THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COUTRT OF JUSTICE
(SUB REGISTRY SAN FERNANDO)

Claim No. CV 2012- 2195

Between

VINCENT BOYCE

Claimant

And

PETROLEUM COMPANY OF TRINIDAD AND TOBAGO LIMITED

Defendant

Before the Honourable Mr. Justice R. Rahim

Appearances:

Mr. N. Ramnanan for the Claimant.
Mr. R. Bissessar instructed by Ms. A. Rampersad for the Defendant.

Ruling

1. By Claim Form and Statement of Case filed on the 1st June 2012, the Claimant sought *inter alia* damages for personal injury arising out of an incident which occurred on the 17th April 2007 at the Point-a-Pierre compound of the Defendant.

2. The Defendant in its Defence contended that the Claim was statute barred by virtue of sections 5(1), (2) and 7(1) of the **Limitation of Certain Actions Act Chap 7:09** (hereafter "***the Act***").

3. The Claimant, by notice of application dated 23rd October 2012, sought an order to extend the time for filing his claim to the 1st June 2012. The application is understood by the court to be, *stricto sensu*, one of an application for an order to disapply the limitation provisions set out in section 5(2) of the Act.

4. The Claimant contends firstly that the Claim has been properly filed within the limitation period. In this regard, the Claimant contends that the major component of his claim, i.e. the Lichen Planus, was confirmed in the report dated 12th June 2008 by Dr. Morgan Basanta to have been caused by the accident on the 17th April 2007. Thus, in accordance section 5(2)(b) and 7(1) of the Act, the Claimant claimed that he first acquired knowledge of the cause of action on the 12th June 2008. This would mean that the action was filed within the time period prescribed.

5. Section 7(3) of the Act sets out as follows:

> *"(3) For the purposes of this section a person's knowledge includes knowledge which he might reasonably be expected to acquire—*
>
> *(a) from facts observable or ascertainable by him; or*
>
> *(b) from facts ascertainable by him with the help of such medical or other expert advice as it is reasonable for him to seek, but there shall not be attributed to a person by virtue of this subsection, knowledge of a fact*

ascertainable 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."

6. Secondly, the Claimant submits that even if the court finds that the claim was filed outside of the limitation period, the reasons set out in his application are sufficient for the court to exercise its discretion conferred in section 9(1) of the Act in favour of extending the limitation period.

7. Section 9(1) of the Act confers a discretion on the courts to extend the Limitation Period for the filing of a Claim. Section 9(3) sets out the considerations that the court ought to have regard in making this determination. Thus, a determination on this point, should the court find that the action was brought out of time, is to be made on an application of the facts to the factors set out in section 9(3).

8. The court must therefore determine when time began to run, for the purpose of the limitation period.

When did time begin to run

9. The Claimant submitted that a cause of action consists of every fact which is material to be proved to entitle the plaintiff to succeed, every fact which the Defendant would have a right to traverse. Consequently, the Claimant submitted that establishment of a nexus between his injury and exposure to the gases was a necessary precondition of the cause of action.

10. The Claimant submitted that "*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 inquiries became known to him or if he delayed in obtaining*

confirmation, until the time when it was reasonable for him to have obtained it": **Civil Procedure by Adrian Zuckerman pg 893 para 24.20**.

11. It was submitted therefore that the nature of the Claimant's injuries necessitated that the Claimant seek expert medical advice on his injuries. The Claimant submitted that he acted with diligence and promptness, and was examined by a Dermatologist within 10 days of the incident. As a result the Claimant contended that he could only be imputed with knowledge of the accrual of the cause of action from at earliest the 12th June 2008 at which time he received independent expert confirmation of the nexus between his exposure to the gases and the his injuries.

12. In the affidavit of Louis Poy Wing, on behalf of the Defendant, Mr. Poy Wing averred that:

    a. Dr. Basanta in his medical report dated 24th May 2007 (some 37 days after the incident) certified that the claimant was suffering from *lichen planus;*

    b. by a pre action protocol letter dated 13th August 2007 the claimant's then Attorney at Law Messrs. Harrikissoon & Company claimed against the Defendant damages in negligence *arising from the Claimant's alleged exposure to sulphur dioxide while at the refinery*;

    c. having regard to the matters in (i) and (ii), the Claimant knew as at 13th August 2007 being the date of the pre action protocol letter of his medical condition of *lichen planus* and related it to his alleged exposure to sulphur dioxide which occurred at the refinery on 17th April 2007;

    d. there was an exchange of correspondence between the parties *post* 13th August 2007 and throughout the Claimant's claim was formulated on the basis that his condition of *lichen planus* was linked to his alleged exposure to sulphur dioxide while he was in the refinery.

13. Thus, it was submitted by the Defendant that on its most generous interpretation, the Claimant first acquired knowledge of the cause of action relating to the skin rash when he received Dr. Basanta's report dated 24th May 2007.

14. The Defendant submitted that the Claimant's assertion that it was not until 12th June 2008 that he was only able to link his skin condition (*lichen planus*) with his exposure to sulphur dioxide as a result of the alleged incident of the 26th April 2007, is untrue and unsupported by the evidence. Counsel for the Defendant pointed out that by pre action protocol letter dated 13th August 2007 Messrs. Harrikissoon & Co advised the Defendant that it was instructed by its client (the claimant) that:

"He [the Claimant] has developed a skin rash due to the exposure to the gas"

15. This, it was submitted, proved that the Claimant was being untruthful when he stated that he only suspected that his exposure to the gas was responsible for his skin condition but it was only confirmed by Dr. Basanta in his report dated 12th June 2008.

16. For the purpose of this Act, the general rule is that the period of limitation ended on a corresponding date in the appropriate subsequent month, irrespective of whether some months were longer than others: ***Sarah Young and ors v Lena Pegus and ors H.C.876/2008. CV.2008-00876***.

17. The court notes that our section 5(2) is on par with section 11(4) of the UK's **Limitation *Act 1980***. In personal injury claims time begins to run from the date of the claimant's 'knowledge', if later than the date on which the cause of action accrued: ***Halsbury's Laws of England Volume 68, Fifth Edition: para 920***.

18. Section 7(1) of the Act speaks to when "knowledge" of the cause of action accrues. It provides four circumstances which would amount to knowledge. In ***Halford v Brookes* [1991] 3 All ER 559 at 573**, a case which was approved in the local case of ***Sarah Young and ors v Lena Pegus and ors***, it was stated that:

'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”.’

19. In **Dobbie v Medway Health Authority** [**1994] 4 All ER 450** the Court of Appeal explained at page 456:

“This test is not in my judgment hard to apply. It involves ascertaining the personal injury on which the claim is founded and asking when the claimant knew of it. In the case of an insidious disease or a delayed result of a surgical mishap, this knowledge may come well after the suffering of the disease or the performance of the surgery. But, more usually, the claimant knows that he has suffered personal injury as soon or almost as soon as he does so.

… … …

The effect of ss 11(4)(b) and 14(1)(b) is to postpone the running of time until the claimant has knowledge that the personal injury on which he founds his claim was wholly or partly attributable to the act or omission of the defendant on which his claim in negligence is founded. 'Attributable to' was construed by May LJ in Davis v Ministry of Defence to mean 'capable of being attributed to' and not 'caused by', and I see no reason to question that conclusion.

… … …

Time starts to run against the Claimant when he knows that the personal injury on which he found his claim is capable of being attributed to something done or not done by the defendant whom he wishes to sue. This condition is not satisfied where a man knows that he has a disabling cough or shortness of breath but does not know that his injured condition has anything to do with his working conditions. It is satisfied when he knows that his injured condition is capable of

being attributed to his working conditions, even though he has no inkling that his employer may have been at fault."

20. The case of **Sarah Young and ors** (supra) is distinguishable on the facts. In that case the matter was being brought by the legal personal representative of the deceased, who died on the 10th March 2004. The Claimants attempted to argue that they only acquired knowledge of the cause of action when they visited their attorneys in August 2009 and obtained expert advice. The Defendants argued that that by virtue of section 7(3) of the Act the requisite knowledge may have been acquired by the Claimants from facts observable or ascertainable by them and that legal advice did not fall into the category of expert advice. Thus the Defendants contended that the Claimants' knowledge of the accrual of the cause of action should not be taken as being first acquired in August 2005 when the Claimants received legal advice that they could bring such an action, but on the date when they learned of the death of the deceased. The court held, inter alia that the Claimants, or at least one of them, ought to have had knowledge of one or more of the facts specified in section 7(1) of the Act at the time of the deceased's death and that in the circumstances of the case time began to run when the deceased died.

21. In that regard, this court notes that the Claimant herein instructed his then attorney Messrs. Harrikissoon & Co that the injury was due to the exposure to gas. Of course, the court also recognizes the nature of the condition. In as much as the rash appeared following the alleged accident, the cause of such a rash could have been attributed to a number of other reasons. This is seen in the reports of Dr. Basanta dated 4th June 2009 and 18th January 2010, where he indicates that the cause of the condition is unknown and has a range of causes.

22. However, the contents of the report dated 24th May 2007 by Dr. Basanta must be scrutinised. The report indicates that the Claimant suffers with Lichen Plamus disease without giving a cause or linking the disease to an event. This was not indicated until the 12th June 2008 when a further report stated that the condition appeared **after** the alleged

incident. When properly analyzed, it is apparent that Dr. Basanta has not in that further report, attempted to say that the event was in fact the cause of the disease. He simply gives a correlation to the disease and the incident. This was a matter of fact which was well within the knowledge of the Claimant in any event. It was well within the Claimant's knowledge that he developed the symptom of the disease only after the incident so that the addition of this well known statement of fact to the Dr. Basanta's report, in the court's view would have added nothing new. Dr. Basanta was not as an expert, confirming that the disease was caused by the incident but was merely repeating a fact. The relevant part of the report of Dr. Basanta of the 12th June 2008 reads as follows:

"Mr. Boyce was seen at my office on the 26.04.07. He presented with a rash on his arms, legs and neck. The latter appeared after he was exposed to gases from an explosion which occurred on 17.4.07."

23. The court is of the view and agrees with attorney for the Claimant that a Claimant is entitled to obtain expert confirmation that the disease was attributable to the Defendant's acts:

> *"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 inquiries became known to him..."* **Civil Procedure by Adrian Zuckerman pg 893 para 24.20**

24. The court however finds that on the evidence, this case is different. Nowhere in any of his reports does Dr. Basanta say that the disease suffered by the Claimant was caused by his exposure to the gases. Quite to the contrary, Dr. Basanta opines at paragraph 2 of his report of the 4th June 2009 and also in his report of the 18th January 2010, that the cause of the disease is still unknown. This confirms the court's assessment that the mention of the incident contained in the report of the 12th June 2008 was merely that of setting out a correlation between the occurrence of the symptoms and the incident and was not intended to proffer an expert opinion as to causation.

25. Further, Dr. Basanta's statement in his report of the 12th June 2008, that a surgical biopsy established the diagnosis when taken in proper context appears to be merely confirmation of his diagnosis already set out in his report of the 24th May 2007. The report of 2007 sets out clearly that the doctor had made a diagnosis of Lichen Planus at that time. The report does not say whether such a diagnosis was preliminary and subject to confirmation. Similarly, the report of 2008 does not say when the biopsy was conducted. Nevertheless, the doctor appears to have made a diagnosis on the 24th May 2007.

26. It means therefore that the Claimant came to know by the 24th May 2007, that he was suffering with Lichen Planus. He also knew from his own personal knowledge that his symptoms only manifested themselves after the incident. It is in these circumstances that the Claimant's attorneys dispatched a pre-action protocol letter on his behalf having drawn the conclusion that his condition was as a result of the incident. The court therefore finds that while it was reasonable for the Claimant to seek expert advice, by the 13th August 2007, the Claimant knew from facts ascertainable and observable by him by way of his personal knowledge and expert advice given by way of the medical report of the 24th May 2007 that his injured condition was capable of being attributed to the incident at his workplace and therefore to the Defendant. Time therefore began to run from the 13th August 2007 and had expired by the date upon which the claim was filed.

The factors to be considered in the exercise of the discretion

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

27. The Claimant submits that he acted with utmost dispatch in retaining counsel to seek his interest. Further, that due to financial difficulty he had sought the advice of his company who had offered to pay for counsel and recommended certain counsel. It was therefore reasonable for the Claimant to accept such counsel in the circumstances. It was further submitted that the Claimant having entrusted his matter to counsel was entitled to rely on advice which he believed to be given in good faith and that counsel would fairly and competently conduct proceedings on his behalf. Therefore no blame could be attributed

to the Claimant for the delay in those circumstances. Further according to the Claimant, when he became suspicious that his counsel may not have been aggressively progressing with his matter, he acted promptly in terminating his retainer and sourcing alternative counsel.

28. Having regard to the court's ruling as to when the time began to run, it appears that the claim was filed some nine months and eighteen days after the expiration of the limitation period. The court accepts the reasons given by the Claimant for the delay up to the 23rd April 2011 as the evidence supports him. The delay up to that point seems to have occurred through no fault of the Claimant and it appears to the court that the Claimant would have done all that was reasonably necessary to ensure that his claim was pursued. However the court is concerned with the lack of explanation for the delay from the 23rd April 2011 to the date of filing. The evidence shows that when the Claimant first learnt that there was a limitation period on the 17th April 2011, he was still within the prescribed period. He however chose to terminate his retainer with his then attorney on the 23rd April 2011 and permitted the limitation period to expire without making an application to the court to disapply section 5 of the Act. This is so despite his testimony by affidavit that he had been informed by the said attorney sometime in April that he could have applied for an extension of the limitation period.

29. Further, the Claimant testified in his affidavit that his *next* step was that of retaining Mr. Ramnanan. He also said that upon termination of the retainer he was informed by Mr. Mungalsingh that the file could not be located. In this regard, paragraphs 15, 16, 17, and 18 of the affidavit of the Claimant must be read together to decipher the chronology of events. When taken together, the court is led to conclude that the Claimant retained Mr. Ramnanan on the 1st May 2012, as the Claimant says that Mr. Ramnanan immediately sent correspondence on the 1st May 2012 to ascertain whether the Defendant was still being represented by MG Daly and Company and to request disclosure. This could only

mean that Mr. Ramnanan upon being retained, immediately observed that he needed further information in order to draft the claim. Left as is therefore, there is no explanation by way of evidence as to why it took the Claimant over one year to retain and instruct Mr. Ramnanan knowing that the limitation period was about to expire or had expired. The failure of the Claimant to provide any explanation for the delay in that regard is therefore a factor which the court will consider in the round together with the other factors.

The extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the Claimant 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

30. In this regard, the Defendant claims at Paragraph 13(iii) of the affidavit of Louise Poy Wing that the Defendant's witnesses cannot be located or it is extremely difficult to locate them and even if found, their memories may have been dimmed in the ensuing years and their recollection less cogent than if the action had been brought within the limitation period. It is clear to the court that this claim by the Defendant is founded more on speculation than on an actual risk of prejudice to the Defendant. Firstly, the delay in this case is some nine months and eighteen days. It surely could not be the case that the Defendant's witnesses would (in the absence of specific evidence in relation to any particular witness) have as a matter of course suffered from such debilitating memory loss in such a relatively short period. More so, the Defendant has not identified any witness or set out that such witness may be suffering from any specific condition which would cause memory loss and thus prejudice to their case and would in effect make their evidence less cogent. That which is set out by the Defendant at paragraph 13(iii) is of equal applicability to all witnesses within our system and is adequately provided for by the refreshing of the witness' memory from documents, statements and reports. Further, and in any event, there is an inference to be drawn from the said affidavit that the Defendants have not attempted to locate the witnesses so that they are not in a position to say whether the witness' memory will be or is likely to be affected.

31. Additionally, the Defendants would have been notified of the possibility of the claim since 2007 and would therefore have had the opportunity to gather and preserve its evidence in preparation to meet the allegations.

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

32. In this regard the Claimant submits that an incident of this nature where personal injury was suffered ought to have been the subject of an independent (external) investigation or at minimum an internal investigation. As a result, according to the Claimant, sometime in May 2007, an investigation appeared to have been launched under the Factories Ordinance 1946.

33. Further by letter dated 31st October 2007 from the Defendant to Harrikissoon & Company the Defendant expressly represented that its Health and Safety Departments were preparing the final reports of incidents which occurred on the 17th April 2007 and that it would revert to Harrikissoon & Company as soon as it had perused same. This was however never done. It is submitted that the reports are critical documents since they would have enabled the Claimant to analyze the extent of the negligence of the Defendant and properly plead its particulars and to seek expert advice if necessary. Its failure to disclose this document was therefore manifestly prejudicial to the Claimant.

34. But a close analysis of the relevant correspondence reveals a fundamental flaw in the submissions of the Claimant. Firstly, the Claimant has neither exhibited to his affidavit nor annexed to his Statement of Case any letter on his part requesting the disclosure of the said reports. Assistance is only to be found in the correspondence attached to the Defence filed by the Defendant. In this regard, the letter of the 6th August 2008 from Harrikissoon to the Defendant refers to an alleged promise by the Defendant to disclose

the reports and an allegation that to date the report has not been forthcoming. The allegation contained therein was however highly inaccurate. Nowhere in the Defendant's letter of the 31st October 2007 does the Defendant promise to forward any reports to the attorneys for the Claimant. The promise contained in that letter is simply one to peruse the reports when they become available and revert to the attorney. It is misleading to suggest that this meant that the Defendants would send the reports to the Claimant's attorney and the court. There was therefore no basis for attorney for the Claimants coming to this conclusion. So that it appears to the court that at no time was a request made for copies of the relevant reports. It is therefore disingenuous of the Claimant to argue that he had been awaiting the disclosure of important documents from the Defendant which the Defendant had promised to disclose when in fact there was no such promise or request from the Claimant.

The duration of any disability of the Claimant arising after the date of the accrual of the cause

35. In his report of the 12th June 2008, Dr. Basanta opines inter alia, that the condition suffered by the Claimant is chronic and likely to deteriorate as time goes by. He says further that treatment is long term and for many years. He further states at the end of his report that treatment of the Claimant could last for the rest of his life. This in the court's view is indicative of disability which requires prolonged extended treatment and is a factor which ought to be given considerable weight in this case.

The extent to which the Claimant 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

36. The court agrees with the submission of the Claimant that he has adequately surmounted this threshold. It is clear that the Claimant sought legal advice within a reasonable period and followed up on that advice. Unfortunately, the Claimant changed attorneys on more than one occasion during the period for reasons which the court has found to be

reasonable in the circumstances set out in his affidavit. In large measure therefore the Claimant has acted promptly save and accept in relation to the retention of Mr. Ramnanan (see paragraphs 28 and 29).

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

37. Again it is clear to the court that the Claimant took such steps which were prompt and reasonable in securing medical advice and had continued to do so right up until the filing of the Claim.

The exercise of the discretion

38. This court follows the dicta in ***CV 2007-04365 Between Nigel Aparball and Ors –v- Attorney General and Ors.,*** where Pemberton J at p. 3 adopted Jamadar J's reasoning in **HCA *No. 617 of 2004 Between Derryck Mitchell v Kumar Bickraj & Anor*** that the court ought not to extend statutory limitation periods without good cause and the overriding consideration is *all the circumstances of the case*.

39. Having considered all the relevant factors, the court finds in particular as follows;

i) The length of delay of nine months and eighteen days after the expiration of the limitation period when taken in its proper context is negligible in this case.
ii) The reasons for the delay are in large measure satisfactory save and except for the period between the termination of the services of Harrikissoon & Company.

However, this notwithstanding, when viewed in its totality the court is of the opinion that the entire period of delay was not without good reason.

iii) The evidence of the Defendant is not likely to be less cogent than that to be lead should the claim have been brought within the prescribed time.

iv) The disability suffered by the Claimant is likely to require treatment for the rest of his life.

v) The Claimant acted promptly and reasonably when he became aware that 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.

vi) The claimant took almost immediate steps to obtain medical and legal advice.

40. In the court's view, these factors carry considerable weight in the Claimant's favour. Additionally, the court is of the view that the Defendant has not demonstrated a sufficient prima facie likelihood that they would suffer prejudice. It therefore means that the Claimant has discharged his burden of satisfying the court that the Defendant will not likely suffer prejudice. The court is therefore of the opinion that it would be unfair and inequitable for the Claimant to be denied the opportunity of pursuing his claim in all the circumstances of the case.

41. In relation to costs, the court takes account of the delay in bringing this application. This application could have been brought prior to the filing of the claim but was not so brought. Further, the action having been filed, it was only after the point of applicability of the limitation period was pleaded by the Defendant that the Claimant saw it fit to make the present application. In those circumstances the court is of the opinion that the costs of the application should be borne by the Claimant.

42. The court will therefore make the following order;

i) The court directs that the limitation provisions of section 5 of the Limitation of Certain Actions Act Chap 7:09 shall not apply to this claim.

ii) The Claimant is to pay the Defendant's costs of the application to be assessed.

Dated this 8th day of February, 2013.

Ricky Rahim
Judge