BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

(CIVIL DIVISION)

Civil Suit No: 639 of 2020

BETWEEN:

CARL WATSON **CLAIMANT**

AND

NATIONAL PETROLEUM COMPANY **DEFENDANT**

Before: The Hon. Madam Justice Shona O. Griffith, Judge of the High Court

Date of Hearing: 2021 9th June

Date of Decision: 2021 13th July (Oral)
2022 12th January (Written)

Appearances: Ms. Liesel N. Weekes for the Claimant.

Ms. Alicia A. Archer for the Defendant.

AND

Civil Suit No: 544 of 2020

BETWEEN:

GRACE GILL **CLAIMANT**

AND

THE ATTORNEY GENERAL **DEFENDANT**

Before: The Hon. Madam Justice Shona O. Griffith, Judge of the High Court

Date of Hearing: 2021 27th September

Date of Decision: 2021 16th December (Oral)
2022 12th January (Written)

Appearances: Mr. Michael R. Yearwood QC in association with Ms. Nicole Roachford for the Claimant.

Ms. Marsha Lougheed, Principal Crown Counsel and Ms. Nicole Boyce, Senior Crown Counsel for the Defendants.

Personal Injuries – Limitation of Actions Act, Cap. 231, sections 20, 52(1) & 53(1) - Application to exclude limitation period – Factors to be considered in exercise of discretion – Assessment and balancing of factors.

Personal Injuries - Statutory causes of action - Limitation (Public Authorities) Act, Cap. 206 – Application of Act only to public act, duty or authority – Whether statutory duty public.

DECISION

Overview

[1] This decision comprises two separate claims, not heard together, but which concern the same issue and have similar underlying facts. Both Claimants seek damages for personal injuries and filed their claims outside the expiry of their respective limitation periods. Both Claimants filed Applications for the limitation period to be disapplied pursuant to section 52(1) of the Limitation Act, Cap. 231.

The Applications were determined as preliminary issues in each matter; heard via affidavit evidence, written and oral submissions; and were determined in the first instance by oral rulings, now reduced into writing. Both Applications have been reduced into this single written ruling, as notwithstanding their similarity in facts, they have given rise to dissimilar results, which the Court considers illustrative of the extent to which applications of this nature are truly dependent on individual facts and circumstances. The Decision is set out as follows:-

I CV639 of 2020 Carl Watson v NPC

Introduction and Background

[2] This is a claim for damages for personal injuries which was filed in July 2020 arising out of injury sustained by the Claimant during the course of his employment with the Defendant. The injury complained of was sustained in February 2013 whilst the Claimant was carrying out duties as a general worker employed by the Defendant. The Defendant filed a defence disputing liability and pleaded the obvious point that the claim was statute-barred. The Claimant was obliged to and did file an application pursuant to section 52 of the Limitation Act, Cap. 231, to exclude the three-year limitation period which would have expired in relation to the injury sustained, in February 2016. The Defendant resisted the Application, which was ventilated via written and oral submissions. The Court delivered its oral decision in July 2021, which is now reduced into writing.

[3] The Claim filed is one for the Defendant's negligence and breach of statutory duty in failing to provide a safe and proper system of work. The Claimant alleges that during his employment as a general worker with the Defendant, he was required to lift a heavy object which caused injury to his back, eventually resulting in his permanent incapacitation and resulting termination from the Defendant's employ on medical grounds. The incident causing the

injury occurred on the 6th February, 2013, thereby meaning that the limitation period expired on the 5th February, 2016 and the action instituted in July 2020 was therefore more than four (4) years after the limitation expiry. The grounds of the Application pleaded that the Claimant had a good arguable case; a full defence having been filed, it was unlikely that the Defendant would be prejudiced in its ability to defend the claim; and the conduct of the Defendant significantly contributed to the delay which resulted in the expiry of the limitation period.

[4] The Claimant in his supporting affidavit to the Application, referenced an incident in which he alleged that he sustained injury to his back at his workplace in 2008 and submitted a claim to his employers, which was acknowledged. The reference to this injury in 2008 however, was not distinctly pleaded as a cause of action and is not considered relevant to the determination of the Application to extend the limitation period applicable to the 2013 incident. The alleged facts according to the Claimant, are that:-

(i) By written memorandum to his manager in March 2013, he notified his employers of the February 2013 incident and his resulting injury;

(ii) He was directed by Human Resources for medical attention to assess his injury, whereby he was diagnosed with an injury to his back, prescribed medication and advised against heavy lifting;

(iii) The Claimant returned to work but was later that year certified by a doctor as unfit to continue employment as a general labourer due to his inability to lift heavy objects. The Claimant was eventually medically boarded with effect from February 2014;

(iv) The Claimant says he sought legal advice in late 2014 and in May 2015 his attorney notified the Defendant in writing of his intention to claim for the injury he sustained in February, 2013;

(v) The letter sent by his attorney claimed damages for wrongful termination (calculated in accordance with the Severance Payments Act), as well as damages for the injury sustained in the course of employment;

(vi) An answer to this letter was demanded from the Defendant or its insurers (who had been notified by copy letter), within 28 days;

(vii) Between May and July, 2015 the Defendant responded via their attorney-at-law requesting on the one hand, further time to respond in order to seek instructions; the Defendant's insurers also responded, advising that the latter's inquiries relating to liability were ongoing;

(viii) The Defendant's insurers later responded posing several questions in answer to the Claimant's request for settlement of an invoice to obtain a medical report.

The Claimant (by his attorney) responded to the questions posed and in November 2015 the insurance company paid for the medical report;

(ix) In September 2016 the Claimant through his attorney requested another medical report from a different doctor and in October 2016 the Claimant requested of the insurers that they settle the cost for this medical report;

(x) The insurers refused and several months later (in June 2017), the Claimant through his Attorney threatened legal proceedings (in the form of an application for interim payment;

(xi) By letter written June 2017 (received in July 2017), the Defendant declined to pay for the further medical report as requested by the Claimant and expressly denied liability for the claim in writing;

(xii) There was no further correspondence between the parties on the claim for personal injuries, and the proceedings herein were filed in July 2020.

The Application and Submissions

[5] In the round, the submissions in support of the Claimant's Application to disapply the limitation period cited the obvious prejudice to him if denied the opportunity to advance his claim. Conversely, the Claimant contended that there could be no greater prejudice to the Defendant as it, (as well as its

insurers), had received early notification of the claim from since May 2014. The Defendant would therefore have had all opportunity to make and carry out its inquiries in order to defend the claim. Further, it was submitted that the Defendant's conduct was such that the Claimant was led to believe that liability was not an issue. Particularly, the Defendant's agreement to pay for the Claimant's medical report after asking a series of questions; as well as their response when asked to pay for a second report, which was to the effect that the first report provided a sufficient answer to their inquiries.

[6] In addition to the obvious prejudice in the loss of opportunity to pursue his claim and the Defendant's conduct, the Claimant also submits that he sought early medical attention (of which the Defendant was aware), illustrating that he was not dilatory in making his claim (as distinct from instituting legal proceedings) against the Defendant. The Claimant accepts that his claim filed in July 2020 was commenced after significant delay after the date of the incident; however, contends that it was the Defendant's conduct that led him to believe that his claim was being amicably settled. In this regard it was also pointed out that liability was denied some 14 months after the limitation period expired. Thereafter, the Claimant was impecunious and unable to fund his litigation.

Most importantly, the Claimant submitted that the Defendant had not demonstrated that it would not be able to conduct a defence of the matter as a result of the lapse of time. To the contrary, the Defendant had already filed a comprehensive defence which must have been based on instructions and an ability to produce evidence to support it.

[7] With respect to the applicable legal principles, Counsel for the Claimant alluded to the underlying rationale of the prescribed period of limitation as being to protect a defendant from having to face a claim it never expected to meet. Reference was made to **Donovan v Gwentoys**[1] as illustration of this rationale, where a defendant was first notified of a former employee's claim against them some five (5) years after the cause of action arose. Aside from the notification after the expiry of limitation, the claim did not contain sufficient particulars to properly enable the defendant to investigate or answer it at that later stage. Counsel for the Claimant distinguished the situation in the case at bar from that in ***Donovan,*** insofar as there was early notification to the Defendant and its insurers of the claim, and the Defendant acknowledged the claim and conducted inquiries, as evident from the questions posed prior to payment for the medical report on behalf of the Claimant.

[1] [1990] 1 All ER 1018

[8] Further, as illustrated by the decision of **Best v C.P. Hotels Inc.**[2], an issue for the court to determine is whether the delay in bringing the claim affects the cogency of the evidence available to the defendant in order to properly defend the claim. As shown in ***Best***, if the delay does not seriously affect the evidence available to the Defendant, the Court should exercise its discretion in favour of disapplying the limitation period. In this case, Counsel for the Claimant submits that the Claimant exhibited a number of documentary exhibits, and the Defendant itself, also exhibited documents relevant to the Claim. Further, the Claimant's affidavit revealed that witnesses relevant to the issue of liability remained available to participate in the trial, notwithstanding the number of years elapsed since the incident complained of.

[9] Additionally, Counsel for the Claimant contends that the Defendant's behaviour in paying for the Claimant's medical report, together with the tenor of the correspondence exchanged, provided a reasonable basis for the Claimant to infer that liability had been accepted. Reference was also made to the case of **Daniel v M&W Jordan Enterprises**[3], in which the defendant's conduct therein was held to provide a reasonable basis to infer the acceptance of liability, even in the absence of any express position taken by the defendant.

[2] Barbados High Court No. 185 of 2004
[3] Barbados High Court, No. 844 of 2007

On the whole, Counsel for the Claimant submitted that the potential prejudice to the Claimant if the limitation period were not disapplied was demonstrably greater than that to the Defendant, should the claim be allowed to proceed. Further, consideration of the factors prescribed in section 53 of the Act, was such that it was fair and equitable for the Court to exercise its discretion in favour of the Claimant.

[10] The Defendant's position is that its potential prejudice is greater than the Claimant's, particularly having regard to the availability of evidence. The Defendant accepts that there was early notification of the claim but points out in relation to the incident firstly, that the Claimant initially alleged having received instructions from someone whom he did not name. Further, whilst the Defendant was able to identify who the Claimant's supervisor at the material time was, that person was no longer employed by the Defendant and in any event not in a position to give evidence. Even further, the Claimant in an affidavit (filed subsequent to the Application and Claim), newly alleged that there were four (4) crew members present at the time of the incident, however he named just one of those persons and gave no particulars which could assist in identifying such other persons.

[11] In relation to the facts newly alleged, Counsel submits that the information in the Claimant's subsequent affidavit, would not have been part of the Defendant's prior inquiries. Further, the Claimant's assertion that the Defendant clearly has in its possession documentary evidence concerning the incident speaks only to medical evidence. The Defendant having disputed liability, the issue of how the accident occurred, as distinct from medical evidence supporting the alleged injury, would still be required in order to determine liability. As a result, the Defendant submits that it is at a disadvantage in relation to the availability of evidence to defend its case.

[12] Additionally, the Defendant contends there was no reasonable basis for the Claimant to have inferred that liability had been accepted. The payment of the medical report could not in the circumstances amount to an acceptance of liability, and neither could the questions posed prior to issuing payment. It is submitted that the questions posed were clearly designed to assist the Defendant with its inquiries into the incident. Moreover, the Defendant's position is that the Claimant had no explanation for failing to commence the claim for the next three years after they had definitively communicated their denial of liability by letter in June 2017.

The Defendant declines to accept that the Claimant's plea of impecuniosity prevented the filing of a claim, particularly given that the Claimant was represented by Counsel from the inception when the claim was notified.

[13] The Defendant also contends that the Claimant's case by its own evidence, is a weak case, in that the medical report submitted by the Claimant (paid for by the Defendant), did not attribute the Claimant's chronic back pain to the lifting incident as alleged by the Claimant. Instead, the Claimant's back pain was attributed to ageing. Further in this regard, subsequent to the commencement of the Claim, the Claimant sought clarification from the doctor as to the cause of his condition and the response received did not vary from the doctor's findings expressed in the report. Any medical evidence to the contrary would be a contradiction of important evidence arising from the Claimant's own case, thereby rendering the claim a weak one.

[14] Counsel for the Defendant primarily relied on the cases of **Thompson v Brown**[4] and **Cain v McKay**[5] as authorities on the application of section 53 of the Limitation Act. Counsel points out that according to ***Thompson***, whilst the relevant period of delay is that occurring after the expiry of the limitation period, the Claimant in this case is faced with significant delay after that date

[4] [1981] 2 All ER 296
[5] [2008] EWCA 1451

of expiry, for which there is no good explanation. More particularly, ***Thompson*** is also authority for the position that whilst the delay referred to in section 53 is that after the expiry of limitation, the exercise of the court's discretion in determining the overall question of fairness, entitles the court (if appropriate), to take into account the entire period of delay, i.e. from the date the cause of action arose. Counsel maintains that the Defendant's conduct from the inception of receiving notification of the claim could not reasonably impute acceptance of liability on their part. Having therefore been legally represented, the entire period of delay should be considered relevant to the question of fairness.

[15] By way of contrast, Counsel for the Defendant pointed out that in the cases relied on by the Claimant, firstly **Best v CP Hotels (Barbados) Inc.**[6] - there was a clear distinction in the conduct of the defendant, which had invited a quantified claim and paid for the claimant to travel overseas to receive medical treatment, as well as the cost of such treatment. Further in **Daniel v M&W Jordan Enterprises Inc.**[7] the defendant had accepted liability and settled the claimant's special damages by paying for the repair of the claimant's motor vehicle.

[6] Supra
[7] Supra

It was held in that case, that albeit there was no express agreement confirming acceptance of liability, the defendant's settlement of the claim for special damages was certainly a reasonable basis from which the claimant therein had been entitled to infer acceptance of liability for his personal injuries. Counsel for the Defendant herein submits that the Defendant's singular action of paying for a medical report in this case cannot be equated with the action taken by the either of the defendants in ***Best*** or ***Daniel***. In any event however, the Defendant had expressly denied liability subsequent to paying for the medical report.

II CV544 of 2020 Grace Gill v Attorney General

Introduction and Background

[16] In June 2020 the Claimant Grace Gill filed a Fixed Date Claim supported by affidavit, seeking an order under section 52(1) of the Limitation Act, Cap. 231 for the limitation period to be disapplied, in respect of a personal injury claim which arose in July 2013. The Claimant was directed by the Court to file a statement of claim[8], which she did in August 2020. By that statement of claim, the Claimant, a teacher at St. Silas Primary School, St. James,

[8] The claim was not one properly begun by FDC.

pleaded that in July 2013, she tripped and fell on a piece of floor covering at the entrance of a classroom in the school. As a result of that fall, she sustained severe personal injuries, loss and damage. The Claimant pleaded breach of statutory duty under the Occupier's Liability Act, Cap. 208;[9] breach of statutory duty under the Safety and Health at Work Act, Cap. 356;[10] and common law negligence.

[17] The incident complained of according to the Claimant, is that on the 1st July, 2013, whilst attending to her duties as a primary school teacher, she tripped and fell on the floor at the entrance to a classroom, sustaining soft tissue injuries to her right shoulder, side and left knee. The Defendants did not file a defence, but filed an affidavit in response, opposing the Application, which set out their denial of liability for the incident. The Defendants allege that the Claimant reported the incident as occurring because she felt dizzy and unwell that day and fell. Primarily however, the Defendants rely on their limitation defence and contend that there is no good reason for the Court to exercise its discretion to extend the limitation period, having regard to the circumstances of the Claimant's failure to file her claim within the relevant limitation period.

[9] Section 4
[10] Section 43

The Application and Submissions

[18] As prescribed by section 52 of the Limitation Act, the Claimant asserts that it would be fair and equitable for the Court to exclude the limitation period of three (3) years as it pertains to the cause of action in negligence. In relation to the specific factors to which the Court must have regard under section 53(1) of the Act, the Claimant set out the circumstances which arise for consideration in her affidavit in support of the Application, in the following manner:-

(i) Delay – insofar as the incident occurred on the 1st July, 2013, the Claimant by her attorney-at-law wrote to the Ministry of Education, in November 2014 enquiring as to their position on liability for the injuries alleged to have been sustained. There were exchanges of correspondence between the attorney-at-law and the Ministry between November 2014 and January 2019. As a result of the correspondence exchanged, the Claimant held the view that liability had been accepted and she was patiently trying to pursue a settlement on quantum. The Claimant's attorney is shown to have written to the Defendant following up about the matter, some eleven (11) times within the five (5) year period above. As a result, the Claimant submits that the delay was caused by the conduct of the Defendant;

(ii) Cogency of Evidence – the Claimant's position is that as the matter requires determination only of quantum, she is in possession of (and the Defendant has been provided with), all of the relevant medical evidence necessary to quantify her claim;

(iii) Conduct of the Defendant since the cause of action arose – the Defendant requested medical reports but has done nothing to facilitate settlement of the matter;

(iv) Duration of disability arising after cause of action arose – the Claimant reports that to date she is afflicted by painful injuries, some of which are expected to be permanent. As a result of her injuries the Claimant says she was retired in the public interest on the basis of medical unfitness to work;

(v) Extent to which Claimant acted promptly and reasonably relative to cause of action – the Defendant and its insurers were formally notified of the claim approximately 1.5 years after the incident, but the Defendant would have been aware of the incident given that it occurred on its premises. It is contended that the Defendant had ample time within which to investigate the circumstances of the incident;

(vi) Steps taken by Claimant to obtain medical, legal or other advice and the nature of any such advice received – the Claimant says she sought and received medical attention on the day of the incident, and produces a report of that visit as well as further medical reports in respect of her injuries.

[19] The overall position of the Claimant regarding the factors to be considered by the Court in determining whether it would be just and equitable to exclude the limitation period, is that the Defendant by its responses led the Claimant to believe that liability was not an issue. This position is held particularly due to the Defendant's correspondence requesting receipts and medical reports arising from the incident; a fully quantified claim had been provided and the Defendant never denied liability. Further, given that the issue would be one of quantum only, the Defendants would suffer no prejudice in defending the claim as the main evidence would be the medical evidence to be provided by the Claimant, of which the Defendant had already had sight.

[20] The Defendant's position is that liability was never admitted and there is no reasonable basis upon which liability could have been presumed admitted, having regard to the Defendant's conduct. Further, that the delay is of such that the Claimant's attempt to pursue her case at this stage amounts to an abuse of process.

Counsel for the Defendant relied on **Ronex Properties Ltd v John Laing Construction Ltd.**[11] in support of the submission that the late filing was an abuse of the Court's process. Also, referring to **Thompson v Brown,**[12] in construing the relevant period of delay, Counsel for the Defendant identifies that period as approximately four (4) years, i.e., subsequent to the expiry of the limitation. Further, it was contended that the Claimant has no good explanation for failing to file her claim, having been represented by an Attorney-at-Law from the time notice of the claim was given to the Defendant. With respect to the correspondence written by the Defendant, the responses all merely indicated that the matter was being attended to by the Ministry.

[21] With respect to the Ministry's request for medical receipts to process the matter, Counsel for the Defendants submit that this request was also not capable of establishing any reasonable basis upon which the Claimant could infer acceptance of liability. There was never any request for the Claimant to submit a quantified claim and having received no response from the Defendant to the claim, there was no basis to infer the Defendants' acceptance of liability. Counsel for the Defendants further submits that its ability to defend the claim has been seriously prejudiced by the lapse of time, in that the

[11] [1983] 1QB 398
[12] Supra

former principal of the school where the Claimant fell had retired and is not in a position to testify. Finally, in relation to the applicable section 53 factors, Counsel for the Defendant submits that the Claimant was obviously aware from at least November 2014 of her right to damages, given the letter written to the Ministry by her Attorney. However, the Claimant failed to act promptly to preserve her legal rights by filing a claim.

[22] In addition to refuting that it would be fair and equitable for the Court to grant the Claimant's Application to exclude the limitation period, the Defendants submit that the two statutory claims are statute barred under the Limitation (Public Authorities) Act, Cap. 206, which likewise carried a limitation period of three years. Unlike the provisions of the Limitation Act however, there is no provision under the Limitation (Public Authorities) Act to save an action that is statute barred. Queens Counsel for the Claimant agrees with the finality of the limitation period under the Limitation (Public Authorities) Act, but disputes that the Act is applicable to the claim. Queens Counsel argued that the Act protects liability in relation to 'persons' carrying out public duties, and the Crown does not fall within the definition of 'person' in the Interpretation Act. The protection of the Act instead is afforded to natural persons or statutorily created bodies, carrying out public functions or duties.

III Discussion and Analysis

The Law

[23] Sections 20, 52(1) and 53(1) of the Limitation Act are commonly litigated in Barbados, thus the Court need only set out its understanding of the principles regarding application of these sections, which can be extracted from the well-known authorities both local and persuasive from abroad. The principles include the following, which are firstly not exhaustive, but more importantly, are always relative having regard to attendant circumstances:-

(i) The overall question governing the Court's exercise of discretion to exclude the limitation period is whether it would in all the circumstances of each case, be equitable to do so, having regard to the degree of prejudice that would be occasioned respectively by the parties;[13]

(ii) The most obvious prejudice to a claimant would be to be deprived of a cause of action for recompense for injury or damage sustained; whilst the most obvious prejudice to a defendant would be to be deprived of a complete defence of limitation.[14]

[13] Limitation Act, section 52(1)
[14] Thompson v Brown *supra* per Lord Diplock @ 750

These respective prejudices generally balance each other out[15], but can be mitigated or exacerbated depending on the existence of relevant factors as listed in section 53(1);

(iii) The Court's discretion under section 52 is unfettered[16], thus other factors not listed under section 53(1) can also be considered. For example - a claimant's obviously weak claim[17] or a defendant's prior admission of liability;[18]

(iv) If the time elapsed after the expiry of the limitation period is very short, even present a good defence, the exclusion of the limitation period may be regarded as a windfall to the defendant;[19]

(v) The delay referred to in section 53(1)(a) is that period from the expiry of the limitation period, not the date from which the cause of action accrued;[20]

(vi) However, the length of delay from the date of accrual of the cause of action could in cases of significant delay, be a factor in weighing

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[15] ***Hartley v Birmingham City DC*** [1992] 2 All ER 213 per Parker LJ @ 224

[16] ***Firman v Ellis*** [1978] QB 886 per Lord Denning MR @ 903-906. (NB the actual decision on the issue of a writ filed but not served within the limitation period was deemed overruled by *Walkley v Precision Forgings Ltd 1979 1 WLR 606 HL* (itself departed from by the HL in *Horton v Sadler et anor [2007] 1 AC 307*) but the dictum regarding the unfettered nature of the discretion under section 53 (UK Limitation Act, section 33) was affirmed by Lord Diplock in ***Thompson v Brown*** (@ 752 and *Horton v Sadler* per Lord Bingham of Cornhill @ paras 26-27)

[17] Thompson v Brown supra, per Lord Diplock @ 750; ***cf Nash et al v Eli Lilly & Co et al*** [1993] 4 All ER 383 @ 403-404

[18] For example, ***Best v CP Hotels Inc***. supra

[19] ***Thompson v Brown*** supra per Lord Diplock @ 750; ***Best v CP Hotels Inc***. supra

[20] Ibid @ 751

prejudice to the defendant,[21] particularly where the claim is a weak one;[22]

(vii) The reasons for failure to file the claim are important especially given that it is the claimant's burden to satisfy the court that it is equitable to disapply the limitation period;[23]

(viii) Sections 53(1)(c), (e) & (f) address the conduct of the parties and such conduct must be applied within the particular context of the parties' actions (or omissions), relative to the expiry of the limitation period, as well as having regard to the importance of conduct when seeking to apply equity.[24] For example:-

(a) The (potential) defendant's response to reasonable requests for information or inspection for the purpose of ascertaining facts relevant to the (potential) claimant's cause of action (section 53(1)(c)) means that the defendant must not be obstructive in affording access to the claimant for such information, but there is no obligation on the defendant to volunteer such information;[25]

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[21] ***Burke v Ashe Construction Ltd*** per Potter LJ @ para 46***; KR et al v Bryn Alyn Community (Holdings) Ltd (In liquidation) et anor*** [2004] 2 All ER 716 per Auld LJ @ para 74, considering the application of UK Limitation Act, section 33.
[22] ***Nash et al v Eli Lilly et al***, fn 26 supra
[23] *A v Hoare [2008]* AC 844 per Lord Hoffman @ para 49
[24] ***Thompson v Brown*** supra, per Lord Diplock @ 751
[25] Ibid

(b) Outside of responses to requests for information, conduct on the part of the defendant to be considered should still have a bearing on whether or not, and if so the degree to which, it affected or influenced the claimant's actions or ability to act within the limitation period;[26]

(c) The claimant's conduct referred to in sections 53(1)(e) & (f) pertain to how quickly the claimant sought to assert his or her right of action against the defendant (once aware of such), including obtaining medical, legal or other expert advice. The reference to 'the nature of any such advice received', must have bearing to whether or not, and if so, the extent to which such advice affected the claimant's ability to act within the limitation period;

(d) The conduct of both the claimant and defendant referred to in sections 53(1)(c), (e) & (f) would include the conduct of or conduct attributable to their attorneys-at-law;[27]

(e) Where a claimant has acted reasonably and promptly, the actions of his or her lawyers in failing to file a claim within the limitation period should not weighed against them;

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[26] For example, inviting the claimant to submit a quantified claim as in ***Best v CP Hotels Inc***. supra

[27] ***Thompson v Brown*** supra, per Lord Diplock @ 751-752

(ix) The disability occurring after the accrual of the cause of action, is not the existence of a physical disability, but a legal disability affecting a claimant's legal capacity, such as a minor or patient under the mental health legislation.[28] However, given the overall discretion of relevant circumstances, a physical disability occurring after the accident can have a bearing on the exercise of the Court's discretion, but the disability must be shown to have affected the ability of the claimant to pursue his or her right of action.[29]

[24] In the round therefore, the Court considers that the exercise of its discretion to disapply the limitation period as provided under section 52(1) of the Limitation of Actions Act, Cap. 231, is firstly one that is unfettered, albeit to be grounded in the criteria prescribed in section 52(1) (relative prejudice) as informed by the overall fairness of the case based upon all the circumstances, particularly, any applicable factors as set out in section 53(1). The overriding object of the limitation period is to ensure that a defendant is not visited with stale claims outside of a reasonable period within which to investigate same;[30] in applying section 52(1), a key consideration in determining relative

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[28] ***Yates v Thakeham Tiles Ltd*** [1994] (CA) Lexis Citation 3425 per both Nourse LJ and Ward LJ; *cf* ***Khairule v North West Strategic Health Authority***, [2008] EWHC 1537 (QB) @ para 103 – "*section 33(3)(d), concerning a Claimant who is under a legal disability, does not arise in this case*"

[29] ***Yates v Thakeham Tiles Ltd***., supra

[30] ***Cain v Francis [2008]*** EWCA Civ 1451 @ paras 63-65

prejudice is that a defendant's ability to defend a claim is not affected by the delay in filing; however, the section 53(1) and any other relevant factors must be appropriately balanced within the circumstances of each claim, in order to determine what is fair and equitable. Relevant factors are generally knowledge of rights, length of and reasons for delay, conduct of parties with reference to steps taken or not taken. Based on the principles extracted in paragraph 23 above, the Court will now assess and balance all relevant factors in relation to each case.

Application of Cap. 231 Sections 52(1) and 53(1)

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[25] The Court makes the following findings of fact or takes a provisional view of asserted facts:-

(i) The Claimant's cause of action in negligence (or breach of statutory duty) for personal injury suffered in carrying out his duties as a general worker whilst employed by the Defendant arose on the 6th February, 2013. No issue of want of knowledge of the cause of action arises in this case therefore the primary limitation period expired on the 5th February, 2016;

(ii) Having been filed on the 7th July, 2020 the claim was just short of four and one half years (4½) years out of time. However:-

(a) the Defendant received notification of the claim prior to the expiry of the limitation period by virtue of the Claimant's legal letter issued in May 2015;

(b) the correspondence issued by the Defendant or their insurers indicates that they were availed of the opportunity to carry out their inquiries into the incident;

(iii) The Claimant's reasons for the almost 4½ years delay after the expiry of limitation were that:-

(a) He was led to believe by the Defendant's conduct that liability had been accepted;

(b) He was impecunious and unable to instruct the filing of the claim.

(iv) The Claimant sought medical attention immediately following the incident and was referred to orthopedic surgeon Dr. Chode. The Claimant did not seek legal advice until late in 2014, several months after he was medically boarded as a result of his medical condition. The Claimant was additionally seen by a Dr. Martyr in 2016;

(v) By the affidavit evidence submitted by both parties, the Defendant's conduct towards the Claimant (by itself, its insurers or attorney) comprised of the following actions:-

(a) Formal written acknowledgment of receipt of the claim notified by the Claimant's attorney-at-law;

(b) In July 2015, written request by insurers for information in response to the Claimant's request (made in May 2015), for assistance in making payment for a medical report from Dr. Chode to whom he was referred after being directed by the Defendant to one Dr. Russell for medical attention;[31]

(c) Payment for cost of medical report in November 2015, approximately 2 months after receiving responses to information requested;

(d) In response to request made by Claimant's attorney in September 2016, refusal (in writing) to pay for medical report from Dr. Martyr, indicating that the report from Dr. Chode was sufficient to address the Claimant's medical issues;

(e) Denial of liability, in writing, in July 2017.

[26] Based on the above findings, the Court assesses the factors of section 53(1) in the following manner:-

(i) The length of the delay in filing the claim approximately 4½ years after expiry of the limitation period in February 2016 is a significant delay,

[31] Paragraph 12, Claimant's affidavit in support of Application, filed November 18, 2020.

particularly considering that the Claimant obtained legal advice and representation prior to the expiry of the limitation period;

(ii) Notwithstanding the significant delay however, this is not a case of a defendant being faced with a stale claim as in *Donovan v Gwentoys Ltd*.[32] The Defendant received notification ahead of the limitation expiry and by its responses was availed of the opportunity to make its inquiries into the claim. The Defendant had also administratively received notification of the incident by the Claimant at the point in time it occurred;

(iii) There is no good reason found to have been advanced by the Claimant for the delay on the basis that:-

(a) The Defendant's responses to the notification or enquiries in respect of the claim did not expressly or impliedly accept liability. The authorities relied on by the Claimant of **Best v CP Hotels Inc.**[33] and **Daniel v M&W Jordan Enterprises Inc.**[34] can both be distinguished from the case at Bar. In the former, the defendant's insurers requested the claimant's medical information and invited the submission of a quantified claim for damages along with

[32] [1990] 1 Al ER 1018 @ 1023
[33] Barbados High Court Civil Suit No. 185 of 2004
[34] Barbados High Court Civil Suit No. 844 of 2007

supporting documentation. The defendant also arranged and paid for travel and overseas medical treatment for the plaintiff. In the latter case, the defendant had settled the plaintiff's claim for special damages arising out of the same accident from which the claim for damages for personal injuries arose. The acceptance of the cost of repair for the claimant's motor vehicle which was damaged in the accident was found to be conduct upon which the claimant could reasonably have inferred acceptance of liability.

(b) The same cannot be said in the instant case. The claimant's evidence by way of affidavit in support of his application reveals that he was directed to medical attention by the Defendant's human resource officer – which is not remarkable given the relationship of employer/employee which existed at the time of the incident in February 2013. Unlike in ***Best v CP Hotels***, the Defendant in the instant case responded to a 'request for assistance' in order to progress the claim, by way of the Defendant paying for the cost of the medical report. After making inquiries, the Defendant did pay for the medical report however, there was no further act by the Defendant which could reasonably give rise

to the inference of acceptance of liability, which was subsequently expressly denied;

(c) Further, when the Defendant did advise in writing of its refusal of liability, the Claimant still failed to file a claim for another 3 years and there was no conduct on the part of the Defendant from which to infer a change in that position;

(d) The explanation of impecuniosity on the part of the Claimant as an acceptable reason for not being able to file the Claim after being notified in writing of the Defendant's refusal of liability is not supported by reference to any judicial authority. The Defendant was not responsible for the Claimant's financial arrangements with the latter's attorney, who in any event alluded to an available course of action[35] which was never pursued;

(iv) In relation to cogency of evidence, whilst the Defendant received notification of the claim prior to the expiry of limitation, and filed a defence in answer to the statement of claim, that statement of claim did not allege the presence of witnesses at the time of the incident, the claim

[35] Attorney's letter notifying of intention to file application for interim payment in event of refusal to pay for medical report.

pleaded an unsafe system of work. Additionally, the following is observed:-

(a) The defence filed refuted the claims regarding the unsafe system of work, denied liability entirely or alternatively pleaded contributory negligence. By the Claimant's pleaded reply, he alleged the presence of 'a younger workman' whom the Claimant was assisting with welding, but made no further allegations of other witnesses present;

(b) By the Claimant's affidavit in support of his application to disapply the limitation period, he deponed that he was on the day in question, directed to lift a heavy piece of board of dimensions of six by three feet when he hurt his back.

(c) As pointed out by Counsel for the Defendant, the Claimant did not initially state whether anyone was present and who gave him the direction. In the incident report he submitted to his superior, which was attached to his affidavit, the Claimant says he was working with one Orlando Hall's team, and whilst moving a piece of bridge board he suddenly realized the board was too heavy and he dropped it. The Claimant's account of the incident given in March 2013 is essentially repeated in his attorney's letter of May 2015.

(d) Given the Defendant's refusal of liability which was definitively communicated in July 2017, the Court agrees with Counsel for the Defendant that the issue of liability must engage evidence as to what actually transpired at the time of the incident in February 2013. This would be the case whether or not liability is to be found by establishing the existence or not of a safe system of work according to either side. The fact of what transpired at the material time is relevant whether or not a safe system of work can be found or otherwise presumed on a balance of probabilities;

(e) Aside from the Claimant referring to having worked with Orlando Hall's team at the material time, there were no specific allegations made regarding witnesses, nor any evidence produced regarding what the Defendant's investigations might have revealed or concluded in relation to the actual incident. Further, the account of events offered by the Claimant (including medical evidence) at the material time, now reflected in his pleadings, rested entirely on the Claimant's reports of what transpired.

(f) Particulars attempted to be given regarding the presence of at least one other person, do not on the evidence provided by the Claimant, appear to have been provided at the material time, therefore the

Defendant is faced with allegations concerning the incident for the first time, now approximately 7½ years after the incident.

(g) Further, the Defendant by way of its affidavit indicated that the one person named by the Claimant in connection with the incident, Orland Hall, was no longer within its employ and not in a position to give evidence. The Defendant deponed to not being able to expand upon the position regarding Orlando Hall, without breaching confidentiality;

(h) It is concluded from the above that it is therefore not accurate for the Claimant to suggest that the evidence available to the Defendant would not suffer from a lack of cogency;

(i) In coming to this conclusion, the Court does note that the Defendant has not specifically stated why their former employee Orlando Hall would not be in a position to give evidence. However, the length of the delay, the absence of good reason therefor and the absence of particulars given at the material time regarding the presence of any other person, all outweigh that lack of specificity. This is so considering that there is no evidence of any statement made by Orlando Hall regarding the incident which can be assessed for cogency.

(v) The conduct of the Defendant in relation to responding to requests for information or inspection for the purpose of ascertaining facts relevant to the cause of action does not arise as a factor to be considered, on the evidence. Other than any request for information, the conduct of the Defendant has already been assessed as not reasonably attributable to the Claimant's failure to file his claim within the limitation period, particularly, given that the Claimant must be taken to have been aware of his legal rights and the delay has not been found attributable to any good reason;

(vi) No evidence has been presented regarding any disability, legal or otherwise, of the claimant since the cause of action accrued, as affecting his ability to have filed his claim within the limitation period. The assertion of the Claimant's impecuniosity as a reason for the delay has already been rejected by the Court;

(vii) The Claimant acted before the expiry of the limitation period in obtaining legal advice and as well as notifying the Defendant of his claim. However, the promptness of the Claimant's actions prior to the expiry of the limitation period are of no assistance to the Claimant's position, having regard to the failure to act for another 3 years, after being notified in writing of the Defendant's denial of liability.

[27] Arising from the consideration of these factors, the Court finds that the greater prejudice lies with the Defendant being denied a complete defence on limitation but moreover being put to the expense of a trial in respect of which the Claimant's case is not supported on its face. In particular, the medical evidence procured by the Claimant in the first instance, did not support his medical issue as being caused in the manner alleged at the hands of the Defendant. Further, the delay in the filing of the claim does have an effect on the Defendant's ability to defend the claim by reason of availability of potential witnesses together with the lack of prior assertion by the Claimant of the need for such witnesses. It was always for the Claimant to assert all facts relevant and necessary to proving his claim. With respect to legal principles, the Court applies the following (extracted from authorities, as set out in paragraphs 23 and 24 herein):-

(i) The burden of satisfying the Court that it would be equitable to allow the claim to proceed is a heavy one and rests with the Claimant;

(ii) The obvious prejudice to the Claimant in this case (denial of pursuing cause of action) has to be viewed within the context of (a) significant delay subsequent to the expiry of the limitation period; (b) significant delay subsequent to express notification of the Defendant's denial of liability; (c) absence of good reason for the delays; (d) no reasonable

basis to support any subjective or objective conclusion on the part of the Claimant that the Defendant had accepted liability for his claim; (e) full particulars of how the incident occurred were not given at the material time so as to justify a finding that the Defendant had available all relevant information necessary to defend the claim; and (f) the Claimant's case is not supported by the medical evidence which he submitted to the Defendant;

(iii) Relative prejudice to the Defendant on the other hand, must take into account (a) the absence of conduct leading the Claimant to an inference of acceptance of liability; (b) no further engagement on the claim for three (3) years subsequent to their express denial of liability; (c) lack of notification at the time of the incident of information regarding potential witnesses with knowledge of how the incident transpired, versus new but undetailed allegations regarding such potential witnesses being made subsequent to the filing of the Claimant's pleaded case – in other words, the cogency of the evidence available to the Defendant is affected by the delay; (d) the Claimant's case is not supported by the medical evidence produced by him.

[28] In the circumstances as viewed and assessed above, it is not considered equitable to disapply the limitation period in this case and the Claimant's application and claim are accordingly dismissed. Costs are awarded to the Defendant, to be assessed if not agreed.

CV544 of 2020 Grace Gill v Attorney-General

[29] Reverting to the general principles extracted at paragraph 23 herein and summarized at paragraph 24, the Court now repeats the exercise of identifying the facts or provisional assessments of evidence relevant to the exercise of its discretion under section 52(1) and 53(1) of the Limitation of Actions Act, Cap. 231.

(i) The Claimant's causes of action[36] arose on the 1st July, 2013 when she allegedly tripped and fell at the entrance of a classroom at her place of work in the St. Silas Primary School, St. James. The Claimant filed her claim in June 2020;

(ii) There is no issue regarding knowledge of accrual of the cause of action, therefore the limitation period for the claim expired on the 30th June, 2016, rendering the claim filed in June 2020 just short of four (4) years outside the expiry of limitation. However:-

[36] The issue of the application of the Limitation (Public Authorities) Act Cap. 206 to the Claimant's two statutory causes of action remains to be either (i) rendered moot by a refusal to disapply the limitation period under Cap. 231; or for determination at trial, if the claim is permitted to proceed.

(a) The Defendants received notification of the claim prior to the expiry of limitation by virtue of the Claimant's attorney's letter, issued in early November 2014;

(b) The Defendants (via the relevant Ministry official)[37] acknowledged receipt of the Claimant's legal letter in late December 2014;

(c) Including the first letter issued on behalf of the Claimant notifying of the claim and enquiring of liability, and the final letter issued on the 23rd January, 2019 – there were 12 letters sent by the Claimant's attorney, enquiring as to the Defendant's position on liability. The correspondence at varying times included the submission of medical reports, receipts for expenses and a quantified claim for damages;

(d) The Defendants (via MIST), responded by letter, a total of 5 times. Four of those 5 letters, consisted of a standard reply stating that the matter was receiving the attention of the Ministry. The 3rd response requested the submission of receipts to facilitate processing of the matter; the 4th response reverted to the standard issue reply that the matter was receiving the attention of the Ministry; the 5th and final

[37] Permanent Secretary, Ministry of Education, Science, Technology and Innovation (MIST)

response notified that the matter (by then the quantified claim had been submitted), had been forwarded to the Solicitor-General's Chambers for their attention;

(iii) The Claimant's reason for the approximately four (4) years delay after the expiry of limitation was that the Ministry's response of 13th June, 2016 (the 3rd response), by which medical receipts were requested in order to facilitate processing of the matter, caused her to be of the opinion that liability was not in dispute;

(iv) The Claimant sought and obtained medical attention from Dr. Persaud on the same day of the incident and produced the medical report from this visit; the Claimant attended two additional doctors apparently during 2013, the second of whom referred her to Dr. Prasad Chode. The Claimant was seen by Dr. Chode between October 2013 through April 2015. Dr. Chode's medical report was produced;

(v) The Claimant also sought legal advice before the expiry of the limitation period as evidenced by the letter of claim sent by her attorney in November 2014;

(vi) The Claimant has not asserted that any medical, legal or other expert advice she obtained, caused her to hold the opinion that liability for her claim had been accepted by the Defendant;

(vii) The Claimant asserts that since the accident, she continues to undergo serious medical ailments as a result of the accident and that she was retired from the Public Service as a result of her injuries;

(viii) With reference to any effect on the Claimant's actions or failure to file her claim within the limitation period, the Defendant's conduct subsequent to the accident is found to have been as follows:-

(a) The Defendant (MIST) acknowledged receipt of initial notification of the claim in writing;

(b) The Defendant thereafter responded on 5 occasion times with substantially the same response on four of those occasions - namely, that the matter was receiving the attention of the Ministry (and after the submission of a quantified claim, the attention of the Solicitor-General's Chambers);

(c) The third response requested the submission of medical receipts to facilitate processing of the matter, however, the standard responses reverted on the 2 occasions issued thereafter;

(d) No further response was ever forthcoming after the last response that the matter had been sent to the Solicitor-General's Chambers.

[30] The Court assesses the factors prescribed in section 53(1) in the following manner:-

(i) At just shy of 4 years after the expiry of limitation, the length of delay is significant, albeit the case is not one of the Defendant being faced with a stale claim. The Claimant notified her Principal on the same day of the incident's occurrence. The Defendant through the Principal was provided with a report of the incident approximately four (4) months after the incident's occurrence. The Defendant received legal notification of the claim from the Claimant's attorney prior to the expiration of the limitation period;

(ii) The Claimant has not advanced any good reason for the delay in filing the claim. The reason provided by the Claimant that she was of the opinion that liability had been accepted given the request of the Ministry for submission of medical receipts to facilitate processing of the matter, cannot be considered an opinion reasonably held having regard to the circumstances before or after the issue of that response by the Defendant. These circumstances were that:-

(a) By the Claimant's own categorisation, the Defendant's responses were at best unhelpful and sporadic relative to the Claimant's numerous correspondence issued in the years 2015 through 2016;

(b) Notwithstanding having requested receipts to facilitate 'processing of the matter', the Defendant provided the Claimant with no feedback or other substantive response regarding payment of such receipts or otherwise giving any indication regarding their position in respect of her claim. The responses following that request reverted to pro forma 'holding' replies;

(c) As acknowledged by the Claimant, even after submission of a quantified claim (which had not been requested or invited by the Defendant), the Defendant issued no response except to indicate that the matter had been sent to their legal advisors, namely the Solicitor-General;

(d) The above circumstances could not have engendered any belief that liability had been accepted. On the available evidence, the incident report prepared and submitted to the Ministry by the Claimant's Principal cannot give rise to even a provisional finding on paper, that the Defendants were minded to accept liability even if not so communicated. The Principal's Report supports the contrary view, as do the generic, non-committal responses fielded in response to the Claimant's letters.

This position is easily distinguishable from **Best v CP Hotels Inc.**[38] and **Daniel v M&W Jordan Enterprises Inc.**[39], in which the defendant in the former case invited submission of a quantified claim and paid for medical attention, including overseas travel; and in the latter case, settled the cost of repair to the claimant's motor car which had been damaged in the accident;

(iii) The cogency of the evidence is to be regarded in context that the Defendants did not accept liability for the claim, nor in the circumstances can acceptance of liability be attributed to them via their conduct. The issue of liability therefore has to be litigated and the question of the cogency of evidence assessed in that context;

(iv) However, it is found that the Defendant has not established that the cogency or availability of evidence otherwise, will be affected to the extent that a trial would be unfair. This assessment is made for the following reasons:-

(a) The Claimant's account of the accident at the material time and in the pleaded case and application filed remains the same – namely, that she tripped and fell at the entrance of a classroom.

[38] supra
[39] supra

The Claimant has never alleged that her fall was witnessed by any other person (the apprehension of the fall by children of primary school age, is not considered of assistance to either party's case by reason of their tender years at the material time);

(b) Contrary to the Claimant's account of the incident, the sum total of which is that she tripped and fell at the entrance of the classroom, the report of the incident prepared by the Principal is available to Defendant as a record of what was reported to the Ministry as having occurred on the same day of the incident;

(c) The Principal gives an eyewitness account of the aftermath of the Claimant's fall, (having arrived after being notified by a student), of having seen the Claimant on the floor with other teachers around her;

(d) In addition to the Principal, three other teachers are identified by name as having remained and assisted in helping the Claimant off the floor in some manner;

(e) The Report contains allegations as to what was said and done by the named teachers, the Claimant and the Principal;

(f) A Barbados Union of Teachers (BUT) Staff Representative is identified by name as having asked the Claimant to write a report of this incident, the Claimant is reported as having refused;

(v) The Defendant has by the affidavit filed in response to the Application to exclude the limitation period, deponed via an officer of the Ministry (MIST), that the Defendant's ability to defend the claim is compromised, given that the Principal of the primary school retired since 1st September, 2015. In relation to this statement, the Court observes:-

(a) No account is given in the affidavit filed, therefore there is no account in the Defendants' evidence, as to their knowledge or not of the whereabouts of the now retired Principal;

(b) Further, and unacceptably so, Counsel for the Defendant has sought in submissions, to advise as to the unavailability of the retired Principal, as having only been located after the filing of the affidavit, but not in a position to give evidence. It was always available to the Defendants to have filed a further affidavit in order to properly put such evidence before the Court;

(c) For arguments sake however, given that the unavailability of evidence would seriously prejudice the Defendants' ability to

defend the case, the Court will take at its highest, the Defendants' position that the Principal – it's primary witness, is for good reason unavailable to give evidence. Even if that were the case, there are options available pursuant to evidentiary legal principles to treat with the Principal's Report;

(d) More importantly however, the Report contains a fair degree of detail occurring in the immediate aftermath of the Claimant's fall, which is capable of supporting the Defendant's position on liability. The Report pre-dates the Defendant having been notified of the claim by the Claimant's attorney;

(e) In particular, the Report identified by name, four other adult persons with direct involvement in the relevant aftermath of the incident. These persons comprise 3 other teachers, all named, who by the terms of the Report, would have apprehended as much as, or more than the Principal of what transpired, given that the Principal states that she met those teachers surrounding the Claimant on the ground, when she arrived;

(f) In that regard, the retired Principal's account of the relevant aftermath of the incident, consisted of reported speech and observance of actions of the other persons who have been named

in the Report. As a result, the persons so named would be in a better position than the Principal to give evidence as to what they apprehended;

(g) No account has been given of the Defendants' knowledge or investigation of the whereabouts or availability of such persons to give evidence in support of its case. Further, given the clear rationale emanating from the authorities[40] regarding the importance of a defendant's ability to fairly defend its case in the determination of relative prejudice, it was incumbent upon the Defendant in light of the potential witnesses and relevant evidence available on the face of the Principal's Report, to have provided a realistic account of the whereabouts, availability or lack thereof, of such persons;

(h) It is not known whether the Claimant had sight of the Principal's Report or if same was provided to her attorney prior to the filing of the Defendants' affidavit in response to the Application. No position can thus be taken by the Court in relation to any obligations the Claimant may have had in relation to the

[40] For example, *Hartley v Birmingham City DC* [1992] 2 All ER 213 per Parker LJ @ 224

ascertaining the availability or not of such persons named in the Principal's Report;

Consequently, it is found that the Defendants' submission that the cogency of evidence available to defend their case has been affected by the delay subsequent to the expiry of limitation, is not properly supported in their response to the Application;

(vi) In relation to the conduct of the Defendants - as stated above in assessing the reason for the delay put forward by the Claimant - it is not accepted that the conduct of the Defendants (by issuing standard 'holding' and non-committal responses), was such that acceptance of liability for the accident could be attributed to them. The position in ***Thompson v Brown***[41] that the language of this factor does not place any obligation to volunteer information or assistance to a potential claimant, is regarded in like manner in relation to the Defendants' responses to the Claimant's letters. There was no request for information or inspection made regarding information in the hands of the Defendant relevant to the Claimant's ability to pursue her claim;

(vii) In relation to the factor pertaining to any disability suffered by the Claimant after the accrual of the cause of action - as already referred to

[41] See fn 34 herein, para 33(viii)(c) supra.

above- in ***Yates v Thakeham Tiles Ltd***[42] the reference to disability in section 33 of the UK's Limitation Act, 1980 is clearly accepted by the UK Court of Appeal to refer to a legal disability on the part of the Claimant, subsequent to the accrual of the cause of action. The evidence proffered by the Claimant of her continuing physical ailments are therefore of no relevance to this factor under section 53(1)(d) of the Limitation Act;

(viii) As nonetheless permissible, in considering the Claimant's evidence of persistent medical injury as an overall factor within the circumstances of the case, there is no evidence which demonstrates that the Claimant was inhibited in pursuing her claim within the limitation period. To the contrary, even with whatever medical issues she sustained, the Claimant was able to instruct an attorney well ahead of the expiration of the limitation period. Further, by her own evidence submitted in support of her Application, she declined to pursue a recommended course of medical treatment because of circumstances personal to her mindset regarding undergoing a surgical procedure.

[42] [1994] Lexis Nexis Citation (CA) 3425; also acknowledged in ruling out the application of UK's section 33(3)(d) in *Khairule v North West Strategic Health Authority* [2008] All ER (D) 85 @ para 103

The medical condition of the Claimant is therefore not found to be a factor relevant to the Court's consideration of all the circumstances relevant to the exercise of its discretion.

[31] Having considered the factors prescribed in section 53(1) as well as the overall circumstances of the case, the Court finds this Application ultimately dependent on its assessment of the Defendants' ability to defend their case. As stated before, the claim is not a **Gwentoys v Donovan**[43] type stale claim, as the Defendants were notified by the Claimant's attorney-at-law of the claim in November 2014 – well ahead of the expiry of limitation. Further, the Court does not find that there is evidence of conduct by the Defendant which could justify the Claimant having formed the opinion that liability had been accepted. Counsel for the Defendant was inviting the Court to consider the fact of the Claimant being legally represented as a factor to be weighed in assessing prejudice to the Claimant, a la ***Hartley v Birmingham City Council.***[44] Any such consideration is a matter for the Claimant, who's attorney remains unchanged. No question in relation to the respective prejudice to the parties therefore arises in respect of any perceived action the Claimant may have against her attorneys. [45]

[43] Supra
[44] [1992] 1 WLR 968 – the right of a plaintiff to sue her solicitor in negligence for failure to file a writ within limitation was assessed in the defendant's favour in determining relative prejudice.
[45] ***Firman v Ellis*** [[1978] QB 886 per Ormrod LJ @ 910

[32] Further in relation to the relative prejudice to either party, factors relating to the promptitude of action and advice sought and received, as well as the nature of any such advice received does not arise for consideration on the evidence in this case. The Claimant obtained medical treatment immediately, sought legal advice within the expiry of the limitation period, but nothing has been raised which speaks to any such advice or treatment affecting the Claimant's ability or decision to have pursued her claim. Having regard to all of the factors as assessed above, the Court finds that in comparison to CV639/2020 Carl Watson v NPC above, the factual matrixes of the two cases are alike in terms of:-

(i) the significant delay in filing the claim (of just under and just over 4 years), subsequent to the expiry of limitation;

(ii) both Claimants had the benefit of legal representation from the time of notification of the claim to the respective Defendants therefore no question of ignorance of the limitation period can arise;

(iii) the Court has found in neither case, the existence of good reason for the significant delays in filing the claims;

(iv) the Defendants in both cases received notification of the claim within the limitation period with sufficient time to carry of inquiries and investigations to aid them in a defence of the claim.

[33] The Court does however find a variance in the Defendants' respective ability to defend their cases. In CV639 of 2020 (Carl Watson), the Court found that the Claimant's own medical evidence weakened his claim, and there were new particulars in terms of witnesses present at the time of the accident which had been alleged subsequent to the filing of the Claim and Application. The existence of these additional factors when coupled with the significant delay and absence of good reason therefor, tipped the balance of greater prejudice in favour of the Defendant. In the instant Application the Defendants contend that their key witness is unavailable due to the lapse of time. However, in addition to the unavailability of their key witness (the Principal) not being properly rooted in evidence, the Defendants' evidence in response to the Application reveals that there were witnesses present who would have apprehended the same or more than that reported by the Principal.

[34] The Report and therefore information regarding the other named witnesses was in the hands of the Defendants four months after the incident. There has been no account given by the Defendants as to the availability or not of those other witnesses. In the circumstances of this Application therefore, the Court finds that despite the significant delay and lack of good reason for the delay, the important factor that is the Defendants' ability to properly defend the claim, is established from the Defendants' own response to the Application.

Therefore the underlying rationale attributed to section 52(1) prevails in favour of the Claimant. Given the circumstances of the length of, and inadequately explained reason for the delay, there is no order as to costs upon the Claimant's success on her Application.

CV544 of 2020 - Applicability of Limitation (Public Authorities) Act

[35] The Limitation (Public Authorities) Act ('the PA Act'), known in other common law jurisdictions as the Public Authorities Protection Act, is an Act which prescribes a limitation period in relation to claims for damages or loss arising out of a prescribed category of acts (or neglect or default of an act) executed in furtherance of a public duty or authority. Section 3(1) of the PA Act provides as follows:-

> *"3. (1) No action or other proceeding shall be brought against any person for any act done in pursuance or execution or intended execution of any Act or of any public duty or authority or in respect of any neglect or default in the execution or intended execution of any such Act, duty or authority, unless it is commenced before the expiration of 3 years from the date on which the cause of action accrued."*

Section 3(2) makes provision for the application of the limitation period in relation to continuing acts, neglects or defaults, but continuing acts do not concern the case at bar.

[36] Queens Counsel for the Claimant referred the Court to the Preamble (or the Long Title) of the Act in support of his submission that the Act is inapplicable to the Crown, which is the Defendant herein. The Long Title is as follows:-

> *"An Act to generalize and amend the law relating to the limitation of actions in respect of persons acting in execution of statutory and other public duties and for matters connected therewith"*

As already stated, Queen's Counsel's position is that based on the definition of 'person' in the Interpretation Act, the PA Act does not apply to the Crown. The issue for the Court to decide, is indeed whether the PA Act is applicable within the circumstances of the case at bar; however, the answer to the issue of applicability does not in the Court's view turn on the definition of 'person'. Instead, it is more appropriate to identify the nature of the act or default giving rise to the alleged liability to the Crown.

[37] The Claimant pleads (inter alia), breach of the Occupiers Liability Act, Cap. 208. By section 3 of that Act, the rules relating to the regulation of what is known at common law as occupiers' liability are expressly replaced by the rules prescribed by that statute. Section 3(2) however, also provides that the common law rules governing the question of (i) upon whom the duty is imposed, and (ii) to whom the duty is owed, remain in place.

Occupiers' liability is of course part of the law of tort and is rooted in legal principles that comprise the body of law that is negligence. As the law relating to occupiers' liability encompasses obligations owed to individuals as a matter of private law, is such a breach intended to be captured within the protection afforded by the PA Act? As will be illustrated by a few authorities, the protection afforded to public authorities is restricted in scope to the exercise of public duties (whether derived from statute or performed by or pursuant to a public authority), as distinct from private law duties imposed by statute or carried out by a public officer or authority. The Court will further consider this question, but for now returns to the submission of Queen's Counsel for the Claimant, that the definition of 'person' excludes the application of the PA Act to the Crown.

[38] A cause of action based on occupiers' liability must of necessity require the identification of the 'occupier' upon whom the statutorily imposed common duty to ensure the safety of visitors to premises, is imposed. The Claimant's case is that the school premises at which she worked was not maintained according to the required standard of safety, thereby giving rise to the cause of action filed. Whilst the Crown Proceedings Act requires civil actions brought against the Crown to be brought against the Attorney-General, for the most part, the Attorney-General is merely the representative party in whose

name the action must be constituted. The failure giving rise to the claim in occupiers' liability however must be that of an identifiable government functionary or authority - whether (in this case) the Principal of the school, the school's Board, the Ministry of/or Education Department, or the Chief Education Officer.

[39] The Statement of Claim pleads that the Defendant is sued pursuant to the Crown Proceedings Act and that the Department concerned is the Ministry of Education, Science, Technology and Innovation. As far as the Court is concerned, it is for the Claimant to properly identify the authority or functionary upon whom the specific duty was imposed, as opposed to resting upon the generic moniker of the Crown. The Crown's liability arises even in a case such as this, as a result of the failure of a specific functionary or authority. The argument that the use of the word 'person' renders the Act in this case inapplicable to the Crown, is therefore rejected on the basis that the statutory breach pleaded, by its very nature, has to be attributed to a 'person' or other entity, charged with the responsibility of the maintenance and upkeep of the school.

[40] The Court now returns to the categorisation of the nature of the duty at bar, as the issue of whether the PA Act is applicable to this case remains.

The Court refers to the celebrated case of **Bradford Corporation v Myers**[46] which concerned the application of the UK Public Authorities (Protection) Act, 1893. Save for section 3 of Barbados' Cap. 206 being expressed in the negative (and the period of limitation differing), the protection afforded a public authority under the UK 1893 Act (as thereafter amended), as applied in ***Bradford Corporation***, is the same. In this case a statutory corporation was obliged by its enacting legislation to supply a local area with gas, as well as empowered under its Act, to dispose of a by-product of the gas, such disposal including by way of sale. An act of negligence occurred in the delivery of the the by-product after a sale, and the injured party sued the statutory corporation for damages.

[41] The corporation pleaded the six (6) month limitation against suit, as provided in the UK's PAPA. The House of Lords held that the sale of the gas by-product, whilst empowered by statute, was not a public duty (as was the obligation to supply the local area with gas), and as such the protection afforded by the Act did not apply. The following oft cited passage by Lord Buckmaster (emphasis mine) affords the illustration of differences in duty and purpose as pertains to the protection afforded by the Act:-

[46] [1916] 1 AC 242

"Now it must be conceded that the Act applies only to a definite class of persons and to a definite class of action. If the section stood alone, and were construed without reference to the introductory words of the statute, it would be wide enough to grant protection to any person who was acting in pursuance of a private Act of Parliament, but on more than one occasion the Courts have pointed out that this cannot be its true interpretation, and that "any person" must be limited so as to apply only to public authorities… While the preamble is necessary thus to constrict the meaning of the persons whom the statute is intended to protect, the words of the section themselves limit the class of action, and show that it was not intended to cover every act which a local authority had power to perform.

In other words, it is not because the act out of which an action arises is within their power that a public authority enjoys the benefit of the statute. It is because the act is one which is either an act in the direct execution of a statute, or in the discharge of a public duty, or the exercise of a public authority. I regard these latter words as meaning a duty owed to all the public alike or an authority exercised impartially with regard to all the public. It assumes that there are duties and authorities which are not public, and that in the exercise or discharge of such duties or authorities this protection does not apply…

This distinction is well illustrated by the present case. It may be conceded that the local authority were bound properly to dispose of their residual products; but there was no obligation upon them to dispose by sale, though this was the most obvious and ordinary

> *way. Still less was there any duty to dispose of them to the respondent. No member of the public could have complained if the respondent had not been supplied; nor had any member of the public the right to require the local authority to contract with him."*

[42] Whilst the Court considers that the words in this extracted passage require no expansion, the question of what is or is not a public duty or exercise of public authority has been shown to give rise to difficulty. The difficulty includes as well, powers or duties exercised pursuant to statute. In determining how an act is to be categorized, a useful starting point is to break the section down into its component parts, according to the class of acts afforded protection. The classes of acts (or neglect or default) which fall under the protection of the Act are as follows:-

(i) Any act done in pursuance or execution (or intended execution) of any Act;

(ii) Any act done in pursuance or execution (or intended execution) of any public duty;

(iii) Any act done in pursuance or execution (or intended execution) of any public authority.

[43] In the case at bar, it is a neglect or default pursuant to a statute which forms the basis of the liability, but neglect or default relative to any act is likewise categorized as above. The Occupiers' Liability Act creates a common duty of care by which an occupier is obliged to ensure that visitors entering upon premises are reasonably safe for the purpose for which they enter. This Act binds the Crown, but as already stated, 'the Crown' (as in all constituent branches of the State, is ultimately vicariously liable), but there is a 'person' or entity as agent of the Crown that is properly named and fixed with the duty *qua* occupier. The difficulty in categorisation of the alleged breach of statutory duty is illustrated by reference to the following two cases, both of which applied ***Bradford Corporation v Myers***:-

(i) **Attorney-General of the Commonwealth of Dominica & Hospital Services Co-ordinator v Cecelia Robin**[47] - In this case, a nurse employed by the Government of Dominica's public hospital was injured after receiving an electrical shock caused by faulty wiring left exposed during renovation works at the Hospital's Dialysis Unit. The Attorney-General pleaded the six-month limitation under Dominica's PAPA, and sought to have the claim struck out as an abuse of process. The application to strike was refused and the AG appealed.

[47] Eastern Caribbean Supreme Court HCVAP 2011/0034

The Eastern Caribbean Court of Appeal held that the renovation of the Dialysis Unit was not an act directly executed under a statute and as such the PAPA did not apply. The hospital's public obligations were viewed as owed to its patients, whilst the breach of duty arising from the careless renovations was seen as a privately owed duty to the nurse. Clearly, there was no mention of occupiers' liability in that case, but the nature of the underlying tortious breach is the same; and in the case of Barbados' Occupiers' Liability Act, the determination of the relationship giving rise to the statutorily defined common duty of care remains governed by the common law.

(ii) **Daphne Alves v Attorney-General of the Virgin Islands**[48] - This case is somewhat similar in fact to ***Cecelia Robin*** above, in that the claimant was employed as a nurse at the Government of the Virgin Islands' public hospital. In assisting a patient (due to the shortage of appropriate personnel), she injured her back severely and was eventually unable to continue working as a nurse. The claimant sued the Government for damages, the Crown pleaded the six-month PAPA limitation period. The trial judge followed **Bradford Corporation v Myers** as well as several other cases (which also applied ***Bradford***) and

[48] [2017] UKPC 42

ruled the breach of duty as a common law duty to provide a safe place and system of work, therefore PAPA did not apply.

The Court of Appeal reversed that ruling and the claimant appealed to the Privy Council. In this judgment, the Privy Council extensively traced the application of the PAPA, as illustrated by authorities over the years. It was concluded that **Bradford Corporation** remained an accurate statement of the law, but that authorities demonstrate that the precise ambit of application of the Act is less settled.

At paragraph, 12, Lord Hughes, delivering on behalf of the Board noted that if construed literally, private persons or bodies vested with statutory authority, or every action of a public body, would be subject to the short PAPA limitation. After acknowledging that such a state of affairs was obviously not intended, Lord Hughes unequivocally affirmed as settled, the rejection of the literal application of PAPA so that it is confined to public acts or duties, which are not automatically so categorized, for reason that the act or duty arises out of statute. This point is significant in the Court's consideration, as the fact that the duty arises by statute is clearly not sufficient, the nature of the duty must still

be found to be of a public nature in order to fall within the protection intended by the Act.

In paragraphs 12 through 18, Lord Hughes examines a series of cases decided before and after ***Bradford Corporation,*** and concluded that the application of the Act depended in some instances on the nature of the act or duty; or the nature of the public body together with the nature of the act or duty. What was clear however was that the application of the Act was not without difficulty and that the ultimate question, is whether it is a public duty owed to all, or a private duty, owed on the basis of the underlying relationship of the parties.

[44] At this juncture, the Court notes that the Claimant's case also pleads breach of statutory duty under the Health and Safety at Work Act, Cap. 356. This Act is made specifically applicable to all except two Government Departments, and specifically imposes a duty on employers in relation to several aspects of health and safety at work. Relevant to the case at bar, as pleaded by the Claimant, is section 43, which places a duty to keep floors and passageways properly maintained. There is therefore a specific statutory duty imposed on whoever the Claimant ought to identify as the appropriate Government functionary. However, is this a public duty, owed to all? Or is this a duty owed

to employees, howsoever defined, that is based not on a public duty, but the underlying private contractual relationship of employer/employee.

[45] Similarly, under the Occupiers' Liability Act, albeit owed to all who would qualify as a visitor under common law, is the nature of the common duty to ensure the safety of premises, one that is truly public in nature, or a private duty that is borne out of the relationship of the class of persons entering unto the premises? These were not questions addressed by or during Counsels' submissions and are therefore not answered without such engagement from Counsel. Moreover, the Claim having been permitted to proceed, the question of the applicability or not of the Public Authorities (Limitation) Act can now be fully ventilated with Counsel, at the substantive trial of the Claim.

IV Disposal

[46] The respective Applications before the Court as disposed of as follows:-

CV639 of 2020 Carl Watson v National Petroleum Corporation

(i) The Claimant's Application to exclude the limitation period to his claim filed on November 18th, 2020 is refused;

(ii) Costs are awarded to the Defendant to be assessed if not agreed.

CV544 of 2020 Grace Gill v Chief Education Officer and the Attorney-General

(i) The Claimant's Application to exclude the limitation period to her claim filed on 7th August, 2020 is granted;

(ii) The issue of the applicability or not of the Limitation (Public Authorities) Act, Cap. 206 to the statutory causes of action pleaded by the Claimant, is to be determined at the substantive trial of the claim;

(iii) There is no order as to costs.

SHONA O. GRIFFITH
Judge of the High Court