WILLIAM DUNN v ATTORNEY GENERAL

High Court Civil Jurisdiction
Fatiaki, J
16 August, 2000
HBC 0331/96

Amendment of pleadings – striking out – whether statute barred – High Court Rules O.18 r.7 – Limitation Act (Cap 35) ss4(1), 16(3), 17(3), 19(a) & (c), 20, 21, 22

Negligence and breach of implied term of contract - damages for injuries being exposed to considerable noise and ultraviolet rays - sustained during course of employment – Factories Act (Cap 99) – Workmen's Compensation Act (Cap 94)

The plaintiff, a welder and boiler maker claimed damages alleging injuries caused by being exposed to considerable noise and ultra violet rays were sustained in the course of employment. The defendant denied the claim and alleged contributory negligence. The plaintiff filed an application to amend Statement of Claim and the defendant filed an application to strike out.

Held – (1) Where the particular nature and extent of injury was of an insidious type unbeknown to the applicant and where initiating procedures had been taken to claim workmen's compensation, he was not required to seek medical advice and be able to estimate his chances of success.

(2) Plaintiff became aware of true nature and extent of onset of blindness and deafness when he was medically examined for Workmen's Compensation purposes and would then have discovered their degenerative nature was due to acts and omissions of employer in 30 years of employment.

(3) Application to strike out claim dismissed. Leave granted to plaintiff to amend Statement of Claim within 14 days and thereafter defendant to file and serve an amended Statement of Defence.

Cases referred to in Ruling

Foll ***Permal & Anor v Loraini Saweta*** (unrep) ABU 19/85
Cons ***Central Asbestos Co. Limited v Dodd*** (1972) 3 WLR 333
Cons ***Knipe v British Railway Board*** (1972) 2 WLR 127

Ramanlal Kapadia for the plaintiff
Daniel Singh for the defendant

16 August 2000. **RULING**

Fatiaki, J.

On the 11th of July 1996 the plaintiff, a welder and boiler maker employed in the Ministry of Public Utilities and Infrastructure issued a Writ against the defendant claiming damages for injuries allegedly sustained by him during the

course of his employment with the Ministry, and caused by being 'exposed to considerable noise and ultra violet rays' as a result of the defendant's alleged breach of it's statutory duties under the Factories Act (Cap.99), negligence, and breach of an implied term in the plaintiff's employment contract. In the alternative, the plaintiff claims compensation under the Workmen's Compensation Act (Cap.94).

As for this latter claim I would merely observe that the Workmens Compensation Act plainly prescribes that the court with original jurisdiction in such claims is 'a court of a resident magistrate'.

On 12th July 1996 the defendant formally acknowledged service of the Writ but it was not until 17th February 1997 that a Statement of Defence was eventually filed denying the plaintiff's claim and alleging contributory negligence on his part in 'exposing himself to unnecessary risk of injury'. No limitation defence was pleaded however as it should have been if the State was minded to rely on it see: Order 18 r.7 of the High Court Rules and the unreported judgment of the Court of Appeal in **F.E.A. and A.G. v. Miriama Ganilau** Civil Appeal 50 of 1997 where in dismissing the A.G's appeal based on the Limitation Act which was not pleaded in its defence, the Court observed at p.3:

> 'It has always been understood that a defendant has an option whether to raise this (limitation) defence and one does not expect to see it exercised in a case like this by a responsible public body and a public officer to defend what appears to be a meritorious claim by the respondent.'

Be that as it may no reply to defence was filed and following the closure of pleadings the parties proceeded to attend to interlocutory matters in preparation for the trial and culminating with the assignment of two (2) trial dates in April 1998. Thereafter and prior to the trial dates arriving, counsels sought and were granted a postponement of the trial to June 1998.

Then on 26th May 1998 on the court's indication, defence counsel who had earlier sought to amend his pleadings to include a limitation defence, filed an application to strike out the Statement of Claim on the basis that 'the plaintiff's claim is statute barred under the provisions of the proviso to Section 4(1) of the Limitation Act Cap.35'.

Subsequently and in response to the above application, plaintiff's counsel applied for leave to amend the Statement of Claim in order to aver that the plaintiff's injuries were sustained ...'between 1993 and 1998' (i.e. within 3 years of the issuance of the Writ). Additionally, the plaintiff sought interest ... 'at the rate of 6.5% per annum from the date of issue of the Writ'.

Both applications were jointly listed for argument before me although it was the defendant's application which occupied most of the argument.

In short, defence counsel's argument is that based on various entries in a Workmen's Compensation Notice of Injury form dated 26.2.96, the plaintiff had

complained of and was aware of his deteriorating aural and visual abilities as long ago as 'NOVEMBER 1964 - JANUARY 1996' and accordingly his claim for damages is well outside the three (3) year limitation period provided under Section 4 of the Limitation Act (Cap.35) for a claim for ' damages in respect of personal injuries'. In counsel's words 'time would have run out from 1990'.

Plaintiff's counsel for his part rejects the Notice as 'the defendant's document' and argues, rather ingeniously, that the plaintiff's claim is for 'progressive deterioration every day up till now' for which '... we say (on) every working day of the week the defendant has breached statutory duties and committed a tort against the plaintiff who has a cause of action each day'.

In response defence counsel whilst accepting that the plaintiff's claim is based on a progressively deteriorating type of injury nevertheless submits that 'that (factor) begs the question in terms of the Limitation Act (Cap.35)' which establishes a limitation period of three (3) years within which an action for 'damages in respect of personal injuries' can be brought and here the on-set of the plaintiff's injuries occurred (and his cause of action accrued) as long ago as 'November 1964' and accordingly the claim is statute-barred.

In this regard in **Cartledge v. E-Jopling & Sons** (1963) 1 All E.R.341 where the appellant workmen contracted an insidious disease whilst in the respondent's employ but only became aware of it long after the limitation period had expired, the House of Lords in rejecting the claims as statute-barred held:

> '(i) ... time did not run from the date when the plaintiff knew or ought to have known that he was suffering from pneumoconiosis, but from the date when the cause of action accrued ;
>
> and
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> (ii) the cause of action for breach of statutory duty arose when material damage had been suffered by the plaintiff (although he was then ignorant of the damage) .'

Subsequently the English Parliament recognising the harshness of the decision passed the Limitation Act 1963 which in part was intended to remedy the defect in the law highlighted in Cartledge's case (op.cit) and which Act is undoubtedly the predecessor of Division D of Part III of our Limitation Act (Cap.35) which are the relevant provisions to be considered in this case.

In particular, in the context of the present case the relevant provision is Section 17(3) of the Limitation Act ('the Act') which provides:

> '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, in the absence of any evidence to the contrary, be sufficient -
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> (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 the cause of action had occurred on such a date as, apart from the last preceding action, to afford a defence under subsection (1) of Section 4.'

This latter over-riding (and additional) requirement of Section 17(3) was interpreted by the Fiji Court of Appeal in **Permal and Anor v. Loraini Saweta** Civil Appeal 19 of 1985 (unreported) to mean (at p.5):

'... that the applicant had no knowledge, before instituting the action that the matters constituting (the)cause of action had occurred on a date which would afford a defence to the action namely a date more than 3 years before commencing the action.'

and later the Court adverted to the making of an application for leave under the Limitation Act when it said at p.7:

'Generally speaking it can be stated that in virtually all cases leave should be sought before issuing a writ. If leave is sought after commencement of the action a court has no jurisdiction to entertain the application unless the applicant can satisfy the court that he did not know or could not with reasonable diligence discover that the material facts on which he based his claim had occurred more than 3 years before he issued the Writ.'

As to the requirements of para. (a) above I am satisfied on the plaintiff's averments in his Statement of Claim coupled with the admissions in the Statement of Defence and the information in the Notice of Inquiry form which is heavily relied upon by the defendant that there is sufficient prima facie material to establish the plaintiff's various cause(s) of action.

As to the requirements of para. (b) above, Section 16(3) of the Act provides:

'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 the 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.'

a As to what are 'material facts relating to a cause of action', Section 19 of the Act provides that the phrase refers to the following:

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

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

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

c Section 20 of the Act then defines the meaning of 'facts of a decisive character' in the following objective terms:

'... if they were facts which a reasonable person, knowing those facts and having obtained appropriate advice ... with respect to them, would have regarded at that time as determining ..., that, an action would have a reasonable prospect of succeeding and of resulting in the award of
d damages sufficient to justify the bringing of the action.'

For completeness reference should also be made to the subjective provisions of Section 21 of the Act which provides that:

'... a fact shall, at any time, be taken to have been outside the knowledge,
e actual or constructive, of a person if, but only if -

(a) he did not know that fact;

(b) in so far as there existed, and were known to him, circumstances from which with appropriate advice ... that
f fact might have been ascertained ..., he had taken all such action, if any, as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice ... with respect to those circumstances.'

Finally 'appropriate advice' is defined in Section 22 as meaning 'the advice of competent persons qualified, in their respective spheres, to advise on
g the medical, legal or other aspects ... as the case may be'.

The above provisions are an exact replica of the provisions of Sections 1 & 7 of the Limitation Act 1963 (U.K.) which were considered by the House of Lords in the leading case of **Central Asbestos Co. Ltd. v. Dodd** (1972) 3 W.L.R. 333.

Their lordships in construing the above provisions were extremely critical of the drafting manner adopted, describing it as: '... the worst drafted Act in the statute book' (per Lord Reid at p.337); ... 'notoriously difficult to construe' (per Lord Pearson at p.347); and ... formulated to disguise rather than reveal the meaning which it was intended to bear' (per Lord Salmon at p.360).

My difficulty is compounded in this case by the absence of a formal application for leave or an affidavit from the plaintiff and I am accordingly left to determine this preliminary matter on the basis of the pleadings and the defendant's affidavit and annexures.

Having said that however I respectfully accept the interpretation of the provisions formulated by the least critical of their lordships namely, Lord Morris of Borth-y-Gest when he said in his judgment at p.343 ibid:

> "The provisions of Section 1(3) [which are identical to our Section 16(3) above] are all important. The requirements of the subsection are 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 specified. There are here contained three terms of art which must only be given their specially assigned meanings. The first is `the material facts relating to that cause of action.' That is specifically defined in Section 7(3) [our Section 19]. The second is `facts of a decisive character.' This is defined in Section 7(4) [our Section 20]. The third is `outside the knowledge (actual or constructive.' This is defined in Section 7(5) [our Section 21].
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> The scheme of Section 1(3) appears, therefore, to be to direct an enquiry whether there was a material fact relating to a cause of action (using this phrase not in any ordinary sense but as defined), which in a defined sense was 'decisive' and which in a defined sense was outside the knowledge of the plaintiff. I use the phrase a material fact because although Section 1(3) speaks of 'the material facts relating to that cause of action' when one turns to the definition in Section 7(3) it is said that any reference to 'the material facts relating to a cause of action is a reference to any one or more of the following, ...' This further suggests that (a) and (b) and (c) which follow each refers to one defined material fact. The first is : '(a) the fact that personal injuries resulted from the negligence, nuisance or breach of duty constituting that cause of action'."

In this latter regard his lordship whilst mindful of the alternative meanings that could be ascribed to para.(a) of Section 7(3) [our Section 19(a)] nevertheless said:

> 'Though the wording of (a) might suggest otherwise, I incline to the view that the intention was to refer only to one 'material fact' and that that was the existence of personal injuries.'

Later at p.344 his lordship said of our Section 19(b):

> 'A separate 'material fact' is denoted by (b) namely, 'the nature or extent of the personal injuries resulting from negligence, nuisance or breach of duty'. If a plaintiff was aware of his personal injuries a fact outside his knowledge might be their nature and extent.'

Digressing from Lord Morris' judgment it is convenient in the present context, to refer to a passage in the judgment of Sachs L.J. in **Knipe v. British Railway Board** (1972) 2 W.L.R. 127 in which the plaintiff successfully sued in 1970 for an injury sustained in 1948 and where the plaintiff relied on absence of knowledge of the extent of his injuries, his lordship said at p.134:

> 'Taking first head (b), which relates to the extent of the injuries - that extent to my judgment means an extent sufficient to give him a worthwhile cause of action. The extent of which he must have knowledge is one which depends on the facts of each case, and the extent known to the plaintiff must be such as would, if properly advised, lead him to take an action.'

and in words that might well apply to the present plaintiff Sachs L.J. continued:

> 'In this particular case there is a complication that the extent would have had to be such that it would be more to his benefit to rely on a common law action rather than on the Workmens' Compensation Act.'

Returning then to Lord Morris' judgment in the **Central Asbestos Case** (op.cit) his lordship had the following to say at p.344 about our Section 19(c):

> 'The other 'material fact' is denoted by (c) ... I think that for clarification it is helpful to note the words 'so resulting'. The reference back which is there denoted is a reference back to (a) and (b) [our Section 19(a) and (b)].
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> In my view, the words 'were attributable' show that the 'material fact' which might have been outside the plaintiff's knowledge was the fact that he could attribute his personal injuries to negligence, nuisance or breach of duty. That means whether he could attribute them to what was in law negligence, nuisance or breach of duty.'

and later at p.345 in further explaining the meaning of 'attributable' his lordship said:

> The fact (of which the plaintiff may have been ignorant) which is denoted by (c) must, I think, be a different fact from that denoted by (a) or (b) ... The Subsection speaks of 'personal injuries so resulting being attributable to negligence or breach of duty. This is wholly different from the conception of injuries being a consequence of some act or omission. The conception of knowledge of injuries being 'attributable' to negligence

> involves that a person could assert not merely that his injuries were the result of something done by another person but could also assert that that other person was negligent and so could be sued.'

Then at pp.3346 his lordship gave as an instance of 'a typical case' which would be covered by the above provisions:

> '... someone who knows or comes to know that he has suffered injuries in such a form as pneumoeoniosis or asbestosis and who knows or comes to know that he has suffered those injuries while at work and because of the nature of his work but has no idea that he can in any way blame his employer or sue his employer. He would say: (if asked about the delay in suing) I did not know that I could put my injuries down to his negligence or breach of duty ; I did not know I could ascribe them or attribute them to negligence. I did not know that I could sue him. In my view, by enacting the sections now under consideration Parliament decided that such a plaintiff who has proved his case should not be debarred from recovery provided always that his ignorance was excusable.'

In this latter regard and paraphrasing Lord Reid in the Central Asbestos case (op.cit at p.340):

> '...the reasonable person would not be a lawyer (or a doctor), else why should the subsection (i.e. our Section 20) require him to take (medical and/or legal) advice. And the reasonable layman would not, without taking advice in many cases be able to estimate either his chances of success, or whether he was likely to obtain sufficient damages.'

A fortiori where the particular nature and extent of the injury was of an insidious type unbeknown to the applicant and where initiating procedures had been taken to claim Workmens Compensation for his injuries.

Whatsmore in **McCafferty v. Metropolitan Police District Receiver** (1977) 1 W.L.R.1073 where the plaintiff developed deafness from working for many years without adequate protection in a confined space where firearms were test-fired and which injury the plaintiff considered at the relevant time to be 'an irritating nuisance' and the plaintiff continued in his work without suing his employers, Lawton L.J. in rejecting the employer's appeal based on a limitation defence, said at p.1081:

> 'In my judgment the court should be understanding of men who, after taking an overall view of their situation come to the conclusion that they would prefer to go on working rather than become involved in litigation.'

In similar vein the Court of Appeal said in **Howell v. West Midlands Passenger Transport Executive** (1973) 1 Lloyds Reps 199 at 201:

> 'A man is taken to have constructive knowledge as soon as he could reasonably be expected to put the facts before a legal advisor and be advised that he had a worthwhile cause of action. From that moment

> time runs against him. But if he is put off by some circumstance which afford him a reasonable excuse - so that he could not reasonably be expected to go to a legal adviser - then his time will be extended till his misapprehension is removed.'

The final citation I desire to refer to in Lord Morris' judgment is that to be found at (ibid) p.346 where his lordship said after dealing with the meaning and effect of Sections 7(4) and 7(5) [our Sections 21 & 22]:

> 'The legal position was, if I may respectfully say so, conveniently summarised by Lord Denning M.R. in **Skingsley v. Cape Asbestos Co. Ltd.** (1968) 2 Lloyds Rep.201. After referring to **In re Pickles v. National Coal Board** (1968) 1 W.L.R. 997 he said at p.202:
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> The case shows that, in the case of industrial disease, time does not run against a man unless and until he has knowledge (actual or constructive) of these material facts : (i) that he is suffering from the disease ; and (ii) that the disease is attributable to the negligence or breach of duty of his employers. Once he has sufficient knowledge (actual or constructive) of those facts, such that a reasonable person in his place (who was in receipt of competent medical or legal advice) would have realised that he had a worthwhile action, they are facts of a decisive nature and time begins to run against him.'

In the present case whilst the plaintiff may well have been aware of the onset of his deafness and blindness in the 1960s or 1970s during the course of his continued employment in the Ministry, nevertheless, I am satisfied that he only first became aware of their true 'nature and extent' when he was medically examined for Workmen's Compensation purposes in 1996. Whatsmore having regard to their degenerative nature, he would then have discovered that his injuries 'were attributable' to the acts and omissions of his employer (rather than advancing age) during his 30 odd years of employment.

For the foregoing reasons leave is granted to the plaintiff to continue with this action. Leave is also granted to amend the Statement of Claim as sought. The plaintiff is to prepare, file and serve an amended Statement of Claim within 14 days and thereafter the defendant is given 14 days to file and serve an amended Statement of Defence. The action is thereafter to follow its normal course and the parties are urged to settle this claim if at all possible or file fresh pre-trial conference minutes before any trial date can be assigned. Costs are reserved.

Application dismissed.

Marie Chan