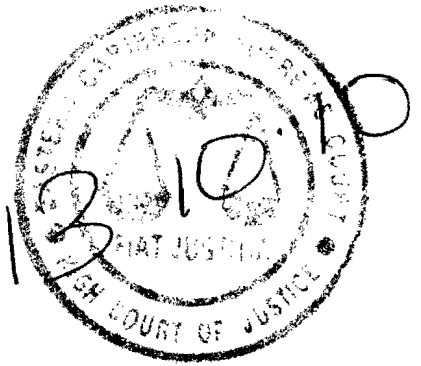


THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
SAINT VINCENT AND THE GRENADINES
HIGH COURT CIVIL CLAIM NO. 113 OF 2008



BETWEEN:

BURTON WILLIAMS

Claimant

v

ELVINEAL RICHARDS

First Defendant

ALEXIS OLLIVIERRE

Second Defendant

ANDRE BROWNE

Third Defendant

ALEXIS OLLIVIERRE

Ancillary Claimant

v

ANDRE BROWNE

Ancillary Defendant

Appearances: Mr. Olin Dennie for the Claimant
Mr. Joseph Delves for the First and Second Defendant/Ancillary Claimant
Mr. Ronald Jack for the Third Defendant/Ancillary Defendant

2010: October 4th
October 13th

JUDGMENT

[1] **THOM, J:** On June 7, 2002 motor vehicle HB25 owned by Mr. Ollivierre and which was driven by Mr. Richards collided with motor vehicle PH810 which is owned and was driven by Mr. Browne. Mr. Williams who was a passenger in HB25 suffered injuries as a result of the collision.

- [2] On April 15, 2008 Mr. Browne filed this claim for damages for personal injuries.
- [3] On July 14, 2008 Mr. Ollivierre filed an Ancillary Claim Form against Mr. Browne. The Claim Form was refiled on July 1st 2009.
- [4] Mr. Richards and Mr. Ollivierre pleaded in their defence that Mr. Williams' claim was statute barred by virtue of Section 13 of the Limitation Act Cap. 90.
- [5] Mr. Browne also pleaded in his defence Section 13 and in relation to Mr. Ollivierre's Ancillary Claim that the Ancillary Claim was statute barred by virtue of the provisions of Section 4 of the Limitation Act Cap. 90.
- [6] Mr. Williams in his reply contended that he had a good reason for the delay in filing his claim since he had filed his first claim No. 281 of 2005 within the limitation period but his then solicitor failed to have the claim form served on Messrs. Richards, Ollivierre and Browne within the period stipulated by CPR 2000.
- [7] When this claim came up for pre-trial review before Joseph J. on July 28, 2000 it was ordered that the issue of limitation be tried as a preliminary issue and the parties were ordered to file written submissions. All of the parties filed written submissions.

SUBMISSIONS

- [8] Learned Counsel for Messrs Richards and Ollivierre submitted that Mr Williams' claim is statute barred by virtue of the provisions of Section 13 of the Limitation Act. Also it is an abuse of process and vexations. Where the issue of limitation has been raised then the onus is on Mr. Williams to prove that Section 13 does not apply to his claim. Learned Counsel referred the Court to the textbook The Law of Limitation by Prime and Scanlan (2005) ed. p. 344.
- [9] Learned Counsel also submitted that the Court should not exercise its discretion under Section 33 since firstly Mr. Williams has made no application under Section 33 to have

Section 13 be dis-applied to his case. In support of this proposition Learned Counsel referred the Court to the case of Walkeley v Precision Forgings [1979] 2AER 548, at 555, and Adams v Ali [2006] 1WLR. 1330. Secondly, Mr. Williams cannot get relief under Section 33 since the Court has no discretion under Section 33 to dis-apply Section 13 where the Claimant had started a previous action within the limitation period. Learned Counsel referred the Court to the case of Walkeley, and Chappell v Cooper [1980] 2AER p. 463 the head note of which reads:

"The principle that S2D of the Limitation Act 1939 does not give the Court a discretion to override the limitation period where the Plaintiff has brought a second action outside the limitation period after failing to proceed with an action for the same cause of action brought within the limitation period applies for whatever reason the Plaintiff did not proceed with the first action, whether because he or his solicitor failed or chose not to serve the writ in time or because the action was subsequently struck out for want of prosecution or was for good or bad reasons discontinued, because in such a case the Plaintiff is not prejudiced by the provisions of S2A or S2D of the 1939 Act but by his own or his solicitor's act in relation to the first action."

- [10] Learned Counsel for Mr. Browne submitted that Mr. William's claim for damages was statute barred by virtue of the provisions of Section 13 of the Limitation Act and Mr. Ollivierre's ancillary claim was statute barred by virtue of the provisions of Section 4 of the Limitation Act since the ancillary claim was filed more than six years after the claim for damages accrued.
- [11] Learned Counsel further submitted that no leave was obtained by Mr. Williams. Further Mr. Williams' reason for the late filing of his claim is not within the ambit of Section 33 of the Limitation Act as his case was not prejudiced by the legislation which is a prerequisite of the relief offered by the Section.
- [12] Learned Counsel for Mr. Williams submitted that notwithstanding Section 13 of the Limitation Act, under the provisions of Section 33 the action should be allowed to proceed since Mr. Williams' failure to proceed with the first action was due to the dilatoriness on the part of his then solicitor. Learned Counsel submitted that the case of Walkeley is applicable but not in relation to Mr. Richards who did not file a defence to the claim.

LAW AND ANALYSIS

[13] The relevant law is the Limitation Act Cap. 90, in particular Sections 4, 13 (1) - (4) and 33 (1) and (3).

[14] Section 4 reads as follows:

"An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued."

Section 13 reads:

"(1) 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 any such provisions) 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.

(2) None of the time limits given in the preceding provisions of the Act shall apply to an action to which this section applies.

(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) or (5).

(4) Except where subsection (5) applies, the period is three years from -

- (a) the date on which the cause of action accrued; or
- (b) the date of knowledge (if later) of the person injured."

Section 33 reads:

"(1) If it appears to the Court that it would be equitable to allow an action to proceed having regard to the degree to which -

- (a) the provisions of Section 13 and 14 prejudice the plaintiff or any person whom he represents; and
- (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents;

The Court may direct that these provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.

(2)

(3) In acting under this section the Court shall have regard to all the circumstances of the case and in particular to -

- (a) the length of, and the reasons for, the delay on the part of the plaintiff;

(b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by Section 13 or as the case may be, section 14;

(c) the conduct of the defendant after the cause of action arose, including the extent, if any, to which he responded to requests reasonably made by the plaintiff for information or inspection for the purposes of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;

(d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;

(e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damage;

(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."

- [15] Learned Counsel on both sides relied on the House of Lords decision in **Walkeley** where the House of Lords considered Sections 2A and 2D of the 1939 UK Limitation Act which is in the same terms as Section 13 and 33 of the Limitation Act referred to above. In **Walkeley** the House of Lords held:

"Where a plaintiff had started an action within the primary limitation period prescribed by S2A of the 1939 Act he could not, unless there were most exceptional circumstances invoke S2D in respect of a second action brought after the expiry of the primary limitation period to enforce the same cause of action because, having brought the first action within the primary limitation period under S2A it could not be said that the provisions of S2A had prejudiced him, within S2D (1) (a). Moreover the fact that at the time of the application under S2D for leave to proceed with the second action the first action was no longer in existence because it has been struck out for want of prosecution or discontinued of the plaintiff's own volition did not constitute prejudice caused by S2A, for the only cause of prejudice in those cases was either the plaintiff's or his legal advisor's dilatoriness, or his own act in discontinuing the first action."

- [16] Over the years this decision in **Walkeley** has been severely criticised and in the case of **Horton v Sadler and Another** [2006] AER(D) p1177 the House of Lords reviewed the

same provisions which were re-enacted as Sections 11 and 33 of the 1980 UK Limitation Act and held:

“(1) While the House of Lords exercised its power to depart from its own precedent rarely and sparingly and it had never been thought enough to justify doing so that a later generation of Law Lords would have resolved an issue or formulated a principle differently from their predecessors, too rigid an adherence to precedent might lead to injustice in a particular case and unduly restrict the development of the law. Therefore, the House would depart from a previous decision when it appeared right to do so. The effect of S11 of the 1980 Act was to provide the defendant with a time limit defence in any proceedings brought after the expiry of the three-year period. When S33 (1) of the 1980 Act referred to consideration whether it would be equitable to allow “an action” to proceed it was referring to such an action. It was prejudice to the claimant by application of S11 to that action to which S33 (1) (a) referred, and that action to which the court might direct that the provisions of S11 shall not apply. Thus the question for the court under S33 was always whether it was equitable or inequitable as between the parties to override the time bar which, if relied on by the defendant, would, unless dis-applied by order of the court, defeat the action which the claimant had ex hypothesi brought out of time. That analysis could not readily be reconciled with the reasoning in the previous authority, which should be departed from. The reasoning of that decision was unsound, it had given rise to distinctions which disfigured the law in the area of law with which it was concerned and had driven the Court of Appeal to draw distinctions which were so fine as to reflect no credit. Its effect had also restricted unduly the broad discretion which Parliament had conferred by S33 by unfairly depriving claimants of a right Parliament intended them to have...

(2) In resolving an application under S33 the Court had to make a decision of which the inevitable effect was either to deprive the defendant of an accrued statute bar defence or to stifle the claimant's action against the tortfeasor who caused his personal injuries. In choosing between those outcomes the court had to be guided by what appeared to it to be equitable, namely no more but also no less than fair...”

- [17] Applying the above principles to this case I find that the fact that the Claimant had instituted proceedings by way of Claim No. 281 of 2005 which was within the limitation period and that claim was discontinued, and the present claim was filed after the limitation period that is not a bar to equitable relief under Section 33. I will therefore consider whether it is equitable to allow this claim which was filed outside of the limitation period to proceed.

[18] Under Section 33(3) the Court is required to have regard to all of the circumstances of the case in particular the factors outlined in sub-paragraphs (a) - (f).

Paragraph (a) Delay and Reasons for Delay

[19] This claim was filed on April 15, 2008. The accident occurred on the 7th June 2002. Thus the claim was filed 5 years and 10 months after the accident occurred and a period of 2 years 10 months after the limitation period expired. The reason for the delay given by Mr. Williams is that his then solicitor failed to serve the first claim within the period stipulated by the CPR 2000.

Paragraph (b) The Extent to which the Evidence is likely To Be Less Cogent

[20] Only Mr. Williams, his witness and Mr. Ollivierre filed witness statements. From an examination of the witness statements all of the witnesses appear to have a clear recollection of what occurred on the day of the accident. No witness statements were filed by Mr. Richards and Mr. Browne.

Paragraph (c) Conduct of The Defendants in Response to Request for Information

[21] The record does not show that requests were made by Mr. Williams to any of the Defendants for information or inspection relevant to his cause of action.

Paragraph (d) Disability of the Claimant

[22] Mr. Williams suffered injuries to his leg and his neck as a result of the accident. He used crutches for two months and a cervical collar for five months. He received medical treatment in St. Vincent and the United States of America between June 2002 and May 2003. All of the receipts of sums paid that are filed in support of his claim for damages and dated between June 2002 - May 2003.

Paragraph (e) Knowledge of Claimant that Defendant's Act Gave Rise to Action in Damages

[23] Mr. Williams is an accountant having graduated with a degree in business in 1982. His medical report of May 6, 2003 stated:

"This patient is here for follow up treatment for a neck injury as a result of an automobile accident on June 7, 2002."

Paragraph (f) Time when Claimant obtained Medical, Legal or Other Expert Advice

[24] Mr. Williams received medical advice at the latest May 6, 2003 that his neck injury was a result of the accident. It is not clear when he obtained legal advice.

[25] The above circumstances show that Mr. Williams who is an educated man, an accountant by profession, suffered injuries to his leg and neck during a motor vehicle accident where he was a passenger. He had to wear crutches for two months and a cervical collar for five months. He received further medical treatment in the United States until May 6, 2003 but his claim for damages was not filed until the very last day of the limitation period on June 7, 2005. The record of his Claim No. 281 of 2005 shows that on the 28th March 2008 he made an application for extension of time to serve the Claim Form. This application was refused on April 4, 2008. Mr. Richards was known to Mr. Williams, he knew where he lived. He do not allege that he did not know who was the owner of the minibus. His disability as a result of the accident lasted at the latest until May 2003 less than one year after the accident. The present claim was not filed until two years and ten months after the limitation period expired. The Defendants became aware that Mr. Williams was seeking compensation for his injuries five years and ten months after the date of the accident since they were not served within the first claim. I note that one of the Defendants filed a witness statement and he seems to have a clear recollection of the accident, however, there is nothing to show that the other passengers who would be likely to give independent testimony are now available and have a recollection of the accident. No good reason was given for the inordinate delay in filing the present claim. Mr. Williams did not explain when he learnt that the first Claim was not served on the Defendants. The onus was on Mr. Williams to show that it was equitable to allow his action to proceed this he failed to do.

[26] Learned Counsel for the Claimant in his submission stated that Mr. Richards did not file a defence. This is not correct. Mr. Richards filed a defence on the 27th April pursuant to an order of the Learned Master made on the 21st April 2009. In that defence he pleaded the defence of limitation.

[27] In view of the above I will not exercise my discretion and dis-apply Section 13, I will dismiss the Claim. Consequently, I will also dismiss the Ancillary Claims filed by the Second Defendant.

[28] It is ordered:

(a) The Claim is dismissed.

(b) The Ancillary Claims are dismissed.

(c) Mr. Williams shall pay Mr. Richards and Mr. Ollivierre costs in the sum of \$1,500 and Mr. Browne costs in the sum of \$1,500.


.....
Gertel Thom
HIGH COURT JUDGE