IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 171 of 2021

BETWEEN: **FAIYAZ ALI KHAN** of Kulukulu, Sigatoka.

Plaintiff

AND: **FIJI SUGAR CORPORATION** a body corporate constituted under the Fiji Sugar Corporation Act (Cap. 209), having its registered office at Western House, Private Mail Bag, Lautoka, Fiji.

First Defendant

AND: **THE NEW INDIA ASSURANCE COMPANY LTD** having its registered office at the New India Assurance Company Limited Building, 87 M.G Road, Fort Mumbai, 400001, India and having its Principal Office in Fiji at the 1st Floor, Harbour Front Building, Broadwell Road, Suva.

Second Defendant

Before : Master U.L. Mohamed Azhar
Counsel: Mr. S. Nand for the Plaintiff

Date of Ruling: 30. 06. 2022

RULING

01. The plaintiff filed the instant summons and sought enlargement of time to issue the writ within seven days. The summons is supported by an affidavit sworn by the plaintiff and states that, it was filed pursuant to Order 32 rule 9 (d) of the High Court Rules and the inherent jurisdiction of this court. However, on perusal of the summons and the supporting affidavit it reveals that, the plaintiff seeks extension of time to bring an action for damages against the defendants for the injuries allegedly caused to him on 03.09.2014 due to the negligence of an employee of the first defendant. At hearing of the summons, the counsel for the plaintiff urged the leave to issue writ out of time and tendered his written submission annexing some authorities.

02. The proviso under section 4(1) of the Limitation Act Cap 35 (**the Act**) clearly provides that, an action in respect of personal injuries should be commenced within 3 years from the date on which the cause of action accrued. The section 16 of the Act confers the discretionary power to the court to extend the time limit for actions in respect of personal injuries, upon fulfilling certain requirements. For the court to consider the extension of time, the application shall be made in accordance with section 17 of the Act, which provides;

Application for leave of court

17.-(1) Any application for the leave of the court for the purposes of section 16 shall be made ex parte, except in so far as rules of court may otherwise provide in relation to applications which are made after the commencement of a relevant action.

(2) Where such an application is made before the commencement of any relevant action, the court may grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if such an action were brought forthwith and like evidence were adduced in that action, that evidence would, in the absence of any evidence to the contrary, be sufficient-

(a) to establish that cause of action, apart from any defence under subsection (1) of section 4; and

(b) to fulfil the requirements of subsection (3) of section 16 in relation to that cause of action.

(3) Where such an application is made after the commencement of a relevant action, the court may grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if the like evidence were adduced in that action, that evidence would, in the absence of any evidence to the contrary, be sufficient-

(a) to establish that cause of action, apart from any defence under subsection (1) of section 4; and

(b) to fulfil the requirements of subsection (3) of section 16 in relation to that cause of action,

and it also appears to the court that, until after the commencement of that action, it was outside the knowledge (actual or constructive) of the plaintiff that the matters constituting that cause of action had occurred on

such a date as, apart from the last preceding section, to afford a defence under subsection (1) of section 4.

(4) In this section, "relevant action", in relation to an application for the leave of the court, means any action in connection with which the leave sought by the application is required.

03. However, the plaintiff's summons is filed pursuant to Order 32 rule 9 (d) of the High Court Rules which deals with the enlargement of time. The Order 32 rule 9 specifies the powers of the Master of the High Court apart from those that are provided in Order 59 of the High Court Rules. Accordingly, the plaintiff's summons is irregular as it was filed pursuant to a rule which is not relevant to the context. However, I decided, considering the interest justice, to determine the substantive issue as to whether this court can grant leave to the plaintiff to issue the writ out of time, despite the irregularity of the plaintiff's summons.

04. The section 17 of the Act stipulates that, whether application is made before or after the commencement of any action, the court may grant leave only if it appears to the court, on evidence adduced by or on behalf of the plaintiff, that it establishes a cause of action and it fulfills the requirements of section 16 (3) of the Act, if such an action were brought forthwith. The relevant sub-section that provides the requirements is as follow;

*16 (3) The requirements of this subsection shall be fulfilled in relation to a cause of action if it is proved that the **material facts relating to that cause of action** were or included **facts of a decisive character** which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which-*

(a) either was after the end of the three-year period relating to that cause of action or was not earlier than twelve months before the end of that period; and

(b) in either case, was a date not earlier than twelve months before the date on which the action was brought.(Emphasis added).

05. The Act in sections 19 and 20 also provide the meaning of material facts relating to a cause of action and the facts of decisive character for further convenience. Those sections are;

Meaning of "material facts relating to a cause of action"

19. In sections 16 and 18 any reference to material facts relating to a cause of action means a reference to any one or more of the following:-

(a) the fact that personal injuries resulted from the negligence, nuisance or breach of duty constituting that cause of action;

(b) the nature or extent of the personal injuries resulting from that negligence, nuisance or breach of duty;

(c) the fact that the personal injuries so resulting were attributable to that negligence, nuisance or breach of duty, or the extent to which any of those personal injuries were so attributable.

Meaning of "facts of a decisive character"

20. *For the purposes of sections 16 and 18, any of the material facts relating to a cause of action shall be taken, at any particular time, to have been facts of a decisive character if they were facts which a reasonable person, knowing those facts and having obtained appropriate advice within the meaning of section 22 with respect to them, would have regarded at that time as determining, in relation to that cause of action, that, apart from any defence under subsection (1) of section 4, an action would have a reasonable prospect of succeeding and of resulting in the award of damages sufficient to justify the bringing of the action.*

06. Even though the Act gives the meaning for several phrases used therein, the interpretation of these provisions seems to be notoriously difficult for the purpose of ascertaining the meaning which was intended to bear. In fact, the section 16 and 17 of the Act are the verbatim of **Limitation Act 1963 (U.K.)** The relevant provisions of that Act was considered in several English cases and the English courts have repeatedly been critical of the provisions of that Act. The House of Lords in **Central Asbestos Co. Ltd. v. Dodd** (1972) 2 ALL E.R. 1135 expressed it displeasure over its drafting. In that case. **Lord Reid** said at page 1138 as follows;

Normally one expects to be able to find at least some clue to the general purpose and policy of an Act by reading it as a whole in the light of the circumstances which existed when it was passed or of the mischief which it must have been intended to remedy. But here I can find none. The obscurity of the Act has been frequently and severely criticized; indeed I think this Act has a strong claim to the distinction of being the worst drafted Act on the statute book. But even so I cannot believe that it could have been so elaborately drafted if it had been intended only to have the very limited application for which the appellants contend.

07. **Lord Pearson** at page 1148 said that;

The provisions of s7(3) of the Limitation Act 1963 are notoriously difficult to construe. I think one must try to ascertain the general intention which presumably prompted these provisions and to envisage the task which confronted the draftsman.

08. **Lord Salmon** held at page 1159 that;

> *This Act has been before the courts on many occasions during its comparatively short life. I do not think that there are many judges who have had to consider it who have not criticized the wholly unnecessary complexity and deplorable obscurity of its language. It seems as if it were formulated to disguise rather than reveal the meaning which it was intended to bear.*

09. However, **Lord Denning M.R** in **Goodchild v Greatness Timber Co Ltd** [1968] 2 All ER 255 explained the operation of these provisions despite their obscurity at page 257 and held that;

> *It is very difficult to understand. The particular section here in question is s.7 (4) which defines which facts are of a 'decisive character'. I can best explain it by stating the way in which it should be applied. Take all the facts known to the plaintiff, or which he ought reasonably to have ascertained, within the first three years, about the accident and his injuries. Assume that he was a reasonable man and took such advise as he ought reasonably to have taken within those three years. If such a reasonable man in his place would have thought he had a reasonable prospect of wining an action, and that the damages recoverable would be sufficiently high to justify the bringing of an action – in short, if he had a "worth-while action" – then he ought to have brought the action within the first three years. If he failed to bring an action within those three years, he is barred by the statute. His time will not be extended under the Limitation Act 1963 simply because he finds out more about the accident or because his injuries turn out to be worse than he thought. His time will only be extended if a reasonable man in his place would not have realized, within the first two or three years, that he had a "worth-while action". Then, if it should turn out after the first two or three years that he finds out facts which make it worthwhile to bring an action, he must start it within twelve months after he finds out those facts. Then, and then only, will the time limit be extended so that he is not barred.*

10. **Lord Denning M.R** further emphasized the need for scrutiny of any application for extension of time to see whether it is proper case for leave. His Lordship held at the same page that:

> *I would add, however, that when application is made for leave under the Limitation Act 1963, a judge in chambers should not grant leave as of course. He should carefully scrutinize the case to see whether it is a proper case for leave.*

11. According to the above provisions and the cases decided thereunder, the first question is whether the plaintiff adduced sufficient evidence to establish a cause of action against the

defendants? The plaintiff on 03.09.2014 transported sugar cane to Lautoka sugar mills. The plaintiff signaled to the operator at the Sugar Mills to wait until he loosened the cable to unload the sugarcane. However, the operator pulled the cable which resulted in moving the lorry back. As a result, the sugarcane spilled over the plaintiff and his left thumb was broken. Eventually, the thumb was amputated and on 23.01.2015 the plaintiff was declared by the Lautoka hospital to have incapacity of 32%. The plaintiff stated that the incident took place due to the sole negligence of the operator who, at all tmes material, was an employee of the first defendant. This evidence is sufficient to establish a cause of action for the plaintiff against the first defendant.

12. The second question is whether the material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff? In personal injury matters, the identity of the tortfeasor, to whose negligence the plaintiffs' injuries was attributable, was held to be 'a material fact of a decisive character' in **Re Clark v. Forbes Stuart (Thames Street) Ltd. (intended action)** (1964) 2 ALL E.R. 282), and **Walford v. Richards** (1976) 1 Lloyds Rep. 526). A Statute of Limitation cannot begin to run unless there are two things present - a party capable of suing and a party liable to be sued (*Per: Vaughan Williams L.J.* in **Thomson v. Lord Clanmorris** (1900) 1 Ch. D 718 at pages728 and 729).

13. **Lord Reid** in **Lord Reid Central Asbestos Co. Ltd v Dodd** (supra) at page 1139 explained how the three years' time limit is extended under the Act and what are the material fact relating to the cause of action and the facts of decisive character. His Lordship said that;

> *This at least is plain. The Act extends the three years' time limits in cases where some fact was for a time after the damage was suffered outside the knowledge of the plaintiff, if that fact was 'material' and 'decisive'. Before a person can reasonably bring an action he (or his advisers) must know or at least believe that he can establish (1) that he has suffered certain injuries; (2) that the defendant (or those for whom he is responsible) has done or failed to do certain acts; (3) that his injuries were caused by those acts or omissions; and (4) that those acts or omissions involved negligence or breach of duty.*

14. The knowledge that required for this purpose is not the knowledge for certain and beyond possibility of contradiction, but the knowledge sufficient to embark on preliminaries to issue the writ as **Lymington M.R.** held in ***Halford v Brookers*** (1991) 1 WLR 428, at page 443 in which he said:

> *"In this context 'knowledge' clearly does not mean 'know for certain and beyond possibility of contradiction.' It does, however, mean 'know with sufficient confidence to justify embarking on the preliminaries to the issue of a writ such as submitting a claim to the proposed defendant, taking legal and other advice and collecting evidence."*

15. The averments in plaintiff's affidavit show that, he had sufficient knowledge of his claim immediately after the incident. On 01.10.2014 he wrote to Human Resources Manager of the first defendant of this incident sought compensation. A copy of the letter dated 01.10.2014 is annexed with his supporting affidavit. By 23.01.2015 the plaintiff was informed by the Lautoka hospital of the percentage of his incapacity. He continued to inquire at the office of the first defendant of his claim. Finally, the plaintiff hired a solicitor and he officially wrote to the first defendant on 02.03.2017 annexing the copy of medical report. Thereafter, there was no step either by the plaintiff or his solicitor to issue a writ in this matter. The plaintiff alleged that, the solicitor who wrote to first defendant did not take proper steps and he ran out of time due to incompetence of his solicitor.

16. Fatiaki J., in **Cakau v Habib** [1999] FJHC 53; Hbc0241d.98s (18 June 1999) emphasized that, leave to be denied for the fault and failure of the solicitors to commence proceedings within the time. This proposition was followed by Amaratunga J., in **Kasaimatuku v Vakaloloma** [2018] FJHC 392; HBC107.2015 (18 May 2018).

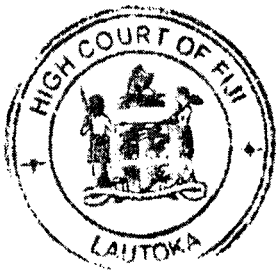
17. The overall examination of the Act shows that, the parliament's intention was to extend the time limit to those who genuinely did not know the material facts and the facts of decisive character in relation the cause of action for damages for negligence, nuisance or breach of duty as provided in section 16 of the Act within stipulated period of three years. It was not the intention of the parliament to excuse the litigants who hired the ignorant and or negligent solicitors who are lethargic in taking steps within the appropriate timetable. When explaining how the parliament drew a line between kind of ignorance which is to be sufficient excuse for delay and the kind of ignorance which is not excused according to the provisions of **Limitation Act 1963 (U.K)**, Lord Pearson stated in **Central Asbestos Co. Ltd v Dodd (supra)** at pages 1148 and 1149 that;

> *In order to strike that balance Parliament would have to draw a line somewhere between the kind of ignorance which is to be a sufficient excuse for lateness in bringing an action and the kind of ignorance which is not to be a sufficient excuse for such lateness. It seems to me that Parliament has drawn the line between ignorance of facts (Material and decisive facts) and failing to draw the conclusions which a reasonable man, with the aid of expert advice, would have drawn from those facts as to the prospect of success in an action. If the plaintiff did not know one or more of the material and decisive facts, his lateness in bringing the action is excused. If he knew all the material and decisive facts, but failed to appreciate his prospects of success in an action because he did not take expert advice or obtained wrong expert advice, his lateness in bringing the action is not excused. It seems to me that is the broad effect of sub-ss(3) and of s 7 of the Act. That is where the line is drawn.*

18. The above analysis on the law and facts of the case before me concludes that, the plaintiff did know the material and decisive facts relating to his cause of action against the defendant well within the three years of time and took preliminary steps necessary for

instituting an action for damages. However, the he could not take out the writ from this court within the prescriptive period due to the sole negligence or rather the lethargic attitude of her previous solicitor, which cannot be an excuse for this court to exercise its discretion by extending the limitation period.

19. For the above reasons, I hold that this application for extension of time to bring an action for negligence fails and ought to be dismissed. Accordingly, the leave is refused and the summons filed on 11.08.2021 is dismissed.



U.L.Mohamed Azhar
Master of the High Court

At Lautoka
30.06.2022