IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 212 of 2018

IN THE MATTER OF an application for leave to commence proceedings in which the limitation period has lapsed.

AND IN THE MATTER OF section 16 (3) & 17 (i) of Limitation Act 1971.

BETWEEN: **INDU MATI** of Solovi, Nadi, Self Employed Farmer.

Applicant/Plaintiff

AND: **AJNESH VINESH** of Togo, Nadi, and Occupation unknown.

Respondent/Defendant

Before : Master U.L. Mohamed Azhar
Counsel: Ms. J. Singh (L/A) for the Applicant/Plaintiff

Date of Ruling: 02.11. 2018

RULING

01. The applicant and the intended plaintiff filed this ex-parte notice of motion on 25.09.2018 pursuant to section 17 (1) of the Limitation Act 1971 (the Act), seeking extension of time to bring an action for damages against the defendant for the injuries allegedly caused to her as a result of the road traffic accident occurred on 17.05.2015. The application is supported by an affidavit sworn by her. On the day the motion was listed for support, the legal aid counsel who represented the intended plaintiff sought leave of the court to file the written submission in support of the motion and the court allowed the application. Accordingly, plaintiff's counsel filed the written submission supporting motion.

02. The proviso under section 4(1) of the Act clearly provides that, an action in respect of personal injuries should be commenced within 3 years from the date on which the cause of action accrued. However section 16 of the Act confers the discretionary power to the court to extend the time limit for actions in respect of personal injuries, upon fulfilling the

certain requirements. For the court to consider the extension of time, the application shall be made in accordance with section 17 of the Act, which provides;

Application for leave of court

17.-(1) Any application for the leave of the court for the purposes of section 16 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 4; and

(b) to fulfil the requirements of subsection (3) of section 16 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 4; and

(b) to fulfil the requirements of subsection (3) of section 16 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 4.

(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.

03. The above section stipulates that, whether application is made before or after the commencement of any action, the court may grant leave only if it appears to the court, on evidence adduced by or on behalf of the plaintiff, that it establishes a cause of action and it fulfills the requirements of section 16 (3) of the Act, if such an action were brought forthwith. The relevant sub-section that provides the requirements is as follow;

> *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.*(Emphasis added).

04. The Act in sections 19 and 20 also provide the meaning of material facts relating to a cause of action and the facts of decisive character for further convenience. Those sections are;

> *Meaning of "material facts relating to a cause of action"*
>
> ***19**. 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.*
>
> *Meaning of "facts of a decisive character"*
>
> ***20**. 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.

05. It should be noted that, though the Act gives meaning for several phrases used therein, the interpretation of these provisions seems to be notoriously difficult for the purpose of ascertaining the meaning which was intended to bear. In fact, the section 16 and 17 of the Act are the verbatim of **Limitation Act 1963 (U.K.)** The relevant provisions of that Act was considered in several English cases and the English courts have repeatedly been critical of the provisions of that Act. The House of Lords in **Central Asbestos Co. Ltd. v. Dodd** (1972) 2 ALL E.R. 1135 expressed it displeasure over its drafting. In that case, **Lord Reid** said at page 1138 as follows;

Normally one expects to be able to find at least some clue to the general purpose and policy of an Act by reading it as a whole in the light of the circumstances which existed when it was passed or of the mischief which it must have been intended to remedy. But here I can find none. The obscurity of the Act has been frequently and severely criticized; indeed I think this Act has a strong claim to the distinction of being the worst drafted Act on the statute book. But even so I cannot believe that it could have been so elaborately drafted if it had been intended only to have the very limited application for which the appellants contend.

06. **Lord Pearson** at page 1148 said that;

The provisions of s7(3) of the Limitation Act 1963 are notoriously difficult to construe. I think one must try to ascertain the general intention which presumably prompted these provisions and to envisage the task which confronted the draftsman.

07. **Lord Salmon** held at page 1159 that;

This Act has been before the courts on many occasions during its comparatively short life. I do not think that there are many judges who have had to consider it who have not criticized the wholly unnecessary complexity and deplorable obscurity of its language. It seems as if it were formulated to disguise rather than reveal the meaning which it was intended to bear.

08. However, **Lord Denning M.R** in **Goodchild v Greatness Timber Co Ltd** [1968] 2 All ER 255 explained the operation of these provisions despite their obscurity at page 257 and held that;

It is very difficult to understand. The particular section here in question is s.7 (4) which defines which facts are of a 'decisive character'. I can best explain it by stating the way in which it should be applied. Take all the

facts known to the plaintiff, or which he ought reasonably to have ascertained, within the first three years, about the accident and his injuries. Assume that he was a reasonable man and took such advise as he ought reasonably to have taken within those three years. If such a reasonable man in his place would have thought he had a reasonable prospect of wining an action, and that the damages recoverable would be sufficiently high to justify the bringing of an action – in short, if he had a "worth-while action" – then he ought to have brought the action within the first three years. If he failed to bring an action within those three years, he is barred by the statute. His time will not be extended under the Limitation Act 1963 simply because he finds out more about the accident or because his injuries turn out to be worse than he thought. His time will only be extended if a reasonable man in his place would not have realized, within the first two or three years, that he had a "worth-while action". Then, if it should turn out after the first two or three years that he finds out facts which make it worthwhile to bring an action, he must start it within twelve months after he finds out those facts. Then, and then only, will the time limit be extended so that he is not barred.

09. **Lord Denning M.R** further emphasized the need for scrutiny of any application for extension of time to see whether it is proper case for leave. His Lordship held at the same page that:

> *I would add, however, that when application is made for leave under the Limitation Act 1963, a judge in chambers should not grant leave as of course. He should carefully scrutinize the case to see whether it is a proper case for leave.*

10. According to the above provisions and the cases decided thereunder, the first question is whether the plaintiff adduced sufficient evidence to establish a cause of action against the defendant? As per the affidavit of the plaintiff, the accident that resulted in her injuries occurred on 17.05.2015 and the vehicle bearing number FJ 273 driven by the defendant collided with her while she was selling the vegetables along Solovi Road in Nadi. It is evident from the affidavit that, the said accident allegedly occurred due to the negligent driving of the defendant and resulted in the injuries to the plaintiff, making her unconscious. As a result, the plaintiff was admitted to hospital and treated there for 10 days before being discharged. This evidence is sufficient to establish a cause of action for the plaintiff against the defendant.

11. The second question is whether 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? In personal injury matters, the identity of the driver, to whose negligence the plaintiffs' injuries was attributable, was held to be 'a material fact of a decisive character' in **Re Clark v. Forbes Stuart (Thames Street) Ltd. (intended action)** (1964) 2 ALL E.R. 282), and **Walford v. Richards** (1976) 1 Lloyds Rep. 526). A Statute of Limitation cannot begin to run unless there are two things present

- a party capable of suing and a party liable to be sued (*Per: Vaughan Williams L.J.* in Thomson v. Lord Clanmorris (1900) 1 Ch. D 718 at pages728 and 729).

12. It reveals from the affidavit of the plaintiff that, immediately after accident the plaintiff was not only aware of the identity of defendant, but also knew that, the injuries were attributable to his negligence. The paragraphs 3 to 8 of her affidavit reads as follows;

> 3. *The Defendant had at all material times been the driver of motor vehicle registration number FJ 273.*
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> 4. *On 17 May 2015 I was sitting near my residence at a bus stop at Solovi Road in Nadi and selling vegetables when the Defendant's motor vehicle number FJ 273 had collided with me rendering me unconscious (hereinafter referred to as "the accident")*
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> 5. *At the time of the accident, the Defendant had been the driver of the Motor Vehicle Registration Number FJ 273.*
> *(Annexed hereto and marked as annexure "IM 1" is the letter from the Nadi Traffic Officer dated 29 June 2015 outlining the details of the accident).*
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> 6. *As a result of the accident, I suffered injuries on my upper and lower limbs and also I had sustained head injuries.*
>
> 7. *To my recollection I was admitted at Lautoka Hospital for about 10 days after the accident for treatment of my injuries.*
>
> 8. *After my discharge from the Hospital and to-date I remained in pain from the injuries' sustained as a result of the accident and also have difficulty in moving and from time to time has been bedridden.*

13. **Lord Reid** in **Lord Reid Central Asbestos Co. Ltd v Dodd** (supra) at page 1139 explained how the three years' time limit is extended under the Act and what are the material fact relating to the cause of action and the facts of decisive character. His Lordship said that;

> *This at least is plain. The Act extends the three years' time limits 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.

14. Examination of paragraphs 3 to 8 of the plaintiff's affidavit in the light of the above decision and the provisions of the Act reveals that, the material facts and the facts of decisive character were within the knowledge of the plaintiff immediately after the said accident. The knowledge that required for this purpose is not the knowledge for certain and beyond possibility of contradiction, but the knowledge sufficient to embark on preliminaries to issue the writ as **LYMINGTON M.R.** held in ***HALFORD v BROOKERS*** (1991) 1 WLR 428, at page 443 in which he said:

> *"In this context 'knowledge' clearly does not mean 'know for certain and beyond possibility of contradiction.' It does, however, mean 'know with sufficient confidence to justify embarking on the preliminaries to the issue of a writ such as submitting a claim to the proposed defendant, taking legal and other advice and collecting evidence."*

15. The fact, that the plaintiff had sufficient knowledge to embark on preliminaries to issue a writ against the defendant, is further confirmed by her other averments that, she immediately acted upon receiving the medical report in somewhere in year 2017 and retained a lawyer to commence the proceedings against the defendant. The paragraphs 10 to 14 of her affidavit as highlighted by her counsel read as follows;

> *10. Immediately thereafter, I had engaged the services of a private lawyer, Messers Bale Law to proceed in taking action against the Defendant and/or all parties' concerned to recover compensation for my personal injuries as a result of the accident (hereinafter referred to as "my matter").*
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> *11. It was only on 19 September 2017 on my follow-up that Messers Bale Law had sent a Demand Notice to New India Insurance demanding the third party insurance monetary claim against vehicle FJ 273.*
> *(Annexed hereto and marked as annexure "IM 3"*
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> *12. After the period of the Notice of Demand dated 19 September 2017 had lapsed, I had been informed by Messers Bale Law that there was no response from New India Insurance to the Notice of Demand dated 19 September 2017.*
>
> *13. Thereafter, I had called Mr Bale requesting for updates and progress regarding my matter but he had failed to provide any feedback.*
>
> *14. After making numerous attempts to get an update regarding my matter from my previous solicitors, all attempts were futile*

therefore it caused a delay in filing my application in Court and as a result, I had also lodged an official complaint through my husband at the Chief Registrar's Legal Practitioners Unit against Messers' Bale Law for further actions.
(Annexed hereto and marked as annexure "IM 4" is the Complaint Form received by the Chief Registrar's Legal Practitioners Unit on 17 April 2018)

16. The above averments of the plaintiff clearly show that, she ran out of time limit not because the material facts were outside her knowledge, but because of the fault and failure of her previous solicitor against whom she complained to the office of Chief Registrar. It was emphasized by Fatiaki J., in **Cakau v Habib** [1999] FJHC 53; Hbc0241d.98s (18 June 1999) that, leave to be denied for the fault and failure of the solicitors to commence proceedings within the time. This proposition was followed by Amaratunga J., in **Kasaimatuku v Vakaloloma** [2018] FJHC 392; HBC107.2015 (18 May 2018).

17. The overall examination of the Act shows that, the parliament's intention was to extend the time limit to those who genuinely did not know the material facts and the facts of decisive character in relation the cause of action for damages for negligence, nuisance or breach of duty as provided in section 16 of the Act within stipulated period of three years. It was not the intention of the parliament to excuse the litigants who hired the ignorant and or negligent solicitors who are lethargic in taking steps within the appropriate timetable. When explaining how the parliament drew a line between kind of ignorance which is to be sufficient excuse for delay and the kind of ignorance which is not excused according to the provisions of **Limitation Act 1963 (U.K)**, Lord Pearson stated in **Central Asbestos Co. Ltd v Dodd (supra)** at pages 1148 and 1149 that;

> *In order to strike that balance Parliament would have to draw a line somewhere between the kind of ignorance which is to be a sufficient excuse for lateness in bringing an action and the kind of ignorance which is not to be a sufficient excuse for such lateness. It seems to me that Parliament has drawn the line between ignorance of facts (Material and decisive facts) and failing to draw the conclusions which a reasonable man, with the aid of expert advice, would have drawn from those facts as to the prospect of success in an action. If the plaintiff did not know one or more of the material and decisive facts, his lateness in bringing the action is excused. If he knew all the material and decisive facts, but failed to appreciate his prospects of success in an action because he did not take expert advice or obtained wrong expert advice, his lateness in bringing the action is not excused. It seems to me that is the broad effect of sub-ss(3) and of s 7 of the Act. That is where the line is drawn.*

18. The above analysis on the law and facts of the case before me concludes that, the plaintiff did know the material and decisive facts relating to her cause of action against the defendant well within the three years of time and took preliminary steps necessary for

instituting an action for damages. However, the she could not take out the writ from this court within the prescriptive period due to the sole negligence or rather the lethargic attitude of her previous solicitor, which cannot be an excuse for this court to exercise its discretion by extending the limitation period. In fact, the plaintiff had approached the legal aid office on 19.04.2018 almost a month before the expiry of three year period. It reveals from her affidavit that, at that point in time she was advised of three years limitation period. However, the assessment of her application by the legal aid took time, which finally resulted in her claim falling out of the limitation period. The legal aid application is generally subjected to preliminary means test based on the income of the applicant which makes him or her eligible for legal aid. However, in case of civil litigation, the legal aid commission conducts another layer of testing the merits of a particular case before embarking on the litigation. I understand that, this second layer test is the one which prevented the action being filed by the legal aid commission on behalf of the plaintiff in this case, though the legal aid lawyer who advised the plaintiff on 19.04.2018 found the expiry of limitation period was nearing.

19. At this point I would suggest to make access to justice more efficient in cases like this where the limitation period is nearing to expiry that, the local legal aid offices should, after a particular applicant is qualified on means test for legal aid, immediately file the writ pending the merits test result from the head office. Then it does not matter whether the merit result comes after the expiry of limitation period or before it. If it comes after expiry and a writ has already been taken out, the pleadings can be amended at any time if necessary. On other hand, if no writ has been taken out and the positive merit result comes after expiry of limitation period, the applicant who is otherwise eligible for legal aid assistance based on his or her means, will be barred by the statute and it would be more difficult to satisfy the court for extension of time, as the threshold is relatively high. I reiterate that, this suggestion is not in any event meant to find fault on the legal aid lawyers who were consulted by the plaintiff on the eleventh hour, but aims to promote and protect the right to access to justice enshrined in the constitution.

20. For the above reasons, I hold that this application for extension of time to bring an action for negligence fails and ought to be dismissed. I have my sympathy towards the plaintiff who could not bring her action, as British Statesman Edmund Burke stated many years ago that, 'Next to love, sympathy is the divinest passion of human heart'. However, the sympathy is not the valid basis for determination of important issues on law and as judicial officers it is our responsibility to do justice according to law. Hence, the Ex-parte Notice of Motion filed by the intended plaintiff is reluctantly dismissed.

U.L.Mohamed Azhar
Master of the High Court

At Lautoka
02.11.2018