

THE REPUBLIC OF TRINIDAD AND TOBAGO:-

IN THE HIGH COURT OF JUSTICE
Court Office, San Fernando

Claim No. CV 2012-04831

**IN THE MATTER OF AN INTENDED APPLICATION UNDER SECTION
2 (3) OF THE LIMITATION OF CERTAIN ACTIONS ACT, 1997**

BETWEEN

JOHN ROBERT CUMMINGS
(also called ROBERT CUMMINGS)

Proposed Claimant

AND

WATER AND SEWERAGE AUTHORITY
OF HEAD OFFICE, VALSAYN, ST. JOSEPH

Proposed Defendant

Before the Honourable Mr. Justice R. Rahim

Appearances:

Mr. W. Seenath for the Proposed Claimant.

RULING ON APPLICATION

1. By Application without Notice filed on the 26th November 2012, the proposed Claimant applied to the court for the following orders:
 - i. That pursuant to section 9 of the Limitation of Certain Actions Act Chap 7:09, leave be granted to the Claimant to file the intended claim in negligence against the proposed Defendant although the time limited under section 5 of the Act for bring the claim has expired;
 - ii. That in the alternative, notwithstanding that the time limited to bring the claim has expired, that the time be extended pursuant to section 11 of the Act due to the proposed Claimant being a person under a disability within the meaning of the Act.

2. The application was supported by affidavit evidence of the proposed Claimant. The affidavit revealed that:
 - i. The proposed Claimant had been employed at the proposed Defendant company as a Carpenter. On the 8th December 1981 while at work he was electrocuted.
 - ii. As a result of the alleged incident, the proposed Claimant became mentally ill and was constantly under doctor's care.
 - iii. In 1983 the proposed Claimant received workmen's compensation in the sum of \$4,325.19. The proposed Claimant deposes in his affidavit that the proposed Defendant claimed to have paid to him a further sum of \$9,021.19, but that he could not recall receiving this sum. In this regard, the alleged is that he was paid workmen's compensation based on an assessment of 10% permanent disability. The proposed Claimant has

alleged that this was not a true assessment of his permanent partial disability.

- iv. Although the proposed Claimant saw his attorney in 2008, he claimed to have had a reoccurrence of his mental condition and now feels competent to pursue his claim.

Section 9

- 3. Section 9 (1), (2) and (3) gives the court a discretion to override the limitation period prescribed in sections 5 or 6 of the Act and prescribes the circumstances under which the court may exercise this discretion. It provides:

9. (1) Where it appears to the Court that it would be inequitable to allow an action to proceed having regard to the degree to which—

(a) the provisions of section 5 or 6 prejudice the plaintiff or any person whom he represents; and

(b) any decision of the Court under this subsection would prejudice the defendant or any person whom he represents,

the Court may direct that those provisions shall not apply to the action or to any specified cause of action to which the action relates.

(2) The Court shall not give a direction under this section, in which the provisions of section 6 are not applied except where the reason why the person injured could no longer maintain an action was because of the time limit established by section 5.

(3) In acting under this section the Court shall have regard to all the circumstances of the case and in particular to—

(a) the length of, and the reasons for, the delay on the part of the plaintiff;

(b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be

less cogent than if the action had been brought within the time allowed by section 8 or, as the case may be, section 9;

(c) the conduct of the defendant after the cause of action arose, including the extent to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;

(d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action; or

(e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the defendant's act or omission to which the injury was attributable, might be capable at that time of giving rise to an action for damages;

(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

4. Section 9 (1) first requires the court to conduct an inquiry into any prejudice that may occur. That is to say, the degree of prejudice likely to be suffered by the defendant in the event of the exercise of the power and by the claimant in the event of a refusal to do so.
5. Having conducted this balancing exercise and concluded that it would be inequitable not to override the limitation period, the court is then duty bound to consider all the circumstances of the case and to have regard in particular to the six specified matters in section 9 (3).

Prejudice to Either Claimant or Defendant

6. This is a primary threshold requirement for the proposed Claimant to cross, since it is the Claimant's burden to prove that the Defendant will suffer no prejudice if the action is allowed to override the limitation period: **Aparball et al v The AG CV2007-04365**.

7. In this regard, it was submitted on behalf of the proposed Claimant that although workmen's compensation was paid to the proposed Claimant, the incorrect permanent partial disability was used, that is 10%. Thus, it is argued that the proposed Claimant suffered serious prejudice in not receiving fair compensation based on that mistake of fact since he was later assessed in letter dated 19th September 1995 by Dr. Ceilia Ramcharan as suffering from a permanent partial disability of 30%-40%.
8. Since the application was an ex parte application, there are no submissions to the contrary by or on behalf of the proposed Defendant. However, since the court is duty bound to conduct a balancing exercise of prejudice, the court must consider the possible prejudice of the proposed Defendant.
9. The court considers that the possible prejudice to the proposed Defendant in the event of the exercise of the power to be:
 - i. In making the assessment of 30%-40% permanent partial disability, Dr. Ramcharan took into account the patient's history of psychotic disorder and his present mental state. This does not appear to be a consideration in the previous assessment of 10% (letter dated 29th August 1983 by Dr. H.M. Collymore). What is more, in letter dated 27th June 1984 Dr. Peter Hosein was of the opinion that although the patient seems to think that his mental illness is attributable to the alleged incident at work, it was in fact caused by a "*inborn tendency to acquire it plus a noxious agent which was an active principle in cannabis*". There seems to be evidence thus, that points to the conclusion that there may not be a causal link between the alleged work accident and the disability allegedly suffered by the proposed Claimant. So that the partial disability proposed by Dr. Ramcharan seems to be on faulty grounds.
 - ii. By the proposed Claimant's own evidence, he received workmen's compensation in 1983. The accident, (but not necessarily the injuries

alleged by the proposed Claimant), was therefore acknowledged by the proposed Defendant. It would be to the obvious disadvantage of the proposed Defendant to have a claim which was seemingly dead be brought back up some 29 years later. Particularly in light of the fact that the accident was admitted to have occurred.

- iii. The proposed Claimant contends that he is now better able to recall the incident. The court notes that the proposed Claimant has not given evidence that he has been now certified mentally fit. The court is of the view that in addition to the time that has passed, the proposed Claimant's mental health, calls into question his reliability. This weighs negatively against the case proposed by the Claimant.

10. The court notes the dicta of Jamadar J. (as he then was) in **Mitchell v. Bickraj HCA 617 of 2004**, he said:

*“ Courts ought not to extend statutory limitation periods without good cause, and section 9 (3) describes at least six considerations which a court must have regard to. These considerations are not weighted. This is a matter which Parliament has left to the courts. The overriding consideration is “all the circumstances of the case”, which gives the court a fair measure of latitude. However, as with all judicial discretions, this one must be exercised in a fair and reasonable manner, bearing in mind the relevant facts and applying the appropriate legal considerations. **Judicial discretion is not some amorphous power to be exercised whimsically**”.*

11. Thus the court is mindful of the prejudice that may be caused to the proposed Defendant in finding that there is no good cause for overriding the limitation period in this case.

12. Even if the court is wrong, when the factors under section 9 (3) are considered the court is equally not minded to override the limitation period.

The length of, and the reasons for, the delay on the part of the plaintiff

13. It has been some 29 years since the cause of action arose. The reason given was that the proposed Claimant was under a disability. While the medical evidence discloses mental illness, the medical evidence does not sufficiently show a causal link between the accident and the mental illness. What is more, the medical evidence proffered by the proposed Claimant was last updated in 1995. There has been no evidence showing the reason for the delay even after 1995. In the circumstances the court is unable to say that the continuing mental illness was the cause of the delay.

The extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 8 or, as the case may be, section 9

14. The court is of the view that it is very likely that the evidence may be less cogent than if the action would have been brought in time. This is due to the proposed Claimant's admission of a history of mental illness as well as the lack of medical evidence confirming that he is mentally fit/sound. This ground is also of applicability to the Defendant in that it is more than reasonable to conclude that an intervening period of such substantial length is bound to render the evidence to be adduced less cogent than that which is to be expected should the claim have been filed within the requisite period or within a reasonable time thereafter. The Defendant would have to source evidence from witnesses in relation to an incident which occurred 32 years ago. It goes without saying that this evidence coming so many years later is bound to be less cogent.

The conduct of the defendant after the cause of action arose, including the extent to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant

15. The proposed Defendant, in the court's view, acted reasonably. An offer for compensation was made and paid soon after the accident occurred.

The duration of any disability of the plaintiff arising after the date of the accrual of the cause of action

16. Again, while the proposed Claimant alleges that he suffered from mental illness as a result of the accident there is no evidence that the mental illness was as a direct result of the accident. Further, there is no evidence of the full period of the disability. The last medical addressing the mental illness was in 1995, with no review since. The court is left only with the evidence that up to 1995 he suffered from the mental illness.

The extent to which the plaintiff acted promptly and reasonably once he knew whether or not the defendant's act or omission to which the injury was attributable, might be capable at that time of giving rise to an action for damages

17. There is simply no evidence of causation.

The steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received

18. Again there is no evidence of this. The proposed Claimant alleges that no one paid him any attention during his disability that they referred to him as a mad man. However the court is left only with the word of the proposed Claimant on this issue.

Section 11

19. The proposed Claimant has argued in the alternative that the time be extended pursuant to section 11 of the Act due to the proposed Claimant being a person under a disability within the meaning of the Act.

20. Section 11(1) provides:

Where on the date when any right of action of which a period of limitation is prescribed by this Act accrues, the person to whom it accrues is under a disability, the action may be brought at any time before the expiry of four years from the date when the person ceased to be under a disability or died, whichever first occurred, notwithstanding that the period of limitation has expired.

21. In section 2 of the Act “disability” is defined:

(3) For the purposes of this Act, a person shall be treated as under a disability while he is—

(a) an infant;

(b) suffering from a mental disorder;

(c) receiving treatment as an inpatient in any mental hospital within the meaning of the Mental Health Act, without being liable to be detained in the said hospital;

or

(d) mentally ill within the meaning of the said Mental Health Act

22. It was submitted on behalf of the proposed Claimant that the certificate from the medical board dated 10th March 1990 shows the proposed Claimant to be suffering from (1) a chronic psychotic disorder (2) impaired judgment and (3) personality deterioration.

23. While it is clear to the court that the proposed Claimant did suffer from a mental disorder, within the meaning of the Act, again there is no medical evidence as to *when the person ceased to be under a disability* which is a requirement under section 11 for the reckoning of the period of limitation. The proposed Claimant is therefore in the court's view unable to avail himself of the provisions of section 11 as he simply has not fulfilled an important qualifying criteria set out in that section.

24. For these reasons, the court is unable to grant the orders sought. The application is therefore dismissed with no order as to costs.

Dated this 26th day of April 2013

Ricky Rahim

Judge