BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT
CIVIL JURISDICTION

CV No. 1843 of 2012

BETWEEN

WENDY TAYLOR **APPLICANT**

AND

SANI SERVICES LIMITED **RESPONDENT**

Before the Honourable Mr. Justice William Chandler, Judge of the High Court

Decided on Written Submissions

Date of Decision: 2015 November 6th

Appearances:

Ms. Adonica Spence of Holder & Co. Attorneys-at-Law for the Applicant
Ms. Wendy Straker Attorney-at-Law for the Defendant/ Respondent

DECISION

Introduction

The Parties

[1] The Applicant, at all material times, was an employee of the Respondent Company and held the position of cleaning administrator at the time her

employment was terminated on 27 November 2009. Her job entailed the use and handling of industrial chemicals for cleaning purposes.

[2] The Respondent is a limited liability company registered under the **Companies Act, Cap. 308** and provides commercial and industrial cleaning services.

The Applications

[3] The Applicant filed an application on 29 October 2012 seeking an order pursuant to **section 52 (1) of the Limitation of Actions Act (the Act) Cap. 231 of the Laws of Barbados** that: (1) the provisions under section 20(1) and (2) of the Act Cap 231 shall not apply to the Applicant's cause of action and (2) the time limit for making a claim in negligence and/or for breach of statutory duty against the Respondent be extended on the grounds (a) that the operation of section 20(1) and (2) of the Act will greatly prejudice the Applicant since her cause of action had a good prospect of success and (b) an award of damages was the only remedy available to her and she had exhausted all other avenues for redress.

[4] The Applicant further alleged in the grounds of her application that the delay in filing her application was as a result of the Applicant's reliance on the Respondent's assurances that their insurers, Brydens Insurance Inc. (Brydens or the Insurer) was dealing with her personal injury claim. She

also alleged that it is just, in all the circumstances, to expect the Respondent to meet the claim since the Respondent is a well established company carrying on business in this Jurisdiction.

[5] The Applicant also filed a claim form (form 1) on 17 January 2013 seeking, *inter alia*, damages for personal injuries suffered whilst in the Defendant's employment as a result of the Defendant's breach of common law duties through negligence and/or breach of statutory duties.

[6] It is only the first application which concerns us here.

The Case for the Applicant

[7] The application is supported by an affidavit (the affidavit in support) sworn on 21 October 2012 and filed 29 October 2012 wherein she deposed, inter alia, that she was employed by the Respondent from February 1995 until 27 November 2009. She started work as a cleaner and at the time of termination of her employment she was a cleaning administrator. Her duties included using industrial chemicals to clean floors, walls and bathrooms; vacuuming carpets and upholstery and stripping, sealing and polishing tiles. She also ordered and checked chemicals and checked the quality of work done by cleaning technicians who used the chemicals.

[8] She also deposed that the Respondent did not provide her with any adequate safety equipment to carry out her duties. She was only provided with latex gloves and occasionally a dust mask which she wore at all times.

[9] In 2007 she observed that she became unwell whenever she handled or was in close proximity to the cleaning chemicals or in the vicinity where the chemicals had been or were being used. She would experience dizziness, headaches, burning of the eyes and red eyes.

[10] She made numerous complaints to the Respondent's Human Resource Manager, Ms. Caroline Rock (Ms. Rock), but her concerns were never addressed except to the extent that Ms. Rock assured her that she had passed the matter on to the Respondent's insurers and that the matter was being dealt with.

[11] She stated that she saw several doctors including Dr. Haresh Gopwani (an Ear Nose and Throat (ENT) Specialist) who, on 6 May 2008, diagnosed her as suffering from the disease Vasomotor Rhinitis which he attributed to the inhalation of the volatile chemicals provided to her by the Respondent during the course of her daily duties. Dr. Gopwani's letter is attached as "**exhibit WT1**" and says **"… she is suffering from vasomotor rhinitis a condition aggravated by inhalation of volatile chemicals."** He **"strongly advised she wear a respirator to stop inhalation of volatile chemicals."**

[12] She submitted Dr. Gopwani's letter to Ms. Rock and discussed her claim for the injuries suffered whilst in the Respondent's employment as a result of their (the Respondent's) failure to provide safety equipment. The Human Resource Manager told her that she had submitted the claim to their insurers.

[13] She deposed at paragraph 8 of the affidavit in support that, as a result of Dr. Gopwani's recommendation, the Respondent provided the Applicant with a respirator which she wore at all times so that she could safely execute her duties. However, as a result of her heightened sensitivity to the chemicals, the rubber material of the respirator made her nauseous when she wore it. Further complaints were made to the Human Resource Manager and she continued to work as best she could.

[14] By letter dated 9 November 2009 Ms. Rock sought Dr. Gopwani's advice as to: (i) whether the Applicant would recover from the illness; (ii) the length of time for the Applicant's recovery process and (iii) what action the Respondent could take to further protect the Applicant since the respirator seemed to be a hazard. Dr. Gopwani responded by letter of 11 November 2009 and advised that there was no cure for the Applicant's disease. He further advised that the Applicant would have to be labeled permanently disabled from continuing in her job description if she could not use the

respirator. The Applicant's employment was subsequently terminated on 27 November 2009.

[15] On 15 June 2009 Ms. Rock notified the Respondent's insurer, Brydens Insurance Inc. that the Applicant had made an injury on duty claim for Vasomotor Rhinitis.

[16] The Applicant states that in November 2009 she applied for invalidity benefits from the National Insurance Office and between 2010 and 2012 she was evaluated by two doctors. However, in March 2012 she was subsequently informed that she did not qualify for invalidity benefits and thereafter sought legal advice in May 2012. The Applicant's attorney-at-law, by letter dated 26 May 2012, wrote Ms. Rock and copied the correspondence to the insurer. The relevant portions are set out below:

> "I am also informed that you as Human Resources Manager advised her that her injury claims had been submitted to the Company's Insurers, Brydens Insurance. To date my client has not received any indemnity from Sani Services Ltd and/or Brydens Insurance for the injuries she received whilst in the course of employment – nor, indeed, any written communication from either party.
>
> Would you kindly provide me with a report on the status of my client's claim and, in particular, indicate whether Sani Services will be accepting liability for my client's injury, pain and loss."

[17] On 19 June 2012 Mr. Irvin Springer (Mr. Springer), the insurer's Claims Manager, responded by stating that the matter was being actively reviewed

and Brydens "… will respond further in due course." However, there was no further correspondence between the parties.

[18] The Applicant further deposed at paragraph 18 of the affidavit in support that, in September 2012, her Attorney-at-Law contacted the insurer and was informed that her claim had been sent to the Respondent's Attorneys-at-Law but that it appeared to be out of time and they would respond accordingly. At the date of swearing the affidavit her Attorney-at-Law had received no communication from the Respondent.

The Case for the Respondent

[19] The Respondent opposes this Application and in support filed affidavits of Ms. Rock and Mr. Springer.

The Affidavit of Ms. Rock

[20] In her affidavit of 06 December 2012, Ms. Rock deposed that the Respondent is a service company providing cleaning services primarily to commercial premises including the Central Bank of Barbados and the General Post Office of Barbados. She denied that the Applicant had made numerous complaints to her about symptoms she was experiencing when using chemicals. She detailed a complaints procedure at her workplace where aggrieved employees would report their concerns to their supervisors

who would report to management. The concerns would be addressed in management meetings if necessary.

[21] She admitted receiving a note from Dr. Gopwani "… in which he stated that Ms. Taylor was suffering from vasomotor rhinitis resulting from the inhalation of chemicals used in the defendant's business and he requested that she be given a respirator to use."

[22] The Applicant submitted claim forms to the National Insurance Board for sickness benefits and she had not previously discussed the same with the Applicant.

[23] She informed the insurer that the Applicant had a claim for injury benefits for an injury on the job by a letter which was attached to the affidavit. At the request of the insurer she completed a Workmens' Compensation Accident Report Form which was also attached to the affidavit.

[24] She deposed that, at the time of notifying the insurer, she would have notified the Applicant that she had done so. She further deposed that she had no further discussions with the Applicant about her claim and she could not and "…would not have told Ms. Taylor anything other than that her claim for injury benefit on the job had been submitted to the Insurer. I would not have known whether the Insurer intended compensating Ms. Taylor and I therefore could not have spoken to her about that."

[25] She also deposed that the respirator was provided as recommended by Dr. Gopwani but the Applicant was not wearing it at all times.

[26] She recalled the Applicant enquiring from time to time about her claim and she would have told her that she had notified the insurers about her accident. She denied she had given the Applicant any assurances that the insurer had accepted liability for her claim since she did not know how the insurer intended dealing with her claim.

[27] She maintained that she had merely submitted the Applicant's claim to Brydens for it to determine whether it would accept liability.

[28] Ms. Rock further stated that Ms. Belle, the Applicant's supervisor left the Respondent's employ in 2011 to work with a competing business and it was unlikely that she would be willing to give evidence for the Respondent.

[29] She had been advised by their Attorneys-at-Law and verily believed that, in the circumstances, the Respondent's evidence was likely to be less cogent and the Respondent would therefore be prejudiced should the Applicant be permitted to continue with her claim.

The Affidavit of Mr. Springer filed 12 December 2012

[30] Mr. Springer is the claims manager of the Respondent's insurer and holds a Diploma in Insurance from the Chartered Insurance Institute in London and a Diploma in management from the University of the West Indies.

[31] He deposed that Brydens is the local agent of Trinidad and Tobago Insurance Limited (TATIL) which insured the Defendant under an Employers Liability Insurance policy which requires the Defendant, as employer, to notify TATIL of any incident where an employee might have sustained injury during the course of employment.

[32] In June 2009 the Respondent notified the Insurer that the Applicant had made an injury on duty claim for vasomotor rhinitis "…which according to the medical report submitted with the letter, the Applicant would have been aware of since May 2008." They duly noted that the claim was made.

[33] He deposed that they had not heard anything further about the claim until May 26, 2012 when they received a copy letter addressed to the Respondent and copied to them.

[34] Mr. Springer deposed also that, since such liability would be covered under the policy, he responded to a letter dated June 15, 2012 by letter of 19 June 2012. His letter did not accept liability for the claim since Brydens needed to review and research the claim before it could respond to the question of liability.

[35] He received a telephone call from Ms. Spence, the Applicant's present counsel, in September 2012 enquiring about the matter and informed her that the matter had been passed to their attorneys-at-law for their advice but that

he believed that, in any event, the time in which the Applicant could commence proceedings had expired.

[36] Nothing further was heard from the Applicant and/or Holder & Co. Attorneys-at-Law until the filing of the present application on 29 October 2012.

[37] At paragraph 11 of the affidavit he deposed that "TATIL has acquired a reputation for being very fair in the settling of claims under the terms of its policies and seek always to recognize legitimate claims. In the instant case since we heard nothing from the Applicant for more than three years after the alleged injury on duty claim TATIL concluded that the claim was not being pursued.

[38] He further deposed as follows:

> "12. Generally TATIL sets a reserve for all potential claims which shows as a liability in the Company's books. Once that claim is paid or not pursued the reserve is removed. In the instant case the reserve for the Applicant's claim was removed on September 29, 2011 after the expiration of the three year limitation period. It would be unreasonable to expect TATIL to show such liabilities indefinitely.
>
> 13. The Applicant has not filed a Claim Form nor has she submitted any medical report since the initial report dated 2008. In the circumstances TATIL considers that it would be prejudiced by being precluded from relying on the statutory defence under the Limitation of Actions Act especially since even after the three year limitation period the quantum of the claim is still uncertain."

The Issue

[39] The sole issue to be determined in this application is whether the Court should exercise its discretion in favour of the Applicant under section 52 of the Act by granting the enlargement of time within which the Applicant can file her claim for personal injury, loss and damage allegedly sustained during the course of her employment with the Respondent.

The Law

[40] The applicable law is found in **sections 20, 52 and 53 of the Act** which are now quoted seriatim:

> "20 (1) This section applies to an action for damages for
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> *(a)* negligence;
>
> *(b)* nuisance; or
>
> *(c)* breach of duty, whether the duty exists by virtue of a contract or of a provision made by or under a statute or independently of any contract or of any such provision,
>
> when the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.
>
> (2) Except where subsection (3) applies, **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.**

52 (1) 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 to which the action relates.

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; 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." **(emphasis mine.)**

The Applicant's Submissions

[41] The Applicant submitted that the date from which the limitation period ought to run is December 2011, the date the Applicant commenced alternative employment and suffered no resurgence of her symptoms. That being the date by which she acquired knowledge of the cause of action. The appropriate test was when could it reasonably be said that the Applicant was on notice that her claim for compensation under the employer's insurance contract was rejected or would not otherwise be honoured. She relied upon **Sparham-Souter v Town & Country Developments (Essex) Ltd [1976] QB 858**.

[42] She said in a contract of employment where an employee is injured at work and is covered by insurance the employee may seek relief either through the insurance provisions which form implied terms in his/her contract of employment or by direct action in the torts of negligence and/or breach of statutory duty. In such a situation the action in tort does not accrue until the employer has had a reasonable opportunity to honour the obligations which it has assumed by way of the insurance coverage.

[43] Where an employer, through its insurers has exhibited contumacy in satisfying the employee's reasonable expectation the employer cannot be permitted to assert the employee's delay in exploring reasonable possible

alternative remedies in relation to the limitation period since this would permit the employer to profit from his own wrong.

[44] Counsel further submitted that the Applicant's knowledge of her cause of action would not be sufficient until she had consulted a legal adviser or might reasonably have expected to do so. She further submitted that the Applicant was entitled to take stock of the situation before being deemed to have constructive knowledge of her cause of action. She was therefore entitled to a reasonable period to enable the Respondent to superintend her claim following the termination of her employment contract in November 2009. Limitation should therefore run from 12 months after her dismissal from her employment.

[45] Counsel also submitted that the Respondent's insurers replied to the Applicant's Attorney 4 years after the claim was made that they were still actively investigating it and that to date they still have not indicated the outcome of their investigations.

[46] Further, that the Respondent's unconscionable conduct, in failing to honor their obligations under the Applicant's contract of employment, has resulted in the Applicant incurring significant costs in the institution of these proceedings.

The Respondent's Submissions

[47] The Respondent's submissions were set out under the various heads which are now reproduced in this decision.

The Applicant's Knowledge and the Commencement of the Proceedings Pursuant to Section 20 (2)

[48] The Respondent submitted that the Applicant first had knowledge of her claim on May 6, 2008 when she submitted the letter from Dr. Gopwani. Counsel quoted paragraph 7 of the Applicant's first affidavit where she deposed that she submitted that letter and discussed with the Respondent's Human Resource Manager "a claim for the injuries I had suffered whilst in their employment as a result of their failure to provide safety equipment." Counsel therefore opined that the Applicant had until May 5, 2011 to commence proceedings and until May 4, 2012 to serve her Claim Form.

The exercise of the Court's discretion under Sections 52 and 53

[49] Section 52 provides that in exercising its discretion the Court must consider the prejudice to the parties or any person they represent. Section 53 acknowledges that in exercising its discretion under Section 52, the Court must evaluate the evidence before it in its totality, with emphasis on the matters prescribed in Section 53.

[50] Ms. Straker submitted that neither the Respondent nor Brydens denied knowledge of the Applicant's alleged injury, however, Bryden's were unaware at all times during the limitation period of the Applicant's intention to make a claim. The evidence, which indicated that the Applicant's first contact with Brydens was on May 26, 2012, fully supported Brydens' position.

[51] In response to the Applicant's submission that the Respondent was aware of her intention to make a claim and that she relied on the assurances of the Respondent that the claim was being considered by Brydens, counsel submitted that the Respondent's evidence was that it did not give the Applicant any assurances that her claim was being dealt with by its insurers nor that it would be favourably dealt with by its insurers. The Applicant left the Respondent's employment in November 2009, one and a half years before the expiration of the limitation period and two and a half years before the May 26, 2012 letter. According to her, the Applicant made a blanket statement in paragraph 14 of her First Affidavit that "I continued to make enquiries about my injury claim to the Respondent's Human Resource Manager and again I was told by her that the claim was with the Insurers", she did not state, however, when or how those enquiries were made after November 2009 when she was no longer employed with the Respondent and

would not therefore have been in day to day contact with the Human Resource Manager.

[52] Counsel referred to paragraph 13 of the Applicant's First Affidavit in which she stated that, between 2010 and 2012 (after she had left the Respondent's employ), she was evaluated by two separate doctors on behalf of the NIS for invalidity benefits and "in March 2012 I received a letter from NIS informing me that based on the medical report I did not qualify for Invalidity Benefits" and submitted that a reasonable inference to be drawn therefrom was that it was only when the Applicant realised that she was not entitled to invalidity benefits that she became interested in pursuing a claim for her alleged injury and that March 2012 was the first time she took any active steps to do so. The Respondent further submitted that the Applicant's story that during the period 2008 to 2012 she was in contact with the Respondent's Human Resource Manager who assured her that her claim was being considered by Brydens was contrived by her after March 2012.

[53] Counsel disagreed with the Applicant's contention made in her Affidavit filed on June 24, 2013 (the Second Affidavit) that it was not her duty to follow through the claim herself and that there was a duty on Brydens to superintend her claim. She submitted that the Applicant was under a duty to seek legal advice in a timely manner. Having sat on her claim for four years

before seeking legal advice she could not now state that everyone else had a duty to ensure that her matter was being properly managed, but that she had no such duty.

The Case Law in the Area

[54] Counsel quoted the following cases in support of her submission that generally in cases in which a party requested the court to exercise its discretion under section 52, the defendant/respondent and/or its insurers have been notified not only of the Applicant's injury, but also of the Applicant's intention of making a claim for the injury suffered: **Angela Watkins v Marlene Holder and Brian Holder No. 2173 of 2002 (Watkins v Holder) and No. 2555 of 2002 (unreported decision of 23 June 2008)** and **Lester McDonald Daniel v M & W Jordon Enterprises Inc and Adrian Maynard No. CV 844 of 2007 (Daniel v Jordan) (unreported decision of 5 May 2009)**, are no exception.

[55] In summary, the Respondent submitted that the Court should exercise its discretion in its favour for the following reasons:

(i) the Applicant sat back on her claim for more than a year after the limitation period expired before she sought legal advice and it was only after she was informed that she was not eligible for invalidity benefits that she sought such advice;

(ii) the Applicant failed to prove, on a balance of probabilities, that the Defendant had given her any assurances about the insurers reviewing her claim;

(iii) the Applicant also failed to prove that the insurers were aware that she intended making a claim;

(iv) the insurers were therefore never given a chance to review the legitimacy of the Applicant's claim and to make any independent investigation into the circumstances surrounding the claim;

(v) in not pursuing her claim in a timely manner and, in the process, denying the insurer the right to conduct an independent investigation, the Defendant had been prejudiced especially since the insurer was not given an opportunity to interview Ms. Belle who was the Applicant's supervisor and the person in the Defendant's operation who would have had intimate knowledge of the Applicant's duties and her ability to undertake such duties;

(vi) in not pursuing her claim in a timely manner the Applicant also prevented the insurer from setting aside any reserve in the form of a sum of money for a potential claim.

[56] The Respondent therefore submitted that the Court should exercise its discretion in its favour and deny the Applicant's Application for an order

that (i) the provisions under s. 20 (1) and (2) of the Limitation of Actions Act shall not apply to the Applicant's cause of action and (ii) the time limit for making a claim in negligence and/or breach of statutory duty against the Respondent be extended.

Discussion

[57] Notwithstanding the three (3) year limitation period has expired under section 20 (2), the Court has a discretion (under section 52) to enlarge the time within which an Applicant can file his/her claim if it considers that it would be equitable to do so. Thus, as was stated by **Inniss J** in **Best v CP Hotels (Barbados) Inc. Suit No. 185 of 2004 (unreported decision of 16 February 2005)**:

> "[22] In seeking to strike a balance between the respective interest of the plaintiff and the defendant. (sic) The main issue to be considered in a case of this nature is the issue of prejudice… The general principle therefore is that if the delay does not seriously affect the evidence, the Court will exercise its discretionary power to grant an extension in the matter."

[58] Lord Griffiths said in **Donovan v Gwentoys Ltd [1990] 1 WLR 472 at 479** that:

> "**The primary purpose of the limitation period is to protect a defendant from the injustice of having to face a stale claim, that is, a claim with which he never expected to have to deal. In weighing the degree of prejudice suffered by the 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 to be permitted to rely upon his limitation defence.**" (emphasis mine)

[59] In **Ward v Foss The Times, November 29, 1993** Hobhouse LJ in considering section 33 of the English Act which is similar to section 52 of Cap 231 stated as follows:

> "For the purpose of section 33, if a defendant is to say that he is prejudiced, he must show something more than merely that he is going to be required to meet his legal liabilities. The prejudice must arise from some other additional element—some change of his position which would not have occurred if the action had been brought within time; some belief by the defendant that he was not going to be troubled with the claim; some alteration in his financial position or some failure to make provision for the claim the loss of relevant evidence; some difficulty in having a fair trial after the lapse of time. No list can be exhaustive and the statute requires the court to have regard to all the circumstances of the case, but it must be some factor over and on top of the legal liability of the defendant which created the prejudices."

[60] In **Watkins v Holder** supra counsel for the plaintiff had written to the defendant's insurer notifying it that the plaintiff had suffered injury in a motor vehicle accident involving the defendant. The insurer responded to that letter requesting the plaintiff to submit her claim for its consideration. As the court noted "the plaintiff thereafter went about the task of gathering medical reports to support her claim for physical injuries and documents to verify her pecuniary loss..." The latest medical report exhibited was dated April 17, 2002 and on April 30, 2002 counsel for the plaintiff wrote to the insurer setting out the plaintiff's quantified claim and thanking the insurer for accepting liability and requesting her to submit a claim. The insurer responded that as the statutory period had expired and there was no further correspondence from the plaintiff it had closed its file. In exercising his

discretion in favour of the plaintiff, **Moore J** (as he then was) opined that the claim was not a stale claim "as the defendant had been promptly notified of the claim by the plaintiff who had been invited by the defendant to submit a claim".

[61] In **Daniel v M & W Jordan Enterprises Inc supra** the plaintiff had sustained personal injuries and his car was extensively damaged in an accident on December 31, 2002. The evidence was that counsel for the plaintiff had written to the defendant's insurers in June 2003 advising them of the claim and seeking damages on the plaintiff's behalf. The evidence further indicated that the plaintiff had changed counsel a couple of times and that he was awaiting a medical report in order to submit his quantified claim for the personal injuries sustained. Meanwhile, the insurer had settled the plaintiff's property damage. The plaintiff commenced proceedings against the defendant in May 2007 and the defendant raised the limitation period in defence of the plaintiff's claim. The plaintiff then sought an enlargement of time under section 52 of the Limitation Act. **Crane-Scott J** in her considered judgment assessed the balance of prejudice under sections 52 and 53 of the Act and held "that the balance of prejudice" lay 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 Plaintiff's claim;

(b) Additionally, the Defendant's insurers had prior to the expiration of the limitation period on December 31, 2002 satisfied themselves as to the Defendant's 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 Defendant's liability for the accident, the Defendant's 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 Defendant's 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) The fact is apparent from the correspondence which ensued in 2006 after the expiration of the limitation period. Exhibits (**"NOS4"**) (**"NOS5"**) and (**"NOS6"**) 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 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 Defendant's 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."

The Balance of Prejudice

[62] The Court in acting under section 52 is required to have regard to the circumstances of the case and in particular to those matters listed at section 53(1).

(a) The length of, and reasons for, the delay on the part of the plaintiff i.e. the delay after the expiry of the limitation period.

[63] Counsel for the Applicant submitted that the limitation period should run from 2009, representing a reasonable period from the date of Dr. Gopwani's letter of 11 November 2009 or from the date the Applicant's employment ceased. The Defendant submitted that the limitation period should run from the date the Applicant first had knowledge of her claim; namely 6 May 2008 when she received the letter from Dr. Gopwani. She therefore had until 5 May 2011 to file her claim. Section 20 (2) clearly states that a claim issued after 3 years from either: (a) the date on which the action accrued or (b) the person acquired knowledge of his cause of action.

[64] The Court is of the view that the cause of action arose on 6 May 2008 when Dr. Gopwani diagnosed her with vasomotor rhinitis. The Court rejects the Applicant's counsel's submission. In the circumstances, there was a delay of 1 year and 5 months between the expiry of the limitation period in May 2011 and when the action was instituted by this application of 29 October 2012.

[65] In addressing matters of this nature and weighing the degree of prejudice it must be determined when the Respondent first had notification of the claim.

[66] Upon reading Ms. Rock's affidavit it is clear that the Respondent had knowledge of the Applicant's personal injuries in 2008: (paragraph 6 - per Dr. Gopwani's letter of diagnosis dated 6 May, 2008). While no precise date is indicated as to when the letter was received it is clear that the Respondent was notified of the Applicant's claim shortly after the date of Dr. Gopwani's letter. Ms. Roach deposed, at paragraph 6 of her affidavit, that she received a note from Dr. Gopwani in early 2008.

[67] It is also apparent that the Respondent's insurer had notice of the Applicant's condition and injury claim. Ms. Rock at paragraph 11 of her affidavit deposed to the following: "As required, I informed the Defendant's Insurer that Ms. Taylor had made a claim for injury benefits for an injury on the job by letter dated June 15, 2009." Also, Mr. Springer, a claims manager at Brydens, deposed at paragraph 6 of his affidavit that, "the Defendant

notified us that the Applicant had made an injury on duty claim for vasomotor rhinitis …"

[68] The Applicant at paragraph 15 of her affidavit attributes her delay in seeking legal advice (and bringing this action), on the reliance of Ms. Rock's assurances that "the matter had been passed to the insurer's and that it was being dealt with". Both the Applicant and Ms. Rock acknowledged in their affidavits that the Applicant enquired as to the status of the Applicant's claim. In her Affidavit, the Applicant deposed to the following:

> "12. I made queries about my claim for injuries I had received and the Respondent's Human Resource Manager again informed me that the matter had been passed on to their Insurers.
>
> 14. I continued to make enquiries about my injury claim to the Respondent's Human Resource Manager and again I was told by her that the claim was with the Insurers.
>
> 15. … I faithfully relied on the Respondent's Human Resource Manager's assurances that she had passed on the matter to their Insurers and that it was being dealt with."

[69] The Court makes the following observations, the Insurers having been notified in June 2009 of the Applicant's claim, took no further action in relation to the claim. There is an absence of correspondence on the part of the insurer (no exhibits were attached to show the contrary).

[70] On one hand Mr. Springer deposed at paragraph 7 that, "We heard nothing further about the claim [submitted by the Respondent in 2009] until May 26,

2012…" On the other hand, interestingly enough, Mr. Springer (in response to Ms. Spence's letter of 15 June 2012) deposed at paragraph 8: "Since any such liability would be covered under the Policy I responded to the June 15, 2012 letter on June 19, 2012 … as noted we needed to review and research the claim before we could respond on the question of liability….".

[71] Mr. Springer's letter of June 19th 2012 [Exhibit 1S2] acknowledges receipt of Ms. Spence's letter of 26th May 2012 addressed to Ms. Rock and notes: "We are actively reviewing the matter and will respond further in due course".

[72] The Applicant filed an Affidavit in Response to Mr. Springer's affidavit. She deposed to the following:

> "5. In respect of paragraph 8, the CM (Claims Manager) acknowledges that liability would be covered under the policy and he further acknowledges the appropriate course of action following upon such a claim, that is, notification that the claim had been received and was being researched or otherwise superintended. On his own admission, this course of action was not followed when the first claim was received by Brydens and for a further period of three years.
>
> 8. … Brydens ignored my claim for more than three years until my Attorney's intervention … To say that I was inactive is to cast on me a duty I did not have. My contract of employment was with the Defendant and not Brydens...
>
> 9. … I do not understand how my claim for compensation under my contract of employment has anything to do with the limitation period to which CM refers. Nor, in any event, do I understand how Brydens could possibly fix a date arbitrarily for a limitation to run without thoroughly investigating my claim and advising both the Defendant and myself."

[73] Ms. Rock, having admitted at paragraph 14 of her affidavit that the Applicant had made several enquiries as to the status of her claim, took no further steps with respect to advising the Applicant on the procedure of the claim; that is to say, if the Respondent had no further involvement in the matter (having submitted the Applicant's claim), she did not for instance advise the Applicant that she was to deal directly with the insurer or provide the Applicant with the contact information of the claims manager. (See also: the Applicant's affidavit of 10 June 2013 in response to Ms. Rock's affidavit where she claims that the Defendant failed to superintend her claim in accordance with her contract of employment).

[74] Having regard to Mr. Springer's affidavit, it is clear that Brydens was aware since June 2009 through its insured that the Applicant had made a claim for injury on duty. It is clear from the affidavit also that Brydens failed to follow-up on the claim which it said it needed to review and research before it could respond on the question of liability.

[75] The insurance policy is between the Respondent and Brydens. The duty of the insurer is to keep its insured abreast of its investigations on the claim. It seems to me that Brydens is seeking to place the onus on the Applicant to ascertain the status of the claim under the contract with the insured. Whilst it

is prudent for the employee to follow-up on her claim her contractual nexus is with her employer as distinct from Brydens.

[76] In these circumstances Brydens owed a duty to its insured to advise it of the results of its review and investigation. No such thing occurred.

[77] There was no cross-examination of the various deponents on their affidavits and the Court was therefore unable to observe the demeanor of the deponents. I am inclined, however, to believe that the Applicant did enquire of the employer about the status of her claim. I am fortified in my finding by the evidence contained at paragraph 14 of Ms. Rock's affidavit where she deposed that she recalled that the Applicant enquired from time to time about her claim and that she (Ms. Rock) had told her that she had notified the insurer of her accident.

[78] The Court is of the opinion that the delay in filing was occasioned by the Applicant's reliance on the assurances of her employer that the claim was being looked into by its insurers.

(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;**

[79] There is no evidence and it has not been submitted that the cogency of the evidence is or is likely to be affected. The Applicant is available to give

evidence. The Respondent opposes this application on this ground that one Ms. Belle, a former employee to whom the Applicant would have reported, is no longer employed by the Respondent. This to the Court's mind is not a compelling reason. No reason has been advanced to show that this former employee is unable or unwilling to give evidence in relation to this matter. In any event, the potential witness can be subpoenaed to give evidence before the Court.

***(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;**

[80] In the present case, the Respondent having been informed of the Applicant's condition (by Dr. Gopwani's 6 May 2008 letter) provided a respirator for the Applicant to use in the course of handing the volatile chemicals. The Respondent recognizing the excellent job performance of the Applicant sought further advice from Dr. Gopwani as to what additional steps it could take to protect her during the course of her employment. These were facts relevant to the Applicant's cause of action against the Respondent. It is clear therefore that the employer took it upon itself to ascertain how best it could

alleviate the Applicant's suffering occasioned by her use of chemicals during the course of her employment.

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

[81] The Applicant's diagnosis with respect to vasomotor rhinitis is chronic and irreversible, there being no cure but only management of that disease. The Applicant will continue to suffer the effects of this disease indefinitely.

(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;

[82] The evidence shows that the Applicant's submitted Dr. Gopwani's 6 May 2008 letter and (ii) her injury claim to the Respondent fairly promptly after she received Dr. Gopwani's letter informing her of her diagnosis. The delay on her part is in respect of the length of time she took to file her Claim before the court. This has already been addressed above.

(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.

[83] The evidence is that the Applicant sough the legal services of Messrs. Holder & Co. Attorneys-at-Law after her efforts to ascertain the status of her claim through her employer had failed. As previously noted, she sought the

medical advice of Dr. Gopwani shortly after her symptoms of vasomotor rhinitis presented themselves. Having regard to my findings in relation to the manner in which the employer superintended or failed to superintend her claim which had been submitted to Brydens by the said employer, I am of the opinion and hold that the Applicant cannot be said to have acted unreasonably in relying upon the assurances of her employer.

[84] Mr. Springer at paragraph 12 of his affidavit deposed that a reserve had been set in respect of the Applicant's claim. Once a claim is paid or not pursued the reserve is removed. The reserve in the instant case had been removed on September 29th, 2011 after the expiration of the 3 year limitation period.

[85] Mr. Springer's letter of June 19th 2012, and addressed to Holder & Co., is worded as follows "We refer to the captioned matter, and acknowledge receipt of your letter, dated 26th May, 2012, addressed to Mrs. Caroline Rock, Human Resources Manager, Sani Services Ltd. We are actively reviewing the matter, and will respond further in due course." It is clear that if the reserve had been removed, in 2011 Mr. Springer would have been aware of that. He did not inform Holder & Co. of the removal in his said letter under reference. The net effect is that the Claimant's Attorneys-at-Law would have been entitled to believe that the Insurer was actively reviewing the matter, in a situation where there was no prejudice to itself.

[86] There is no evidence to date that Brydens had either reviewed or researched the claim which it said it needed to do before it could respond on the question of liability as requested by the letter of June 15th, 2012. (see: paragraph 8 of the Springer Affidavit.)

[87] In balancing the risk of prejudice to the Respondent as against the prejudice to the Applicant in denying this application the Court must take into account that Brydens removed the reserve without complying with its stated position that it would review and research the claim and respond to the letter of the Applicant's counsel. I do not find this omission to be reasonable in all the circumstances.

[88] Mr. Springer deposed that TATIL considered that it would be prejudiced if it was precluded from relying on the limitation defence since the quantum of the claim was still uncertain after the limitation period had run.

[89] I do not consider that there is much merit in this assertion since Mr. Springer had deposed that a reserve had been set as against the claim even before the full particulars of the claim had been submitted. In the circumstances I am of the opinion and hold that there is no prejudice to the Insurer if the Application to dis-apply the limitation period is granted.

Conclusion

[90] This Court finds that if the order enlarging the limitation period is not made, the Applicant receives no compensation for personal injuries, loss and damage suffered during the course of employment. I also find that the Respondent being a corporate entity with the clientele deposed to in the affidavit of Ms. Rock would suffer less prejudice than the Applicant who does not appear to have substantial means.

Disposal

[91] Having considered the application for the enlargement of time and the relevant circumstances as required by **section 53(1)** of the **Limitation of Actions Act**, the Court considers that it would be equitable to allow the action to proceed having regard to the provisions of **the Act**. The Court further holds that the balance of prejudice lies in the Applicant's favour and that she is entitled to the relief sought.

[92] In the premises, it is ordered that:

i. Pursuant to **Section 52(2)** the provisions of **Section 20(2)** of the **Limitation of Actions Act** shall not apply to the Applicant's cause of action.

ii. The application filed on the 17th of January 2013 do stand as though filed with the permission of the Court.

And it is further ordered by consent:

iii. that the time of filing the defence is extended until the 7th of December, 2015; and

iv. the issue of costs is reserved until the 25th day of January 2016.

William J. Chandler
Judge of the High Court