4.(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say -

(a) actions founded on simple contract or on tort;

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Provided that -

(i) in the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under any Act or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years;

Two issues were raised by the parties. They were:-

- (1) What do the words "breach of duty" mean?
- (2) Is the action an action for damages consisting of or including damages in respect of personal injuries?

In view of the conclusion we have reached in respect of the first issue, it is not necessary for us to decide the second. As it should not arise in the proceedings in the High Court because of our decision on the first issue, there is no need for us provide guidance in respect of it; we, therefore, think it better to express no opinion about it.

The English Court of Appeal, dealing in Letang v. Cooper [1965] 1 QB 232 with legislation containing provisions essentially the same as those of section 4(1) of the Act, decided that, even where personal injuries are caused deliberately and not negligently or by nuisance, the cause of action is for damages for breach of duty and so is statute-barred after three years; the duty breached is the common-law duty not to inflict direct injury on another. That part of the Court of Appeal's decision was, however, not followed by the House of Lords in Stubbings v. Webb [1993] A.C. 498. It held that the provision to which proviso (i) is identically worded related only to actions for personal injuries arising from *accidents* caused by negligence, nuisance or breach of a duty of care, so that injuries caused by deliberate assaults and similar intentional acts were subject to the general six-year limitation period.

Scott J. decided that he should follow the decision of the House of Lords. The appellants say that he should not have done so because the House of Lords used aids to interpretation not permitted in Fiji now and not permitted in England in 1965 when the Court of Appeal decided Letang v Cooper. In particular it took into account the Hansard report of the parliamentary proceedings when the bill for the English legislation was debated, which showed

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that the Parliament intended to give effect in the legislation to the recommendations contained in the 1948 report of the Tucker Committee: it noted that the legislation remained in 1993 essentially as it was in 1965.

Mr Greenwood submitted that the Courts in Fiji should follow Letang and not Stubblings for two reasons. They were, first, that the reasoning of the Court of Appeal was sound and as long as extrinsic materials could not be used in the interpretation of the statute, correct. As there was still no statutory authority in Fiji for the use of extrinsic aids, this Court was now in the same position as the Court of Appeal had been in 1965 and not in the position of the House of Lords in 1993. As the reasoning of the Court of Appeal was sound, it should be followed.

The second reason advanced by Mr Greenwood was that, by 1971 when the Fiji legislation was enacted, the interpretation of the proviso by the Court of Appeal in Letang was firmly established, so that the Parliament of Fiji, by including in the Act proviso (i) to section 4(1) in the same terms as in the English statute, was to be taken to have intended that it bear that established meaning.

In respect of the first reason advanced by Mr Greenwood, Mr Haines submitted that the Court of Appeal's reasoning in Letang was not sound. It gave a strained meaning to the proviso and should not be followed. He referred particularly to the following two passages in Lord Griffiths' judgment in Stubbing which cast doubt on the soundness of the Court of Appeal's reasoning. At page 507 Lord Griffiths said:

"I accept that Letang v. Cooper was correctly decided in so far as it held that negligent driving is a cause of action falling within section 2(1) of the Act of 1954. But I cannot agree that the words "breach of duty" have the effect of including within the scope of the section all actions in which damages for personal injuries are claimed which is the other ground upon which the Court of Appeal decided Letang v. Cooper. If that had been the intention of the draftsman it would have been easy enough to say so in the section. On the contrary the draftsman has used words of limitation; he has limited the section to actions for negligence, nuisance and breach of duty."

At page 508 he said:-

"Even without reference to Hansard I should not myself have construed breach of duty as including a deliberate assault. The phrase lying in juxtaposition with negligence and nuisance carries with it the implication of a breach of duty of care not to cause personal injury, rather than an obligation not to infringe any legal right of another person."

We note that all the other Lords of Appeal agreed generally with Lord Griffiths' judgment.

In respect of the second reason advanced by Mr Greenwood why the Courts in Fiji should follow Letang, Mr Haines made a number of submissions. First he pointed out that, although proviso (i) to section 4(1) of the Act is the same as the English statute, section 3 of the Act is not: indeed there is no provision in the English statute which is even broadly similar.

Section 3 reads:

"3. The provisions of this Part shall have effect subject to the provisions of Part III which provide for the extension of the periods of limitation in the case of disability, acknowledgement, part payment, fraud and mistake, and in the case of certain actions in respect of personal injuries."

Section 16 of the Act, which contains provision for the extension of the period of limitation in actions for personal injuries in specified circumstances, is in Part III of the Act. Section 16(2)

applies the section to actions described in the same terms as the actions described in proviso (i) to section 4(1). The reference to those actions in section 3 as "certain actions in respect of personal injuries" was significant, Mr Haines contended. The Act was not simply a copy of the English statute: that negated any presumption of an intention on the part of the Parliament of Fiji that proviso (i) to section 4(1) was to bear the meaning established in England by Letang. It also indicated that the draftsman of the Act intended the actions described in the proviso and in section 16(2) to be limited in extent and not to comprise all actions for damages in respect of personal injuries, as decided by the Court of Appeal in Letang.

At this point we think it necessary to deal with a suggestion put to us that, because statutes of limitation are procedural and do not affect substantive rights, Order 1 rule 7 of the High Court Rules can be relied on to support a decision that Letang should be followed in Fiji. That rule reads:-

"7. *Where no express provision is made by these Rules with respect to the practice or procedure in any circumstances arising in any cause or matter, then the jurisdiction of the High Court shall be exercised in conformity with the practice and procedure being adopted in the like circumstances in Her Majesty's High Court of Justice in England.*"

We are satisfied that the rule has no application to the interpretation of the Act. We are not concerned here with a situation where there is no express provision with respect to the procedure. The Act itself contains the express provision; the fact that the provision made may be unclear does not cause it to cease to be express provision.

Having regard to the inclusion of section 3 in the Act and to its terms, we are persuaded that it was not the intention of the Parliament of Fiji that, by including proviso (b) to section 4 (1) in terms the same as the English statute, it was necessarily to be interpreted in the way established for England by the decision in Letang.

We accept that it is likely that the Act was modelled on the English statute, and incorporated many of the provisions of that statute, in order that the Courts in Fiji, and indeed members of the legal profession and the public, might take advantage of the guidance afforded by the decisions of the English Courts which, because of the much larger size of the population of England and Wales, can be expected to have to consider the provisions of the English statute more frequently than the Courts of Fiji can be expected to consider those of the Act. No doubt, the decisions of the Court of Appeal and, more so, of the House of Lords are to be regarded as persuasive; but ultimately they are to be followed only if the Courts in Fiji are satisfied that the reasoning on which they are based is sound and that only matters which the Courts in Fiji are permitted to take into consideration were taken into consideration by the English Court.

In passing we would distinguish the situation in this case from the situation in Ambika Nand v Sahu Khan (Civil Appeal No. ABU0066 of 1995; delivered on 14 August 1997) where the issue concerned the common law of England applicable in Fiji by virtue of section 22(1) of the High Court Act (Cap.13). In such a case a decision of the House of Lords expounding the common law is authoritative. The situation is different also from that in Tam Suk-Chong Tammie v. Minister for Foreign Affairs and Another (Civil Appeal No. CBV0004 of 1994; delivered on 7 March 1996) where the Supreme Court suggested that, in

interpreting the provisions of the Extradition Act, the Courts in Fiji should follow the judgments of the House of Lords for reasons of international comity.

We have come to the conclusion, therefore, that we must interpret proviso (i) to section 4(1) using Lerang and Stubblings (to the extent that the judgment does not depend on the use of extrinsic materials) as assistance but without being bound to follow either. We must also take into account the inclusion in the Act of section 3 and the reference in it to "certain actions in respect of personal injuries".

Mr Greenwood submitted that "certain" in section 3 of the Act bears the meaning which it does in the phrase "a certain John Doe". We do not agree. In our view it clearly means "some" as distinct from "all". That being so, it is not possible to interpret "breach of duty" in proviso (i) to section 4(1) in a way which results in the proviso applying to all actions for damages for personal injuries, as was done in Lerang. We readily accept that the phrase should be construed as bearing its natural meaning, if that is possible and does not result in absurdity or conflict with another provision of the Act. However, the natural meaning of any expression used in a statute is to be ascertained by reference to the context in which it is used. In proviso (i) it is used in a context in which clearly it cannot bear its broadest meaning of breach of any possible duty, as that would lead to all actions for damages in respect of personal injuries coming within its terms. That is a meaning which it cannot bear in the context.

It is one of a set of three causes of action stated, i.e. negligence, nuisance and breach of duty. Certainly, as Mr Greenwood pointed out, it is difficult to identify precisely what

negligence and nuisance have in common, as nuisance can be committed deliberately. However, it is, we believe, possible to see in the choice of those three causes of action as the ones excluded from the general provision of section 4(1)(a) an intention not to exclude from that general provision actions for damages for personal injuries founded on specific common law causes of action as distinct from causes of action which in the past would have been described as actions on the case. In our view "breach of duty" has to be construed accordingly.

The conclusion to which we have come is consistent with the views expressed by Lord Griffiths in the passages which we have set out above. As he expressed those views in respect of the English statute, which does not contain a provision such as section 3 of the Act, *a fortiori* they can be seen to support our conclusion.

The appeal is dismissed; the appellants are to pay the respondent's costs of the appeal. The hearing in the High Court of the respondent's action should now proceed.

I.R. Thompson

 Mr Justice Ian Thompson
Justice of Appeal

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 Mr Justice Gordon Ward
Justice of Appeal

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 Mr Justice John Dillon
Justice of Appeal