C.F.

IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(CIVIL JURISDICTION)

APPEAL CASE NO. 2 OF 1998

BETWEEN: **RAFFEY TAIWIA**

First Appellant

AND: **SOUTH PACIFIC CONSTRUCTION LTD**

Second Appellant

AND: **ROBSON EDWARD**

Respondent

Coram: **Acting Chief Justice Vincent Lunabek**
Justice Bruce Robertson
Justice John von Doussa
Justice Reggett Marum

Counsel: **Mr Mark Hurley for the Appellants**
Mr Garry Blake for the Respondent

JUDGMENT

This appeal concerns the interpretation and application of the provisions in the *Limitation Act* No. 4 of 1991 ("the Act") which permit the time limit which ordinarily applies for the bringing of proceedings for damages for personal injury to be extended. This is the first time that these provisions have been considered by the Court of Appeal.

The facts which led the respondent, Mr Edward, to seek an extension of time to commence proceedings claiming damages for personal injuries from the appellants are straightforward. On 10th July 1993 Mr Edward was a passenger seated on the back of a Toyota truck owned by the second appellant and driven by the first appellant. As the truck turned into a driveway Mr Edward fell to the road. He suffered serious injuries to his neck. For some hours he suffered temporary quadriplegia. He lost time from work.

At the time of the accident Mr Edward was a member of the Vanuatu Teachers Union "Group Life and Medical Insurance Scheme". Following the accident his Union tried to pursue a claim through Mauren Insurance. In April 1996 Mauren Insurance advised Mr Edward that there was nothing that he could claim under the Group Life and Medical Insurance Scheme. The manager of Mauren Insurance advised Mr Edward to see Mr Tarisu Emile at Bain Hogg Insurance Brokers. Mr Edward did so, although he did not understand why it was suggested that he should see Mr Emile. Mr Emile told him that he would try to do his best to recover compensation for Mr Edward. Mr Edward has deposed that he did not understand how it was that he might be able to recover compensation, but he was grateful for Mr Emile's offer.

Sometime after 19th July 1996 Mr Emile informed Mr Edward that there was nothing that he could do as "QBE" were not prepared to pay any compensation. Mr Emile gave Mr Edward a copy of a facsimile transmission received by him from QBE Insurance (Vanuatu) Limited dated 19th July1996, and bearing a heading "Our reference: 0796B18 re: CTP claim – South Pacific Constructions". The facsimile read:

> *"Our letter dated 6/6/96 and your reply dated 17/6/96 refers. Unfortunately due to the length of time taken to advise us of this claim and therefore our inability to confirm the accuracy of the events that led to this claim, we will be denying liability on behalf of South Pacific Constructions to the Third Party. Please note your file accordingly."*

Mr Emile suggested to Mr Edward that he should see the Public Solicitor. Mr Edward's first appointment with the Public Solicitor was on 3rd October 1996. Mr Edward deposes that he then learned for the first time that he might have a claim in negligence against the first appellant for his negligent driving of the truck, and that the time in which he should have brought proceedings in a court to recover compensation expired on 10th July 1996.

On 23rd September 1997 by ex parte summons issued by the Public Solicitor, Mr Edward sought an order granting leave to bring an action against the appellants for damages. Although the application was initiated by an ex parte summons, counsel appeared at the hearing on behalf of the proposed defendants, now the appellants. An

inter-parties hearing occurred before Saksak J. In a reserved judgment delivered on 30th December 1997 his Lordship granted Mr Edward leave to bring his action against the appellants. This appeal is now brought by leave against that decision.

Before the primary judge counsel for Mr Edward conceded that his proposed claim was time barred unless the Court granted an extension of time. The main issue was whether the Act empowered the Court to do so in the circumstances outlined above.

The relevant provisions of the Act are as follows:

> *"3.(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say –*
>
> *(a) actions founded on simple contract or on tort;...*
>
> *Provided that –*
>
> *(i) in case of actions 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 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 any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years; and...*
>
> ...
>
> *15.(1) The provisions of subsection (1) of section 3 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 purpose 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 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.*

(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.

...

(5) *Nothing in this section shall be construed as excluding or otherwise affecting –*

(a) any defence which, in any action to which this section applies, may be available by virtue of any provisions of any Act other than those contained in subsection (1) of section 3 (whether it is an Act imposing a period of limitation or not) or by virtue of any rule of law or equity; or

(b) the operation of any Act or of any rule of law or equity which, apart from this section would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.

16.(1) *Any application for the leave of the court for the purposes of section 15 shall be made ex parte, except in so far as rules of court may otherwise provide in relation to applications which are made after the commencement of a relevant action.*

(2) *Where such an application is made before the commencement of any relevant action, the court may grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if such an action were brought forthwith and like evidence were adduced in that action, that evidence would, in the absence of any evidence to the contrary, be sufficient –*

(a) to establish that cause of action, apart from any defence under subsection (1) of section 3; and

(b) to fulfil the requirements of subsection (3) of section 15 in relation to that cause of action,

(3) *Where such an application is made after the commencement of a relevant action, the court may grant leave in respect of any cause of*

action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if the like evidence were adduced in that action, that evidence would, in the absence of any evidence to the contrary, be sufficient –

(a) to establish that cause of action, aart from any defence under subsection (1) of section 3; and

(b) to fulfil the requirements of subsection (3) of section 15 in relation to that cause of action,

and it also appears to the court that, until after the commencement of that action, it was outside the knowledge (actual or constructive) of the plaintiff that the matters constituting that cause of action had occurred on such a date as, apart from the last preceding section, to afford a defence under subsection (1) of section 3.

(4) In this section, 'relevant action', in relation to an application for the leave of the court, means any action in connection with which the leave sought by the application is required.

...

18. In sections 15 and 17 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.

19. For the purposes of sections 15 and 17, 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 21 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 3, an action would have a reasonable prospect of succeeding and resulting in the award of damages sufficient to justify the bringing of the action.

20.(1) Subject to the provisions of subsection (2), for the purposes of sections 15 to 17 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 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) or (b) of that subsection shall be construed as a reference to that parent.

21. In sections 19 and 20 '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."

The power to extend time is essentially conditioned on fulfilment of the requirements of s 15(3) within the timeframe specified. That timeframe, in effect, requires that the potential plaintiff ascertain a material fact of a decisive character within 12 months before the day on which leave to extend time is sought. Three critical expressions used in s 15(3), namely "material facts relating to that cause of action", "facts of a decisive character" and "outside the knowledge (actual or constructive) of the plaintiff" are precisely defined in ss 18, 19 and 20, with s 21 giving further definition to the concept of knowledge of the plaintiff.

The first question which arises in this case concerns the knowledge which qualifies or disqualifies the prospective plaintiff from a grant of leave. Well outside the timeframe specified in s 15(3), indeed years before, Mr Edward knew that he had suffered serious injury when he fell from the truck owned by the second appellant and driven by the first appellant. He knew the facts which would comprise the evidence to prove his case in court. However, he did not know until a point of time within the specified timeframe that those facts in law gave rise to a cause of action in negligence against the appellants. Lord Denning in *In Re Harper v National Coal Board* [1973] 1 QB 614 at 620 put the same question in these simple terms:

"What is the knowledge which bars a man from getting leave? Is it his knowledge of the facts? or his knowledge of the law?"

The Court of Appel in *In Re Harper* was considering the interpretation of the *Limitation Act* 1963 (UK) which in material respects is in the same terms as the Act now under consideration. Lord Denning went on to say (at 620):

> *"According to one point of view, time begins to run against a man as soon as he acquires knowledge of all the material facts, even though he does not know the law and does not know that he has a worthwhile cause of action. According to the other point of view, time does not begin to run against him until he acquires knowledge, not only of the material facts, but also that he has a worthwhile cause of action."*

The *Limitation Act* 1963 (UK) was considered on many occasions by the courts in England. The arguments for and against the two possible interpretations identified by Lord Denning were considered in the two leading cases of *Smith (and Dodd) v Central Asbestos Co. Ltd* [1973] AC 518 and *In Re Harper*. The parties in this case are agreed that these authorities should be applied in the interpretation of the Vanuatu legislation. We agree, and nothing would be served by rehearsing again the arguments discussed in the English authorities.

In *Smith (and Dodd) v Central Asbestos Co. Ltd*, there was a division of opinion amongst the law Lords. That division of opinion was considered by the Court of Appeal in *In Re Harper* where it was held that the interpretation placed on the legislation by Lord Reid and Lord Morris of Borth-y-gest should apply.

Lord Reid, having criticised the obscurity of the drafting of the legislation, said at 530:

> *"This at least is plain. The Act extends the three years' time limit in cases where some fact was for a time after the damage was suffered outside the knowledge of the plaintiff, if that fact was 'material' and 'decisive'. Before a person can reasonably bring an action he (or his advisers) must know or at least believe that he can establish (1) that he has suffered certain injuries; (2) that the defendant (or those for whom he is responsible) has done or failed to do certain acts; (3) that his injuries were caused by those acts or omissions; and (4) that those acts or omissions involved negligence or breach of duty.*

> *In the present case the first three of these were all known to the respondent more than 12 months before this action was brought, but the fourth was not; he only got to know of it some six months before the writ was issued. The question for decision is whether the fact that the appellants' acts involved or amounted to negligence or breach of duty is or can be a 'material' or 'decisive' fact within the meaning of the Act."*

His Lordship referred to the provisions which now find expression in ss 20(1)(b) and 21 of the Act. His Lordship continued:

> *"In order to avoid constructive knowledge the plaintiff must have taken all such action as it was reasonable* for him *to take to find out. I agree with the view expressed in the Court of Appeal that this test is subjective. We are not concerned with 'the reasonable man'. Less is expected of a stupid or uneducated man than of a man of intelligence and wide experience.*
>
> *Apart from opinions recently expressed in this House on a very limited class of case in* Herrington v British Railways Board *[1972] AC 877 this is, I think, a novelty in the law of tort. It shows that Parliament had in mind the common knowledge that most people do not have a legal or businesslike turn of mind. Among other things they are reluctant to visit the terra incognita of a solicitor's office."*

Lord Reid concluded that Parliament intended that a prospective plaintiff's ignorance of his legal rights should be treated in the same way as his ignorance of any other material fact. His ignorance of the law was a decisive fact, and accordingly the legislation empowered an extension of time.

In the present case the ascertainment by Mr Edward that the circumstances of the accident in which he had been involved could give rise to a cause of action in his favour was a material fact of a decisive character. The next question then arises: was that material fact outside the actual or constructive notice of Mr Edward until a date within 12 months of the commencement of these proceedings? The material fact was outside his actual knowledge until he received advice from the Public Solicitor on 3 October 1996. However, the appellants contend that the material fact was not outside his constructive knowledge because the fact was capable of being ascertained by him had he taken all such action as it was reasonable for him to have taken for the purpose of obtaining appropriate advice with respect to the circumstances of the accident: see s 20(1)(b).

Lord Morris is *Smith (and Dodd) v Central Asbestos Co. Ltd* at 539-540 said:

> *"If the fact was capable of being ascertained by him the question will arise whether he had taken all such action as it was reasonable for him to have taken for the purpose of ascertaining it."*

That question poses a subjective test. As Lord Reid said in the passage already cited "less is expected of a stupid or uneducated man than a man of intelligence and wide experience".

The primary Judge has accepted that Mr Edward was ignorant of his legal rights and did not know that the circumstances of the accident could give him an entitlement to claim damages until he received advice from the Public Solicitor. It is difficult to criticise a person from not seeking legal advice when they did not know that there was any occasion to do so. Mr Edward left the matter in the hands of his union initially who pursued a claim under an insurance policy. It was not unreasonable for Mr Edward to be guided by the union. When the insurance company to whom the union directed the matter told him he had no entitlement under the policy they advised him to see Mr Emile. Mr Edward did so. Mr Emile in fact referred the matter to the appropriate source, the insurer of the appellants, but did not explain Mr Edward's legal rights to him. As an insurance broker Mr Emile was probably a competent person sufficiently qualified to give "appropriate advice" within the meaning of s 21 of the Act, but he failed to do so. As Mr Emile said he would do his best to recover compensation it was not unreasonable for Mr Edward to allow this to happen. It seems that Mr Emile acted reasonably promptly in his dealing with QBE Insurance (Vanuatu) Limited. We do not think Mr Edward, in his actual state of knowledge about his legal rights, was unreasonable in not seeking advice from someone other than Mr Emile until Mr Emile told him sometime after 19 July 1996 to see the Public Solicitor.

The evidence does not indicate why it was that Mr Edward did not see the Public Solicitor until 3 October 1996. It is reasonable to assume that it was necessary for Mr Edward to make an appointment which would be some time ahead. He was not cross-

examined on his affidavit nor was it otherwise suggested that he could have seen the Public Solicitor sooner after Mr Emile suggested he should do so. In our opinion on the facts which were before Saksak J it should be held that a material fact of a decisive character was outside Mr Edward's knowledge until within 12 months of the commencement of the proceedings, and that he fulfilled the requirements of s 15(3) of the Act.

But to qualify under s 15(3) for an exercise of the power to extend time is not necessarily to succeed. The power to extend time is a discretionary power: see s 16(2) and (3). The Court "may" grant leave.

The effect of the provisions of s 16 is that where the prospective plaintiff realises before action that the claim is out of time under s 3(1) unless an extension is obtained, the prospective plaintiff must apply for leave to commence the proceedings out of time. In other words rather than issue the writ of summons and then seek leave, the applicant must seek and obtain leave before issuing a writ of summons. That procedure was followed in this case. Solicitors for Mr Edward filed an ex parte summons seeking an extension of time, and at the same time brought into Court a copy of the writ of summons proposed to be issued. It is desirable that this procedure be followed in other cases, so that the Court considering the application for leave has before it precise details of the proceedings which it is proposed to bring.

The provisions of s 16 contemplate that an application for leave to extend time will be made ex parte, and that the plaintiff will establish on evidence adduced a prima facie case that the requirements of s 15(3) are fulfilled. If leave to commence the proceedings is then granted at an ex parte hearing, the plaintiff must nevertheless, as a pre-requisite to final judgment, establish on a consideration of all evidence led at trial that the requirements of s 15(3) are fulfilled: s 15(1)(b). In other words, if leave to bring an action which is otherwise out of time is granted on an ex parte application, the defendant is not deprived of the opportunity to plead a defence under s 3(1) of the Act, and to prove that the prima facie evidence led by the plaintiff on the ex parte application should be rejected.

Where the application made under s 16(1) proceeds ex parte in the absence of the proposed defendant, the plaintiff can expect that the same issues will be considered again at a later time on an inter-parties hearing. In our view, however, the provisions of s 16(1) do not prevent a court from allowing a prospective defendant to appear on the application and to contest it at that stage. It is up to the plaintiff to decide whether the defendant will be notified and then up to the defendant to decide whether to appear at that stage. It may often be in the interests of both sides that the defendant appear, and that an inter-parties contest on the time point occur at the outset. If the application fails, that will put an end to the matter there and then. On the other hand if the plaintiff reveals that there is a good case for extending time, the defendant can immediately address the substantive issues arising in the cause of action, and, if appropriate, seek to settle the matter before the costs of further litigation are incurred.

If the defendant named in an application under s 16(1) chooses to appear and to contest the grant of leave at that stage, that issue will be tried as a preliminary one, and the result will be binding on both sides as an inter-parties hearing will have occurred on the limitation point.

In the present case, the appellants were advised of the application under s 16(1), and appeared to contest it. The appellants did not confine their opposition to points of law arising on the interpretation of the Act, but also addressed the facts and the inferences which should be drawn from the evidence adduced by Mr Edward. In these circumstances there has been an inter-parties hearing on the limitation question, and the outcome of the hearing, and this appeal, will bind the appellants to the result.

The Act does not provide express guidance on the way in which the discretion to extend time should be exercised where the prospective plaintiff establishes that the pre-requisites of s 15(3) are fulfilled. There are many examples of discretionary powers to extend time requirements to be found in the procedural rules of courts. Factors relevant to the exercise of such powers include the length of the delay, the explanation for the delay, and the degrees of prejudice which may be suffered by the party seeking an indulgence on the one hand, and, on the other hand the party against whom time will be extended. These principles have application to the discretion arising under s 16.

In the present case the application for leave to extend time was brought approximately 14½ months beyond the normal three year time limit. In considering the significance of the length of this delay, it must be remembered that the plaintiff could lawfully have issued his proceedings on the last day of the three year period, and the writ then issued would have remained valid for service for a further 12 months. If the writ were served on the last day of that period, almost four years could have expired before the fact of the proceedings came to the attention of the defendants. The proceedings nevertheless would have been validly instituted and served. The proceedings in the present case were served not long outside this period, and in the meantime the fact that Mr Edward was seeking compensation had been made known to the appellants' agent – a factor which we discuss below.

In the present case the explanation for the delay is the plaintiff's ignorance of the law until he received "appropriate advice" within the meaning of ss 20 and 21. As Saksak J observed in his reasons for judgment, there is a substantial need in this jurisdiction for beneficial legislation to protect those who are ignorant of the legal principles which may give them rights to compensation for personal injury. As Lord Reid observed in the passage set out above the construction which his Lordship placed on the corresponding provision to s 15(3) achieves that end.

Saksak J was critical of the Act on the basis that it reflected English legislation which did not make due allowance for the social, cultural and educational situation in Vanuatu. We think his Lordship's criticism of the Act was misplaced. The passage from the speech of Lord Reid indicates that the English legislation was designed to give protection to people in the community who do not understand their legal rights. It must be assumed that the Parliament of Vanuatu took a similar view when it passed the Act.

In applications to extend time, the exercise of the discretion frequently turns on the question of prejudice. In this case the appellants' argument was addressed to that topic. Usually, if it appears that there is a good prospect of establishing the cause of action alleged, the proposed plaintiff will obviously suffer prejudice if the claim is barred. Against that prejudice must be weighed any prejudice which the defendants

will suffer if time is extended. If the proposed defendant asserts prejudice, evidence of that prejudice should be led. A bare assertion of prejudice without explanation of the nature and cause of prejudice will not suffice. Bare assertions of prejudice often turn out to be unfounded when the evidence is examined. That is so in this case. The appellants assert that they will suffer prejudice from an extension of time but no one for the appellants has sworn to the fact of prejudice. Rather, in submissions on their behalf counsel for the appellants contends that an extension of time would undermine the certainty which their insurers otherwise would have in estimating claims, and further, that it is commercially unacceptable to have large money claims brought well after the cause of action arose. The Appellants also contend that the delay will prejudice them in tracking down witnesses, and that the memory of witnesses is likely to have faded.

There is no substance in the allegation of prejudice in respect of claims' estimating and commercial certainty. Defendants must be taken to know, since the passing of the Act in 1991, that no absolute bar against a personal injury claim arises at the end of three years from the occurrence of injury. Even when three years have expired, the legislation permits late claims in appropriate cases. Insurers in the ordinary course of their business allow for this possibility in estimating for incurred but unnotified claims.

On the facts of this case, the assertion of prejudice by reason of difficulty in tracking witnesses and in witnesses recollecting facts is not established. It is notable that no one on the appellants' behalf has deposed to actual prejudice. The Court has been given no evidence to suggest that any particular witness might have been located had notice been given earlier, or that any known witness has died or disappeared. For all that is known to the Court, there may be witnesses to the event who can be readily identified, even witnesses who gave detailed written statements close to the event.

Of greatest significance however, is the fact that within the three year time limit arising under s 3(1) the second appellant, through its insurance broker, was given notice of Mr Edward's potential claim, and that notice was brought to the attention of

the insurer of the truck. The appellants and their insurer could have instigated investigations at that stage.

In this case the balance of prejudice is heavily in favour of Mr Edward. On the facts adduced before the Court, and as found by the primary Judge, Mr Edward qualifies under s 15(3) for an exercise of the discretionary power to extend time, and on the facts it is inevitable that the discretion must be exercised in favour of Mr Edward. In these circumstances we consider the appeal against the order of Saksak J must be dismissed.

Whilst we consider the appeal should be dismissed, we are unable to agree with the reasons by which Saksak J arrived at his conclusion. His Lordship purported to decide the matter under s 15(5) "on equity" without deciding whether the requirements of s 15(3) were fulfilled. His Lordship thought it was unnecessary to consider that subsection and the expanded definitions contained in ss 18 and 19 of the expressions "material facts relating to a cause of action" and "facts of a decisive character".

With respect to Saksak J the approach taken by him is not one that was open under the legislation. Section 15(3) is central to the power to extend time. Unless the requirements of that subsection are fulfilled, the application for leave must fail. Section 15(5) does not create an independent power to extend time. Section 15(5)(b) does no more than preserve the operation of any other Act of any rule of law or equity which, apart from s 15, would enable such an action to be brought after the end of the period of three years. There is no general principle of equity which permits a statutory time limit to be extended merely on the general grounds of fairness. The reference in s 15(5)(b) to any rule in equity is directed to rare cases where equity has relieved against the fraudulent concealment of facts from a potential plaintiff to avoid proceedings, and to the principles of waiver and estoppel which may prevent a defendant relying on a time bar: e.g. *The Commonwealth of Australia v Verwayen* (1991) 170 CLR 394.

For these reasons the formal order of the Court is that the appeal be dismissed and that the appellants pay the Respondent's costs of the appeal.

Delivered this 26 th day of November 1998

V Lunabek ACJ J B Robertson J J W von Doussa J R Marum J

REPUBLIC OF VANUATU COUR D'APPEL COURT OF APPEAL REPUBLIQUE DE VANUATU