THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO: CV 2015-01072

BETWEEN

LEWIS NEAVES

CLAIMANT

AND

MEDCORP LIMITED

FIRST DEFENDANT

THE MINISTRY OF HEALTH

SECOND DEFENDANT

Before the Honourable Madame Justice Charmaine Pemberton

Appearances:

For the Claimant: **Mr. A. Khan instructed by Mr. I. Juman**

For the Defendants: **Mr. N. Bismath and Mr. R. Nanga instructed by Ms. N. Jagnarine**

JUDGMENT

[1] The short point for determination concerns the interpretation of Section 5(2) and Section 7 of the **LIMITATION OF CERTAIN ACTIONS ACT[1].** Parties filed written submissions for my consideration.

[1] Chap 7:09

[2] **FACTS**

The facts are, in brief, that Mr. Lewis Neaves, the Claimant, is a cancer survivor. The road to this state was not passive and uneventful. Mr. Neaves received some of his treatment at the Brian Lara Cancer Treatment Centre of Trinidad and Tobago (BLCTC).The BLCTC is the trade name of the Cancer Centre of the Caribbean Limited, which is owned by the Defendant, Medcorp Limited. This treatment spanned from 16th July, 2009 to 15th September, 2009.

[3] According to Mr. Neaves, over the period 8th September 2010 to 10th September 2010 the Pan American Health Organisation (PAHO) visited Trinidad and Tobago to conduct investigations into reports that excessive radiation treatment was administered to patients. He was interviewed by (PAHO) over the allegation that he was over radiated. This took place in September 2010, approximately one year after his treatment at Medcorp Limited had ceased. Mr. Neaves informs that he did not receive the results of this visit.

[4] In their Defence (as amended) Medcorp Limited maintains that at no time did PAHO advise BLCTC of any adverse findings. They admitted to the miscalibration but alledge it was within accepted Internaional Standards.

[5] Sometime in September 2010, the 21st to be exact, Mr. Neaves started visiting his private doctor, Dr. Barrios. Those visits extended until 10th June, 2011. On 3rd February, 2011, Dr. Barrios wrote to PAHO's examining physician, Dr. Perez, indicating that Mr. Neaves 'developed post radiation cystitis and also PR bleeding to telangieotasias in the rectum as well as pain almost 24/7'. These dates are important. On 5th April 2011 Mr. Neaves submitted a Request for Information under the FOI for the PAHO report speaking to the results of investigations conducted at the BLCTC regarding excessive exposure to radiation of cancer patients. In May 2011 Mr. Neaves received the report.

[6] On 2nd April, 2015, Mr. Neaves caused a Claim Form to be filed on his behalf claiming *inter alia* damages for personal injury as a result of Medcorp's negligence. At paragraph 1 of the Defence, Medcorp Limited raised the limitation issue, that the claim offended the Act.

[7] **SUBMISSIONS**

The Court expresses its gratitude to Counsel for the parties for their written submmissions and authorities which have proved to be most helpful. I would crave their indulgence in not rehearsing their submissions but would make references in my analysis as required.

[8] **LAW**

The **LIMITATION OF CERTAIN ACTIONS ACT** at Section 3(1) prescribes the bringing of actions 'founded…in tort' after the 'expiry of four years from the date on which the causes of action accrued'. Section 5 makes specific reference to actions for damages for negligence with specific reference to the recovery of damages for personal injuries: the specific cause of action in this case.

[9] Section 5(2) qualifies the four year limitation to the extent that time will begin to run from either the date on which the cause of action accrued or, of significance in this case, the date on which the Claimant, Mr. Neaves in the matter at bar "first acquired knowledge of the accrual of the cause of action".

[10] Section 7 further delves into when a person first acquired knowledge. This occurs when the injured person first became aware of any of the following facts:

a) That the injury in question was significant;
b) That the injury was attributable in whole or in part to the act or omission constituting negligence;
c) The identity of the Defendant.

Further "knowledge" in this area includes knowledge that Mr. Neaves might "reasonably be expected to acquire" from facts observable or ascertainable by him; or facts ascertainable by him with the help of "medical advice" as it is reasonable to seek. The proviso to this is also noteworthy and I shall set it out in full:

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

[11] Section 9 gives the Court the power to override the limitation period. In so doing the Court must have regard to certain criteria which must be outlined in an application by the Court supported by evidence. That sadly does not form part of the Court's remit on this issue.

[12] Counsel for the Claimant relied on **VINCE BOYCE v PETROTRIN**[2] and **SARAH YOUNG and ORS v LEAN PEGUS and ORS**[3]**.** In the former case, Rahim J. had to decide an application framed under the Court's powers outlined above - that is, pursuant to Section 9. The Learned Judge considered the factors outlined at Section 9(3). That is not the case here. There is no application before this court for the excercise of that discretion. By extension the **SARAH YOUNG** case is also inapplicable.

[13] That leaves us with the issue: ***from the pleadings as filed, when did Mr. Neaves receive knowledge that his condition was significant; that it was attributable in whole or in part to Medcorp***. For our part was that knowledge such as he might reasonably be expected to acquire from a condition "observable or ascertainable" by him or from facts ascertainable with the help of medical advice? Even though the tail piece to the section does not contain a reference to "medical" advice, I do not think it unreasonable to infer from that part that such advice being specialist advice cannot be imputed to Mr. Neaves without more. To me, that would make a nonsense of the section.

[14] When did Mr. Neaves acquire the knowledge as provided for in Section 7 sufficient to displace the clear provisions of Section 3, as qualified by Section 5(1) and (2)? I thank Counsel for the Defendant for providing this explanantion from Zuckerman in relation to the nature of the knowledge required in this regime:

> *A firm belief held by the Claimant that his injury was attributable to the act or omission of the Defendant, but in respect of which he thought it necessary to obtain confirmation from experts, would not be regarded as knowledge until the results of his enquiries became known to him, or if he delayed in obtaining confirmation, until it was reasonable for him to have obtained it.*

[15] As noted above, Mr. Neaves's private physician wrote to Dr. Perez, PAHO's representative, indicating to him certain developments in his patient's condition which he attributed to an excess of radiation being administered to him. Two issues arise, one which I have pronounced upon, that the knowledge of the physician cannot be the foundation of Mr. Neaves's knowledge. That knowledge will become Mr. Neaves's once communicated to him. There is no evidence of this. Simply providing an email attachment is not enough.

[2] CV 2012-02195
[3] CV 2008-00876

[16] Even at this stage, a further issue arises. Are we to take it that an excess of radiation being administered without more constitutes negligence? If that were the case, why was Dr. Barrios writing to Dr. Perez of PAHO? This to me is a salient issue in determining the timing of knowledge attributable to Mr. Neaves.

[17] I think that the only reasonable conclusion to draw in all of the circumstances is that Mr. Neaves acquired the requisite knowledge to file his action when he received confirmation from PAHO which detailed their findings on his exposure to radiation. There, the conditions set out in Section 7 were met to wit:

- That his injury was significant;
- That his injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence;
- The identity of the Defendant.

[18] **CONCLUSION**

The preliminary point raised by the First Defendant is therefore without merit. The Statement of Case as filed by the Claimant does not offend the **LIMITATION OF CERTAIN ACTIONS ACT**.

[19] The Court admonishes the parties to meet to settle this matter.

ORDER:

1. That proceedings brought by way of the Statement of Case filed on 2nd April 2015 do continue.
2. That the costs of and association with this issue be costs in the cause as it was a preliminary issue framed by the Court.
3. The CMC to take place on 14th November 2016 at 10:45 a.m. at POS #17.

Dated this 23rd day of June 2016

/S/ CHARMAINE PEMBERTON

HIGH COURT JUDGE