

BARBADOS

[Unreported]

**IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
CIVIL DIVISION**

No. 772 of 2011

BETWEEN:

STEPHEN ATKINSON

CLAIMANT

AND

OLIVER CORBIN

FIRST DEFENDANT

RODNEY ARMSTRONG

SECOND DEFENDANT

Before the Honourable Madam Justice Margaret A. Reifer, Judge of the High Court

**Dates of Hearing: 2014 January 28th,
February 18th,
March 10th,
2015 October 20th**

Appearances:

Ms. Kim Sherry-Ann Marshall Attorney-at-Law for the Claimant

Ms. Liesel N. Weekes Attorney-at-Law for the First and Second Defendants

DECISION

Introduction

[1] This application sports an interesting and challenging history which raises issues of re-litigation (in its broad sense) and the exercise of a Court's

discretion to exclude or enlarge the limitation period prescribed by section 20 of the Limitation of Actions Act, which is a 3 year period.

Background to this Application

- [2] It commenced in October 2006 when the Claimant (Plaintiff) herein filed a Writ of Summons given suit no. 1904 of 2006 under the 'old' Rules of the Supreme Court 1982 (hereinafter referred to as RSC), in which he claimed damages against the First Defendant herein Oliver Corbin for personal injuries, loss and damage consequent on a motor vehicle collision which occurred on September 2nd 2005. Oliver Corbin is the owner but not the driver of the vehicle at the relevant time.
- [3] This first suit was commenced 13 months after the accident and well within the 3 year limitation period.
- [4] Thereafter the Plaintiff (Claimant herein) filed no Statement of Claim as required under the RSC. It is not unreasonable to conclude that the Plaintiff's counsel filed this Writ to secure his client's interests, believing reasonably or unreasonably (at that time) that no further action was necessary.
- [5] Certainly it was evident by mid 2009 that further action was necessary, because three years later, on September 24th 2009, the Defendant (First Defendant herein) filed a Summons to Dismiss pursuant to Order 19 Rule 1

of the RSC seeking dismissal of the claim consequent on the failure to file and serve the Statement of Claim in accordance with the time requirements of the RSC. This application was not a 'bolt from the blue'. It was preceded by several pieces of correspondence from the Defendant's counsel.

[6] This application was heard by Worrell J. who made an 'Unless' (or peremptory) Order on December 15th 2009 (entered April 2010), to wit:

“That unless the Plaintiff files and serves its Statement of Claim by 31st December 2009 the action stands dismissed with costs to the Defendant.”

[7] No provision was made in this Order for its service.

[8] The copy of the Order appended to the Affidavit in Support of Stephen Atkinson indicates that no appearance was entered by or on behalf of the Plaintiff to this application. The unchallenged Affidavit evidence indicates that the Plaintiff's attorney on record at the time was served with notice of the Summons to Dismiss and prior to that a Notice of Intention to Proceed.

[9] The Affidavit evidence makes clear (even if it is not clearly shown that the order was formally served) that a copy was faxed to the plaintiff's counsel on December 20th 2009 and the final Order under cover of letter dated April 30th 2010.

[10] These facts give rise to several questions: should not the Plaintiff have appealed this Order or applied to have it set aside or the time extended instead of filing a new action? Do these circumstances give rise to an

inference that this new action was an attempt to avoid an Order of the Court?

Has there been an abuse of process?

- [11] No Statement of Claim having been filed within the ordered time, the Plaintiff's claim was struck out.
- [12] The Defendant's unwavering position was made clear at the earliest by April 30th 2010, but undeniably by letter dated July 28th 2010 in response to a 'partially' quantified claim submitted under cover of letter dated July 5th 2010. Their position remained consistent when responding to counsel Ms. Marshall in December 2010 and January 2011 and to date.
- [13] On April 26th 2011 the Plaintiff, now Claimant, filed a new action CV 772 of 2011 the only difference between this action and the action struck out is that there are now two defendants, namely, Oliver Corbin as the First Defendant and Rodney Armstrong, the driver of the vehicle as the Second Defendant. This application is filed under the 'new' Civil Procedure Rules (CPR); it consists of claim form, statement of claim, notice of legal proceedings and statement of special and general damages. The claim is a substantial one being in the amount of \$264,933.00 (an amount which clearly took the Defendants by surprise and may be the real reason the First Defendant's insurer has taken a hard line in this matter). The attached medical reports reveal that the Claimant sustained serious injuries, some of them life-

threatening and limb threatening at the time. The Claimant apparently spent several months in hospital, was unable to work for approximately one year and has allegedly continued to endure the sequellae consequent on the injuries received.

[14] This new claim was filed approximately 16 months after the dismissal of the first action and some 5 years and 7 months after the cause of action arose.

[15] The Defendants acknowledged and defended the Claim denying liability and pleading that the claim was statute barred.

[16] By Case Management Order of October 3rd 2011, the Master of the High Court ordered that “The Claimant be at liberty to file an application under **section 52** of the **Limitation Act**, on or before October 31st 2011”.

The Application

[17] A Notice of Application was filed by the Claimant on November 25th 2011 (notably outside the time requirements of the Order) without further application to the Court. This point was however not taken by the Defendants’ attorney-at-law.). The Claimant therein applied to the Court “to disapply **section 20** of the **Limitation Act, Cap 231** of the **Laws of Barbados** to the present action and thereby permit him to proceed with his claim against the Defendants.”

[18] The grounds of the Application are as follows:

- “1. The application of **section 20 of the Limitation Act** will unnecessarily defeat the Claimant’s rightful claim for compensation against the First Defendant’s insurers;
2. The reasons behind the Claimant’s delay were not due to any failure, unreasonable or otherwise, to appreciate the significance of his injuries, or to make use of information available to him to make further enquiries to ascertain what transpired on the date of the occurrence or, to take medical or legal advice.
3. The continuance of the Claimant’s present claim cannot, in any way, prejudice the Defendants in the conduct of the present claim; and
4. The Defendants admitted liability shortly after 2 September 2005 when the Claimant sustained his injuries and subsequently, through their insurers, encouraged the Claimant to abandon his investigations into the issue of liability and to amass the requisite medical evidence to assist him in the determination of the quantum of damages.”

[19] The Claimant filed an Affidavit in Support of Application of even date. This Affidavit outlined the circumstances of the accident in some detail and the course of action taken by his then attorney Mr. Bolden from the time he was retained in September 2005 through to 2010. There are noticeable gaps in the chronology of events which are unexplained by the said Affidavit. In December 2010 counsel Ms. Marshall indicated her involvement in the matter in association with the Plaintiff’s attorney Mr. Bolden, and it appears that thereafter she has had conduct of the matter.

[20] The following facts are noted for their absence:

1. At no time is there an unequivocal acceptance of liability by the Defendants' insurers and no documentary evidence supporting the Plaintiff's assertion that the Defendants admitted liability shortly after September 2nd 2005. There is a request for the Claimant to submit to the examination of their medical representative and several invitations over time to submit a quantified claim (see para. 29 of the Stephen Atkinson Affidavit) which on their own do not constitute an unequivocal acceptance of liability. At para 23 of the Stephen Atkinson Affidavit he deposes: "I am informed and verily believe that insofar as the issue of liability was concerned Mr. Bolden had requested a Road Traffic Accident Report on 18 October 2006, as the insurer initially appeared to him to have had reservations with the issue of liability." There is a further reference to this Report in an exhibited letter from counsel Mr. Bolden to the Plaintiff dated April 13th 2007 indicating that the Report was available, but no evidence of its receipt. Counsel for the Defendants notes at paragraph 18 of her Affidavit that her requests for the submission of a quantified claim were on a 'Without Prejudice' basis, (other exhibited correspondence between the parties indicates that their course of dealings was on a "Without Prejudice" basis although it is clear from the letters dated 7th May and 2nd July 2009 that the first Defendant's insurers were minded to settle the claim at that time). The defence filed by the Defendants to this action indicates that contributory negligence was intended to play a large part in their defence of this claim. This Court cannot accept the submission of counsel for the Plaintiff/Claimant that the history of the case indicates that liability was already settled.
2. Paragraphs 38, 39 and 40 suggest that the Plaintiff/ Claimant was aware from September 2009 (actual service was effected on October 5th 2009 of the filed Summons to Dismiss: See Affidavit of Liesel Weekes at para. 29) of the Summons to Dismiss and that the scheduled hearing date was December 2009. There is a marked absence of any explanation as to why the Plaintiff and

his attorney did not respond to the application or attend the hearing. Paragraph 42 of said affidavit indicates that the Plaintiff/Claimant's attorney was aware of the dismissal after April 2010: "42. I am informed and verily believe that sometime after 30 April 2010, Ms. Weekes sent a copy of the order to Mr. Bolden." There is the suggestion at paragraph 43 that there was never formal notice of the Order. Significantly, there is no denial of the Defendant's counsel's assertion that the Order was faxed to his office on December 20th 2009.

The Claimant's Submissions

[21] Claimant's counsel filed Written Submissions and made oral submissions as well.

[22] These submissions were focused primarily on persuading the Court to exercise its discretion under **section 52** of the **Limitation of Actions Act Cap. 231** in which application a Court is enjoined to do what is 'equitable'. **Section 53** provides the criteria for the consideration of the Court in such an exercise as follows:

"53 (1) 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;
- (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.”

[23] It is noted that first in the list of considerations is the length and reasons for the delay. Counsel for the Claimant did not confront this very critical issue in the Affidavit of Stephen Atkinson but curiously, in her Written Submissions provided the following:

“Reasons for Claimant’s Delay

. The Claimant filed an action within the limitation period but it was dismissed by the Court due to initial non-compliance with the Rules of the Supreme Court, 1982, to wit, filing a Statement of Claim and ultimately, within the time period specified by the court, 29th December 2009.

. Thereafter, the Claimant’s legal counsel was involved in a motor vehicular accident which eventually pushed him into retirement.

. The Claimant fell victim to the circumstances of his legal counsel in that the collision in which the Claimant’s counsel was involved had a ripple effect on his legal practice and for certain, the progress and conduct of his claim.”

[24] In counsel’s oral submissions to the Court she submitted that the Claimant’s claim was impeded by an inability to secure medical reports and that this was communicated to the Defendants’ attorney. She submitted that ‘all inconveniences were brought to the attention of counsel for the Defendants and notwithstanding this, counsel still proceeded to strike out the claim’.

[25] These Written Submissions also spoke (not deposed) to the Cogency of Evidence available for Trial, the Defendants Conduct after the Collision, Obtaining Medical and Legal Advice, all relevant criteria in accordance with section 53. Under the rubric, Circumstances Surrounding the Dismissal of the First Action, some attempt was made to give what may have been relevant evidence, but the attempt was unsuccessful.

[26] The reasons advanced to support the Court's exercise of its discretion under the **Limitation of Actions Act** are set out '*in extenso*' as follows:

- “1. Liability is not genuinely in dispute. The Defendants forwarded two holding letters dated 12 October 2005 and 17th November 2005, respectively followed by two letters requesting an appointment with Dr. Prasad Chode and the Claimant to assess his injuries independently.
2. There is an abundance of correspondence in evidence which together suggests that the Defendants were prepared to settle the Claimant's claim for damages for personal injuries, an obligation they need not have undertaken if they were not in fact liable for the collision and so concluded.
3. The trial can properly proceed to assessment of damages and the Defendants' additional “without prejudice” correspondence revealed to the court, as not to do so would most likely lead to perjury.
4. To do other than permit the Claimant's claim to proceed would be to foist liability for the injuries he sustained upon his previous legal counsel and stifle the Claimant's action against the very tortfeasor who caused his personal injuries.
5. The Defendants, as individuals, are not liable to suffer any prejudice as a result of judgment in favour of the Claimant as the onus of paying the larger portion of the Claimant's claim rests squarely with the re-insurers of the First Defendant's insurers.
6. Even if liability is now to be determined, the Defendants have set out a clear exposition of ‘circumstances of the incident’ thereby suggesting that they have all the relevant information and evidence to hand. As a result, the effect of the delay on the trial itself would be minimal, if indeed there is any

and the Defendants and the insurers would merely lose a fortuitous limitation defence: **Buck v English Electric Co. Ltd [1977] 1 WLR 806.**

7. Even if the delay in filing was inordinate it was excusable given the evidence provided by the Defendant's legal counsel in her Affidavit that the Claimant's attorney was not functioning as he was before and therefore the discretion should not be exercised to bring the Claimant's case to an end: **d's Curator Bonis v Lothian health Board [2010] CSOH 61...**

8. No useful purpose could be served by dismissing the existing action, it could only lead to further delay in seeking to bring action against the Claimant's former attorney: **Allen v Sir Alfred McAlpine & Sons Ltd [1968] 1 All ER 543.**

9. As Lord Denning stated in **Firman v Ellis [1978] 2 All ER 851**, as really a matter of simple justice, it is the Defendants' insurers who should pay the Claimant. They received the premium to cover the risk of the accident and should not be allowed to foist their liability on the Claimants' lawyers or insurers."

The Defendants' Submissions

[27] As with the Claimant, the Defendants' counsel filed Written Submissions supplementing same with oral submissions to the Court.

[28] The gravamen of the Defendants' counsel's submissions is that in view of the Claimant's conduct in the prosecution of the previous action and its subsequent dismissal, this is not a proper case in which the Court should exercise its discretion under section 20.

[29] Counsel in her submissions addressed, inter alia, the length of and reason for the delay laying significant importance on the fact that the second action was filed 5 years and 7 months after the cause of action accrued, that there were significant periods of unexplained delay by the Claimant, subsequent to the filing of the writ, the effect of the delay on the integrity of the evidence to be

adduced by both parties. Counsel submits that the Court must examine all the considerations outlined in section 53 in the exercise of its discretion, and when it does so it must conclude that the Claimant's actions have led to the delay which led Worrell J. to dismiss the first action.

[30] Counsel adopts the sentiments of Bingham LJ in the English House of Lords case of **Horton v Sadler [2007] 1 A.C. 307** where she submits that the court may exclude section 20 if it is equitable to allow the action to proceed (“...no more (but no less) than fair...”).

[31] And in determining whether it is fair to allow the matter to proceed and to exercise its discretion to exclude, the Court must have regard to the considerations set out in **section 53 (1)** of the **Act**.

[32] Counsel further submits that it would neither be equitable or fair to allow the Claimant, in view of his dilatory conduct to proceed with this second action. In making this determination, she submitted, this Court must weigh in the balance the prejudice to the Claimant if his action were not allowed to proceed, and prejudice to both defendants in allowing the matter to proceed.

[33] Counsel relied heavily on the authority of **McDonnell v Walker [2009] A11 ER 259**, a recent legal authority which suggests that where a defendant can prove forensic prejudice consequent on the Claimant's delay in bringing his action then the Court's exercise of its discretion should be in favour of the

Defendant. In that case two Claimants injured in a motor vehicle accident submitted initial claims which were modest. They subsequently filed suit one day out of time which contained claims which were substantially greater in value than that initially submitted. The court found that there was significant forensic prejudice to the Defendant and did not allow the matter to proceed.

[34] In expressing the view that the Second Defendant was especially prejudiced by the filing of the second action filed almost 6 years after the accident, counsel relied on the House of Lords decision of **Donovan v Gwentys Limited [1990] 1 WLR 472** where **Lord Griffiths** in delivering the judgment of the Court stated:

“In weighing the degree of prejudice suffered by a defendant it must always be relevant 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 permitted to rely upon his limitation defence...

And later:

“I have no doubt that the balance of prejudice in this case comes down heavily in favour of the defendants. It would not be equitable to require the defendants to meet a claim which they would have the utmost difficulty in defending...”

[35] Counsel submits that the prejudice to the Second Defendant in particular, substantially outweighs any prejudice to the Claimant since this prejudice is caused by the Claimant’s own inexcusable delay.

[36] She further submits that there are three periods of substantial delay in the Claimant's conduct of his claim and no reasonable explanation having been given for these delays they are deemed to be inexcusable. They are:

1. A period of 17 months between the date on which a request was made by the First Defendant's insurers for the Claimant to submit to an independent medical examination and his consent so to do;
2. A period of 14 months between the correspondence dated May 12th 2009 on behalf of the Claimant indicating that he was awaiting a final medical report, which he received on May 28th 2009 and July 5th 2010 the date on which a quantified claim was submitted on his behalf;
3. A period of 10 months between the letter on behalf of the First Defendant of July 28th 2010 reminding counsel for the Claimant that the matter was dismissed and that the claim would not be entertained and the issuing of the Claim Form in this action.

Issues Arising

[37] Having failed to attend the hearing of the Summons to Dismiss and appeal the Order of Worrell J., can the Claimant simply file a new action without it being an abuse of the process of the Court?

[38] Should the Court exercise its **section 52** discretion in favour of the Plaintiff/Claimant to exclude the time limit prescribed by **section 20** of the **Limitation of Actions Act, Cap. 231**/or enlarge the Limitation period.

Discussion

[39] The circumstances of this new action do not constitute re-litigation in its strictest sense: see **Sir James Wigram, VC** in the case of **Henderson v**

Henderson 1843 Hare 100 as more recently explained by the Court of Appeal in **Barrow v Bankside Agency Ltd [1996] 1 WLR 257, 260** in these terms:

“The rule in **Henderson v Henderson** (supra) is very well known. It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which could have been put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of ‘*res judicata*’ in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppels. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed.”

[40] See also **Carl Zeis Stiftung v Rayner & Keeler Limited (No. 2) [1967] 1 AC 853; Guide (trading as Guide’s Funeral Home) et al v Guide et al CV 214 of 2006 (unreported decision of May 2008 from the High Court of Trinidad and Tobago) and Chadwick LJ in Securum Finance Ltd v Ashton 3 WLR 1400.**

[41] In the present case there was no determination of the action on the merits, no adjudication upon the issues. The dismissal was by reason of default, and in such circumstances, it is possible for a claim such as this one to be re-instituted. The authorities quite clearly suggest that a Claimant is free to bring a subsequent claim where there was no adjudication on the merits of the earlier claim: **See: Pople v Evans [1969] 2 Ch. 255 Leonard Williams**

v Leroy Williams CV No. 28 of 1999 (OECS); Bobolas v Economist Newspaper Ltd [1987] WLR 1101; Securum Finance Ltd v Ashton and another 3 WLR 1400.

[42] This statement of principle was also consistent with the discussion to be found at para. 19/1/17 of the Supreme Court Practice 1999 on Order 19, Rule 1 of the RSC which under the rubric “Effect of Order to dismiss” provided that “an order for dismissal with costs, for default of pleading or compliance with an order of the Court, whether by consent or otherwise, is no bar to the commencement of a fresh action unless the order contains some express provision to the contrary: **see Magnus v National Bank of Scotland (1888) 57 L.J. Ch. 902** (to be verified).

[43] In **Securum Finance Ltd v Ashton and another** (supra) **Chadwick LJ** had this to say further:

“The sole restriction on the parties’ ability to relitigate in such circumstances is that subsequent claims must be brought within the limitation period.”

[44] See references therein to the authorities **National Westminster Bank Plc v Kitch [1996] 1WLR 1316**; and **Birkett v James [1978] A.C. 297**.

[45] It is evident that there was acceptance of this principle by the Plaintiff/Claimant as reflected in his counsel’s letter of February 9th 2011 addressed to Mr. Peter Harris of Consumers Guarantee Insurance Co. Ltd where she states as follows:

“The law as it relates to dismissal of actions for want of prosecution is very clear. In order to resuscitate one’s claim one must proceed either by way of appeal or file a new claim within the limitation period.”

[46] Moreso than the issue of relitigation is the question of ‘Inordinate and inexcusable delay’ which can also give rise to the issue of abuse of process: see **Grovit v Doctor and others [1997] 1WLR 640; 2007 Civil Procedure, Vol. 1, page 103, paragraph 3.4.3.**

[47] The question for determination is whether the circumstances of this case fall within this category. This question in large measure encompasses the submission of the Defendants’ counsel, namely, whether the Claimant’s conduct in the prosecution of the previous action and the subsequent dismissal thereof makes this an inappropriate case in which this Court should exercise its discretion under the **Limitation of Actions Act, Cap. 231.**

[48] The learned authors of the text **Civil Litigation, John O’Hare and Robert N. Hill 7th ed;** advance the view that there are two matters of primary consideration in applications of this nature. They state as follows:

“... in such cases s. 33 [in *pari materia* with our section 52] gives the court a discretion to disapply the time limit where it thinks it is equitable to do so after taking into account two matters: first the degree to which the defendant would be prejudiced by an order disapplying that time limit. In acting under this section the Court must have regard to all the circumstances of the case and in particular to six specific matters including “(a) the length of and the reasons for the delay on the part of the plaintiff” 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 may have received.”

[49] While the court is not limited to considering only these factors, the learned authors emphasize the importance of the following two factors at page 86:

“Of the six factors specified in section 33 the first two factors, length of and reasons for delay and the effect which the delay has had on the evidence available to the defendant, are often the decisive one.”

Second Action Cases

[50] The learned authors refer to actions such as the subject one as “Second Action cases” and make this significant submission at page 87 which challenges the applicability of their section 33 to such actions:

“The purpose of section 33 is to enable courts to alleviate the prejudice suffered by plaintiffs who do not start proceedings within the relevant limitation period. Thus if a plaintiff starts an action within time but for any reason fails to proceed with it, it is not thereafter open to him to seek to take advantage of s. 33: see **Walkley v Precision Forgings Ltd [1979] 1 WLR 606, H.L.** and **Thompson v Brown [1981] 1 WLR 744.**”

[51] **Walkley v Precision Forgings Ltd** (supra) was such a ‘Second Action Case’. A second writ was issued after the expiry of the primary period of limitation and the House of Lords considered the issue, *inter alia*, of whether it was equitable to allow the action to proceed, and in effect held that sec. 2 (later section 33, equivalent to our 52) does not apply.

[52] Their Lordships held that once a plaintiff had started an action within the primary limitation period it was only in the most exceptional circumstances that he would be able to bring himself within section 2D (of the Limitation Act) in respect of a second action brought to enforce the same cause of

action; and that accordingly, since the plaintiff in this case had previously started an action for the same cause of action within the primary limitation period prescribed by section 2A, he could not bring himself within sec. 2D at all, that any application by him under that section would fail *in limine* and that any prejudice caused to the plaintiff by the discontinuance of the first action was his own act.

[53] **Lord Diplock at p. 619** spoke to ‘exceptional circumstances’ as follows:

“The only exception I have been able to think of where it might be proper to give a direction under section 2D, despite the fact that the plaintiff had previously started an action within the primary limitation period but had subsequently discontinued it, would be a case in which the plaintiff had been induced to discontinue by a misrepresentation or other improper conduct by the defendant; but there is no suggestions of this in the instant case.”

This speaks nonetheless to the existence of a discretion, but a heavily fettered one.

[54] **Thompson v Brown (supra)** was not a Second Action Case but reflected an interesting interpretation by the House of Lords on the issue of prejudice to the plaintiff. It was held therein ‘*per curiam*’ that when weighing what degree of prejudice the plaintiff has suffered, the fact that if no direction is made under section 2D he will have a claim against his solicitor for the full damages that he could have recovered against the defendant if the action had proceeded must be a highly relevant consideration.

[55] Between 1979 and 2006 **Walkeley** was considered the law in the United Kingdom: see **Chappell v Cooper** [1980] 2 A11 ER 463; **Deerness v John R Keeble & Son (Brantham) Limited & Another** [1983] 2 Lloyd's Rep. 260; **Forward v Hendricks** [1997] 2 A11 ER 395; **Wilkey & Another v British Broadcasting Corporation & another** [2001] A11 ER 183; **Young (rising as executrix of Young) v Western Distribution South West plc** [2003] EWCA Cw. 1034. In some of these cases **Walkeley** was applied with great reluctance.

[56] However, the situation changed in 2006 when the House of Lords reluctantly reversed itself in the case of **Horton v Saddler** [2006] UKHL 27 holding that the true question for the court under s. 33 of the Act was always whether it was equitable or inequitable as between the parties to override the time bar. Their Lordships opined that there was no rational ground for concluding that a defendant should be vulnerable in 'Second Action' cases. They ruled that the reasoning in **Walkeley** was unsound, it had given rise to distinctions that disfigured the law in this area and the effect had been to restrict unduly the broad discretion that Parliament had conferred: see also **Richardson v Watson** [2006] EWCA Cw 1662; **Aktas v Adepta et al** [2010] EWCA Cw 1170; **Roberts v Commissioner of Police of the Metropolis** [2012]

EWCA Cw 799; Dowdall v William Kenyan & Sons Ltd. [2014] EWHC 2822 QB.

- [57] The question therefore arises as to whether **Walkeley** is the law in Barbados or **Horton v Saddler** since by 2006 decisions of the House of Lords would have become merely persuasive. See **Witt JJ in Attorney-General & Others v Joseph and Boyce [2006] CCJ 3; Commonwealth Caribbean Law and Legal Systems** at p. 335 to 338. If **Walkeley**, this Court has no jurisdiction in this ‘Second Action’ case. If **Horton**, this Court has a discretion to do what is ‘equitable’ as between the parties.
- [58] It certainly appears from the reading of the judgment of Lord Bingham of Cornhill in **Horton v Sadler** that the history and chronology leading to the House of Lords decision is not shared by Barbados or specifically the discussion/debate on the nature of the discretion to be given to the court, with respect to the time bar, whether fettered or unfettered.
- [59] The Law Commission in the United Kingdom submitted a Report on Limitations of Actions in July 2001 which the government accepted in principle in July 2002 and proposed to enact, when a suitable opportunity arose. It is against this background that **Horton** was decided.
- [60] While recognising that there is some uncertainty as to whether **Walkeley** or **Horton** are applicable, this Court weighs in on the side of **Horton**.

Disposal

[61] In light of the course of dealings between the Plaintiff/Claimant and counsel for the First Defendant's counsel, it cannot be said that the First Defendant's insurers by its conduct and in its communications unequivocally accepted liability for this accident. In consequence, it cannot be said that the Plaintiff's counsel would have been led reasonably to assume that liability was no longer in issue. Reading the sub-text in this matter, it is clear to this court that counsel was careful to reserve her position at all times with the intention of relying heavily on an argument of Contributory Negligence in the conduct of their "Without Prejudice" negotiations.

[62] I am not entirely persuaded by the Defendant's argument that the cogency of the evidence would or would likely be significantly affected by the delay. A recollection of or disagreement over the colour of or nature of clothing worn at a significant event (specifically referenced by the Defendants) is often at issue in matters of this sort with or without delay. In such circumstances, it will be a matter for a court to weigh all the evidence and testimony to make its determination in accordance with the balance of probabilities.

[63] This Court is of the view that the Second Defendant would be significantly prejudiced by an action started for the first time against him some 5 years

and 7 months after the cause of action arose. See **Donovan v Gwentoy**s

Limited (supra) per **Lord Griffiths** (cited by the Defendants):

“In weighing the degree of prejudice suffered by a defendant it must always be relevant 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 permitted to rely upon his limitation defence”.

[64] This Court finds that in the early stages of this matter the Plaintiff/Claimant acted promptly in prosecuting his claim and that he took steps to obtain medical, legal or other expert advice, but there was thereafter an unexplained delay in the conduct of the matter, an inexcusable delay, unexplained in the affidavit in support and merely hinted at, inappropriately, in counsel’s Written Submissions.

[65] Counsel for the Defendants points out that the medical reports are dated November 2006 and May 2009 respectively but never revealed to the Defendants’ insurers until 2011. The Defendants would have been prejudiced in their ability to establish an adequate reserve and not taken by surprise by the quantum of the Claimant’s claim (see **McDonnell v Walker** cited by the Defendants).

[66] Other than the fact that early in the proceedings a request was made for a Police Report to settle the issue of liability, no other reference is made to such Report nor is there any evidence that it was produced to the

Defendants' representatives. No copy of such Report is to be found in the documents exhibited.

[67] It is also quite clear that the First Defendant's insurers were taken by surprise by the quantum of the claim and that this may have counterbalanced this matter in the final analysis. This in the opinion of this Court is an unconscionable and unreasonable basis, without more, for insurers to act.

[68] But given the overall picture, after having taken into account those matters required by section 53 of the Limitation of Actions Act and the general failure of the Plaintiff/Claimant to comply with the Rules and Orders of the Court justifies this Court in refusing this application on the grounds that it would be inequitable to do so. (**Horton v Sadler** (supra) applied).

[69] Nonetheless, while ruling in favour of the Defendants, this Court observes that justice requires that the First Defendant's insurers favourably consider the making of an 'ex gratia' payment to the Plaintiff/Claimant.

[70] The Application is dismissed with costs to the Defendants.

MARGARET A. REIFER
Judge of the High Court