
21-11-11



IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE 614 OF 2007

| | | |
|---|---|---|
| BETWEEN | EDWARD ANDRES EBANKS POWERY | PLAINTIFF |
| AND | NORMAN CLARKE | DEFENDANT |

IN CHAMBERS
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 1ST DAY OF SEPTEMBER 2011 AND 21ST NOVEMBER 2011

APPEARANCES: Mr. Clive Allen for the Plaintiff/Respondent
Mr. Kerry Cox of Stenning & Associates for the Defendant/Applicant

**RULING**

1. This action arises out of a collision which occurred on the 26 December 2003 between a mini-bus driven by the Defendant/Applicant ("the Defendant") and a bicycle ridden by the Plaintiff/Respondent ("the Plaintiff). The Plaintiff was struck to the ground and sustained head injuries, the extent of which is now a central issue in this action which he instituted against the Defendant by writ filed on 13th December 2007.

2. By two summonses filed three and a half years apart (5th January 2008 and 20th June 2011) the Defendant seeks orders for the dismissal of the Plaintiff's action. By the first summons, the Defendant seeks to strike out the action on grounds of limitation

and by the second, to strike out the action for want of prosecution and/or on grounds of abuse of process.

3. In this brief ruling, I seek to deal with the summonses in turn.

**Limitation**

4. By virtue of section 13(4) of the Limitation Law (1996 Revision) ("the Law"), an action such as the present involving a claim for damages for personal injuries arising from the negligence of a defendant, shall not be brought after the period of 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.

5. As the writ was filed on 13th December 2007, some four years after the cause of action accrued by dint of the collision on the 26th December 2003; the action must be deemed to be time-barred in keeping with the Defendant's first summons, unless it can be shown to have come within section 13(4)(b) of the Law.

6. To that end, Mr. Allen has sought to argue on behalf of the Plaintiff (ever since 16th September 2008 when the first strike out summons came up for hearing) that due to the head injuries sustained by his client in the collision, he suffered under a disability such that his actual knowledge of the existence of his cause of action against the Defendant did not occur (for reasons to be explained) until at earliest May 2005.

7. The action having been filed on 13th December 2007 was therefore to be regarded as filed well within the three year limitation period if calculated to run from May 2005 other than from the date of the collision.

8. Mr. Allen's argument in this regard is premised on inference and on the psychiatric reports in respect of his client which have subsequently become available.

9. The inference that he invites is said to arise from the fact that the Defendant did not give a statement to the police about the collision until May 2005 while the criminal trial of the Defendant for careless driving was already underway in the Summary Court. The inference is that the Plaintiff did not give a statement at an earlier stage and was not required by the Police to do so, because he was mentally incapable of recalling and narrating the event and that this was a result of his traumatic brain injury sustained from the collision.

10. The psychiatric evidence seems to be supportive: Dr. Marc Lockhart, Consultant Psychiatrist, concludes his report on the Plaintiff's condition (dated July 12 2009) in these terms:

> *"His (the Plaintiff's) inability to adequately assist his attorney in trial preparations in June 2005 was a direct result of the injury suffered and the consequence of the injury."*

11. The question: "when was it that the Plaintiff may be found to have had the appropriate knowledge of the facts for the purposes of the effluxion of the limitation period?" – is one which, by virtue of section 18 of the Law, invites inquiry.

12. Section 18 provides in this regard:

> *"18(1) In sections 13 and 16, a reference to a person's date of knowledge is a reference to the date in which he first had knowledge –*
>
> *(a) that the injury in question was significant;*
>
> *(b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute the negligence, nuisance or breach of duty;*

*(c) of the identity of the defendant,*

*(d) ...*

*and knowledge that any act or omission did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.*

*(2) ...*

*(3) For the purposes of this section, a person's knowledge includes knowledge which he might reasonably have been expected to acquire from facts –*

*(a) observable or ascertainable by him; or*

*(b) ascertainable by him with the help of medical or other appropriate expert advice which it was reasonable for him to seek;*

*but a person shall not be taken by virtue of this subsection to have knowledge of any fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice."*

13. Thus, the inquiry that section 18 invites (at minimum and at risk of over simplification) will be one as to when it was that the Plaintiff was first capable of understanding (with or without the benefit of expert assistance) the nature of his injuries and the fact that they had given rise to a cause of action against the Defendant in the basic sense that his injury was attributable in whole or in part to the negligent action of the Defendant.

14. As was held in ***Halford v Brookes and another*** *[1991] 3 All E.R. 559 (C.A.):*

> *"Knowledge of facts" for the purposes of [(the equivalent)] of section 14 of the Limitation Act 1988, was ascertainable at the point when the plaintiff realised or had a reasonable belief that his injury was capable of being attributed to the activities of the defendant to justify taking steps to commence proceedings against the defendant and (per Nourse and Russell LJJ) did not depend on knowing, with the help of legal advice, that a particular claim was available, since legal advice*

*did not fall into the category of "appropriate expert advice" necessary for ascertaining knowledge of a fact."*

15. Following and applying that dictum in this case, the fact that Mr. Allen had been engaged by the Plaintiff or by someone on his behalf as legal adviser, to hold a watching brief during the trial of the Defendant in May 2005, may not by itself serve to fix the Plaintiff with the requisite knowledge at or before that time. The question therefore remains at what time was the Plaintiff first capable of arriving at the understanding of his claim in the sense contemplated by section 18 of the Law.

16. Mr. Allen posits that that was in May 2005 at earliest but Mr. Cox disagrees. Mr. Cox does so however, without reference to any evidence that can support his hypothesis at this stage. Discovery of relevant information and material in this case is incomplete and Mr. Cox would wish to have access to all such information or material on which to test the Plaintiff's assertion as to his actual date of knowledge of his claim.

17. My conclusion in this regard therefore is that the question of whether the Plaintiff's claim was time-barred as at the date when it was instituted is one that can only be answered conclusively after further inquiry.

18. Having so concluded, I must recognise the difficulty to be posed at an inquiry by the likely unavailability of some medical records relevant to the Plaintiff's treatment and recovery in Cuba where he attended for treatment.

19. Already I am told that some of those records sent to the George Town Hospital (from whence he was referred to Cuba for treatment) are incomplete and that the local hospital will be unlikely to be able to assist in getting the rest.

20. Nonetheless, I do not apprehend that an effective inquiry may not be held: the psychiatrist and neuro-psychoanalyst who both treated the Plaintiff are local residents, as no doubt are those family members and friends who may be examined about the Plaintiff's course of recovery. Also available should be the police investigators who would have interacted with the Plaintiff in taking his statement accounts given in respect of the collision of the 26 December 2003.

21. On the basis of the forgoing, the appropriate decision now must be to defer the question of whether the Plaintiff's claim is time-barred, to an inquiry to be taken preliminary to the trial of the action, the outcome of which will lead to a decision whether the action was time-barred when it was filed on 13th December 2007 and if so, whether by the exercise of discretion given under section 39 of the Law, the judge should allow this action to proceed nevertheless. See in this regard again ***Halford v. Brookes*** (above) where, at page 566 e-h Russell LJ said as follows:

> ***"A number of observations are worth making about section 33*** **[(the equivalent section to section 39)].** ***It gives a very wide discretion to the court, the exercise of which must always depend upon the individual circumstances of the individual case, although by subsection (3) there is a mandatory requirement that the court shall have regard to those matters listed in paras. (a) - (f). Secondly, this court should be slow to interfere with the exercise of the judge's discretion unless it can be shown that the judge erred in principle or that his decision was manifestly wrong. Thirdly, the words of Lord Diplock in Thompson v Brown Construction (Ebbw Vale) Ltd. [1981***

*2 All E.R. 296 at 301, [1981] 1 W.L.R. 744 at 750 should always be borne in mind:*

> ***"A direction under the section must therefore always be highly prejudicial to the defendant, for even if he also has a good defence on the merits he is put to the expenditure of time and energy and money in establishing it, while if, as in the instant case, he has no defence as to liability he has everything to lose if a direction is given under the section.***

***I would add however, that if through no fault of his own or that of is advisers a plaintiff who has no unassailable case finds that the primary period of limitation has expired he, too, will suffer prejudice if he is not able to pursue his remedy."***

22. That exercise of discretion by which such a plaintiff may be allowed to prosecute his expired claim will, of course, involve considerations of fairness. These will include considerations whether legitimate criticism could be leveled against the Plaintiff in respect of the delay in prosecuting the claim, both before and after the expiry of the limitation period whenever that may be found to have been. See in this regard ***Birkett v. James [1978] A.C. 297 (C.A.)***. And considerations of fairness also as to whether or not a fair trial may have been rendered impossible due to the delay: ***Birkett v James*** and ***Halford v Brookes*** (both above).

**Strike out Application**

23. Already criticisms of that kind have been leveled against the Plaintiff by the Defendant, grounded by the Plaintiff's second strike out summons.

24. The criticisms include allegations of abuse of process. This is in the sense that the delay has prejudiced the Defendant's ability to defend himself because eye-witnesses who were passengers on his mini-bus and who testified at the trial for careless driving, on which he was acquitted, have long since returned to the United Kingdom and will likely be uncontactable.

25. This particular complaint causes little difficulty however, when that judgment given in the Summary Court in May 2005 is examined. In it the chief eye-witness in question, a Miss Hallem (the second, Mr. Davis Bucroft described as her partner, saw very little) testified in favour of the Plaintiff to the effect that the collision was the fault of the Defendant. While her testimony was rejected by the Summary Court in arriving at its acquittal of the Defendant, she would remain a witness on whom the Plaintiff could rely at trial in this civil action.

26. It follows that her unavailability, if such it turns out to be, would redound to the detriment not of the Defendant's case, but the Plaintiff's.

27. Mr. Allen says, in any event, that he is confident that he would be able to procure the attendance of these witnesses at trial.

28. Mr. Cox has identified no other witness whose unavailability due to delay could cause prejudice to the Defendant's case. The other basis of the Defendant's strike out application is what he describes as the Plaintiff's contumelious default in failing to comply with an order for discovery and production of medical psychiatric reports. The order in question was made by the Court in these proceedings on 17th September 2009.

29. While some efforts have been made by Mr Allen to comply with that order, it is clear, as already discussed above, that discovery and production remains incomplete.

30. I am satisfied however, that it will not be open to the Court later, as it is not open to me now, to conclude that the blame for this can all be laid squarely at the Plaintiffs' or his lawyer's door.

31. Some of the discovery material, such as the Police and Prosecution records (relating to the careless driving investigation and prosecution) were as much within the Defendant's ability (then acting through attorney Mr Delroy Murray) to obtain as within the Plaintiff's.

32. The Defendant also complains about the "inordinate and inexcusable delay" (as the expression is used in the case law – see ***Birkett v James*** (above) – arising from the Plaintiff's failure to prosecute his claim since it was instituted on 13 December 2007, nearly four years ago. This issue cannot however, in my view, be sensibly separated now from the others as canvassed and discussed above.

33. For instance, Mr Allen's response to this complaint is in part, that had it not been for the Defendant's summons of 5th January 2008 raising the limitation argument and which the Defendant did not prosecute to completion, the Plaintiff would have seen his way clearer to the prosecution his action.

34. This response is not without some merit as it appears that the Defendant took no further steps until now to prosecute its limitation summons, certainly none after 17 September 2009 when the discovery and production order was made.

35. In the result, I am satisfied that it would be inappropriate to strike out the Plaintiff's action on the basis of the Defendant's second summons. This is assuming that the

Plaintiff's action is not already time-barred, the issue that remains now to be determined in limine at trial.

**Disposition**

36. The matter is referred to trial when, as a preliminary issue, the trial judge will need to enquire into and decide upon the time when the Plaintiff must be deemed fixed with the appropriate knowledge, as required by section 13 (4) of the Law.

37. The attorneys are now required to attend upon the Listing Officer for the fixing of a date for trial. I am available for the giving of directions such as might ensure that the discovery and production process is completed for trial.

38. Costs incurred in response to the Defendant's summonses are awarded to the Plaintiff, to be taxed if not agreed.

Hon. Anthony Smellie
Chief Justice

November 21, 2011