BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

(Civil Division)

Suit No. 95 of 2015

BETWEEN:

EARLE BRYAN **CLAIMANT**

AND

BARBADOS PORT AUTHORITY **1ST DEFENDANT**

SEA FREIGHT AGENCIES (BARBADOS) LIMITED **2ND DEFENDANT**

Before the Honourable Mr. Justice Cecil N. McCarthy, Judge of the High Court (Acting)

2018: 14 August

2019: 12 June

Mrs. Makala Broome in association with Mr. Junior Allsopp for the Claimant

Mrs. Tya Atwell for the First Defendant

Mr. Ivan Alert for the Second Defendant

DECISION

INTRODUCTION

[1] This is an application by the claimant under section 52 of the Limitation of Actions Chapter 220 ("the Act") for an order that the

provisions of section 20(2) of the Act not apply to the claimant's cause of action.

FACTUAL BACKGROUND

[2] The claimant at all material times, was an employee on the first defendant.

[3] On the 9th day of August 2005, the claimant was assigned to work on the ship, 'Tug Atlantic', when he fell and sustained personal injuries.

[4] The claimant alleges that on that day he was walking along a gangway to access the ship when the ship swayed away from the dock causing the gangway to fall from the ship to the dock. As a result he fell and sustained injuries.

[5] The claimant alleges that the ship was at the time of the accident, owned by the second defendant.

[6] On January 29, 2015 the claimant filed a claim against the defendants for damages. Both defendants filed defences to the claim. The second defendant pleaded that the claim was statute-barred since the cause of action arose more than 3 years prior to the commencement of the suit.

[7] On July 21, 2016, the claimant filed an application, pursuant to ***Section 52 of the Act*** – that the provisions of ***Section 20 of the Act*** should not apply to the claimant's cause of action, and the grant of an enlargement of time for the claimant to file his claim form and statement of claim.

[8] The first defendant filed an affidavit on October 2, 2016 in which liability was denied and it was pointed out that at no stage did the first defendant accept liability.

[9] The second defendant through its director, David Harding filed an affidavit on November 9, 2016 in which the second defendant asserted that at no time did the second defendant accept or admit any liability for the alleged accident. In the said affidavit the second defendant also expressed the view that because of the length of delay the evidence that was required for this case was less cogent and in some aspects would be unavailable.

[10] The claimant submits the following grounds for his application:

1. The claimant acted promptly and reasonably once he knew whether or not the act or omission of the defendants, which caused the injury might be capable of giving rise to an action for damages;

2. *The claimant made contact with the defendants after the cause of action arose, and remained in contact with the defendants regarding their position on liability;*

3. *The enlargement of the time limit would not materially prejudice the defendants, as the defendants, were notified of the proceedings within the limitation period.*

[11] The claimant filed an affidavit in support of the application which outlined the circumstances of the accident and the actions taken by his attorney-at-law.

The following is a chronology of the course of events:

THE CHRONOLOGY

[12] (a) The claimant was injured on **August 9, 2005**. At that time the claimant was an employee of the first defendant and the ship was allegedly owned by the second defendant;

(b) The claimant first sought medical attention for the injury he suffered on **November 11, 2005**, when he visited Dr. Kwasi Ametewee.

(c) Following instructions to the claimant's attorney, Mr. Allsopp, a letter, dated **March 10, 2006**, was sent to the Barbados Port

Inc., the first defendant, to ascertain whether they would be accepting responsibility;

(d) The first defendant through their attorneys sent a letter dated **March 31, 2006**, denying liability and indicating to the claimant's attorney-at-law that there was a counterpart agreement between the dockers as employees of Barbados Port Inc., and members of the Shipping Association of Barbados which governed matters of liability, and that the second defendant was solely responsible for the docker's supervision and control;

(e) The first defendant forwarded the counterpart agreement to the claimant's attorney-at-law on **April 25, 2006**;

(f) On **November 6, 2006** the claimant's attorney-at-law sent a letter to the second defendant to ascertain whether they would be accepting liability;

(g) Harmony General Insurance, insurers for the second defendant, acknowledged receipt of the letter (of **November 6, 2006**) on **November 8, 2006** and reported that they would investigate the matter and get back to them in due course;

(h) The medical report of Mr. Kwasi Ametewee M.B dated **January 5, 2007** was prepared;

(i) On **March 12, 2007**, the claimant's attorney sent correspondence to Harmony General Insurance seeking an update on the request made in previous correspondence.

(j) On **April 13, 2007**, Harmony General Insurance wrote to the claimant's attorney requesting that they provide authority on which they based the second defendant's liability.

(k) The claimant was declared medically unfit to work as a forklift driver sometime after in **2009**;

(l) On **November 11, 2011** (an associate of the claimant's attorney-at-law, Michael Yearwood) wrote to Harmony General Insurance outlining the claimant's claim and enclosing the claimant's medical records. There is no record that a response was given to this correspondence;

(m) A follow-up letter was sent on behalf of the claimant on **January 4, 2012** to Harmony General Insurance without any response from the insurers;

(n) On **December 12, 2014**, the claimant's attorney sent correspondence to Harmony General Insurance requesting their

urgent response to their letter of November 11 2011 and stated therein that if no response was forthcoming on or before 31st December 2014, they would proceed to advance matter to the Supreme Court;

(o) On **January 29, 2015**, the claim was filed;

(p) The defence was filed on **June 29, 2015**; and

(q) At a case management Conference held on **April 21, 2016**, leave was granted for the claimant to file an application for an extension of time.

[13] In this matter, the parties have decided to stand by the affidavit evidence filed. I now give a summary of that evidence.

AFFIDAVITS OF THE CLAIMANT

[14] i) The claimant filed two affidavits, the first was filed on the 21st day of July 2016 and the second was filed on the 30th day of March 2017.

ii) The claimant in his first affidavit lays out the circumstances surrounding the accident which caused his injuries stating that in the course of his employment walking along a gangway the

ship surged away from the dock causing the gangway to fall from the ship to the dock causing him to fall.

iii) He stated that he subsequently attended Dr. Ametwee, Dr. Chode and Dr. Martyr. Thereafter by his attorney, Mr. Junior O. Allsopp, he enquired of the first defendant, and later the second defendant, as to their positions on liability.

iv) At paragraph 9 of his affidavit the claimant states that "the first defendant responded denying liability in the matter and referred the matter to the second defendant".

v) At paragraph 12 the claimant that by letter dated 8th day of November 2006, Harmony General Insurance, insurers for the second defendant, wrote on behalf of the second defendant.

vi) The claimant alleges that there were "various correspondences and discussions" between the second defendant's insurer and the claimant's Attorney. At paragraph 14, he adds that the last correspondence on this matter from the second defendant or its insurer was a letter dated 13th April 2007.

vii) The claimant then outlines the reasons why barring his claim would prejudice him, citing the joy he took in his job, daily pain

and limitation, his loss of ability to carry out do-it-yourself, household, loss of amenities and social life.

viii) He concludes by giving his understanding, as explained by his attorney-at-law, that the limitation period's primary purpose is to "protect a defendant from the injustice of having to face a claim with which he never expected to have dealt with" and reasons that the defendants were notified of the claim well within the limitation and provided with medical reports on his condition. The claimant emphasizes that the defendants knew about his injuries.

ix) The second affidavit of the claimant responds to an affidavit filed by the second defendant. At paragraph 3 thereof, the claimant states that any delay on his part was caused "by my Attorney-at-Law's efforts to seek to negotiate the matter through out-of-court settlement" and further that "the second defendant was the primary cause of the delay by failing to respond in a timely manner".

x) The claimant at paragraph 5 agreed that he was not an employee of the second defendant but he asserts that he was a lawful visitor on the ‘Tug Atlantic’.

xi) The claimant writes at paragraphs 6 and 7 that he is informed that there was communication between his Attorneys-at-Law and the

claimant in 2006 and 2007 and, thereafter, his attorney was supplied with the Counterpart Agreement which required research. "Once his research was concluded, his Attorney-at-Law, Michael Yearwood, wrote to the insurer referring to previous discussions and detailed his opinion in a letter dated 10th day of November 2011".

xii) The claimant continues at paragraph 9 that the reason a claim was not filed within the limitation period was that his medical history was not completed and medical reports were not available. He adds, "further as a matter of practice claims are usually filed where out-of-court negotiations have been exhausted" and he verily believed that this was not the case.

xiii) Further, the claimant posits that the second defendant had an opportunity to interview a Mr. Grant whom the claimant contends, was asked to conduct as well as to carry out investigations when it was first informed of the accident. In particular at paragraph 12 the claimant mentions that since November 6, 2006, the second defendant was well aware of his claim for damages. He then re-iterates that were his action not allowed to proceed, it would result in “severe prejudice" adding in his concluding paragraph that he

continues to experience pain and was advised that he may have to receive knee replacement surgery.

AFFIDAVIT OF FIRST DEFENDANT

[15] i) The affidavit of the first defendant was filed the 12th day of October 2016, and was sworn by the Legal Officer of the Insurance Corporation of Barbados Limited, Mrs. Tya Atwell.

ii) The first defendant recites the alleged circumstances of the accident as given by the claimant. She then states that seven months after the alleged incident, a letter dated 10th day of March 2006 was sent to the first defendant from the claimant's attorney requesting the first defendant's position on liability. In answer, the first defendant by letter dated 31st day of March 2006 informed the claimant's attorney of an Agreement between the first defendant and the Barbados Shipping Association of which the second defendant is a member. The first defendant denied liability and directed the claimant to the second defendant whom they asserted had responsibility for the claimant’s injury.

iii) The Agreement was provided to the claimant upon request on the 25th day of April 2006. According to Mrs. Atwell, the provision of

the said Agreement was followed by a further letter from Mr. Junior Allsopp, the claimant's attorney, stating that notwithstanding the Agreement, the first defendant was liable. By letter dated 31st day of April 2007 the first defendant stood by their position as expressed in their letter of 31st day of March 2006.

iv) The first defendant states at paragraph 9 of its affidavit, "neither the first defendant nor ICBL received any further communications on this matter until the 10th day of February 2015 some 8 years later, when the first defendant was served with the Claim form filed herein.

v) They denied liability at an early stage and received no further communications from the claimants for 8 years. At paragraph 11, it is stated that "ICBL reasonably believed that the time limited for bringing an action had long expired and that the claimant had abandoned the pursuit of his alleged claim against the first defendant."

vi) Further, Mrs. Atwell states at paragraph 12 that ICBL was never provided with medical reports in relation to the claimant's condition; had never accepted liability; nor entered negotiations;

and had reasonably believed that the claimant had abandoned his claim against the first defendant. In the premises, ICBL closed its file on this matter.

vii) In rehearsing the history of interactions between the claimant and first defendant, and conduct of the claimant, up until filing the first defendant was seeking not merely to establish its defence which it alleges is provided by the Agreement, but also to highlight the prejudice that will be suffered by the first defendant if the action is allowed to proceed against it and at paragraph 15 refers to the action as an abuse of process.

AFFIDAVIT OF SECOND DEFENDANT

[16] i) The affidavit of the second defendant, sworn by David Harding (Director), Sea Freight Agencies (Barbados) Limited was filed on the 9th day of November 2016.

i) The second defendant in supporting their defence argues chiefly that the claimant did not act promptly in that the claimant commenced proceedings claiming damages for personal injuries 9 years after his first communication to the first defendant.

Interestingly, nothing is said about the promptness of the second defendant.

iii) The second defendant averred that at no time did it accept or admit any liability. Of course, it is also true that the second defendant never denied liability. The second defendant stated that:

a. the claimant was not an employee of the second defendant;

b. that the Tug Atlantic Surveyor was not owned by the Second defendant; and

c. that the claimant was not injured in the course of his employment.

iv) The second defendant then turns to identify and discuss the letter of 13th April 2007 whereby it "requested the authority on which the claimant was relying to indicate the second defendant's liability". Mr. Harding states that "no authority was ever provided" and notes that "it was not until 4 years 7 months after the letter requesting authority" that the claimant's then attorney wrote a letter dated 11th November 2011 expressing his opinion that the second defendant was negligent whilst ignoring the prior request of the second defendant.

v) The second defendant then revisits the failing of the claimant, being under no disability, in that up to the expiry of the limitation period the claimant did not prosecute a claim and failed to communicate with the second defendant after the letter of 13th April 2007. In fact, the claimant filed proceedings some 7 years post limitation period.

vi) The second defendant's case as put in its affidavit is that in "light of the length of delay the evidence to be adduced for the second defendant is likely to be less cogent..." In particular, it is submitted that "personnel then under the defendant's engagement who may have witnessed the accident or were in positions of responsibility may no longer be available to the defendants."

vii) In concluding, Mr. Harding states that the claimant's case is a poor case. The second defendant does not mention why he thought so. Indeed other than a blanket statement, no evidence or reason is provided as to why the court should consider the claimant’s case to be weak.

ISSUE

[17] The issue before the Court is whether the Court should exercise its discretion under section 52 of the Act to disapply section 20 to the

claimant's action and therefore, permit the action commenced by the claimant to proceed.

THE RELEVANT LEGISLATION:

[18] "The relevant provisions of the Act are sections 20(2), 52(1) and 53(1). Those provisions respectively stipulate:

"*20. (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 the 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 to 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 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 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.

THE CLAIMANT'S SUBMISSIONS:

[19] Counsel for the claimant, Mrs. Makala Broome, alleges that the defendants were notified of the claim within one year of the incident. She also asserts that the first defendant was fully aware of the claimant's condition as they were his employer and had been furnished with a medical form advising of his incapacity.

[20] The medical report was sent to the second defendant, under the cover of letter on the November 11, 2011.

[21] The claimant further contends that the court is not only called upon to consider the prejudice to the claimant, where the extension is not granted, but also to consider to what extent the exercise of its discretion would prejudice the defendant. The claimant posits that in the exercise of this discretion that it would be fair and just in all circumstances to allow the action to proceed.

[22] The claimant emphasized the fact that the defendants were given early notification of the claim and they would have been able to investigate the matter.

[23] The claimant submits that the essential question that the court must answer is whether it is fair and just in all the circumstances to allow the claimant's action to proceed on the basis that the defendants can still meet the claim on the merits.

[24] The claimant says that the defendants can meet a claim on the merits despite the delay for the following reasons:

"i. The Defendants were notified of the claim at the earliest possible opportunity;

ii. The Defendants were provided with the Claimant's medical information as early as 2009 and 2011 and would have been in a reasonable position to assess the quantum of the claim;

iii. The cogency of the evidence is unaffected by the delay as the Defendants were notified of the claim at the earliest opportunity and would have had an opportunity to carry out their investigations;

iv. The quality of the evidence ought not to be affected as additional information relative to a witness was also supplied to

the second defendant to aid in investigations. The insurers of the second defendant's conduct in not responding to the claimant's Attorney-at-Law's request was unreasonable and in balancing the prejudice should weigh against them;

v. The claimant acted promptly; the failing of the Attorney-at-Law to issue proceedings should not be counted against the claimant; and

vi. Though the claimant may have a claim against the Attorney-at-Law for failing to issue proceedings within the limitation against the defendants, this does not negate the fact that the claimant will be prejudiced by the application of section 20 to his cause of action.

THE FIRST DEFENDANT'S SUBMISSIONS:

[25] Counsel for the first defendant, Mrs. Tya Atwell, submitted that the court should exercise its discretion by refusing to grant the claimant's application to have the limitation period enlarged for the following reasons:

i. They denied liability from their first correspondence;

ii. The last correspondence between the claimant and the first defendant was dated the April 31, 2007;

iii. Nothing was done to advance the claim against the first defendant – no medical reports were forwarded to them.

iv. There was a lengthy delay of approximately eleven years between the date of the accident and the filing of the application for extension of the limitation period;

v. The first defendant through its insurers ICBL, presumed that the claimant had either heeded their advice to refer the matter to the second defendant, or had abandoned his claim against them. Acting on this presumption they exercised their right to close their file on this matter;

vi. The claimant was not under any disability with respect to legal representation and had at all times been represented by the same legal counsel; and

vii. The inexcusable delay is attributable wholly to the claimant and/or his legal counsel.

[26] Mrs. Atwell contended that they would suffer greater prejudice than the claimant if the claimant's application for leave was successful because they were not notified of the extent of the defendant's injuries within a reasonable time; and the claimant's claim would likely be substantial – a claim for which they have not had the opportunity to set aside a consistent reserve.

[27] Moreover, they believe that the claimant has failed to establish a good reason for the court to exercise its discretion in his favour by granting an extension of the limitation period.

THE SECOND DEFENDANT'S SUBMISSIONS:

[28] Counsel for the second defendant, Mr. Ivan Alert, submits that based on the facts of the case, it would be inequitable to allow the action to proceed having regard to the degree to which the provisions of Section 53 prejudice the claimant; and to the significant extent to which a decision to allow the action to proceed would prejudice them. They contend that the claimant was not their employee; and that the "Tug Atlantic Surveyor" was not owned by them when the claimant was injured.

[29] Mr. Alert asserts the claim was actually filed 9 years, 5 months after the cause of action arose. He says that at every stage the claimant was indolent and did not follow up. Although he had given his attorneys instructions at an early stage he did not follow up the case to ensure that it was being prosecuted.

[30] In support of the above, Mr. Alert identified the gaps between correspondence, sometimes several years.

[31] Mr. Alert also referenced the late communication of the medical information; which he says was supplied 3 years, 4 months after the expiry of the limitation period.

[32] Mr. Alert also rubbished the claimant's assertion that the usual practice is to file a claim after the negotiations between the parties have been exhausted.

[33] He pointed out at all letters from the claimant threatened that legal proceedings would be instituted if the insurer did not communicate their intention to amicably resolve the matter; yet it took several years after the expiry of the limitation period for the claimant to commence proceedings.

[34] Mr. Alert highlights the failure of the claimant to respond to the second defendant's insurer's request for information on the basis of the second defendant's liability.

[35] Counsel for the second defendant asserts that the primary reason for the delay was the indolence of the attorneys for the claimant and the claimant himself.

[36] He submits that the claimant has not addressed the issue of the cogency of the evidence and the effect of the delay in this regard. He says that cogency in respect of contribution proceedings has been seriously compromised.

[37] Mr. Alert references the fact that liability was never accepted by the second defendant; the claimant knew his rights but never instituted

proceedings. He deems the claimant's conduct inexcusable and submits that he should not be allowed to pursue his claim.

THE LEGAL PRINCIPLES

[38] Sections 11 and 33(1) of the Limitation Act, 1980 of the United Kingdom are in substantially similar terms to sections 20 and 52 (1) and 53(1) of the Act.

[39] The English cases on the subject are, therefore very useful in interpreting the Barbados statutory provisions.

[40] In **Dovovan v Gwentoys** [1990] 1WLR472, 479 Lord Griffiths describes the main purpose of the limitation period:

"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 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."

[41] In **the Chief Constable of Greater Manchester Police and Robert Carroll** [2017] EWCA 1992, Sir Terrence Etherton MR at paragraph

42 , gave a summary of the general principles to be distilled from the reported cases on section 33(3) of the English Limitation of Actions Act, 1980. I reproduce those guiding principles as set out in that paragraph:

"1) Section 33 is not confined to a "residual class of cases". It is unfettered and requires the judge to look at the matter broadly: Donovan v Gwentoys Ltd [1990] 1 WLR 472 at 477E; Horton v Sadler [2006] UKHL 27, [2007] 1 AC 307, at [9] (approving the Court of Appeal judgments in Finch v Francis unrptd 21.7.1977); A v Hoare [2008] UKHL 6, [2008] 1 AC 844, at [45], [49], [68] and [84]; Sayers v Lord Chelwood [2012] EWCA Civ 1715 [2013] 1 WLR 1695, at [55].

2) The matters specified in section 33(3) are not intended to place a fetter on the discretion given by section 33(1), as is made plain by the opening words "the court shall have regard to all the circumstances of the case", but to focus the attention of the court on matters which past experience has shown are likely to call for evaluation in the exercise of the discretion and must be taken into a consideration by the judge: Donovan at 477H-478A.

3) The essence of the proper exercise of the judicial discretion under section 33 is that the test is a balance of prejudice and the burden is on the claimant to show that his or her prejudice would outweigh that to the defendant: Donovan at 477E; Adams v Bracknell Forest Borough Council [2004] UKHL 29, [2005] 1 AC 76, at [55], approving observations in Robinson v St. Helens Metopolitan Borough Council [2003] PIQR P9 at [32] and [33]; McGhie v British Telecommunications plc [2005] 149 SJLB 114, at [45]. Refusing to exercise the discretion in favour of a claimant who brings the claim outside the primary limitation period will necessarily prejudice the claimant, who thereby loses the chance of establishing the claim.

4) The burden on the claimant under section 33 is not necessarily a heavy one. How heavy or easy it is for the claimant to discharge the burden will depend on the facts of the particular case: Sayers at [55].

5) Furthermore, while the ultimate burden is on claimant to show that it would be inequitable to disapply the statute, the evidential burden of showing that the evidence adduced, or

likely to be adduced, by the defendant is, or is likely to be, less cogent because of the delay is on the defendant: Burgin v Sheffield City Council [2015] EWCA Civ 482 at [23]. If relevant or potentially relevant documentation has been destroyed or lost by the defendant irresponsibly, that is a factor which may weigh against the defendant: Hammond v West Lancashire Health Authority [1998] Lloyd's Rep Med 146.

6) The prospects of a fair trial are important: Hoare at {60]. The Limitation Acts are designed to protect defendants from the injustice of having to fight stale claims, especially when any witnesses the defendant might have been able to rely on are not available or have no recollection and there are no documents to assist the court in deciding what was done or not done and why: Donovan at 479A; Robinson at [32] Adams at [55]. It is, therefore, particularly relevant whether, and to what extent, the defendant's ability to defend the claim has been prejudiced by the lapse of time because of the absence of relevant witnesses and documents: Robinson at [33]; Adams at [55]; Hoare at [50].

7) Subject to considerations of proportionality (as outlined in (11) below), the defendant only deserves to have the obligation to

pay due damages removed if the passage of time has significantly diminished the opportunity to defend the claim on liability or amount: Cain v Francis [2008] EWCA Civ 1451, [2009] QB 754, at [69].

8) It is the period after the expiry of the limitation period which is referred to in sub-sections 33(3)(a) and (b) and carries particular weight: Donovan at 478G. The court may also, however, have regard to the period of delay from the time at which section 14(2) was satisfied until the claim was first notified: Donovan at 478H and 479H-480C; Cain at [74]. The disappearance of evidence and the loss of cogency of evidence even before the limitation clock starts to tick is also relevant, although to a lesser degree: Collins v Secretary of State of Business Innovation and Skills [2014] EWCA Civ 717, [2014] PIQR P19, at [65].

9) The reason for delay is relevant and may affect the balancing exercise. If it has arisen for an excusable reason, it may be fair and just that the action should proceed despite some unfairness to the defendant due to the delay. If, on the other hand, the reasons for the delay or its length are not good ones, that may

tip the balance in the other direction: *Cain* at [73]. I consider that the latter may be better expressed by saying that, if there are no good reasons for the delay or its length, there is nothing to qualify or temper the prejudice which has been cause to the defendant by the effect of the delay on the defendant's ability to defend the claim.

10) Delay caused by the conduct of the claimant's advisers rather than by the claimant may be excusable in this context: Corbin v Penfold Company Limited [2000] Lloyd's Rep Med 247.

11) In the context of reasons for delay, it is relevant to consider under sub-section 33(3) whether knowledge or information was reasonably suppressed by the claimant which, if not suppressed, would have led to the proceedings being issued earlier, even though the explanation is irrelevant for meeting the objective standard or test in section 14(2) and (3) and so insufficient to prevent the commencement of the limitation period: Hoare at [44] – [45] and [70].

12) Proportionality is material to the exercise of the discretion: Robinson at [32] and [33]: Adams at [54] and [55]. In that context, it may be relevant that the claim has only a thin

prospect of success (McGhie at [48]), that the claim is modest in financial terms so as to give rise to disproportionate legal costs (Robinson at [33]; Adams at [55]); McGhie at [48]), that the claimant would have a clear case against his or her solicitors (Donovan at 479F), and, in a personal injury case, the extent and degree of damage to the claimant's health, enjoyment of life and employability (Robinson at [33]; Adams at [55]).”

13) An appeal court will only interfere with the exercise of the judge's discretion under section 33, as in other cases of judicial discretion, where the judge has made an error of principle, such as taking into account irrelevant matters or failing to take into account relevant matters, or has made a decision which is wrong, that is to say the judge has exceeded the generous ambit within which a reasonable disagreement is possible: *KR v Bryan Alyn Community (Holdings) Ltd [2003] EWCA Civ 783, [2003]* 3 WLR 107, at [69]; *Burgin* at [16].”

ANALYSIS:

[42] The claimant, by attorneys-at-law Junior Allsopp and Makala Broome, argues that the court may exercise its powers under section

52 and 53 of the Act to disapply the limitation period. The claimant contends primarily that the defendants' conduct is the cause of the delay and that they have acted prudently.

[43] The defendants claim that the action is an abuse of process and is statute-barred under section 20 of the Act.

[44] In arriving at a decision on whether to allow an enlargement of time to file a claim under the Act, the major consideration of the Court is to weigh the prejudice that will be suffered by the defendants if the claim is permitted to proceed against that of the claimant if the application for leave is denied.

[45] In addition to the very helpful summary of the English case law referred to above, I have considered some of the local cases which have been decided by the High Court. These will be referred to while discussing the statutory factors set out in section 53(1) of the Act.

[46] Additionally, since it is my opinion that the delay in commencing proceedings in this case can be accurately categorized as very substantial I propose to refer to what the learned authors of the text book ***Charlesworth & Percy On Negligence*** have said concerning the matter of delay at paragraphs 4-210 and 4-211 of the 12th edition. That extract reads:

"**Very substantial delay.** Discretion can in an appropriate case be exercised in the claimant's favour even where the delay is substantial, but in such cases careful consideration will have to be given to the ability of the court to hold a fair trial. In ***Buck v English Electric Co Ltd***, a delay of nearly 16 years elapsed between the time when the claimant, who subsequently died, discovered that he had contracted pneumoconiosis, and the time when the proceedings were commenced. It was acknowledged that even five or six years' delay raised a presumption of prejudice to a defendant, but this presumption was rebuttable. The defendants had probably acquired sufficient relevant material as a result of a number of similar claims made against them over the previous decade or more, so that the evidence was unlikely to be any the less cogent now than it has been in the past. As a general rule, the longer the delay after the occurrence of the matters giving rise to the cause of action, the more likely it is that the balance of prejudice will swing against allowing the action to proceed by disapplying the limitation period."

[47] I now turn to the statutory factors:

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

> The limitation period in this case expired on August 8, 2008. The claim was filed on January 29, 2015. Therefore, there has been a delay of approximately 6 years 5 months before a claim was filed; and a delay of 9 years 5 months after the cause of action arose.

[48] The reasons for the delay were not clearly articulated in the claimant's first affidavit. However in his second affidavit he tendered the following reasons:-

i. the delay was caused by his attorneys' efforts to seek a negotiated settlement with the second defendant;

ii. the second defendants' insurers failed to respond to his correspondence in timely manner;

iii. Even though there was a gap in the written correspondence 'there was communication between my attorney-at-law … and the insurer on behalf of the Second Defendant between 2007 and 2011';

iv. His attorney-at-law informed him that his medical history was not completed and the reports were not available.

[49] The above reasons were advanced in an affidavit in response to the affidavit filed on behalf of the second defendant which pointed to an

over 4 years gap in which the attorney for the claimant had failed to respond to a request of the second defendant's insurers' to provide them with the necessary authority on which they rely to indicate that they are liable.

[50] It is true that the attorneys for the claimant did not respond to this correspondence until over 4 years after receipt of the request.

[51] It is also true that since November 6, 2008 the claimant requested the said insurers to indicate their position on liability and despite promising by letter of November 8, 2008 that they will investigate the matter and "revert to them in due course", no response has as yet been forthcoming.

[52] Equity is at the heart of the exercise of the discretion in these matters, and it seems to me that on this point, the second defendant is not coming to equity with clean hands.

[53] In the letter of November 11, 2011 counsel for the claimant, gave two reasons why the second defendant would have been liable. First, the gangway was not secured to the ship as was the procedure. Second, the accident was witnessed by Mr. Reynold Grant of Sea Freight Agencies (the second defendant) who was on the gangway with Mr. Bryan (the claimant) at the time.

[54] In this said letter the insurers were provided with copies of the first defendant's medical reports.

[55] In **Lester McDonald Daniel and M&W Jordan Enterprises Inc. et al** Suit No. Cv 884 of 2007, Barbados High Court (Date of decision, May 5, 2009)

Crane-Scott J. drew attention to the conduct of the defendants' insurers in failing to communicate with the claimant's attorney-at-law for 21 months. This was done as part of the balancing exercise that must take place whenever a defendant or their insurers allege that there has been a delay on the part of the claimant.

[56] In that case the claim was filed about 1 year and 5 months out of time and though the insurers had accepted liability with respect to damage to the claimant's vehicle they had not communicated to the claimant that they were prepared to accept liability for his injuries.

[57] In **Taylor and Sani Services Limited** Suit No. Cv. 1843 of 2012,Barbados High Court (date of decision November 6, 2015) the claimant had commenced proceedings out of time for negligence and/or breach of statutory duty arising out of injury sustained through exposure to chemicals at the workplace.

[58] The Court found that the employer and its insurers who were aware of the employee's claim for injury when on duty since 2009 took no action in response to the claim. Chandler J. observed that there was no response nor exhibits showing a response from the insurers between that time and the filing of the plaintiff's claim on January 17, 2013.

The failure of the insurers to communicate with its insured was cited as the reason for the delay.

[59] In the instant case there is no doubt that a significant part of the delay was due to the failure of the claimant's attorneys to prosecute the claim after there was a failure on the part of the second defendant's insurers to respond to its letters requesting time to indicate whether they accepted liability.

[60] However, the insurers failure to communicate with the claimant's attorneys-at-law after having promised to investigate the matter and revert to them was a very significant reason for the delay.

[61] Having been informed by the first defendant that this case fell into a category that was usually settled by the shipping association the claimant felt assured that the matter would have been resolved amicably.

[62] I am satisfied that as far as the claimant is concerned he relied on his lawyers. The second defendant had the opportunity to cross-examine the claimant with respect to the matters given in his affidavit as reasons for the delay but they opted not to do so.

[63] Given all the circumstances of the case the Court finds that while there was excessive delay on the part of the claimant's attorneys-at-law in pursuing the claim, and certainly in their written communications, the conduct of the second defendants' insurers was a significant reason for the delay. Having regard to the fact that they were notified of the claim within a year of the accident, there was a duty to communicate more with the claimant's attorney-at-law.

[64] In respect of the first defendant I am of the view that the response to the claim was prompt, and liability was consistently denied, and the basis for denial of liability stated with clarity. The first defendant can, therefore, not be faulted for the delay.

(c) The extent to which, having regard to the delay, the evidence advanced by the Plaintiff or the Defendants is or is likely to be less cogent than if the action had been brought within the time allowed by Section 20 …….

[65] The affidavit of David Harding on behalf of the second defendant speaks to the issue of cogency of evidence in one paragraph. It reads:

"I believe that having regard to the length of delay the evidence to be adduced for the Second Defendant is likely to be less cogent than if the action had been brought within the time allowed. Personnel then under engagement to the Defendants who may have witnessed the accident complained of, or who were in positions of responsibility for matters associated with the site, vessel and equipment may no longer be available to the Defendants."

[66] It is difficult for the Court to believe that the second defendant having been notified of the claim within a year of the accident and having made promises to investigate the same were not able to specifically state if any witness(es) or evidence have been affected by delay.

[67] Bearing in mind that the evidential burden of showing that the evidence adduced, or likely to be adduced by the defendant is, or is likely to be less cogent because of the delay is on the defendant, it is my view that the second defendant has not discharged this burden.

[68] It is true that in his submissions, counsel for the second defendant, mentions other matters. However, the only evidence in this hearing is the affidavit evidence.

[69] The second defendant was notified early of the claim and given an explanation of how the accident occurred. Having received this letter and having been supplied with a witness associated with the second defendant who saw the accident, it is my view that any prejudice suffered by the second defendant is unlikely to be great. Furthermore, if the liability of the second defendant depends on the agreement between the first defendant and second defendant this will not be affected by the delay. I have concluded, therefore, that there will not be significant forensic prejudice to the second defendant and a fair trial is still possible at this time.

[70] With respect to the first defendant, the facts reveal that there was a failure to communicate with the first defendant since 2007. Since the claimant had assumed that the second defendant would have met the claim it broke off communication with the first defendant. No medical reports were sent to them and it must have been a surprise when they received a claim in 2015.

[71] Even though the claimant gave the first defendant early notice of the claim, the failure of his attorney-at-law to communicate with the first defendant after 2007 would have affected the first defendant's ability to meet the claim, especially with respect to quantum. Having not had

the benefit of prior notice of medical reports, the first defendant would have a diminished capacity to meet the claim.

(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 plaintiffs cause of action against the defendant.**

[72] In **Thomas v Brown Construction(Ebbw)Ltd. [1981]2 All,E.R. 296 Lord Diplock** explained that the corresponding English provision required that the conduct of the defendants include the conduct of his solicitors and insurers.

[73] It seems to me that a request concerning whether the defendant accepted liability is the type of request that it is reasonable to expect a defendant to respond through his attorneys-at-law or insurers. Although promising to respond to a request from the claimant's attorney at law just over 1 year after the accident, neither the attorneys-at-law nor the insurers of the second defendant ever responded to the claimant.

[74] In contrast the insurers for the first defendant responded indicating that they did not accept liability and generally responded to requests made by the claimant's attorneys-at-law.

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

[75] This factor is not relevant in these proceedings.

(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.

[76] Within seven months of the accident the attorneys-at-law for the claimant wrote to the first defendant notifying them of the accident.

[77] Based on information provided by the first defendant, two months later the attorney-at-law for the second defendant wrote to the Shipping Association of Barbados informing them of the accident and informing them of the claimant's intention to take legal proceedings.

[78] Although it is almost certain that the Association would have informed the second defendant, a letter was written to the second

defendant on November 6, 2006 informing them of the accident and of the claimant's intention to start legal proceedings.

[79] Considering that the claimant would have had to satisfy himself of the liability of the second defendant, I consider that there was prompt notification of the claim to both defendants. It is the late filing of the claim that presents some difficulty for the claimant not the notification of the claim.

(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.

[80] The evidence shows that the claimant sought medical advice 2 months after the accident, and soon after, engaged an attorney-at-law and requested him to commence legal proceedings.

[81] I consider, in all the circumstances, the claimant would have sought the necessary expert advice and would have relied on that advice. To the extent that there was excessive delay on the part of the claimant, it was as a result of the negligence of his attorneys-at-law and not any dilatoriness on his part concerning the prosecution of his claim.

THE BALANCE OF PREJUDICE

[82] In deliberating on this matter I am conscious that the facts of this case are somewhat different from the typical case considered by the local courts.

[83] The vast majority of the applications to disapply the limitation period, have occurred in circumstances where the defendants have either accepted liability or they have led the claimant to reasonably believe that they have accepted liability. See for example,

Wendy Newton v Transport Board Suit 2297 of 2001

Waterman v Caribbean Insurance Company Limited Cv. Suit No. 1204 of 2005 (date of decision February 13, 2006)

Taylor v Sani Services Limited, above

Daniel v M and W Jordan Enterprises Inc and Maynard, above

[84] It is also true that the English cases on the subject in which the equivalent statutory provisions have been disapplied, and the legal principles expounded, have been cases in which liability has been accepted ; the liability of the defendants has not been in doubt;or,the proceedings have been commenced very soon after the expiry of the limitation period.

[85] Therefore, it may reasonably be argued that the legal principles enunciated are applicable only to those cases in which liability is admitted or otherwise not in doubt.

[86] The local case that in my opinion bears the closest resemblance to the instant case is **Best v CP Hotels (Barbados) Inc.** Civil Suit No. (185 of 2004 (Barbados High Court).

[87] In that case the plaintiff, an employee of the defendant,slipped on oil on the floor of the defendant's premises and sustained injuries as a result. About three months after the accident the plaintiff's attorney-at-law wrote to the defendant and its insurers claiming damages on the basis of the negligence of the defendant, its servants,and/or agents.

[88] The insurers for the defendant within 3 months of the correspondence from the plaintiff's attorney-at-law wrote to the plaintiff's attorney-at-law requesting medical reports and a quantified claim.

[89] The defendant's insurers arranged for the plaintiff to travel to Trinidad and Tobago to undergo a Magnetic Resonance Imaging test but after the defendant made the travel arrangements the plaintiff did not attend and nothing was heard from the plaintiff nor his insurers for a period of 4 years 6 months.

[90] In determining that the matter should be allowed to proceed despite the delay Inniss J. made the following observation:

"The purpose of the legislation is not to provide a tortfeasor with a route to escape payment of its just debts arising out of its negligence, but rather to prevent a defendant from being taken by surprise when confronted by a claim a long time after the incident out of which the claim arose. In such circumstances the defendant would have had no opportunity to make provision for the claim or alternatively, prepare its defence".

[91] The court went on to point out that in striking a balance between the interests of the plaintiff and the defendant the main issue is prejudice.

[92] Despite the significant lapse of time referred to above the Court held that the early notification of the claim and the communication between the defendant and its insurers with the plaintiff demonstrated that the defendant had directed its mind to the claim.

CONCLUSION

[93] In this case, with regard to the second defendant, I have come to a similar conclusion.

[94] In arriving at my decision I have also been persuaded by the decision in **Buck v English Electric Co. Ltd.** where even though there was a delay in excess of 10 years the court allowed the action to proceed because the defendants had faced a number of similar claims over the years and would have accumulated sufficient relevant material to ensure that the evidence would not be less cogent than it was in the past.

[95] In the instant case, the first defendant observed that the shipping association, of which the second defendant is a member, had settled several similar cases in the past.

[96] Moreover, the second defendant was given early notification of the claim; had been supplied with the name of a witness who saw the accident; and had itself promised about one year after the accident, to investigate the matter. Based on these facts it is my view that the evidence now is unlikely to be less cogent than it was at the time of the accident.

[97] With those factors in mind, and having regard to the statutory factors and the guidelines referred to earlier, and balancing the prejudice between the second defendant and the claimant, who will suffer a lost opportunity to pursue a significant personal injury claim, if the matter

is not allowed to proceed, I am persuaded that it would be equitable to allow the claimant's cause of action to proceed against the second defendant.

[98] In respect of the first defendant, the absence of communication with this defendant since 2007; the failure to supply this defendant with medical reports; and the length of the delay in respect of the second defendant are all factors that make it inappropriate to disapply the limitation period with respect to this defendant.

I, therefore, refuse the application to enlarge time in respect of the first defendant.

[99] I am of the view that this matter should have an early trial and to facilitate this all parties must attend a Case Management Conference on September 24, 2019.

DISPOSAL

[100] It is hereby ORDERED:

(1) That pursuant to section 52(2) of the Limitation of Actions Act section 20(2) of the said Act shall not apply to the applicant's cause of action against the second defendant;

(2) That paragraph 2 of the Defence filed herein on July 26, 2015 is hereby struck out;

(3) That the claimant's application to have time enlarged against the defendant is dismissed;

(4) That the claimant is permitted to amend its Statement of Claim on or before July 1, 2019;

(5) That the said second defendant is at liberty

to file an amended Defence by July 31, 2019;

(6) That the second defendant is permitted to pursue its counter claim against the defendant;

(7) That the matter is adjourned until September 24, 2019 for a Case Management Conference;

[8] That the issue of costs is reserved until September 24, 2019;

[9] All parties are at liberty to file submissions with respect to costs on or before July 31, 2019.

Cecil N. McCarthy
Judge of the High Court (Acting)