IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Case No. 277 of 2013

BETWEEN: KEN NIKIAU
Claimant

AND: TELECOM VANUATU LIMITED
Defendant

Hearing: *2 May 2014*

Before: *Justice S M Harrop*

Appearances: *Tom Joe Botleng for the Claimant*
Mark Hurley for the Defendant

Decision: *12 May 2014*

RESERVED JUDGMENT OF JUSTICE SM HARROP AS TO CLAIMANT'S APPLICATION FOR LEAVE TO PURSUE PERSONAL INJURY CLAIM OUT OF TIME

Introduction

1. May a personal injury personal injury claimant be granted leave to pursue his claim out of time when he knew, well within time, all of the material facts and that he had a worthwhile cause of action, yet was unaware, despite taking legal advice, of the three-year time limit for filing such a claim?

2. This is the central question raised on this application under section 16 (3) of the Limitation Act [Cap. 212] by Mr Nikiau who claims that, as result of the negligence of his employer Telecom Vanuatu Ltd *("TVL")* he suffered injuries to both of his eyes while at work on 12 March 2010.[1]

[1] Although Mr Nikiau has pleaded that the accident occurred on 16 May 2010, the parties have agreed, as a result of evidence gathered since the claim was filed, that the date of the accident was 12 March 2010.

3. TVL denies liability. It expressly pleads lack of causation based on medical evidence indicating that any eye condition from which Mr Nikiau suffers results from a longstanding condition unrelated the accident in 2010. It also pleads that the claim is a statute-barred by reason of section 3 (1) (d) (i) of the Limitation Act. Mr Nikiau accepts that, if not granted leave on this application, his claim is indeed statute-barred.

Chronology of main facts as found for the purposes of this application

4. **12 March 2010** - Mr Nikiau suffers injuries to both of his eyes as a result of paint stripper falling into them while he was removing Digicel advertising at the Port Vila market house prior to replacing it with TVL branding. Mr Nikiau is treated at the Centrepoint Medical Centre and advised to see a doctor at Port Vila Central Hospital immediately.

17 May 2010 - Mr Nikiau attends the eye clinic at the hospital and is seen by nurse Annie Bong.

Late May/early June 2010 - Mr Nikiau instructs Tom Loughman, a lawyer at the office of the Public Solicitor.

3 June 2010 - Mr Loughman writes to TVL indicating that he acts for Mr Nikiau, referring the accident , to a permanent injury having been sustained to his left eye while working for TVL and complaining that there was no safety equipment protecting against this kind of injury. An immediate response is sought.

15 June 2010 - Mr Kalmet of George Vasaris and Co. replies to Mr Loughman's letter advising that his firm acts for TVL. In order to consider the claim further he requests medical information about the injury suffered.

29 June 2010 - Mr Loughman writes to Mr Kalmet attaching a copy of Annie Bong's handwritten report of 17 May 2010. He confirms that Mr Nikiau continues to attend the hospital for treatment and indicates that compensation in the range of three to five hundred thousand Vatu is being sought. An immediate response is requested.

10 September 2010 - Mr Hurley of George Vasaris and Co. writes to Mr Loughman indicating that his firm acts for QBE , the insurer for TVL. He attaches a copy of a report from Doctor Bador dated 11 August 2010 which concludes that Mr Nikiau's eye condition is not related to the accident suffered at work and that he is as fit as before the accident to resume ordinary duties. All liability is denied.

Later in September 2010 (?) On an uncertain date Mr Loughman, apparently as a result of his workload , refers the file to another lawyer at the *State Law Office*, Henzler Vira. Mr Vira visits QBE's offices to check on the status of the claim and is provided with a copy of Mr Hurley's letter of 10 September 2010 which he had not seen. He tells QBE that a group of people from Tanna (where Mr Nikiau comes from) had visited the State Law Office threatening some action against TVL if nothing was done about the claim. Mr Hurley speaks to Mr Vira who advises that he has no instructions to take legal action or indeed any further instructions. Mr Nikiau's evidence is that Mr Vira did not progress the file despite his meeting him twice and ultimately, on an uncertain date, the file was returned to Mr Nikiau.

23 March 2011 - Mr Nikiau visits Mr Shem Kissel Iauko, the first political advisor to the Ministry of Infrastructure and Public Utilities. On Mr Nikiau's behalf he writes to Mr Kalmet asking that he ensure that compensation is provided by TVL.

25 March 2011 - Mr Kalmet responds referring again to Doctor Bador's report and denying liability.

July 2011 (?) - Mr Nikiau is unsure as to exactly when but believes that in July 2011 he approached another lawyer, Mr Daniel Yawha, to whom he is in some way related. As had been the case with Tom Loughman, Mr Nikiau says he instructed him to draft a letter of demand and to prepare a draft claim if no favourable response was forthcoming from TVL. He paid Mr Yawha Vt 20,000 being the filing fee for a claim, this being money provided by one of his relatives from Tanna. Mr Yawha however did not take any steps on behalf of Mr Nikiau nor did he provide any reason why not.

August 2011 - Mr Yawha informs Mr Nikiau that he is unable to act on his instructions and he refunds the Vt 20,000. No explanation is provided as to why he is not able to pursue the matter.

Late November – Early December 2012 (?) - Mr Nikiau consults Kiel Loughman of Loughman and Associates who arranges for him to be seen by Doctor Johnson Tasso , an eye specialist. This consultation occurs on Santo.

10 December 2012 - Mr Nikiau engages another lawyer, Kiel Loughman of Loughman and Associates. Mr Loughman writes to TVL expressing the view that TVL has breached the Employment Act and is liable to Mr Nikiau for the injury he sustained. He says Mr Nikiau claims Vt 1 million for his injury and will discuss settlement in that region. Mr Nikiau is

later unable to pursue the matter with Mr Loughman through lack of funds and uplifts file from him.

November 2013 - Mr Nikiau instructs another lawyer, Tom Joe Botleng of Tee Jay Bee and Associates. He writes to TVL on 13 November 2013 demanding Vt 5,500,000 in full and final settlement by no later than 27 November 2013 and enclosing relevant medical reports.

5 December 2013 - Mr Botleng files a claim in the Supreme Court seeking damages in the above amount.

6 January 2014 - TVL files a defence including among other things a pleading that the claim is statute-barred.

14 March 2014 - Application for leave to extend time filed.

5. Mr Nikiau's evidence, which on this issue I accept, is that none of the lawyers he consulted prior to Mr Botleng told him that he only had three years to lodge a personal injury claim. As soon as he consulted Mr Botleng, sometime in early November 2013, Mr Botleng did tell him that his claim was out of time.

6. I also proceed on the basis that the reason Mr Nikiau was not in a position to instruct the earlier lawyers to take his case further was through lack of funds: Mr Botleng has been prepared to do so without payment so far.

7. For reasons which will become apparent later, I make the findings in paragraphs four to six for the purposes of this application only because I am conscious that I have not heard evidence from any of the lawyers referred to.

8. I also find, again for the purposes of this application only, that Mr Nikiau has provided a sufficient factual and legal basis for a claim against TVL. I acknowledge though that even if negligence or breach of other duty were established, causation would at trial be a strongly-disputed issue given the sworn statement of Doctor Bador suggesting that there is no causative link between anything TVL did or failed to do and the long term consequences for Mr Nikiau.

The relevant provisions of the Limitation Act

9. The starting point is section 3 (1) which, paraphrased, provides that a claim seeking damages for negligence or breach of duty in respect of personal injury shall not be brought after the expiration of three years from the date when the cause of action accrued. In this case there is no doubt that Mr Nikiau's cause of action accrued on 12 March 2010 and accordingly, in the absence of leave being given to extend time, section 3 prevents him taking a claim after 12 March 2013. Here he seeks leave to do so approximately 9 months later , on 5 December 2013.

10. Section 15 (1) of the Act provides: "***15. Extension of time limit for actions in respect of personal injuries***

(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 purposes of this section; and
(b) the requirements of subsection (3) are fulfilled."

11. The Court may grant leave as contemplated by section 15 (1)(a) on an application filed under section 16 which provides:

> "***16. Application for leave of court***
>
> *(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, 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,
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."

12. Section 16 (2) and (3) respectively contemplate the filing of such an application either before or after the commencement of any relevant action. Here, Mr Nikiau has applied under section 16 (3) , some 4 months after having filed his claim.

13. Self-evidently section 16 (3) contains three prerequisites to the Court considering whether or not to grant leave. If any one of these is absent, the Court simply has no power to grant leave, however meritorious the claim may be, however short the extension of time that may be sought and however unaffected by the delay the defendant may be.

14. The first requirement is that the evidence adduced by or on behalf of the plaintiff appears to the Court to be, in the absence of any evidence to the contrary, sufficient to establish that cause of action, leaving aside any limitation defence. As I have noted in paragraph eight above, I proceed on the basis that Mr Nikiau has provided sufficient evidence to overcome that hurdle. On the face of it, he has a sufficient basis for a claim in negligence or breach of employer duty by TVL in failing to protect him from the kind of harm which he ultimately suffered to one or both of his eyes while working at the Market house in Port Vila on 12 March 2010. In the absence of Dr Bador's evidence, Dr Kasso's evidence and that of Annie Bong provides the necessary causative link.

15. The second requirement is that the evidence adduced fulfils the requirements of section 15 (3) in relation to that cause of action. I note that section 15 (1) (b) also requires in order to avert a limitation problem that the requirements for subsection 3 are fulfilled. There is accordingly a dual obligation to satisfy section 15 (3) , failing which the three- year limitation in section 3 (1) will apply.

16. Section 15 (3) provides:

> *"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."*

17. The phrases *"material facts relating to a cause of action"* and *"facts of a decisive character"* are respectively defined in sections 18 and 19. These provide as follows:

> ***"18. Meaning of "material facts relating to a cause of action"***
>
> *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. Meaning of "facts of a decisive character"***
>
> *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."

18. In turn, section 20 clarifies when facts will be taken as being outside the knowledge of a person:

> *"**20. When facts will be taken as outside the knowledge of a person***
>
> *(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."*

19. Further, the phrase *"appropriate advice"* as used in sections 19 and 20 (1) (b) is defined in section 21 as meaning *"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".*

20. Merely setting out these various provisions leads one to understand why Lord Reid in the House of Lords decision in *Central Asbestos Co. Ltd v. Dodd* [1972] 3 WLR 33 at 336-37 said:

> *"The obscurity of the Act has been frequently and severely criticised: indeed I think this Act has a strong claim to the distinction of being the worst drafted Act on the statute book."*

21. The Limitation Act 1963 (UK) of which Lord Reid was speaking was the basis for Vanuatu's Limitation Act [Cap. 212]. Unfortunately subsequent repeal and replacement of the 1963 Act has not been similarly replicated in Vanuatu.

22. The effect of section 15 (3) in this case is that the material facts relating to the cause of action must be proved to have been at all times outside of Mr Nikiau's actual or constructive knowledge until after 12 March 2013, or at least after 12 March 2012 , *and* in either case no later than 5 December 2012 , being 12 months before the date on which the action was brought.

23. There can be no doubt that Mr Nikiau or at least two of his lawyers, Mr Tom Loughman and Mr Kiel Loughman (who issued correspondence demanding compensation on his behalf in June 2010 and December 2012 respectively) knew the essential facts relating to his cause of action and the legal basis on which he might succeed. What they appear not to have known about, or certainly Mr Nikiau did not know about , is the three- year limitation contained in section 3 (1) of the Limitation Act.

24. This leads to identification and refinement of the key issue in this case as stated at the start of this judgment: does ignorance of the three- year limitation period come within the definition of *"material facts relating to that cause of action"* ? If it does, then the requirements of section 15 (3) will be fulfilled and the application for leave has the potential for success but if it does not then the application must fail.

25. Accordingly this case turns on the extent of the definition of *"material facts relating to a cause of action"* in section 18. It does not appear that the question of whether or not knowledge of the limitation period may be within the category of *"facts of a decisive character"* matters for present purposes. That is because the wording of section 15 (3) implies that facts of a decisive character may either equate to the total of material facts relating to a cause of action or be a subset of them. I draw that inference from the words *"were or included facts of a decisive character"* in section 15 (3).

26. Although counsel's submissions ranged wider than this and I mean no disrespect to either of them by not recounting them in more detail, essentially this case comes down to the following contest:

Mr Nikau submits that his ignorance of the limitation period is a fundamental lack of relevant knowledge of his part. As Mr Botleng put it in his further written submissions dated 2 May 2014: "His ignorance of his legal rights [should] be treated in the same way as his ignorance of any other material facts". Mr Hurley relies on what he contends is the plain wording of the relevant provisions , particularly section 18 to the effect that Mr Nikiau knew everything he needed to know in order to launch his claim well before 12 March 2013. Indeed it appears from Mr Tom Loughman's correspondence that Mr Nikiau was in a position, through him, to issue proceedings in or around June 2010 as his correspondence threatened. Mr Hurley submits that ignorance of the limitation period is not ignorance of a "material fact" for the purposes of the Act.

27. Both counsel referred me to the Court of Appeal judgment in *Taiwia v. Edward* [1998] VUCA 14. That was the first case in which the Court of Appeal had cause to consider the Limitation Act 1991 [Cap. 212]. On 10 July 1993 Mr Edward fell off the back of a truck owned by South Pacific Construction Ltd and driven by Mr Taiwia. He suffered serious injuries and lost time from work. Mr Edward was a member of the Vanuatu Teachers Union group life and medical insurance scheme. In April 1996 Mr Edward was advised that he had no basis for a claim under that scheme. However Mr Edward was advised to see an insurance broker who ultimately referred him to a solicitor. He did not see the Public Solicitor until 3 October 1996 . That was the first time that Mr Edward learnt that he might have a claim in negligence against Mr Taiwia and his employer in negligence and that the time at which he should have brought proceedings in a Court to recover compensation had expired on 10 July 1996.

28. On 23 September 1997, the Public Solicitor sought on Mr Edward's behalf an order granting leave to bring an action. Justice Saksak granted leave. Mr Taiwia and South Pacific Construction Ltd appealed unsuccessfully to the Court of Appeal.

29. At page 6 of its decision the Court of Appeal said: *"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 a specified timeframe that those facts in law gave rise to a cause of action and 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 bars a man from getting leave? Is it his knowledge of the facts? Or his knowledge of the law? The Court of Appeal 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 ran 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."*

30. The Court of Appeal went on to note that the United Kingdom legislation had been considered on many occasions by the Courts in England and accepted that *In Re Harper* was to be applied in the interpretation of the Vanuatu Legislation , as was the House of Lords decision in *Smith (and Dodd) v. Central Asbestos Co. Ltd* [1973] AC 518 (the case in which Lord Reid made the observation I mentioned earlier).

31. Lord Reid said at page 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 advisors) 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."*

32. In the *Taiwia* case Mr Edward did not know that the circumstances of the accident could give him an entitlement to claim damages until he received the advice from the Public Solicitor. As this stage had only been reached less than 12 months before he issued his proceedings, he fulfilled the requirements of section 15 (3). The Court of Appeal went on to exercise its discretion in his favour because the balance of prejudice favoured him heavily.

33. The *Taiwia* case is clearly distinguishable because , applying the English authority, Mr Edward's ignorance of his legal rights related to his legally having a worthwhile cause of action. That prevented him being in a position where he was able to issue proceedings. By contrast, what Mr Nikiau was ignorant of here was not a material fact or legal aspect of his cause of action and its legitimacy but rather ignorance of a statutory time bar applicable to the filing of this kind of claim.

34. While in a loose sense it could be said that both *Taiwia* and this case involve ignorance of legal rights, the question of whether Mr Nikiau's legal ignorance satisfies section 15 (3) has to be answered by reference to the definition in section 18 of *"material facts relating to a cause of action"* .The paragraphs of that definition, in particular paragraph (c) which requires knowledge of the fact of causation between the negligence, nuisance or breach of duty by the defendant which constitutes the cause of action, make it clear that knowledge of an *extraneous legal factor* ,namely the time within which a claim must be filed, is beyond its scope. I note that section 18 is not an inclusory definition but says that the phrase "material facts relating to a cause of action" *means* a reference to any one of more of the matters referred to in paragraphs (a), (b) or (c).

35. This approach is reinforced by the wording of section 19. That defines "facts of a decisive character" as being those which would be regarded as determining that a cause of action would have a reasonable prospect of succeeding in resulting in an award of damages sufficient to justify the bringing of an action *"apart from any defence under subsection 1 of section 3"*. Seen in this light, the focus of section 15 (3) ,when it refers to material facts which were at all times outside the knowledge of the plaintiff, is clearly on the facts (and law) relating to the cause of action , rather than to knowledge of the limitation period in section 3 (1).

36. I therefore conclude that the material facts of which ignorance must be shown for the relevant periods does include ignorance of legal matters, as Lord Denning put it that there is *"a worthwhile cause of action"* , but it does not extend to ignorance of the limitation period itself. Mr Nikiau knew all of the material facts and that he had a worthwhile cause of action as a result of instructing Tom Loughman in June 2010. As he says in his sworn statement (paragraph 53) he instructed Mr Loughman to write a letter of demand to the defendant and also instructed him to draft Supreme Court claim if no favourable response was forthcoming.

37. I am therefore satisfied that for the purposes of section 15 (3) Mr Nikiau has not proved that the material facts relating to his cause of action were or included facts of a decisive character which were at all [relevant] times outside his actual or constructive knowledge.

38. This finding is fatal to the application for leave because it is a threshold or hurdle over which an applicant must pass before other matters , including the discretion whether to grant leave, can be considered.

39. I note however that in any event Mr Nikiau cannot satisfy the proviso to section 16 (3). This says: *"It also appears to the Court that,* ***until after the commencement of the 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."(emphasis added)*

40. Here Mr Nikiau knew that his claim was out of time *before* Mr Botleng filed it, albeit not long before. The evidence was that Mr Botleng told Mr Nikiau of the limitation problem immediately on his being instructed which must have been in early November 2013. The claim was not filed until 5 December 2013.

41. In this case therefore, any application for leave had to be made under section 16 (2) i.e. prior to the commencement of any relevant action. However, had that been done, Mr Nikiau's inability to fulfill the requirements of section 15 (3) would still have prevented a successful application.

Summary and Conclusion

42. Mr Nikiau's application for leave must for these reasons be dismissed. Regrettably, it seems that partly through lack of funds and the absence of a legal aid scheme in Vanuatu and partly as a result of his not being advised by any of his lawyers prior to Mr Botleng about the limitation period, he has been deprived off the opportunity to have his claim heard on its merits. It may be that Mr Nikiau has the basis for a claim in negligence against one or more of the solicitors whom he engaged prior to Mr Botleng given their apparent failure to mention the three-year limitation on filing his claim. I say no more than that and repeat that I have not heard evidence from the lawyers as to the criticism Mr Nikiau and Mr Botleng made of them. However as Mr Hurley pointed out, it is not unknown for a Court in dismissing an application for leave to extend time to point out that there may well be a strong claim against legal advisors: see for example *Donovan v. Gwentoys Ltd* [1990] 1 WLR 472.

43. TVL is entitled to costs which may be taxed if they cannot be agreed. However given the evidence about Mr Nikiau's financial position and the fact that TVL has escaped having to deal with this claim on its merits, it may well think it prudent not to seek costs.

44. Unless by 15 June 2014 Mr Hurley requests a conference to deal with the question of costs, the file will be closed.

BY THE COURT