

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 70 of 2024

BETWEEN: **ASHA LATA** of Davota, Tavua formerly Rakavidi, Tavua, Local Lokgeet Singer.

1st Plaintiff

AND: **RAJESH CHAND** of Davota, Tavua formerly Rakavidi, Tavua, Farmer.

2nd Plaintiff

AND: **YAQARA PASTORAL COMPANY PTE LTD** a limited liability company having its registered office at Yaqara, King's Road, Tavua, Fiji.

1st Defendant

AND: **ROPATE SENIBICI LIGAIRI, VENU GOPAL NAIDU, RESHMA RADHIKA CHAND, WATISONI MATA TABAKI, SETAREKI TARAGA, PAULIASI RAWASOI** of Yaqara Estate, Rakiraki, Fiji, Directors (respectively)

2nd Defendant

Before : Master U.L. Mohamed Azhar
Counsel: Ms. A. Naidu for the Plaintiff

Date of Hearing: 17. 04. 2024
Date of Ruling: 19. 04. 2024

RULING

01. The plaintiffs, on 19 September 2017 at about 20.40 hours, were travelling along Kings Road in Rakiraki in a Motor vehicle bearing registration number DC 144 to attend a family function. A cow suddenly crossed the main road at Yaqara Cattle Farm. Even though the plaintiffs tried to avoid the cow, they could not do so, and the vehicle eventually bumped

into it. The cow died on the spot; the plaintiffs' vehicle was fully damaged and written off later; and the plaintiffs sustained multiple injuries due to the impact.

02. The cow belonged to the first defendant company. After the investigation a charge of failing to confine an animal was brought against the first defendant. The first defendant was found guilty after trial and fined to \$ 100.00.
03. The first plaintiff sustained injuries on her lower lip, tongue and jaw. She could not perform local Lokgeet. The plaintiff had been living happy life and due to the accident they lost amenities especially happy sexual life. They hired two solicitors to sue the defendants. However, the solicitors did not take proper action on time and the limitation period lapsed. The plaintiff through their new solicitors filed the current Motion 09 April 2024 pursuant to section 4, 16 (1) (3) and 17 of the Limitation Act (Cap 35) and inherent jurisdiction of the court and moved the court for leave to file a Writ against the first and second defendant notwithstanding the lapse of time. The Motion is supported by an affidavit sworn by both of them. The Motion was filed after almost 6 years and 7 months from the date of the incident.
04. The plaintiffs annexed copy their proposed statement of claim against the defendants. The plaintiffs alleged that, defendants were negligent in confining the animal and pleaded particulars of negligence in paragraph 19 of their proposed statement of claim. They claimed damages under various heads. The first proviso under section 4(1) of the Limitation Act Cap 35 (**the Act**) clearly provides that,

(i) **in the 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 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 any person, **this subsection shall have effect as if for the reference to six years there were substituted a reference to three years**; (Emphasis is added).

05. In the meantime, the section 17 of the Act 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).

06. 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.

07. Even though the Act gives the 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 its 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.

08. **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.

09. **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.

10. 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 advice 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 winning 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.

11. **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.

12. 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 defendants? The plaintiffs pleaded that, the first defendant company as the owner of the cattle failed to confine them in a proper way and this caused the animal come and unsafely cross the highway, causing accident. They further pleaded that, the above accident was caused to the negligence of the defendants and provided the particulars for the same. The plaintiffs also pleaded injuries sustained and the total damage caused to their vehicle. The pleadings show the issues to be determined by the courts. Accordingly, there is a cause of action for the plaintiffs against the defendants.
13. 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 tortfeasor, 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 pages 728 and 729).

14. **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.

15. 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."

16. The averments in plaintiffs' affidavit and the pleadings in the proposed statement of claim show that, they had sufficient knowledge of their claim immediately after the incident. They knew that, the incident took place due to the alleged negligence of the defendants. They also knew about the investigation by the police and charge levelled against the first defendant company for failing to confine the anima. Furthermore, the plaintiffs hired the services of two solicitors in this regard. However, neither the plaintiffs nor their solicitors did take constructive steps to commence the proceeding within the time prescribed by the law.

17. Fatiaki J., in **Cakau v Habib** [1999] FJHC 53; Hbc0241d.98s (18 June 1999) emphasized 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).
18. 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.

19. The very purpose of the legislature to confer the court the jurisdiction to extend the time was to assist the parties who did know the material and decisive facts relating to their cause of action against the defendants well within the specified time. It was never meant to grant time for those who failed to act within the time knowing very well their rights, claims and the material facts.
20. As it is clearly demonstrated both in the affidavit that supports the current Motion and the proposed statement of claim annexed thereto, the plaintiffs knew very well the material and decisive facts necessary to commence a proceeding against the defendants. However,

failed to do so. This is the kind of ignorance which is not excused. Thus, I hold that this application for extension of time to bring an action for negligence should fail and ought to be dismissed. Accordingly, the leave is refused and the Motion filed on 09 April 2024 is dismissed.

At Lautoka
19.04.2024



ph - n
U.L.Mohamed Azhar
Master of the High Court