BARBADOS

IN THE SUPREMECOURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 2297 of 2001

BETWEEN

WENDY NEWTON

(Plaintiff)

AND

THE TRANSPORTBOARD

(Defendant)

Before the Honourable Madam Justice Beverley Walrond,Judge of the High Court, Acting

2002: December 06

Dr. R.L. Cheltenham QC in association with Mr. John Fordefor the Plaintiff

Mr. Leslie Haynes QC for the Defendant

JUDGMENT

[1] The PlaintiffWendy Newton was a Custom Purchasing Clerk employed by the Transport Board onthe 14th day of May, 1997, when in the course of her duties at work,she sat on a chair which broke. Shealleges that she suffered injuries as a result of her fall.

[2] She retainedthe services of Dr. Richard Cheltenham Q.C. who wrote an open letter dated June9, 1997 to the Transport Board on behalf of the Plaintiff in which he statedthat he wrote " to secure your formal acceptance of liability in this matter" .He further informed the Defendant that failure to respond on or before the 16thday of June, 1997 would result in the Plaintiff proceeding to court withoutfurther reference to the Defendant.

[3] The Defendantdid not respond before the 16th day of June, 1997, but the thenCounsel for the Defendant wrote to Counsel for the Plaintiff a "WithoutPrejudice" letter dated August 22, 1997 which explicitly stated that, " Inlight of the fact that an Accident and Dangerous Occurrence Notice and InjuryReport was completed by Miss Newton and signed by Miss Clarke of the TransportBoard, which notice and report bear evidence of the fact that Miss Newtonsustained her injuries out of and in the course of her employment, the Boardwill accept liability in the matter." The letter went on to state that theDefendant would appreciate that in order to arrive at an amicable settlement itwould be necessary for Counsel to view a copy of a medical report which statesquite clearly and precisely the injuries sustained by Miss Newton and theextent of those injuries.

[4] Counsel forthe Plaintiff deposed that in reliance on the Defendant's admission ofliability, the Plaintiff did not file Suit and he awaited the outcome of themedical treatment of the Plaintiff and the medical reports and by August 3,2000 sent a quantified claim to Counsel for the Defendant. The partiesthereafter entered into further meetings and discussions on the basis of fullliability on the part of the Defendant as late as November 13, 2000 when theparties reached an agreement on quantum which was however expressly madesubject to approval by the Defendant. That agreement has not been approved.

[5] In December,2000, shortly after the meeting between Counsel for the Plaintiff and theDefendant on November 13, 2000, United Insurers Co. Ltd. intervened andinsisted that the conduct of the matter be handed over by Counsel for theDefendant to its Attorney-at-Law, Mr. Leslie F Haynes, Q.C. No doubt, this action on the part of theinsurer was triggered by the submission to it of the proposed settlement workedout between Counsel for the Plaintiff and the Defendant. More importantly, thetime limited for the filing of suit under the provisions of the

Limitation(Public Authorities) Act had at that point already elapsed.

[6] Counsel forthe Plaintiff then wrote to Mr. Haynes enquiring about the future conduct ofthe matter and on the 13th day of June, 2001, at the request ofCounsel for the Defendant both parties visited the scene of the accident.

[7] ThePlaintiff's Counsel has deposed that despite repeated promptings, Counsel whohad taken over conduct of the matter for the Defendant showed reluctance tohonour the out-of-court negotiations and so the Plaintiff filed Suit on the 2nddday of November, 2001 in which she claimed damages for negligence, interest andcosts. The Defendant filed a Defence on December 5, 2001 denying that thePlaintiff's injuries were caused as a result of the negligence of the Defendantand pleading alternately that the Plaintiff's negligence contributed to heraccident. Some 8 days later and beforea response was received from the Plaintiff, the Defendant filed, within theRules of the Supreme Court an Amended Defence in which it claimed that thealleged cause of action did not arise within three years before the action wasfiled and is barred by section 3 of the Limitation (Public Authorities) Act,Cap. 206 of the Laws of Barbados.

[8] By a Summonsfiled on the 14th day of October, 2002, the Plaintiff seeks an Orderthat in the events that have happened, the Defendant is estopped from relyingon the provisions of Section 3 of the Limitation (Public Authorities) Act, Cap.206 and asks that leave be given to the Plaintiff to continue her action on thequestion of quantum only as liability had earlier been admitted by theDefendant. The Summons also seeks tohave costs of the application awarded against the Defendant.

[9] This court isadvised that when the matter first came on for hearing, the Plaintiff had notyet filed her Reply to the Amended Defence and so Counsel for the Defendanttook the point at a previous hearing that the Summons was not properly ripe forhearing before the court in the then state of the pleadings. On the 14th day of November,2002, the Plaintiff filed a Reply claiming that it would be unconscionable forthe Defendant to raise or to be allowed to raise the plea of limitation andthat the Defendant is estopped from so doing and in particular is estopped fromdenying liability for the Plaintiff's injuries.

[10] The Plaintiffcontends that in the light of the admission of liability and the subsequentconduct of the Defendant up to and beyond the time limited by the statute forthe filing of a Writ, the Plaintiff did not file Suit to protect her interests.He submitted that the Plaintiff was entitled to rely on the statement ofacceptance of liability made by the Defendant's letter, albeit that the saidletter was written "Without Prejudice" and also to rely on the subsequentconduct of the Defendant which led the Plaintiff to believe that liability wasadmitted. He further submitted that itonly remained to resolve the issue of quantum. The Plaintiff therefore contendsthat the Defendant is estopped in the circumstances from pleading theprovisions of the statute aforesaid and that it would be unconscionable andunjust for the court to give its stamp of approval to what he contends wouldamount to a fraud in equity in the events which have happened.

[11] Dr. Cheltenhamalso referred the court to Section 9 of the Limitation (Public Authorities)Act, which in his view expressly preserves the equities in the matter. Section9 of the said Act is as follows:

> "Nothing in thisAct shall affect any equitable jurisdiction to refuse relief on the ground ofacquiescence or otherwise."

[12] Counselsubmitted that this would include the equities arising from estoppel andwaiver.

[13] Dr. Cheltenhamfor the Plaintiff in his submissions addressed the fact that the lettercontaining the admission of liability in response to his open letter waslabeled "Without Prejudice" and submitted that the law encourages "WithoutPrejudice" negotiations as a matter of public policy to enable parties toattempt to settle their differences. He cited the principles on "WithoutPrejudice" documents to be gleaned from the cases of Rush & Tompkins vG.L.C., 1989 1 A.C. 1280 and Unilever PLC v The Procter and Gamble Co. 20011ALL E.R. pg. 783. In the Unilevercase, Counsel relied on the judgment of Lord Justice Robert Walker in which thesaid Lord Justice enumerated at pages 2444 and 2445, eight instances as beingamong the most important instances when "without prejudice" communications canbe introduced into evidence. In particular, Counsel adverted to the thirdinstance cited which is as follows:

> "(3.) Even if thereis no concluded compromise, a clear statement which is made by one party tonegotiations and on which the other party is intended to act and does in factact may be admissible as giving rise to an estoppel. That was the view ofNeuberger J. in Hodgkinson & Corby Ltd. v Wards Mobility Services Ltd.(1997. F.S.R. 178, 191 and his view on that point was not disapproved by thiscourt."

[14] Lord JusticeWalker in the case of Unilever also cited the case of Tomlin v Standard Telephones& Cables Ltd. 1969, 1 W.L.R. 1378,which

was relied on by Counsel for the Plaintiff and bears close reading. The case of Tomlin was cited in Hodgkinson'scase as authority for the proposition that *"withoutprejudice"* communications could be looked at by the court to see if thenegotiations therein contained resulted in a settlement. The court went on to say that, "Although, ofcourse, contract and estoppel are quite separate concepts, it appears to melogical and consistent that, if "without prejudice" correspondence can belooked at to see if it gives rise to a contract, then such correspondence canalso be looked at to see if it gives rise to an estoppel. However, I do not suggest that there is anabsolute rule to that effect."

[15] Counsel for thePlaintiff in the instant case therefore urged the court to look at thecorrespondence even though headed *"WithoutPrejudice"* on the principles cited above. Counsel for the Defendant alsoagreed that the relevant principles were to be found in the case of Unileverand provided the court with an article on the subject from the New Law Journal,October 4, 2002.

[16] Counsel for thePlaintiff also cited and adopted the views of the learned authors of the book,Limitation of Actions, 1998 Edition, page 27 where they state that a Defendantmay be precluded from pleading the limitation period where the parties havecontracted out of the statute and where the case of Lubovsky v Snelling, 1943 2AER, 577 was given as the authority for that proposition.

[17] In that case,which was brought under the Fatal Accidents Act, 1846, the Act gave thePlaintiffs a period of one year in which to file Suit. However, the Plaintiff and the insurers hadnegotiations which proceeded on the basis of liability being accepted, but itwas necessary to bring an action for apportionment of damages. The Plaintiff had filed Suit, but uponrealizing that Suit had been filed before Letters of Administration had beengranted to the estate, that Suit was withdrawn until after Letters of Administrationto the estate of the deceased had been obtained. A second Suit was filed sometime after the passage of a year, andthe insurers who all along had proceeded to negotiate with the Plaintiff on thebasis of full liability sought to plead that the time limited for the filing ofSuits under the Fatal Accident Act had passed. The Court held that sinceliability had been admitted, the Defendants were debarred from setting up anylimitation under that section of the Act.

[18] In response,Counsel for the Defendant, Mr. Leslie, Haynes Q.C urged the Court not to grantthe orders sought by the Plaintiff, and further submitted that in any event,even if the court were to grant the Order sought in respect of the limitationperiod on the basis that that there "had been some confusion" and the courtfound that it would be unconscionable therefore to insist on the statute oflimitation, that the Court ought not as a matter of law to grant an order thatthe Defendant be restricted in the Suit to disputing quantum only. He submitted that these were two separateand distinct issues.

[19] In support ofhis argument, Mr. Haynes cited the fact that the Plaintiff's letter of June 9,1997 seeking formal admission of liability "had also reached the office of theinsurers" of the Defendant, United Insurance and that United Insurance hadwritten a letter dated 28th August, 1997 to Counsel for thePlaintiff in which they advised that following completion of theirinvestigations into the circumstances surrounding the matter, they were unableto attach any negligence on the part of their insured. Accordingly, they had no alternative but todeny liability but were prepared to give the claim consideration on a "Without Prejudice" basis. The Court notes however that this letterfrom the Insurers was sent after the Defendant employer of the Plaintiff, whopresumably would have had to inform the Insurers of what had transpired inrelation to their duty to their employee, had already accepted full liabilityfor the accident. The facts also showthat the Defendant thereafter continued to negotiate with the Plaintiff'sAttorney-at-law on the basis of full liability.

[20] Counsel for theDefendant in his submission to the court stated that the only person who hadknowledge of the Insurers's position stated in the letter from the insurers wasCounsel for the Plaintiff. The courtfinds that that submission discloses a curious state of affairs, but if that isindeed so, it speaks to a situation where the Insurer had not properly consultedwith the Defendant for whom it purported to act. In the event, the Defendantcontinued thereafter to deal with the Plaintiff on the terms outlined in itsletter which admitted liability to the Plaintiff and thereafter sought to reacha settlement of the quantum of damages to be paid.

[21] I hold that theDefendant admitted liability upon receipt of the letter written in response tothat of the Plaintiff which sought to "secure" a formal admission ofliability. The Defendant thereaftercontinued during the period of time within which the Plaintiff could have filedSuit within the period limited by the Public Authorities Limitation Act to dealwith the Plaintiff on the footing that liability was established and that theonly issue between them related to quantum.

[22] In the event, Ihold that the Defendant is estopped from pleading or relying on the limitationperiod in the statute as it would be unconscionable for the Defendant to raisethe plea of limitation.

[23] But thePlaintiff has also asked to have the defence limited to one of quantum, andseeks an order that the Defendant be restricted to arguing the matter onquantum only. The Plaintiff relies onthe cases of Tomlin v Standard Telephones & Cables Ltd., 1969 1WLR 1378 andof Lubovsky v Snelling cited above. TheDefendant has strenuously contested this aspect of the matter and states thatno binding agreement could have been reached as to liability as there was noconsideration for the agreement. He sought to differentiate the case of Tomlinwhere he found that there had been consideration from the fact that there theparties agreed on a 50-50 settlement. Counsel for the Defendant has also reliedon the letter written by the Insurers on behalf of the Defendant and statesthat that should have put the Plaintiff on notice, even though the Defendantmay have continued negotiating for more than three years thereafter.

[24] Counsel for thePlaintiff submitted to the court that the court ought not to seek to view thematter of the estoppel which arose from the Defendant's letter admittingliability as only applying to the issue of the limitation period. He submittedthat on any proper interpretation of the Defendant's letter admittingliability, it is not open to the Defendant to concede the limitation pointwhilst disputing the Plaintiff's claim that the Defendant is estopped fromdisputing liability. Counsel submittedthat whereas the principle of estoppel which would make it unconscionable forthe defendant to plead the period of limitation arises only by implication fromthe Defendant's letter of August 22, 1997 and subsequent conduct of theDefendant, the issue of the Defendant being estopped from reneging on theadmission of liability flows directly from the letter itself. Counsel therefore submitted that any properinterpretation of the letter would show that the only issue left to bedetermined was the issue of quantum.

[25] I hold that the Defendant is estopped fromre-opening the matter of liability as a settlement on liability had been reachedfrom the letter of June 9, 1997 from the Defendant's Attorney-at-law and thesubsequent conduct of the Defendant. There is only one Defendant in the Suit, the Transport Board, and thePlaintiff is not to be disadvantaged by any lack of proper communicationbetween the Defendant and its Insurer. The letter from the Defendant'sattorney-at-law dated June 9, 1994, when properly construed, removed liabilityas an issue and reserved only the issue of quantum to be determined uponreceipt of the relevant information. Itwould be inequitable now some 5 years after, to allow the Defendant to re-openthat issue. The subsequent letter from the insurer was not communicated to theDefendant, who continued to admit liability and to conduct all negotiationsbetween itself and the Plaintiff on that basis.

[26] Finally, theDefendant submitted that the *inter partes*Summons was wrongly before the court and that the entire matter should awaitthe full trial. Counsel was asked to cite his authority for the submission anddeclined so to do. Counsel for the Plaintiff submitted that the matter wasproperly before the Court and the court so ruled, as it seems that the facts ofthe matters in contention were adequately before the court by way ofdocumentary evidence, that both parties were before the court and that a greatdeal of costs, time and expense may be saved by a ruling on the inter partesSummons.

[27] The Plaintiffis to entitled to the costs of this application certified fit for two Counsel,save for costs in respect of the hearing days prior to the filing of the Replyin this Suit.

Judge of the High Court (Ag.)