IN THE SUPREME COURT OF NAURU
AT YAREN

Civil Suit No. 1 of 2016

BETWEEN

Joseph Adam

Plaintiff

And:

Nauru Rehabilitation Corporation

First Defendant

And:

Derio Namaduk of Ewa District, Leading Hand

Second Defendant

Before: Khan, J
Date of Hearing: 11 April 2019
Date of Judgement: 16 April 2019

Case may be cited as: Adam v Nauru Rehabilitation Corporation and Others

CATCHWORDS:

Where the plaintiff filed the claim without obtaining leave of the Cabinet as required by s. 3 of the Republic Proceedings Act 1972 and in non- compliance of the provisions of O.50, r.2 of Civil Procedure Rules 1972 and the first defendant failed to plead s. 3 of the Republic Proceedings Act 1972 and admitted liability and matter proceeded for assessment of damages-Whether the first defendant has waived its rights to rely on s.3 of the Republic Proceedings Act 1972.
Held: The first defendant waived its right.

APPEARANCES:

Counsel for the Plaintiff: Mr V Clodumar
Counsel for the First and Second Defendant: D Aingimea

RULING

INTRODUCTION

1. The plaintiff was employed by the first defendant as a labourer. On or about 20 April 2015 the plaintiff was working with the second defendant when he suffered injuries to his middle finger. The plaintiff alleges that the injuries were caused by the negligence of the second defendant.

2. On 12 January 2016 the plaintiff filed this claim for personal injuries.

3. I have set out the chronology of the events in my ruling dated 3 May 2018 at paragraph 6 when I dealt with the defendant's application to strike out the claim under O.15, r.19 of the Civil Procedure Rules 1972. I repeat what I stated therein and for the sake of clarity and completeness which is as follows:

   a) The plaintiff filed this claim on 12 January 2016;

   b) The first defendant entered an appearance on 24 February 2016 and filed a general defence on 15 March 2016 denying all the allegations made against it;

   c) On 30 June 2016 the plaintiff moved the Court to enter default judgement against the second defendant and the second defendant filed an appearance in person on 5 July 2016;

   d) On 16 June 2016 the first defendant filed a full statement of defence to the claim denying liability and in the alternative alleged contributory negligence against the plaintiff;

   e) On or about 25 April 2017 Miss Lekenua admitted liability on behalf of the first and second defendants, and the parties thereafter entered into a negotiation to reach a settlement, and offers and counter offers were made thereafter. The parties were unable to reach a compromise and this matter was set down for trial on 8 June 2017;

   f) On 8 June 2017 Miss Lekenua of counsel for the first and second defendants admitted liability and informed the court that the only issue for determination was quantum and the trial proceeded on that basis. The plaintiff gave evidence and was cross examined by Miss Lekenua. During the course of giving evidence the plaintiff sought an adjournment to go through further medical procedures to correct the injury to his right middle finger;

   g) Subsequently the plaintiff had further medical procedures and a portion of his middle finger has been amputated. The plaintiff's counsel, Mr Clodumar, obtained further medical reports and was ready to proceed with the trial and the matter was set down for trial on 9 April 2018 when this application was filed an application to strike out the action;

4. I dismissed the application for strike out and stated as follows as [15]:

[15] The first defendant failed to raise the issue of non-compliance of s.3 of the Act in its defence. In filing this application, the first defendant is now departing from his pleading and raising a new ground under Order15 rule 10(2) it was required to obtain leave of the Court to do so as the Commonwealth did in Verwayen's case. This application is non-compliance of the Rule and is therefore defective.

5. The matter was adjourned for continuation of trial on 7 November 2018 when Miss Lekenua indicated that she was going to file an Amended Statement of Defence.

6. The application to amend the Statement of Defence was heard on 8 November 2018 by way of an oral application which was opposed by the plaintiff.

7. On 15 November 2018 I granted leave to the defendants to amend their Statement of Defence and I stated as follows at [7] and [8]:

[7] *The Commonwealth of Australian v Verwayen*[1] Brennan J stated at pages 426 that:

"Subject to the Rules of Court, appealing was always capable of amendment, at least until judgement is pronounced.

[8] O.17 r.3 provides that:

"Leave to amend may be given, if the Court thinks it just to give it, notwithstanding that application for leave was made after any relevant period of limitation has expired."

8. At [10] I stated as follows:

[10] The plaintiff will be at liberty to file a reply to the amended Statement of Defence. Mr Aingimea has foreshadowed that he will be moving the Court to strike out the claim and I order that he should file his application within 3 days. I further ordered the parties to address the Court on the following matters:

1) As to whether the first defendant having failed to plead s.3 of the Act has waived its rights to do so;

2) In light of the defendants conduct in admitting liability and proceeding to trial thereafter and the claim now having become statute barred – as to whether the defendants are bound by principles of waiver and estoppel in raising s.3 of the Act.

WRITTEN SUBMISSIONS

9. Both counsels filed written submissions in relation to the issues raised by me as stated in paragraph 8 above.

CONSIDERATION

[1] [1991] 80 CLR 394

10. Mr Aingimea submits that it would be unfair to deny the defendants from raising the point of law that the action was filed in breach of s.3 of Republic Proceedings Act 1972 (RPA), in that, the leave of the Cabinet was not obtained and for non-compliance of O.50 r.2 of the Civil Procedure Rules 1972. He further submitted that notwithstanding the stand taken by the first defendant in admitting liability and the case proceeding to assessment of damages is not to be treated as a waiver of the first defendant's right to raise non-compliance of s.3 of RPA.

11. Mr Aingimea in his closing remarks in the written submissions stated as follows:

"The defendant has submitted that it is within its right under the rules to make the application it has. The plaintiff does not have the Cabinet approval by virtue of section 3 of the Republic Proceedings Act 1972, and did not comply with order 50, r.2 of the Rules, in order to proceed in an action against the first defendant. The defendants have filed a summons to strike out the action by the plaintiff against the defendants. The amended statement of claim has been filed. Clearly, only the first defendant can make such an application. Given that an issue may be dealt with by the Court before or even after the trial (O.28, r.2), we again prayerfully reiterate that we are within our rights to raise this issue at the time of the trial."

12. Mr Clodumar in support of his submission of waiver relied on *Craine v Colonial Mutual Fire Insurance Company Limited*[2]. He submitted at [25] of his submissions as follows:

"The principles of waiver and estoppel defined in Craine were discussed and considered in the case of *The Commonwealth v Verwayen* (1990) 170 CLR 394 by the High Court. By a majority of 4 to 3, the High Court affirmed the decision of the majority of the Full Court of the Supreme Court of Victoria and held that the Commonwealth was stopped from disputing (Deane and Dawson JJ) and had waived its right to dispute (Toohey and Gouldron JJ) its liability to Verwayen. The proposition in Craine that 'estoppel may be established where waiver cannot, and conversely waiver may be found where estoppel does not exist 'was applied in Verwayen'."

13. I will deal with the issue of waiver and estoppel separately.

WAIVER

14. In relation to the issue of waiver I rely on Verwayen's case and Brennan J. stated as follows at pages 424 to 427"

"The general principle was stated by Alderson B. in *Graham v Ingleby* (39)[3]:

"It is evident that a party who has a benefit given him by statute may waive it if he thinks fit. There are many cases in which no action can be commenced except after certain notice of action. That is a requirement by statute; but if a plaintiff went to trial, and the defendant did not then object to the want of notice, could he afterwards set aside the whole proceedings because no notice was given? It is clear that he could not."

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[2] (1920) 28 CLR.305 at page 327

[3] (1848) 1Ex 651, at p657 [154 ER] 277, at p279

In *Wilson v McIntosh* (40)[4], a caveat had been lodged against an application to bring land under the Real Property Act 1862 (NSW)(26 Vict. No. 9) and the time limited for the caveator to take proceedings to establish her title having passed, the caveat lapsed and the applicant was entitled to have the caveat removed. But the applicant proceeded to state his case and secured an order that the caveator should state her case, which she did. The applicant, having neglected to take any steps to set the matter down for hearing, applied to have the caveat removed on the ground that it had expired. The Privy Council ordered that the motion for removal be refused. Davey L.J. said [41][5]:

> "Their Lordships are of opinion that the maxim 'Quilibet potest renunciare juri pro se introtucto' applies to this case, that it was competent to waive the limit of the three months and the lapse of the caveat by sect. 23, and that the respondent did waive it by stating a case and applying for an obtaining an order upon the appellant to state her case, both which steps assumed and proceeded on the assumption of the continued existence of the caveat."

The maxim quoted by Davey L.J. is translated in Brooms Legal Maxims, 10th Edition (1939) p.477 as follows:

> "Anyone may, at his pleasure, renounce the benefit of a stipulation or other right introduced entirely in his own favour."

See Bonner v Wilkinson[6]:

> "According to the well-known principle expressed in this maxim, a defendant may, as a rule, decline to avail himself of a defence which would be at law a valid and sufficient answer to the plaintiff's demand, and waive his right to insist upon that defence."

As it is a characteristic of a right susceptible of waiver that it is introduced solely for the benefit of one party, a condition precedent to the jurisdiction of a court to grant leave cannot be waived: *Park Gate Iron Co v Coates (43)*[7]. It follows that, if the jurisdiction of a court to entertain proceedings is conditioned on the commencement of proceedings within a specified time, a defendant cannot the waive the time requirement and thereby confer jurisdiction on the court. Conversely where a case is fought on the issue where a time limitation in a particular statute is or is not a condition precedent to jurisdiction, an argument that other statute overrides the time limitation can be raised on appeal to though considered in the court below: *Adams v Chas. S. Watson Pty. Ltd (44)*[8]. However, a defence under s.6 of the Limitation Act does not create a condition precedent to jurisdiction. It is merely a right conferred on a defendant to defeat a claim got outside the time limited by the Limitation Act. In *Australian Iron & Steel Ltd v Hoogland (45)*, Windeyer J. said:

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[4] [1894] AC 129,
[5] 1894 at V133:
[6] (1822) 5BM ALB. 682 at p686 and [106] ER. 130 at p1341
[7] (1870) R.5 CA.P. 634
[8] (1938) 60 CLR. 545, at pp547, 548

> "It seems, that under the common law system of pleading, when a limitation is annexed by a particular statute to a right it creates, the plaintiff should allege in his declaration that the action was brought within time. On the other hand it is for the defendant to plead the Statute of Limitation as a defence as to an action on a common law cause of action, as if he does not it is assumed that he intends to waive it: see *Chapple v Durston* (46) [9]. However, when the issue is joined on a plea of the Statute the burden of proving that the action is within time is on the plaintiff: see cases referred to by Dixon J., as he then was, in *Cohen v Cohen* (47)[10] and, when a time limit is imposed by the statute that creates a new cause of action or right, it may be so expressed that it is regarded as having a purely procedural character, as a condition of the remedy rather than an element in the right; and in such cases it can, it seems, be waived, either expressly or in some cases by estoppel: *Wright v John Bagnall & Sons Ltd* (48)[11]; *Lubovsky v Snelling* (49)[12]."

In *Chapple v Durston* (46) (Vaughan B.) noting that the statute of limitation barred the remedy not the right (as does s.5(6) of the Limitation Act, said:

> "If he intends to insist upon it, he should plead it to prevent surprise and if he does not, it should be presumed he intends to waive it."

As the right created by s.5(6) is introduced solely for the benefit of a defendant, who must plead the right before it is effective, the right is capable of a waiver by a defendant.

However, waiver does not apply to an element in the plaintiff's cause of action. An element in the cause of action simply does not answer the description of a right which has been solely for the benefit of a defendant. It follows that the defence of s.5(6) of the Limitation Act is amenable to waiver but the issue of negligence is not.

The next question is whether the defence of s.5(6) was waived, that is to say, abandoned so that it was beyond the capacity of the Commonwealth thereafter to defeat the plaintiff's claim by invoking s.5(6). A failure to plead the Statute of Limitation does not without more establish a waiver of the statute. Subject to the rules of the Court, a pleading is always capable of amendment, at least until judgement is pronounced. It is no more than a party's definition of the issues that that party wishes to litigate: see *Laws v Australian Broadcasting Tribunal (50)*[13]. In the present case, however, there was much more than a failure to plead the Limitation Act. By the clearest communication and by his conduct, the Commonwealth declared its intention to abandon the defence. But does a clear and unequivocal declaration by the defendant that it will not raise a defence under s.5(6) of the Limitation Act amount to a waiver?

As the 'right' (that is, the defence) conferred by s.5(6) is introduced solely for the benefit of a defendant and as a plaintiff can plead the abandonment of the right 'by way of confession and avoidance if the right is thereafter asserted', ***there must be a time***

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[9] (1830) 1C. & J.I at p9 [14] ERE.R. 1311 at p1314
[10] (1929) 42 CCLR 91 at p.97
[11] [1900] 2 Q.B. 240
[12] [1944] K.B. 44
[13] NTANT, at pp 84-87

after which the defence can no longer be exercised. At what time must the defence either raised or waived?

The time when a waiver of a right occurs depends on the relationship between a party possessed of such a right and a party whose interest may be affected by exercise of the right. ***When a party possessed of a right knows that a new legal relationship is to be constituted between him and the party whose rights are liable to affection by exercise of the right and that the right, if exercised, might affect that relationship, the party possessing the right must enforce the right before the new relationship is constituted or he will be held to have waived the right.*** The new relationship is typically created by the ***pronouncing of a judgement*** in which the existing rights of the parties are merged or ***the making of an order***, but it may be created in other ways. However, created, it is on or before the constitution of the new relationship and that the right must be exercised: the right is not waived until the last moment at which its exercise is capable of affecting the new relationship: see *Ward v Raw (51)*[14]. Once the new relationship is constituted without exercise of the right it is immaterial that the relationship would have been differently constituted had the right been exercised.

15. In this matter the relationship between the plaintiff and the first defendant changed when it admitted liability and an order to that effect was made and the matter was set down for assessment of damages. In admitting liability, the first defendant waived its right to raise non compliance of s.3 of RPA and O.50 r.2 and is now precluded from doing so.

16. I agree with Mr Aingimea that estoppel does not apply and estoppel entails an element of representation and no representation was made by the first defendant to the plaintiff.

CONCLUSION

17. The application to strike out the plaintiff's claim is dismissed and I order that the costs shall be in the cause. I further order that the remaining evidence on assessment of damages is to be adduced as a matter of priority and this trial is to be concluded at the earliest possible date.

DATED this 16 day of April 2019

Mohammed Shafiullah Khan
Judge

[14] (1872) LR.15 Eq. 83, at p85