

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

CV No. 1230 of 2011

BETWEEN:

HENDERSON CUMBERBATCH

CLAIMANT

AND

SUNSWEPT INC.

DEFENDANT

Before:

Master Michelle I.L. Weekes, Master of the High Court(ag)

Appearances:

Mr. Edmund Hinkson, Attorney-at-Law for the Claimant
Ms. Zarina Khan, Attorney-at-Law for the Defendant

DECISION

The Application

- [1] This is an application by the Claimant supported by affidavit to allow the present action to proceed and for an order that the Defence filed by the Defendant be struck out by virtue of **Sections 52 and 53 of the Limitation of Actions Act, Cap 231 (the Act)**.

[2] The grounds of the application as outlined in the Notice of Application are that the Defendant reimbursed the Claimant all of his medical expenses during the three year statutory period within which the Claimant's cause of action arose.

[3] The Claimant considers that the Defendant has accepted liability for his injuries due to the fact that the Defendant paid for his medical, physiotherapy, pharmaceutical and other expenses.

Background and Procedural History

[4] The Claimant was employed by the Defendant as a supervisor at "Play-to-Win" Arcade in Marhill Street, Bridgetown. On December 12, 2004 armed men attempted to rob the Arcade and in the course of the attempted robbery the Claimant was shot and as a result sustained a number of serious injuries.

[5] On July 18, 2011 the Claimant filed a personal injury claim against the Defendant under the **Occupiers Liability Act Cap.208** with the Claimant seeking damages totalling \$818,537.74 together with interest and costs for bringing the action.

[6] A Defence and Counterclaim were filed on 16 August 2011, the sole defence being that the alleged cause of action was statute barred as the

claim did not arise within the 3 years of the incident in accordance with **Section 20 of the Act.**

- [7] The Statement of Claim was subsequently amended on 23 August 2012.
- [8] In its Defence to the Amended Statement of Claim filed on September 19, 2012 the Defendant denies all liability for the Claimant's injuries.
- [9] In addition to contending that the action is statute-barred, the Defendant in what is in effect an Amended Defence denies any breach of a duty of care to the Claimant and alleges contributory negligence on the part of the Claimant.
- [10] The Court Ordered the parties to file Written Submissions regarding the claim that the matter is statute barred on two occasions and these were filed and supported by affidavits.

The Claimant's Affidavits in support of the Application to allow the Claimant's action to proceed and in support of Written Submissions.

- [11] In both affidavits the Claimant deposes that the Defendant paid all of his medical expenses and costs up until 2011 in the amount of almost nineteen thousand dollars (\$19,000.00).
- [12] He avers that he initially spoke with an Attorney-at-law in February of 2006 about the issue of monetary compensation for his personal injuries

and consequential losses and that he was advised to speak with the Managing Director of the Defendant about the matter.

[13] He states that he then spoke with the Managing Director of the Defendant who informed him that the Company would look after the matter and that he was informed that he should submit all of his documents. He further deposes that it was as a result of those assurances that he did not retain an attorney-at-law until he consulted Mr. Edmund Hinkson on Wednesday 19 January 2011.

[14] Counsel for the Claimant first wrote on his behalf to the defendant's insurer on 20 January 2011.

[15] The Claimant stated that he believed that his employer would have looked after his interests and did not imagine that it would have been necessary to have an attorney-at-law act on his behalf in the matter.

[16] The Claimant considers that the Defendant has accepted liability for his injuries due to the fact that the Defendant paid for his medical and pharmaceutical expenses and costs up to 2011.

The Defendant's Affidavit in support of Written Submissions

[17] Mr. Peter Odle, Managing Director of the Defendant Company admitted that the Defendant paid the Claimant's medical expenses.

- [18] However he deposed that the payments were done on an ex gratia basis only to ensure that that employee was properly taken care of and that he had never admitted liability.
- [19] He denied receiving any communication from the lawyer the Claimant had initially spoken with but acknowledged that he had told the Claimant that the Defendant would continue to look after his medical expenses.
- [20] In addition he denied advising the Claimant that he would deal with the Company's insurers on his behalf, and also denied leading the Claimant to believe that he would look out for his interests.
- [21] Mr. Odle maintained that he had reminded the Claimant that he should seek legal advice.
- [22] He noted that the Claimant's Attorney was aware that the Defendant's insurers had refused to entertain the claim and that the Defendant had been left to deal with the matter on its own.

Claimant's Submissions

- [23] In his written submissions, the Claimant states that the Court has a discretion under **Sections 52 and 53 of the Act** to allow the action to proceed despite the ending of the limitation period.

- [24] The Claimant relies on **Section 33** of the **United Kingdom's Limitation Act of 1980** which parallels Section 53 of our legislation. The Claimant also refers to several United Kingdom decisions and authoritative texts.
- [25] Cases cited by the Claimant include **Coad v Cromwall Health Authority 1997 1 WLR 189**, **Donovan v Gwentoy's 1990 1 AER 1018**, **Marshall v Martin** (10 June 1987) unreported where the United Kingdom Court of Appeal allowed the Claimant's action to proceed where the Defendants advancement of interim payments led him to believe that liability would not be contested; **Walkely v. Precision Forging Ltd 1979 2 AER 548**. **McCafferty v. Metropolitan Police [1997] 1 WLR**. He also referenced **Miller v London Electrical Manufacturing [1976] 2 Lloyds Reports 284** where the evidence was that a Claimant fearing for his job was reluctant to sue his employer.
- [26] The Claimant also cited the local case of **Edwin Marshall v Cable and Wireless Bartel Limited No 2515 of 2001** where Inniss J. dealt with the issue.
- [27] The Claimant submitted that in this matter the Defendant will not be prejudiced in the presentation of its Defence since the integrity of the evidence has been preserved and has not been adversely affected by the passage of time.

[28] He further submitted that the Claimant having been reimbursed by the Defendant for his expenses led the Claimant to reasonably believe that liability would not be contested. In addition he considered that the financial loss to the Claimant would be unbearable if the claim is dismissed and that he would be severely prejudiced.

Defendant's Submissions

[29] In its written submissions the Defendant argues that in accordance with **Section 20(2) of the Act**, the date of the incident is the relevant date for ascertaining when time should run since the Claimant should have been aware of his cause of action on that date.

[30] The Defendant contends that **Sections 46 and 47 of the Act** relating to the 'Extension or Exclusion of Ordinary' time limits are applicable to persons under a disability and are irrelevant in this matter.

[31] While the Defendant admits to assisting the Claimant with his expenses, the Defendant states that this was done to assist the Claimant who was still the Defendant's employee after the incident and could not on his own meet his medical expenses. According to the Defendant there was no acceptance of liability in any way.

[32] The Defendant concludes that the factors to be considered are set out on **Section 53 of the Act** and maintain that there is no application before the Court to extend the liability period beyond the three year period. Finally the defendant submits that even if such an application was before the Court there is no legal basis for granting an extension without evidence.

The Issues

[33] (1) Whether there is an application before the Court to extend liability beyond the three year period.

(2) Whether the Claimant's action is statute barred under **Section 20 (2) of the Act** or whether it falls within the exception or exclusion of the limitation period provided for in **Sections 52 and 53 of the Act**.

Whether there is an Application for extension of time before the Court

[34] The Defendant raises this issue in only one sentence in the final paragraph of its written submissions and the Claimant does not address it at all. However since the issue has been raised I will address it.

[35] **The Supreme Court Civil Procedure Rules 2008 (CPR) at Part 11 General Rules about Interlocutory Applications for Court Orders** provide at **Rule 11.6** that

“(1) An application must state

- (a) what order the applicant is seeking; and
 - (b) briefly, the grounds on which the applicant is seeking the order
- (2) The applicant must file with the Application or not less than 3 days before the hearing of the application a draft of the order sought and serve a copy on all respondents to whom notice is given”

[36] In the present case, the Claimant’s Application to Proceed is entitled **“Notice of Application to allow Claimant’s Action to proceed and to Strike out Defence”**. In addition, the Application requests that the Defence of North Beach filed on 16 August 2011 be struck out by virtue of **Sections 52 and 53 of the Act**. I therefore consider that implicit in both the heading and content of the application is that it is an application to extend the time limit in accordance with **Sections 52 and 53 of the Act**. On its face therefore the present application relates to whether the matter is statute barred.

[37] However I note that the Application was never amended to apply directly to the **Defence to Amended Statement of Claim**.

[38] **CPR 11.9** relates to **Powers of Court in relation to the conduct of application** and provides there that the Court may exercise any power which it might exercise at a case management conference. Powers at case

management conference are dealt with at **CPR 26.1(1)** and include the power to order written submissions. On 21 November 2014 and 31 March 2014 I specifically ordered written submissions in relation to the claim that the matter is statute barred subsequent to the filing of the **Defence to the Amended Statement of Claim** on September 19 2012.

[39] In the circumstances taking into account the relevant sections of **CPR Parts 11 and 26** together with the title and content of the application I consider that the matter is properly before the court.

Whether the Claimant's action is Statute barred

The Law

[40] **Section 20 of the Act** applies to a number of actions including those relating to personal injury.

Section 20 (2) provides that:

‘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.

Sections 52 and 53 are also relevant. **Section 52(1)** states that:

- (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.

[41] **Section 53 (1)** of the Act reads as follows:

“In acting under Section 52 the court must have regard to all the circumstances of the case and in particular to

- (a) the length of, and the reasons for, the delay on the part of the plaintiff;
- (b) the extent to which, having regard to the delay, the evidence adduced 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 the Defendant 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 the 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.

[42] While the Court should be mindful of these factors when making its determination the statement of Lord Griffiths in **Donovan v Gwentoy's Ltd [1990] 1 WLR 472** is also instructive. He stated that:

“this subsection bestows a discretion in unfettered terms to allow an action in respect of personal injuries or death to proceed despite the expiry of the limitation period if he

considers it fair to do so having regard to the degree which the plaintiff would be prejudiced on the one hand and the defendant on the other hand.”

The factors set out in **Section 53 (1)** do not therefore limit or reduce the Court’s discretion in any way.

[43] Lord Griffiths went on to say at page 479:

“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 deal... In weighing the degree of prejudice suffered by a defendant it must always be relevant to consider when the defendant first had notification of the claim and thus the opportunity he will have to meet the claim at the trial if he is not permitted to rely on his limitation defence.”

[44] In the local case of **Edwin Marshall and Cable Wireless Bartel Limited**, Inniss J. agreed with Lord Griffiths and stated that:

“The principal concern of the Court is the degree to which granting or denying the plaintiff the requested enlargement of time would cause prejudice to the plaintiff or the defendant”

[45] **O’Hare and Browne Civil Litigation 15th ed.** at page 78 discuss the issue.

They state that:

“In acting under s.33 the Court must have regard to all the circumstances of the case and in particular to six specified matters including: “ (a)the length of and the reasons for the delay on the part of the claimant” and “(f) the steps if any taken by the Claimant to obtain medical, legal or other expert advice and the nature of any such advice he may have received”.

These two factors are often the decisive ones. The other four deal with the conduct of the parties and the duration of any period of supervening mental incapacity suffered by the claimant”

[46] Longmore LJ’s guidance in **Davidson v Aegis Defence Services (BVI) Ltd and another [2013] EWCA Civ 1586** is also useful as it speaks to the prejudice which may be suffered by a Defendant.

“It seems to me that in the exercise of the discretion the basic question to be asked is whether it is fair and just in all the circumstances to expect the defendant to meet this claim on the merits, notwithstanding the delay in commencement. The length of the delay will be important not so much for itself as to the effect it has had. To what extent has the defendant been disadvantaged in his investigation of the claim and/or the assembly of evidence in respect of the issues of both liability and quantum? But it will also be

important to consider the reasons for the delay. **Thus there may be some unfairness to the defendant due to the delay in issue, but the delay may have arisen for so excusable a reason that, looking at the matter in the round, on balance it is fair and just that the action should proceed. On the other hand, the balance may go in the opposite direction, partly because the delay has caused procedural disadvantage and unfairness to the defendant and partly because of the reasons for the delay or its length are not good ones”.**

Application of the Relevant Factors to the present case

[47] Length of and reasons for the delay – this period is the delay after the expiry of the limitation period. While this is a period of some four years the Claimant has explained the reason for the delay in his affidavit. According to him he first consulted an attorney-at law on the issue of monetary compensation for his personal injuries in or around 2007 about 18 months after the incident. That Attorney-at-law told him to speak with the Managing Director on the matter. He did so and it is not in dispute that the defendant paid all of his medical expenses up to the time of the filing of the action. However he did not officially retain counsel to act on his behalf until January of 2011 It was because of this fact and other assurances made by the Defendant Company that he did not retain an

attorney-at-law until 2011. The Court accepts the Claimant's explanation of the delay and considers it to be a reasonable one.

[48] The cogency of the evidence- the facts of this matter are not in dispute. The only dispute appears to be that in its Defence the Defendant pleads contributory negligence on the part of the Claimant. Counsel for the Claimant submits that the Defendant would not be prejudiced since the integrity of the evidence has been preserved and that the final detriment to the defendant is not likely to be greater except on the issue of additional interest payments. On the basis of the pleadings before the Court I do not consider that the delay will affect the quality of the evidence.

[49] The conduct of the Defendant after the cause of action arose- Although both sides give different explanations for the payment of the medical expenses, it is not in dispute that these were paid by the Defendant and again in the Court's view it was reasonable for the Claimant to conclude that the Defendant had accepted liability.

[50] Advice sought by the Claimant- the Claimant sought medical and legal advice both before and after the expiry of the limitation period.

[51] The Claimant has not suffered a disability within the meaning of **the Act** since he is not a minor nor did he suffer from any mental disorder. However the Court is mindful of the severity of his injuries and the

likelihood and potential expense of continued care as evidenced by the medical reports filed with the Statement of Case. The Court accepts the Claimant's submission that the financial loss to him would be unbearable if the claim is dismissed and that he would be severely prejudiced

While the Claimant was not prompt in bringing his claim I find that the Claimant's delay was due to the payment of all of the medical expenses both during and after the expiration of the limitation period. I also find that the Defendant is unlikely to be prejudiced by the delay in filing the claim. I therefore consider that it would be equitable to allow the action to proceed.

Disposal

[52] In the circumstances the Court makes the following orders:

(i) **Section 20(2) of the Limitations of Actions Act** shall not apply to the Claimant's cause of action.

(ii) The time limited for filing the Claimant's cause of action is enlarged to include July 18 2011 notwithstanding that the statutory limitation period fixed by section 20 of the Limitation of Actions for filing the claim would by that date have expired.

(iii) The **Defence to the Amended Statement of Claim** filed on September 19 2012 was a full Defence in addition to raising a point of law. Paragraph 3 only of the Defence to the Amended Statement of Claim which raises the defence of limitation of actions is struck out.

(iv) The costs of this application will be the Claimant's in any event.

M.L. Weekes

Michelle I.L Weekes
Master of the High Court (ag)

27 March 2019

Apology

I apologise unreservedly for the delay in the delivery of this decision which was due in part to my assignment to the Criminal Sessions and the recent dislocation of the Supreme Court and the Registration Department.

M.L. Weekes

Michelle I.L Weekes
Master of the High Court (ag)

27 March 2019