

BARBADOS

No. CV 844 of 2007

IN THE HIGH COURT OF JUSTICE

CIVIL DIVISION

BETWEEN

LESTER MCDONALD DANIEL - PLAINTIFF

AND

M & W JORDAN ENTERPRISES INC - 1ST DEFENDANT
ADRIAN MAYNARD - 2ND DEFENDANT

*Before the Hon. Madam Justice Maureen Crane-Scott, Q.C.,
Judge of the High Court,
[In Chambers]*

2009: May 5

**Mr. Tyrone Estwick in association with Miss. Caroline Herbert for the
Plaintiff
Miss Nathalie Sandiford the Defendants**

DECISION

- [1] **Crane-Scott J:** This is an application by the Plaintiff for a direction under section 52 of the *Limitation of Actions Act, Cap. 231* that the provisions of section 20(2) of the said Act shall not apply to the Plaintiff's cause of action on the ground that the application of section 20(2) of the Act would result in severe prejudice to the Plaintiff.

Background:

- [2] On the 31st day of December, 2002 at approximately 8:20 am, the Plaintiff was driving his motor car XK354 from Bridgetown along Forde's Road, Clapham in the parish of St. Michael when, according to him, the Second Defendant so negligently drove, managed and controlled the First Defendant's minibus ZR 34 along Forde's Road in the direction of Bridgetown that the said minibus violently collided with the Plaintiff's motor car.
- [3] By reason of the said collision, the Plaintiff alleges that he sustained personal injuries and suffered loss and damage.
- [4] The Plaintiff filed his action in the High Court on May 10, 2007. On July 6, 2007, a Defence was filed on the Defendants' behalf raising a point of law and alleging simply that as the Plaintiff's claim had issued more than 3 years after the date on which the alleged cause of action arose, the claim was time-barred by operation of section 20 of the *Limitation of Actions Act, 1997-11*.
- [5] On October 3, 2007, the Plaintiff applied by Summons supported by an affidavit ("the affidavit-in-support") seeking an enlargement of

- time and leave of the Court to enable the Plaintiff to prosecute his claim notwithstanding the expiry of the limitation period.
- [6] The Plaintiff's affidavit-in-support was deposed to by his attorney-at-law, Miss. Caroline Herbert, who stated, *inter alia*, that after being consulted by the Plaintiff in December 2002, she had written to the Defendant's insurers, Caribbean Home Insurance Company Limited in June 2003, advising them of the claim and seeking damages on the Plaintiff's behalf.
- [7] The Defendants' opposed the application and filed an affidavit sworn to by attorney-at-law, Miss. Nathalie O Sandiford ("the Sandiford affidavit") setting out their view of the relevant facts. Miss. Herbert's letter of June 27, 2003 giving notice of the Plaintiff's claim was exhibited as ("*NOS 1*") to the Sandiford affidavit. Other letters which passed between the insurance company and the Plaintiff's attorneys-at-law between the period 2003 and 2006 were also exhibited with the Sandiford affidavit.
- [8] From the said correspondence and from both affidavits, it is beyond dispute that from as early as June 27, 2003, the Defendants, through their insurers Caribbean Home Insurance Company Limited, had been put on notice that as a result of the said accident, the Plaintiff had suffered personal injuries and further, that his vehicle had been extensively damaged and had been written off.
- [9] In her affidavit-in-support, Counsel for the Plaintiff, Miss. Caroline Herbert deposed that Caribbean Home Insurance Company Ltd settled the claim in respect of the Plaintiff's car and would, in her view, have established a reserve to deal with the outstanding claim for personal injuries.

- [10] Apart from a bald denial in paragraph 11 to the effect that neither the Defendants nor the insurance company had ever agreed or given the impression that they were prepared to deal with the Plaintiff's claim outside of the limitation period, the Sandiford affidavit failed to address the crucial issue raised by the Plaintiff as to whether the Defendants' insurers had accepted liability for the accident and settled the Plaintiff's claim in respect of his vehicle. That all important issue was also never addressed by Miss. Sandiford in her legal submissions presented at the hearing of the application.
- [11] Instead, Miss Sandiford focussed her submissions on two periods of delay which, according to her, had occurred in this matter and which had prejudiced the Defendants' insurers. According to Miss. Sandiford, these periods were firstly, the delay which had occurred between 2003 when the insurers were first notified of the claim and December 2005 when the 3 year limitation period for bringing the action would have expired and secondly, the delay of approximately 1 year and 5 months which had occurred after the expiry of the limitation period in December 2005 and May 10, 2007 when the action was eventually instituted.
- [12] With respect to the first period of delay, Miss. Sandiford argued that that the failure by the Plaintiff's attorney-at-law to communicate with the Defendants' insurers or to submit a quantified claim as requested in relation to the personal injury claim despite several reminders, had led the Defendants' insurers to believe that the Plaintiff was no longer pursuing his claim for personal injuries.
- [13] According to Miss. Sandiford, the failure of the Plaintiff's attorney-at-law to submit a quantified claim for the Plaintiff's personal injuries

between 2003 and December 2005, had prejudiced the Defendants' insurers as they had been denied the opportunity of setting aside an adequate reserve. Even if a reserve had been set aside, she contended, it was probably not adequate due to the lack of any information about the Plaintiff's condition. Additionally, she argued, the failure of the Plaintiff's attorney-at-law to communicate with the insurers between 2003 and December 2005 in relation to the personal injury claim, had denied the insurers an opportunity of having the Plaintiff independently assessed and his injury effectively managed.

[14] In an attempt to explain why legal action was not commenced before the expiration of the limitation period, Counsel for the Plaintiff deposed in paragraph 4 of her affidavit that the Plaintiff was still receiving medical attention and that a medical report was not available until after February 4, 2004. Furthermore, she was also awaiting information with respect to the Plaintiff's special damages and so did not rush to file an action in the High Court since she expected the Defendants' insurance company to honour its position on liability, it having accepted liability for and settled the Plaintiff's claim in respect of his car.

[15] With respect to the second period of delay of 1 year and 5 months between the expiry of the limitation period and the filing of the action, Counsel for the Defendants submitted that the Defendants' insurers were in effect being asked to deal with a claim nearly 2 years after the expiration of the limitation period. She contended that this was a case where negotiations had not commenced and further, that the claim was one which the insurers had assumed was no longer being pursued and for which they had closed their files.

- [16] Counsel for the Defendants cited the case of ***Thompson v. Brown [1981] 1 W.L.R. 744*** and submitted that the Plaintiff had not discharged the burden of showing that the circumstances of the case were such as to convince the Court that it would be equitable to extend the limitation period in this case. She also cited the case of ***Donovan v. Gwentys Ltd [1990] 1 W.L.R.*** where a delay in filing the action of 5^{1/2} months following the date of expiration of the limitation period was held to be excessive.

Discussion:

- [17] Sec. 20(2) of the ***Limitation of Actions Act*** provides that:

“Except when subsection (3) applies, no action [for damages for negligence in respect of personal injuries] may be brought after the expiration of 3 years from the later of the following dates (a) the date on which the cause of action accrued; or (b) the date on which the person injured acquired knowledge of his cause of action”.

- [18] Sections 52 and 53 of the Act are also relevant. Section 52 (1) provides as follows:-

“If the court considers that it would be equitable to allow an action to proceed having regard to the degree to which

(a) the provisions of section 20 or 22 prejudice the plaintiff or any person whom he represents; or

(b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents

the court may direct that those provisions shall not apply to the action, or do not apply to any specified cause of action relates”.

[19] Section 53(1) provides:-

“In acting under section 52 the court must have regard to all the circumstances of the case and in particular to

(a) the length of, and the reasons for the delay on the part of the plaintiff,

(b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 20 or, as the case may be, by section 22;

(c) the conduct of the defendant after the cause of action arose, including the extent, if any, to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;

(d) *the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;*

(e) *the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages; and*

(f) *the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he might have received”.*

[20] The Court has examined the case of *Donavan v Gwentys Ltd.* [1990] 1 WLR 472 in which the House of Lords had occasion to review the exercise of a similarly worded discretion conferred by section 33(1) of the **Limitation Act, 1980** of the United Kingdom. The Court is persuaded that just as is the case in the United Kingdom, the primary purpose of sections 52 and 53 of the Barbados *Limitation of Actions Act* is to protect a defendant from the injustice of having to face a stale claim, or in other words, a claim with which he never expected to have to deal.

[21] As Lord Griffiths pointed out in the *Gwentys case*, in weighing the degree of prejudice suffered by the defendant it will always be relevant for the Court to consider when the defendant first had notification of the claim and thus the opportunity he will have to meet

the claim at the trial if he is not to be permitted to rely upon his limitation defence.

- [22] In the present case, both parties agree that Caribbean Home Insurance Company Ltd, acting on behalf of the Defendants, was first notified of the Plaintiff's claim by way of Caroline Herbert's letter of June 27, 2003 - ("*NOS 1*"). The notification to the Defendants' insurers was given approximately 6 months following the accident and accordingly, the Court is satisfied that the Defendants were given early notice of the fact that the Plaintiff's claim was one which involved both property damage in respect of his car as well as for his personal injuries.
- [23] Paragraph 3 of the affidavit-in-support does not state the exact date when Caribbean Home Insurance Ltd settled the Plaintiff's claim in respect of his car. Nevertheless, as the fact of payment for the car was neither admitted nor denied in the Sandiford affidavit, the Court accepts the evidence of Caroline Herbert and finds that by the time the 3 year limitation period would have expired on December 31, 2005, Caribbean Home Insurance Ltd was sufficiently satisfied about the Defendants' liability for the accident that it was prepared to, and in fact had settled the Plaintiff's claim in respect of the damage to his car.
- [24] For some unexplained reason, the formal Release and Discharge which ought to have been issued by Caribbean Home Insurance Ltd when settlement was made in respect of the Plaintiff's car was not put into evidence in these proceedings. In the view of the Court, the wording of the Release and Discharge would have been helpful in ascertaining whether the Defendants were admitting liability for the

- entire claim or reserving their position in respect of the claim for personal injuries.
- [25] In the absence of a Release and Discharge or any express disclaimer or reservation to the contrary, the Court is satisfied that by settling the claim in respect of the Plaintiff's car, Caribbean Home Insurance Ltd must be taken to have also accepted liability for the Plaintiff's personal injuries and any damages arising in connection therewith.
- [26] The Court is satisfied that by settling the Plaintiff's claim in respect of his car, the Defendants' insurers, Caribbean Home, would have led the Plaintiff and his attorney-at-law to believe that liability was no longer in issue and that they would simply have been awaiting submission by the Plaintiff's attorney-at-law of the information requested by their letter of July 8, 2003, ("**NOS 2**") to permit them to quantify and settle the Plaintiff's personal injury claim.
- [27] The Court finds it significant that the reminder letter to the Plaintiff's attorney-at-law of March 11, 2004 ("**NOS 3**") was not issued as a "without prejudice" communication. Additionally, the reminder letter referred to the outstanding inquiries which the insurers had made regarding the *assessment* of the Plaintiff's claim. This suggests to the Court that liability for the accident was not in dispute.
- [28] In the light of the above facts, the Court is satisfied that while there cannot be said to have been an 'agreement' between Caribbean Home Insurance Co Ltd and Miss. Herbert as alleged at paragraph 4 of her affidavit, Caribbean Home's conduct and its communications following her letter of June 27, 2003 are such that she would have been led, not unreasonably, to assume that liability was no longer in

- issue and that the Plaintiff's personal injury claim would also have been honoured upon its presentation.
- [29] Although it is evident from the exhibits attached to the affidavit of Nathalie Sandiford that Miss. Herbert did not communicate with the Defendants' insurers after her initial letter of June 27, 2003, it has not escaped the Court's attention that there was also a marked absence of communication on the part of the Defendant's insurers after issuance to the Plaintiff's attorney-at-law of the reminder letter of March 11, 2004 ("*NOS 3*").
- [30] The Court is satisfied that after issuing its first and only letter of reminder of March 11, 2004, Caribbean Home Insurance Co. Ltd (later known as Guardian General Insurance Ltd) then sat back for a period of approximately 21 months without issuing further reminders before it finally issued its letter of February 1, 2006 ("*NOS 4*") informing the Plaintiff's attorney-at-law of the expiry of the limitation period and the subsequent closure of its file.
- [31] Having by its conduct and earlier correspondence, led the Plaintiff's attorney-at-law to believe that it had accepted liability for the Plaintiff's claim and invited the Plaintiff through his attorney-at-law to submit a quantified claim with a view to settling his claim for personal injuries, this Court finds that it was both unreasonable and unconscionable for the Defendants' insurers to sit back no doubt with the view of taking the benefit of the limitation point without first informing the Plaintiff or his attorney-at-law *prior to the expiry of the limitation period* that it proposed to do so.
- [32] Given Caribbean Home Insurance Co. Ltd's earlier dealings with the Plaintiff and the fact that it had previously i) accepted liability for the

- accident; ii) settled the claim in respect of his car, and iii) invited his attorney-at-law to submit a quantified claim for his personal injuries, the company's subsequent failure to warn the Plaintiff of the consequences of his not submitting a quantified claim or filing action prior to the expiry of the limitation period, is unconscionable.
- [33] Additionally, the letters of February 1, 2006 ("*NOS 4*") and October 18, 2006 ("*NOS 6*") advising the Plaintiff's legal representative of the reasons for the closure of their file appears very highhanded and, in the Court's view, leaves much to be desired.
- [34] On the one hand the Defendants' insurers say that after giving just one reminder to the Plaintiff, they closed their file after the expiration of the limitation period because Miss. Herbert did not communicate with them. On the other hand, Miss. Herbert says that after her initial letter, she did not rush to file action since liability had been accepted and she was awaiting additional information on special damages.
- [35] However, it is clear to the Court that the failure to communicate in this case was on both sides. He who seeks equity must himself do equity. The Court is satisfied that the conduct of the Defendants' insurers in not sending a further reminder or notification to the Plaintiff's attorney-at-law before closing its file is a circumstance which must be weighed in the balance alongside the apparent dilatoriness on the part of the Plaintiff's attorney-at-law in not getting back to Caribbean Home before the expiry of the limitation period.
- [36] Section 53(1)(b) of the Act requires the Court to have regard to the question whether the cogency of the evidence would or would be likely to be affected by the delay. In their affidavit in response, the Defendants did not raise this question as a circumstance to be

- considered by the Court when examining the likely prejudice to the Defendant. This is not surprising as the Defendants through their insurers, having already settled the claim for the car, had already decided prior to the expiration of the limitation period that liability was not in issue. Perusal of the Defence which was filed in the action also confirms that the only defence which the Defendants intend to raise to the Plaintiff's claim is the technical limitation point.
- [37] Section 53(1)(d) to (e) of the Act also requires the Court to examine any disability of the Plaintiff arising after the cause of action arose, the extent to which the Plaintiff acted promptly following the accident and the steps taken by the Plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he might have received.
- [38] Counsel for the Plaintiff in her affidavit deposed that the medical report became available after February 4, 2004 and that she was also awaiting information with respect to the special damages and so did not "*rush to file an action*" as she expected Caribbean Home "*to honour (our agreement) their position on liability.*"
- [39] As discussed earlier, although admittedly it would have been advisable and desirable for Miss. Herbert to have communicated these matters to the insurance company, she assumed, in the Court's view, not unreasonably, that as settlement had already been made in respect of the car, the Plaintiff's personal injury claim would likewise have been honoured upon its presentation.
- Assessing the balance of prejudice:**
- [40] As required by section 53 of the **Limitation of Actions Act**, the Court has taken all the relevant circumstances into consideration and done

its best to weigh the likely prejudice to the Plaintiff if the limitation period for instituting his action is not extended on the one hand, against the prejudice to the Defendants if time is enlarged and the action is permitted to proceed on the other. The Court holds that the balance of prejudice lies in the Plaintiff's favour for the following reasons:-

- (a) Notwithstanding the lapse of time which has occurred since December 31, 2002 when the accident took place, there is no doubt that the Defendants through their insurers, had early notification of the nature of the Plaintiff's claim;
- (b) Additionally, the Defendants insurers, had prior to the expiration of the limitation period on December 31, 2002 satisfied themselves as to the Defendants' liability for the accident, had settled the portion of the Plaintiff's claim relating to his car and had also by their conduct and communications, led the Plaintiff and his attorney-at-law to believe that his claim for his personal injuries would likewise be settled;
- (c) The Court finds that having satisfied themselves as to the Defendants' liability for the accident, the Defendants' insurers sat back for a period of 21 months without sending any further reminders or making any further inquiries of the Plaintiff or his attorney-at-law concerning the status of the claim;
- (d) As the Defendants' insurers did not warn or notify the Plaintiff that it was their intention to close their file and to take the limitation point if a quantified claim was not received or the action was not filed before the expiration of the limitation period,

the Defendants and their insurers are estopped from raising the limitation point as a Defence to the action at this stage;

- (e) The delay of approximately 1 year and 5 months which elapsed between the expiry of the limitation period in December 2005 and May 10, 2007 when the action was eventually instituted, though not specifically addressed in the affidavit-in-support, is in the Court's view due to the inconsistency of the Plaintiff's legal representation during the period.
- (f) This fact is apparent from the correspondence which ensued in 2006 after the expiration of the limitation period. Exhibits ("*NOS 4*") ("*NOS 5*") and ("*NOS 6*") of the Sandiford affidavit clearly show that at some time during 2006, the Plaintiff changed his attorney-at-law from Miss. Caroline Herbert, to Mr. John A. Forde and then back once again to Miss. Herbert who ultimately filed the action on May 10, 2007;
- (g) The fact that the Plaintiff was (due to the various changes in his legal representation) under a disability and unable to file a Writ and Statement of Claim for a further period of 1 year and 5 months after the expiry of the limitation period provided, in the Court's view, a totally unexpected windfall benefit for the Defendants' insurers, who, prior to the expiry of the limitation period, were clearly prepared to settle the claim;
- (h) After considering the risk of injustice to both parties the Court has determined that if the order enlarging the time for filing the action were made, the Defendants would suffer less prejudice and loss than would the Plaintiff;

- (i) On the one hand, if the Court were to make the order, the Defendants insurers would in all probability have to pay out to the Plaintiff as damages for his personal injuries, a sum of money which they would, as insurers, no doubt have pre-estimated and set aside during the limitation period, but which they now regard as a windfall;
- (j) On the other hand, if the order enlarging the limitation period were not made, the Plaintiff's action would be extinguished and he would, suffer the obvious prejudice of being unable to pursue his claim and would receive no compensation for personal injuries which he would have suffered in 2002 and for which the Defendants through their insurers had previously admitted liability;

Disposal:

[41] In the result, the Court makes the following orders and gives the following directions for the future conduct of this action:

- a) Section 20(2) of the *Limitation of Actions Act* shall not apply to the Plaintiff's cause of action herein;
- b) Consequently, the time limited for filing the Plaintiff's cause of action is enlarged to include May 11, 2007 notwithstanding that the statutory limitation period fixed by section 20 of the *Limitation of Actions Act* for filing the claim would, by that date, have expired;
- c) As the Defence which was filed on July 6, 2007 merely raised a point of law which has effectively been disposed of on the hearing of the Plaintiff's Summons, the Defence is hereby struck out.

- d) The Defendants are at liberty to file a fresh Defence within 14 days of the date hereof, in default of which final judgment shall be entered for the Plaintiff with damages to be assessed before a High Court Judge;
- e) The costs of this application will be the Plaintiff's costs in any event.

**Maureen Crane-Scott,
Judge of the High Court**