BARBADOS

IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
CIVIL DIVISION

No 1049 of 2012
Between

DANIEL GRIFFITH	**CLAIMANT**
-AND-	
FIRST CARIBBEAN INTERNATIONAL BANK	**1ST DEFENDANT**
MANVENDRA UPADHYAY	**2ND DEFENDANT**

Before the Honourable Madam Justice Jacqueline A.R. Cornelius, Judge of the High Court

2014: July 1;
November 11;

Ms. Cicely P. Chase Q.C., in association with Mr. Anthony D. Francis-Worrell for the Claimant
Mr. Leslie F. Haynes Q.C., in association with Mr. Leslie C. Roberts for the first Defendant

DECISION

[1] Some element of delay has, unfortunately, become a feature of litigation in Barbados in recent times. This matter concerns the delay of the claimant and all of his counsel to commence proceedings after the claimant was involved in a motor vehicle accident in 2005. It is a prime example of how personal injury matters should not be handled.

[2] In this application, filed 22nd June 2012, the court is being asked to exercise its discretion in favour of the claimant so that he could exclude the time limit prescribed by section 20 of the ***Limitation of Actions Act*** **Cap 231.** Under section 52 of the Act the court is empowered with discretion to allow a claimant to exclude the time limit of three years within which personal injury claims are to be commenced if it is equitable so to do.

Background

[3] The claimant was involved in a motor vehicle accident on 8th February 2005. There is some uncertainty as to what happened after that date but it was not until 23rd June 2006, some sixteen months later, that the claimant was seen by Dr. John Gill, a Consultant Neurosurgeon at the Queen Elizabeth Hospital (hereinafter referred to as 'QEH'). A presumptive clinical diagnosis of cervical myelopathy was made at the time and an MRI was requested. Some six days later, on 29th June 2006, Dr. Gill told the claimant of the results of his MRI scans and advised that operative intervention was necessary. The MRI showed severe degenerative spondylosis with a large disco-osteophytes protrusion at C5-6 and evidence of post compression myelopathy. On 11th September 2006, operative intervention was indeed undertaken.

[4] The claimant instructed his then Attorney, Mr. Latchman Kissoon of Messrs Kissoon & Hanoman and by letter dated 18th October 2007, a copy of the medical report was requested from Dr. Gill. The medical report received by the claimant consequent upon this letter is dated 11 June 2010.

[5] By pre-action letter dated 23rd October 2006, the claimant wrote to the defendants' insurance company, United Insurance Company Limited (hereinafter referred to as 'United'). United, whilst disputing the circumstances surrounding the accident and thus not accepting liability, responded by letter dated 16th November 2006 inviting the claimant to submits it quantified claim. At the commencement of this application, no quantified claim had been received. United further informed the claimant that they had requested a police report, but to date none had been received.

[6] The claimant was then reviewed by Dr. Arthur Edghill at the request of United, and to their expense, on 19th February 2007, some two years after the accident. In Dr. Edghill's medical report, dated 4th March 2007 and sent to the claimant by letter dated 25th May 2007, he concluded as follows:

> "It is clear that Mr. Griffith was involved in a road traffic accident in February 2005. No personal injury appears to have followed. Many months later he was found to have degenerative changes in his cervical spine with resulting cervical cord compression requiring surgical correction. Whether the degenerative changes shown to be

affecting his spine is in any way related to his accident of February 2005 is in my opinion, open to question."

[7] Mr. Kissoon, by letter dated 26th June 2007, responded stating *inter alia,* as follows:

"it is clear from the report that (the claimant) did not attempt to claim compensation and according to Mr. Edghill went back to work until the symptoms of his injuries multiplied forcing him to seek medical attention and on the recommendation of a specialist Neurosurgeon Consultant, Dr. John Gill, underwent surgery."

[8] On 3rd September 2007, the claimant visited the office of Dr. Adrian Sealy. Dr. Sealy completed a report dated 27th May 2008 and stated as follows:

"(the claimant's) pain and problems only started subsequently to him being involved in a vehicular accident. It is therefore reasonable to conclude that as a result of his accident (the claimant) sustained severe neck as well as lower back injuries."

[9] By letter dated 21st September 2007, United wrote to Mr. Kissoon requesting that Dr. Gill provided his medical report but it was not until June 2008, that United sent a cheque for $1,200.00 payable to Dr. Gill for the cost of one medical report. United wrote to Mr. Kissoon again by letter dated 30th September 2008 requesting once more a copy of the medical report and stating that they needed to assess their reserves. Mr. Kissoon responded by letter dated 23rd October 2008 stating that he was "still awaiting the medical report of Dr. Gill and would quantify his claim as soon as it comes to hand".

[10] By letter dated 4th November 2008, United wrote to Dr. Gill directly informing him that the parties were awaiting his medical report so that the claimant's claim could be quantified. This letter was followed up by three subsequent letters dated 18th September 2009, 14th January 2010 and 7th January 2011.

[11] The claimant changed Attorneys and by letter dated 28th February 2012, some 20 months after Dr. Gill's report was completed, Ms. Chase Q.C., wrote to United stating that she was instructed to proceed in the quantification of the claim and that it would be received in due course".

United, by letter dated 12th March 2012, responded to Ms. Chase Q.C. inquiring as to whether she was in possession of Dr. Gill's report and stating that they had written to him without reply.

[12] By letter dated 19th March 2012, Ms. Chase Q.C. wrote to United enclosing a copy of Dr. Gill's report which stated that "Mr. Daniel Griffith sustained cervical and lumbar spine injuries that were caused by the accident of the 8th February 2005".

CLAIMANT'S EVIDENCE-Affidavit of Daniel Griffith

[13] Mr. Griffith is a retired mason, having retired from the public service on medical grounds in 2008. He is a relatively young man; his date of birth is 25th September 1975. On the date of the accident in 2005, he was 32 years old. He deposed that he was driving a motor vehicle, registration number MN-838 along St. Barnabas Highway when he was struck by a motor vehicle with registration number MA-7054 that was owned by the first defendant and driven by the second defendant.

[14] He stated that he sustained injuries and was seen by a doctor at the Edward Cochrane Polyclinic. He was subsequently transferred to the QEH due to the severity of his injuries. As a result of the accident, a letter dated 23rd October 2006, was sent to United by his then Attorney-at-Law Mr. Latchman Kissoon. There was a protracted delay in his matter and he retained the services of Ms. Chase Q.C. Unfortunately, the limitation period had expired and the time for the filing of his action became statute barred. Ms. Chase Q.C. advised him of the importance of filing the Claim Form and Statement of Claim.

[15] He stated further that he was seen by several doctors and he desired to have the matter pursued so that he could be compensated for the personal injuries he sustained.

THE DEFENDANT'S CASE

[16] The defendants object to this application on the basis of the length of and contribution of the claimant to the delay in this matter. There were no grounds set out in the claimant's application which could justify a disapplication of section 20 of the ***Limitation of Actions Act.*** The court had to perform a balancing act in determining whether it was fair, just and equitable to dis-apply the limitation period.

[17] They submitted that the limitation period for the claim expired on 9th February 2008 if the cause of action was taken as the date of the accident, that is, 8th February 2005, yet the claimant's action only commenced on 22nd June 2012. The claimant was fixed with knowledge no later than September 2005 when he began experiencing the more severe effects of the accident so at the latest. No reason was given for the initial delay from the date of knowledge to the date of the expiration of the limitation period in September 2008 and no reason was given for the further delay of 3 years and 8 months thereafter. The delay was inordinate and inexcusable and no explanation had been provided in the claimant's affidavit ***Sayers v Lord Chelwood and another*** **[2013] 2 All ER 232** *applied.*

Cogency of Evidence

[18] As a result of the delay which was solely attributable to the claimant, it was now less likely that that the First Defendant would be able to adduce cogent evidence of what really happened in the accident given that the second defendant was not ordinarily resident in Barbados and could not now be located. His absence presented an insurmountable hurdle for the first defendant in defending against this claim.

[19] In all negligence cases, the burden rested with the claimant to show (1) that the tortfeasor had a duty of care; (2) that the duty was breached; and (3) that the breach of duty caused the damage suffered by the claimant. Whilst the accident may be seen as a simple 'rear-end' case, the first defendant was not now in a position to dispute issues of causation or breach. The difficulty in addressing these issues was directly attributable to the delay in this case.

[20] The defendant submitted further that the delay of 16 months between the accident and the claimant's first documented medical visit placed extreme doubt on whether his injuries were indeed attributable to the accident. The court had to take into account the effect of the delay on the claimant's prospect of succeeding in his claim at trial ***Collins v Secretary of State for Business Innovation and Skills and another*** **[2013] EWHC 1117** *applied.*

Conduct of the Claimant

[21] The claimant's affidavits indicate no evidence of any disability which would have prevented him from commencing his claim at an earlier stage. At no point did he act promptly in pursuit of his claim against the first defendant

despite having at least constructive knowledge of his cause of action by September 2005.

[22] After 2007, five years elapsed before he commenced his claim in 2012 even though he had sufficient legal counsel to initiate the proceedings and Dr. Gill's report was available from 11th June 2010. The affidavits showed that he sustained unspecified injuries in an accident, was initially seen by an unnamed doctor at the polyclinic and was later transferred to the QEH but no dates were provided as to when he was seen or indeed when he was transferred to the QEH.

[23] The was not sufficient explanation given by the claimant as to why he did not act on the medical or legal advice given to him in promptly commencing a claim against the first defendant.

Affidavit in Support

[24] In support of the defendant's objection to this application, an affidavit was filed by Elizabeth Bourne, claims supervisor of United. She stated that Dr, Gill's report showed no medical evidence to ground a nexus between the accident and the claimant's present condition.

[25] To date the insurer still had not received a quantified claim. They remained in communication with the claimant's former Attorneys up until October 2008 despite the limitation period expiring on 8th February 2008. It was not until 4 years later on 28th February 2012 that they were contacted by counsel for the claimant.

[26] None of the delay in initiating proceedings could be attributed to the first defendant or their insurer. To date, having received no quantified claim, the insurer was at significant financial prejudice having been unable to assess what reserve, if any, would be required in respect of the claimant's claim.

CLAIMANT'S REPLY- Affidavit of Daniel Griffith

[27] In replying to Ms. Bourne's affidavit, the claimant stated that he sought medical attention prior to 23rd June 2006. He did not see a reason to seek medical care for injuries which were initially minimal and bearable but he immediately sought attention on realising that the injuries were becoming more severe. He was granted permission to retire for medical reasons related to his inability to work because of injuries sustained from the accident of 8th February 2005.

[28] He stated that from the history of the interaction between United and his Attorney, he believed that the matter would be settled amicably. He was informed of this fact by Mr. Kissoon. He realised that Mr. Kissoon was taking some time to quantify his claim and on 27th February 2012, he retained the services of Ms. Chase Q.C. A letter dated 28th February 2012 was dispatched to the insurers (United) informing that the claim would be qualified. He was informed that a Statement of Claim should be filed to secure his rights.

[29] Mr. Griffith stated that the delay in pursuing his claim was due in large part to the non-receipt of Dr. Gill's report until a year after the limitation period and moreso in circumstances where he believed the matter would be settled amicably. The accident in his case was a simple rear end collision and there was no dispute that the accident occurred. It was unreasonable for Dr. Edghill to conclude some two years after the accident that his injuries were not as a result of the accident. Dr. Gill was his physician from inception and he was the one to examine and diagnose him before Dr. Edghill.

ISSUES

[30] There are a number of issues which I am required to resolve in this matter before I determine whether the circumstances are appropriate to exercise my discretion to enlarge the limitation period. I must make an initial determination of when the claimant became aware that he had a cause of action and in so doing determine the date from which time should run.

[31] Section 20 (2) of the ***Limitation of Actions Act*** provides in relation to action for personal injuries as follows

> (2) … no action to which this section applies may be brought after the expiration of the period 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.

[32] Section 22 of the Act deals with the question of knowledge and is in the following terms

(1) References in section 20 and 22 to the date that any person acquired knowledge of a cause of action are references to the day on which that person first had knowledge of the following facts:

(a) That the injury concerned in the cause of action was significant
(b) That the injury was attributed in whole or in part to the act or omission that is alleged to constitute negligence, nuisance or breach of duty;
(c) The identity of the defendant; and
(d) If it is alleged that the act or omission was that of a person other than the defendant, the identity of that other person and the additional facts supporting the bringing of an action against the defendant

and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.

(2) For the purposes of this section

(a) An injury is significant if the person whose date of knowledge of the injury is in question would reasonably have considered the injury sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment; and
(b) A person's knowledge includes knowledge that he might reasonably have been expected to acquire
    (1) From facts observable or ascertainable by him, or
    (2) From facts ascertained by him with the help of medical or other appropriate expert advice that it would be reasonable for him to seek

but a person may not be fixed under this paragraph with knowledge of a fact ascertained only with the help of expert

> advice so long as he has taken all steps to obtain it and, if appropriate, to act on it.

[33] Judicial interpretation of the concept of knowledge in the context of the circumstances provided for in section 24 is interesting. **Purchase LJ** in ***Nash v Eli*** **[1993] 4 All ER 383 at 392** defines knowledge as

> "… a condition of mind which imports a degree of certainty and that the degree of certainty which is appropriate for this purpose is that which for the particular (claimant), may reasonably be regarded as sufficient to justify embarking upon preliminaries to the making if a claim for compensation such as the taking of legal or other advice."

[34] Quite significantly, **Purchas LJ** went on to hold as follows:

> "It is to be noted that a firm belief held by the (claimant) that his injury was attributable to the act or omission of the defendant, but in respect of which he thought it necessary to obtain reassurance or confirmation from experts, medical or legal, or others, would not be regarded as knowledge until the result of his inquiries was known to him, or if he delayed in obtaining that confirmation, until the time at which it was reasonable for him to have got it. If negative expert advice is obtained, the fact must be considered in combination with all other relevant facts in deciding when, if ever, the (claimant) had knowledge. If no inquiries were made, then, if it were reasonable for such inquiries to have been made, and if the failure to make them is not explained, constructive knowledge … must be considered. If the (claimant) held a firm belief which was of sufficient certainty to justify the making or preliminary steps for proceedings by obtaining advice about making a claim for compensation, then such belief is knowledge and the limitation period would begin to run."

[35] The claimant has suggested that the date on which he was fixed with knowledge is 29th June 2006 when he was reviewed by Dr. Gill and advised as to the significant nature of his injuries. The defendant suggested that the claimant had knowledge as of the date of the accident and failing that,

constructive knowledge by September 2005 when he began experiencing the more severe effects from the accident.

[36] There is, in my view, a gap in the claimant's evidence which makes my determination somewhat difficult. With the exception of Dr. Edghill's report, there is no conclusive evidence before me from the claimant that properly explains the claimant's medical care between the date of the accident and his referral to the QEH. The claimant's evidence showed that he did not initially regard his injuries as serious enough to seek medical attention and it was not until the result of the MRI scans after review by Dr. Gill that he sought legal advice. Dr. Edghill's report states that he felt numbness in the toes of both feet in September 2005 and that numbness gradually spread up his left lower limb and pain was noted in his left lower back. Dr. Edghill further notes that the claimant ignored the complaints and continued working and it was not until June 2006 that he noted new complaints of numbness in the fingers of each hand. It was at this stage that he sought medical attention. It appears to me therefore that the claimant delayed in obtaining confirmation of his condition and he had no firm belief upwards to that date that would 'justify the taking of preliminary steps for proceedings' (***Nash v Eli*** *supra*). In light of the circumstances I am of the view and I so hold that the claimant was fixed with knowledge of his cause of action as of 29th June 2006. It is clear that the claimant had no degree of certainty that would have justified embarking upon preliminaries to the making of a claim for compensation.

[37] Consequent upon this finding, the claimant would have 3 years from this date to commence proceedings and time would officially start to run from 30th June 2006 in accordance with the principle laid down in ***Marren v Dawson Bentley and Co Ltd*** **[1961] 2 QB 135** that the date on which the cause of action arose is excluded. Accordingly, I find that the claimant had until 30th June 2009 to commence proceedings within the limitation period.

[38] The claimant's action did not commence however until June 2012, so the second issue that I must consider is whether in the circumstances of this matter, I should exercise my discretion, pursuant to section 52 of the Act to exclude the time limit of 3 years prescribed for the commencement of these proceedings.

[39] Section 52 (1) of the ***Limitation of Actions Act*** allows the court to exclude the time limit in respect of personal injury claims. It states 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 (claimant) 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 to which the action relates.

[40] Section 53 (1) of the Act lists the considerations for the exercise of the court's discretion. It provides as follows:

> 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 of likely to be adduced b 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 (claimant) for information or inspection for the purposes of ascertaining facts which were or might be relevant to the (claimant's) cause of action against the defendant;
> (d) The duration of any disability of the (claimant) arising after the date of the accrual of the cause of action;
> (e) The extent to which the (claimant) acted promptly and reasonably once he knew whether or not the act of 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 (claimant) to obtain medical, legal or other expert advice and the nature of any such advice he might have received.

[41] Section 53 provides a non-exhaustive list of some of the areas that I should pay attention to in the exercise of my discretion. At the outset, I must express my extreme displeasure with the way this matter has proceeded, not by the claimant himself but by his first Attorneys-at-Law. It is to them that I must unfortunately attribute the majority of delay in this matter.

[42] It is common practice in our legal system for practitioners in the realm of personal injury matters to file a claim form once time has started to run in the resolution of their matters. From the time the claimant realised the extent of his injuries he promptly obtained legal advice. His then Attorneys realising the difficulties that obtained in getting Dr. Gill's report, on which they were relying heavily, could have at any time over the period of 2006 to 2009 commenced proceedings on their client's behalf regardless of if they assumed the matter was going to be settled amicably or not.

[43] Ms. Chase Q.C., to her credit, filed this application on 22nd June 2012, a mere 4 months after receiving instructions in February 2012. The application was served on the first defendant on 26th June 2012 but strangely the defendant's affidavit objecting to this application was not filed until seven months later on 11th January 2013. The matter was set down for hearing on 17th June 2013 and written submissions were filed by the defendant on 19th August 2013 and by the claimant on 20th June 2013. On 17th October 2013 the claimant filed an affidavit in response to the affidavit of Ms. Bourne filed 11th January 2013. Thereafter, it was not until 11th June 2014 that the first defendant filed amended submissions. It has taken a total of two years from the filing of this application to the date of hearing, a matter which causes me great concern.

[44] I must also examine the events which took place between Mr. Kissoon's last letter of 23rd October 2008 and the filing of this application. On receipt of Mr. Kissoon's letter, United proceeded to write Dr. Gill directly. They wrote to Dr. Gill on no less than 4 occasions. In these letters, which were not

issued on a 'without prejudice' basis and three of which indicated that they were copied to Messrs Kissoon & Hanoman, United indicated essentially that they were awaiting the medical report so that Mr. Griffith's claim could be quantified. There is no evidence that these letters were served on Mr. Griffith personally. In all the circumstances however, it appears to me that the defendant's insurance company, United, acted with despatch and continued to seek a resolution of this matter long after the limitation period had passed.

[45] In the circumstances it would be fair to conclude that at least up until the early part of 2011, United, as the defendant's insurers had in their contemplation and would have accounted for the resolution of this matter. Consequent upon this finding however, there is no correspondence on file indicating that the matter was considered to be closed by United. To the contrary, after receiving Ms. Chase's letter of 28th February 2012, informing them that she was now the Attorney-at-Law, United wrote back to her on 12th March 2012 not refusing to consider the matter any further but indicating that they would like her assistance in obtaining Dr. Gill's report. What would have been the purpose of obtaining the medical report unless they were prepared to entertain the matter further? Ms. Chase responded by letter dated 19th March 2012 on a 'without prejudice' basis, enclosing the medical report dated 11th June 2010. Unfortunately, there is no evidence to show what happened to the report between June 2010 and March 2012.

[46] Based on the evidence before me, it appears that up until 2012, the defendant's insurer's still had this matter within their contemplation.

[47] Section 53 (1) (b) of the Act requires the Court to have regard to the issue of cogency of evidence. The defendant submits that the absence of the second defendant who was driving the first defendant's vehicle was an insurmountable hurdle in the first defendant's ability to defend against this claim. It would be difficult for them to dispute issues of causation or breach due to the second defendant's absence. Whilst I accept this submission, the court must also note that there is no evidence before it to show that either party has been following up on the police report subsequent to the initial requests by United. A perusal of the defendant's submissions suggests that liability is an issue and this report might have gone some way to resolving that issue.

[48] Section 53 (1) (d) to (e) requires the Court to examine the duration of any disability of the claimant arising after the date of the accrual of the cause of action and the extent to which the claimant acted promptly and reasonably once he knew that the defendants' acts or omissions were capable of giving rise to an action for damages. The claimant is now medically boarded, having been retired from the public service on medical grounds at a relatively young age. The evidence is that as soon as Mr. Griffith was aware of the extent of his injuries he sought the requisite legal advice. There is no evidence in the correspondence from United to ground the belief that this matter would have been settled amicably. What the evidence does show however is extreme delay on the part of his previous Attorneys. Had his then Attorneys filed a claim, it is likely that this matter would have been resolved early and maybe without the court's intervention.

Balance of Prejudice

[49] I must weigh the likely prejudice to the claimant if the limitation period is not extended to commence his action against the prejudice to the defendants if time is enlarged and this action is permitted to proceed. I find that the balance of prejudice in this matter lies in favour of the claimant for the following reasons:

(a) Mr. Griffith acted with despatch from the time he was fixed with knowledge that he had a cause of action. The first defendant and their insurers were at all times aware that there would be a claim from the claimant as of October 2006.

(b) Prior to the expiration of the limitation period and up until 2012, the defendant's insurers had this matter in their contemplation as evidenced by their continued requests for the medical report.

(c) In the absence of a police report, the issue of liability still needs to be resolved.

(d) There is no evidence that the defendant's insurers warned or notified the claimant that it was their intention to close the file or stick to the limitation period if a quantified claim was not submitted. This however is no excuse for the claimant's non-submission of same.

(e) The delay in this matter cannot be attributed to the claimant himself but primarily to his former Attorneys-at-Law and minimally to present counsel for both parties.

(f) Considering the risk of injustice to both parties, it seems to me that the claimant would suffer greater prejudice and loss than the defendants or their insurers.

(g) If the application failed, the claimant's action would be extinguished and he would be unable to pursue any claim for compensation. On the other hand if the application succeeded, the defendant's insurers could possibly have to pay damages to the claimant and/or seek recourse from the previous attorneys if they could show that they were disadvantaged as a result of their failure to act with despatch on behalf of the claimant.

DISPOSAL

[50] Having considered the claimant's application and the objections of the defendant's insurers, I hold that section 20 of the ***Limitation of Actions Act*** shall not apply to the claimant's cause of action. Consequent upon this finding, the time for filing the claimant's cause of action is enlarged to permit the claimant to file the claim form within 7 days of the date of this order.

[51] The costs of this application shall be the claimant's costs in any event.

Jacqueline A.R. Cornelius
Judge of the High Court