

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

HBC 26/2014

BETWEEN: **RANDHIR SINGH** of Korowiri, Labasa, Driver

PLAINTIFF

AND: **VIRENDRA NAND** trading as Main Transport of 86,
NarainjiStreet, Wailoku, Tamavua, Suva

DEFENDANT

Appearances: Mr. A Kohli of Kohli & Singh for the applicant

R U L I N G

Introduction

(1). By an Ex-parte Notice of Motion filed on 4 June 2014 the applicant seeks an extension of time within which he may issue a personal injury claim arising from a motor vehicle accident which occurred on 13 March 2011. The application was made pursuant to Sections 16 and 17 of the Limitation Act.

Background

(2). The applicant was a truck driver for Main Transport Company based at Nausori at the time of the accident. The accident occurred when the truck brakes failed as he tried to descend a hill at Urata Village in Savusavu. As the truck rolled down the hill he jumped out of the truck to save himself and as a result suffered injuries to his hand, knee and head. It appeared that prior to the trip he had informed the company of the problems with the truck's breaking system and nothing appears to have been done.

(3). A search of the Registrar of Companies by his solicitors revealed that no such company existed nor was the truck registered with the company. A further search with the Registrar of Deeds showed that a bill of sale was registered there in the name of one Virendra Nand and it was only then that the owner of the vehicle was known to the applicant.

(4). This information was known to him on 26 May 2014. As the time to make a claim had expired on the 13 March 2014 an application for an extension of time was then made.

The Applicant's Submission

(5). The applicant through his counsel submits very briefly that he has to satisfy the requirements of section 16(3) of the Limitation Act before leave could be granted to him to issue proceedings. This provision requires him to prove that facts of decisive character were at all times outside of his knowledge. This fact of decisive character was the fact relating to the ownership of the truck and as soon as that fact came into his knowledge he made the application for leave. The applicant further submits that there would be no injustice if leave was granted.

The legal framework

(6). It is clear that in a personal injury matter that no action for damages can be brought after the expiration of three years from the date from which the cause of action accrued. It is not in question that this cause of action accrued from 13 March 2011. The Limitation Act was a legislative bar to any actions for damages for personal injuries instituted after the three year period. Therefore this action should have been instituted on or before 13 March 2014. However Section 16 (1) & (2) of the said Act enabled an extension of the time limit in respect of personal injuries in certain instances. This provision states:-

16(1) The provisions of subsection (1) of section 4 shall not afford any defence to an action to which this section applies, in so far as the action relates to any cause of action in respect of which-

(a) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and

(b) the requirements of subsection (3) are fulfilled.

(2) This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under any Act or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.

(7). So far as can be adduced from the above provision, the use of limitation as a defence as provided for in section 4(1) is not available in two instances and these are where leave has been granted by the Court for an extension of time and where the requirements of subsection 3 are fulfilled. Section 16(3), provides as follows:-

16.-(3) *The requirements of this subsection shall be fulfilled in relation to a cause of action if it is proved that the material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which-*

(a) *either was after the end of the three-year period relating to that cause of action or was not earlier than twelve months before the end of that period; and*

(b) *in either case, was a date not earlier than twelve months before the date on which the action was brought.*

(8). Therefore in an application such as this, the applicant must prove that the material facts relating to that cause of action were or included facts of a *decisive character* which were all *outside* his/her knowledge until a date after the three year period or not earlier than twelve months before the end of that period. Therefore one must apply for leave to extend time within twelve months after the applicant has knowledge of the material facts and a failure to institute proceedings within that twelve month period is fatal for an application for leave.

(9). The application for leave must be made *ex-parte* as provided for under section 17(1) however it must fulfil the requirement of Section 16(3). The

Court can then exercise its discretion under section 17(2) having satisfied itself of the requirement under section 16(3).

A cause of action is defined as "every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved". Lord Esher in Read v Brown 1889 22 QBD at 131.

(10). The interpretation of what a *material fact relating to a cause of action* could be found in Section 19 of the said Act. Section 19 states:-

In sections 16 and 18 any reference to material facts relating to a cause of action means a reference to any one or more of the following:-

(a) the fact that personal injuries resulted from the negligence, nuisance or breach of duty constituting that cause of action;

(b) the nature or extent of the personal injuries resulting from that negligence, nuisance or breach of duty;

(c) the fact that the personal injuries so resulting were attributable to that negligence, nuisance or breach of duty, or the extent to which any of those personal injuries were so attributable.

(11). Therefore any one of these three material facts needed to be known by the applicant sufficient for it to issue a claim and they are, *that there was personal injury, the extent of the injury and that the injury resulted from a negligence act.*

(12). A further interpretation which required attention in an application for leave to extend time is the meaning of *facts of a decisive character* as stated under Section 16(3).

Section 20 provides a guide as to what is required here and this Section states:

" For the purposes of sections 16 and 18, any of the material facts relating to a cause of action shall be taken, at any particular time, to have been facts of a decisive character if they were facts which a reasonable person, knowing those facts and having obtained appropriate advice within the meaning of

section 22 with respect to them, would have regarded at that time as determining, in relation to that cause of action, that, apart from any defence under subsection (1) of section 4, an action would have a reasonable prospect of succeeding and of resulting in the award of damages sufficient to justify the bringing of the action”.

(13). Simply put this means that the facts that are within the knowledge of the applicant are facts of a decisive character if a reasonable person knowing those facts and having obtained appropriate advice would have regarded those facts as sufficient to found a cause of action. Section 20 however has to be read and be interpreted together with Section 21. Section 21 qualifies when a fact is taken to be outside the knowledge of the applicant. This section states:-

21.*-(1) Subject to the provisions of subsection (2), for the purposes of sections 16 to 18 a fact shall, at any time, be taken to have been outside the knowledge, actual or constructive, of a person if, but only if-*

(a) he did not then know that fact;

(b) in so far as that fact was capable of being ascertained by him, he had taken all such action, if any, as it was reasonable for him to have taken before that time for the purpose of ascertaining it; and

(c) in so far as there existed, and were known to him, circumstances from which with appropriate advice within the meaning of section 22 that fact might have been ascertained or inferred, he had taken all such action, if any, as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice as aforesaid with respect to those circumstances.

(2) In the application of subsection (1) to a person at a time when he was under a disability and was in the custody of a parent, any reference to that person in paragraph (a), (b) or (c) of that subsection shall be construed as a reference to that parent.

(14). This provision again provides a different texture to a *fact of decisive character within the knowledge of the applicant*. Firstly a fact is outside the knowledge of the applicant if he/she does not know the existence of that fact. That is, it is not known at all by the applicant. The second is that *the fact of a decisive character* (the prerequisite) was capable of being

ascertained by the applicant and that the applicant had taken all the necessary actions or steps as is reasonable to ascertain these facts. The third aspect of this provision is that the applicant having knowledge of the circumstances surrounding *these facts of decisive character* had taken *appropriate advice* within the meaning of section 22 to ascertain these facts and act reasonably in obtaining the appropriate advice.

(15). This provision is in fact the test for "*constructive knowledge*", its English equivalent is found in section 7(5) of the Limitation Act 1963 (now amended as Limitation Act 1980). In the House of Lords judgment in Adams(Respondent) -v- Bracknell Forest Borough Council(Appellants)(2004) UKHL 29 at paragraph 34 Lord Hoffman stated "...Section 7(5) defined what it meant to say that a fact was outside the Plaintiff's constructive knowledge:-

(b). *in so far as that fact was capable of being ascertained by him, he had taken all such action (if any) as it was reasonable for him to have taken...for the purpose of ascertaining it; and*

(c). *In so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such action if any as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances.*

(16). It appears on a broad reading of this provision that it introduces an obligation to act reasonably, for to delay may have a prejudicial effect on the party making the application and to the party affected by it. This is an important consideration in the granting of leave to issue a writ out of time.

Section 22 defines what an *appropriate advice* is, the section states:-

22. *In sections 20 and 21 "appropriate advice", in relation to any fact or circumstances, means the advice of competent persons qualified, in their respective spheres, to advise on the medical, legal or other aspects of that fact or those circumstances, as the case may be.*

(17). An appropriate advice is therefore considered to be the advice of a competent person qualified to advise on the medical or legal aspects of the "*facts of a decisive character now within the knowledge of the applicant*". That is a lawyer or a doctor.

Determination

(18). In personal injury and death claims the ordinary time limit is three years from the date the cause of action accrued. The ordinary time limit does not cover cases where the plaintiffs knew all the facts but until too late do not know the law. Ignorance of the law does not give a right to bring an action late but in these sorts of cases section 16 and the preceding sections of the Limitation Act gives the Court a discretion to extend the time limit where it thinks it is equitable to do so.

(19). The discretion also covers cases where the plaintiff only just out of time had known all the material facts but until too late had been unaware of his/her legal rights. The Limitation Act gives the Court a general discretion to enquire into the merits of personal injury cases begun outside the limitation period to see whether justice would be better served by denying the defendants the opportunity to take what may be an arbitrary or unmeritorious defence. The Court also has to look at the length of and reasons for the delay on the part of the plaintiff and the steps if any taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he/she may receive.

(20). It appears from the information before the court that the applicant sometimes after the injury sought advice from his solicitors. He was informed that certain preliminary matters and facts had to be established first. The initial searches did not establish that the company was registered. After various searches were conducted it was found that the truck was financed by Merchant Finance and that a bill of sale in the name of the defendant was registered with the registrar of titles. The information was obtained on 26 May 2014 approximately 10 weeks after the limitation period had expired.

(21). What then are the material facts of a decisive character necessary in this instance to found an action? The facts are that while he was driving a truck for his employer he had an accident, he suffered an injury as a result of the accident and the accident arose (as far as could be adduced) from the

negligent act of his employer. There is no dispute in respect of the first fact as the applicant was medically examined and a medical report provided. The negligent act was that his employer, having prior knowledge of the defect in the breaking system of the truck, still insisted that he continue to drive the truck. He was in fact told that the parts will be changed when he returned from his trip. This information was obtained from his affidavit in support of the application. In my view this material facts already known by the applicant was decisive enough to found an action.

(22). The facts of decisive character does not have to comprise every single piece of evidence which is necessary to prove each fact. In other words he does not need the proof of who owns the truck given to him by his employer to drive to institute the proceedings. It is sufficient that he was employed at the time and that his employer was Main Transport a company based at Nausori and that his employer knew of the defects in the breaking system before he drove the truck. These facts alone are sufficient to support his right to the judgement of the Court.

(23). The knowledge of the ownership of the truck is not in my view a material fact of a decisive character preventing the instituting the action. In other words the facts that are within the knowledge of the applicant are facts of a decisive character if a reasonable person knowing those facts and having obtained appropriate advice would have regarded those facts as sufficient to found a cause of action. In these circumstances the employer could not say in its defence that he does not own the truck driven by his employee since it is sufficient that he was employed at the time and that the accident occurred during the course of his employment.

(24). The next consideration is whether the delay and the reasons for the delay on the part of the applicant and the steps taken to obtain legal or other expert advice and the nature of that advice is sufficiently small such that the Court can exercise its discretion to give leave. In respect of the injury it is clear from the affidavit in support that the medical report was available to the applicant in January of 2013, that is, two years after the accident. There was no explanation as to the delay except that the owner of the truck was not known to them. The delay in my view should be a delay in obtaining knowledge of a fact of decisive character sufficient to found an action. As stated earlier the knowledge of this fact was not of a decisive


character. It is also clear that the applicant had obtained advice at least two years after the accident and therefore there was sufficient time to issue proceedings. The applicant had not acted reasonably after having all the facts to institute proceedings and the reason for the delay is in my view insufficient.

(25). What essentially section 16(3) says is that the Plaintiff must show that all the material facts relating to the cause of action including facts of a decisive character were outside his knowledge, actual or constructive, until after the limitation period has expired. This was not the case here.

(26). This Court had already raised its concern on a number of occasions regarding the harsh effect of the provisions of sections 16 & 17 of the Limitation Act on the lives of the ordinary citizens who are economically disadvantaged or illiterate who could not access advice due to their circumstances. This concerns were raised by both Justice Jitoko (in *Josaia Cama -v- CKP Fishing*) and Justice Shameem (in *Hasina Bibi -v- Atish Narayan*) however it still remains that without any legislative changes the law still remains to be followed.

Conclusion

(27). In view of the above reasons the application for extension of time is denied and I make no order as to costs.



Master Harry Robinson

High Court, LABASA

8 August 2014.