

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2018-03251

Between

GILLIAN LEWIS

Claimant

And

TOBAGO HOUSE OF ASSEMBLY

Defendant

Before the Honourable Mr. Justice R. Rahim

Date of Delivery: Friday July 23, 2021

Appearances:

Claimant: Ms. J. Roberts-Antoine

Defendant: Ms. K. Anderson

DECISION ON APPLICATION TO DISAPPLY THE PERIOD OF LIMITATION

1. This is the second ruling of the court in this case. On April 12, 2021, on the hearing of the matter of the preliminary point of limitation, after cross examination, the court ruled that the cause of action accrued on August 4, 2014. Parties were then ordered to make written submissions on section 9 of the **Limitation of Certain Actions Act** Chap 7:09 (the Act) to have the court disapply the four-year period of limitation for instituting a personal injury claim under section 5(2) of the said Act. This is the decision of the court thereon. In so far as the history of the claim is important the court repeats some matters set out in its previous ruling.

Brief History

2. The claim was filed in September 11, 2018 alleging injury arising out of an incident that occurred on the 24th July, 2014 at the Crown Point Fire Station where the claimant was assigned as officer in charge of the Black Watch shift. When the claimant arrived for work she was informed that the entire compound including the interior walls were allegedly fumigated for a mosquito infection that day by the Public Health Department of the Tobago House of Assembly. The claimant detected an odour and within two hours began experiencing respiratory difficulty, nausea, tightening of the chest and a burning sensation. These were accompanied by headaches, dizziness and shortness of breath. The claimant alleged that seventeen other co-workers on duty at the time also made similar complaints.
3. The claimant was taken to the Scarborough General Hospital where an ECG and blood tests were done and medication was prescribed. The Statement

of Case at paragraph 13 alleges that the claimant was diagnosed with having reacted to a chemical used in fumigation called Propxyl. She spent the night at the hospital and received further treatment for coughing, painful blisters in her nostrils, diarrhea and chest congestion. Upon discharge on July 25, 2014, she suffered loss of appetite, diarrhea, nostril blisters, blood stained mucus, sore throat, dizziness, headaches and burning in the chest. She was at that time given seven days sick leave.

4. She visited the doctor once again on August 4, 2014, was referred for an X-ray and given five days sick leave. Paragraph 20 of the Statement of Case avers that she was diagnosed with pulmonary infection complications and pneumonitis of the right and left lung. The Statement of Case although having referenced the medical report as having been annexed does not seem to have the said document annexed. A Reply was filed by the claimant. The letter which was omitted from the Statement of Case was attached as GL1 to the Reply. That letter is entirely typewritten except for the date written thereon by handwriting. It carries the date of October 9th 2014. The letter states that a tentative diagnosis was made on July 26th 2014 and a diagnosis, presumably final was made on August 4, 2014. The court has subsequently ruled that the latter is the date of accrual of the cause of action.
5. The Claim Form and Statement of Case were filed on September 11, 2018 some 5 weeks and 3 days (38 days) after the expiration of the period of limitation.

The Law

6. Section 9 of the Limitation of Certain Actions Act Chap 7:09 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.

7. Thus, section **9 (1)** gives the court a discretion to direct that a claim to which section **5** applies (in this case an action for negligence) may nonetheless proceed although brought out of time if it appears to the court that it would be equitable to do so having regard to the degree to which the imposition of the statute bar contained in section 5 prejudices the claimant or any person whom he represents and the degree to which any decision of the court under section 9 (1) would prejudice the defendant or any person whom he represents. It is to be noted that the word "inequitable" appearing at **9(1)** is now to be read as "equitable" and the words "section 8" and "section 9" appearing at **9(3)(b)** should be read as referring to sections 5 and 6 respectively. See paragraphs 44 and 55 of **Mohan** cited immediately below.

8. In what is now considered to be a local the seminal case of **Alana Marisa Mohan v Prestige Holdings Limited and Another** Civ App 364 of 2017, Justice of Appeal Mendonca set out in pellucid terms the approach to be taken by the courts as follows;

“46. In exercising its discretion under section 9 (1), section 9 (3) of the Limitation Act provides that the Court must have regard to all circumstances of the case Page 18 of 32 and in particular to the matters set out at section 9 (3).

49. It has been held that this sub-section (9) (3) “is not intended to place a fetter on the discretion given by sub-section (1), this is made plain by the opening words ‘the court shall have regard to all the circumstances of the case’, but to focus the attention of the court on matters which past experience has shown likely to call for evaluation in the exercise of the discretion and which must be taken into consideration by the judge” (see Donovan v Gwentys Limited [1990] 1 WLR 472 at 477-8).”

Exercise of the discretion-factors under section 9(3)

Length of and reasons for the delay on the part of the claimant-s.9(3)(a)

9. By paragraphs 10, 11 and 12 of her affidavit filed on March 26, 2021, the claimant explained that from the end of 2014 to early 2017, she did not experience any significant discomfort or ill health except for intermittent and infrequent bouts and fits of coughing for short periods on mornings only. In 2017 she began to take greater notice of the symptoms which were becoming more frequent. At that stage she sought further medical

treatment and was informed that the injury had been serious to the extent that her respiratory tract had been inflamed resulting in scarring. It is at this point that she sought legal advice. As a consequence, she has submitted that a Pre action letter dated March 2, 2017 was dispatched to the defendant and there was no response. Whether such a letter was sent to the THA is a contested issue in this case as the THA denies ever having received such a letter and none has been annexed to either the Statement of Case, the Reply or the affidavit of the claimant filed in opposition to this claim.

10. In the court's view, without deciding whether such a letter was in fact sent (which the court is not to determine at this stage), assuming that one was at the highest, and therefore allowing for the period of 28 days for a response there appears to be no explanation for the delay between March 2017 and August 2018. Even if one is to allow a reasonable period for a reply to that letter, it matters not as there remains no explanation for the delay. An entire year and some months elapsed before the claim was filed.
11. More importantly and fundamental is that no reason has been provided for the delay that matters in law, namely for the period between August 14, 2018 and the date of filing five weeks thereafter. It appears therefore that the claimant simply had no reason for the delay in filing after the expiration of the limitation period.
12. In relation to the period before the expiration the court accepts the explanation that the effects of the injury may not have been as severe so as to cause any concern. This however can only go so far in her favour.

13. In relation to the length of the delay, the defendant has relied on several authorities in which courts have found that a delay of nine days in one case and one month in another was unacceptable¹. In the court's respectful view, resort to such cases are unhelpful as each case turns on its own facts particularly in the face of the law's mandate to consider all of the circumstances in the round. In this court's view, five weeks and three days is certainly an unacceptable period in the absence of a satisfactory explanation. It must be reiterated that no explanation has been provided for the said period of delay.

Likelihood of evidence being less cogent-s.9(3)(b)

14. In the court's view there is no reason to conclude that the evidence is likely to be less cogent. There is in fact no evidence of this before the court. The defendant has not provided any evidence that it will be unable to contest the facts of the case or the medical evidence because of circumstances that may have arisen with the passage of time. Such an assertion is also unlikely owing to the period of delay of 5 weeks.

The conduct of the defendant after the cause of action arose-s.9(3)(c)

15. This includes but is not limited to the extent to which it 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 claimant's cause of action against the defendant. In this case, the claimant did not plead the Pre-action letter in her Statement of Case and the issue was not raised in the filed Defence. In the Reply filed by the claimant on December 2, 2020 the claimant averred at paragraphs 4 and 14 that she

¹ See CV2009-00642 Otis Jobe v Ag and HCA 617 of 2004 Mitchell and Bicraj v AG.

was awaiting a response to her Pre-action letter from the defendant dated March 2, 2017. The court noted that no documents were attached to the Statement of Case in breach of Part 8 of the CPR and documents were instead attached to the Reply. However, a copy of the letter was not attached and no explanation has been provided for its absence. Additionally, the claimant had the opportunity to attach same to her affidavit but has also failed so to do and has not provided an explanation for not exhibiting the letter.

16. A perusal of the Reply filed to the Defence of the Chief Fire Officer (who was subsequently removed as a defendant by the court) shows that a letter is attached thereto dated March 15, 2017 in which the Chief Fire Officer acknowledges receipt of a letter dated March 2, 2017 from attorney at law for the claimant. In the court's view this does not lead to an inescapable inference that a letter was also sent to the THA. As a consequence, the court is left in no better position to answer the question as to whether a letter was sent. The court however does not have to determine that factual issue at this stage but the effect is that the court cannot in those circumstances be satisfied that the defendant failed to respond 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.

The duration of any disability of the claimant after the date of accrual-s. 9(3)(d)

17. The defendant has submitted that the claimant did not suffer from any serious or long term injury. The medical report of Dr. Cornelius T. Agbeko dated October 9, 2014 sets out that he at first diagnosed Upper Respiratory Tract infection as a result of exposure to toxic fumes on July

28, 2014. He prescribed medication inclusive of antibiotics. She returned to him on July 30, 2014 with persistent symptoms and was diagnosed with Pneumonitis on July 31, 2014. The right lung was in his view more infected than the left. On August 4, 2014 she was diagnosed with a pulmonary infection complication and granted 5 days sick leave. It is pleaded at paragraph 15(ii) of the Reply that she visited the same doctor in 2017 and he confirmed that she has long term continuous but intermittent respiratory difficulty. There is no medical report to support that averment neither is it contained in the Statement of Case.

18. Suffice it to say that it appears on the pleaded case that the claimant may have suffered from intermittent respiratory complications after the date of accrual but the court is unaware of the nature and same and a prognosis of how long such an injury is likely to last.

Prompt and reasonable action by the claimant-s.9(3)(e)

19. It is the evidence of the claimant that once she realized that there were long term effects of the injury she acted promptly. It is to be noted that this court has ruled that the cause of action accrued in August 2014 and that the claimant was aware of the fact that she had a cause of action against the defendant since that date. It follows that the inference is that for whatever reason (whether or not she thought that the injury was too mild at the time), she decided to do nothing by way of having regular check-ups or attempting to obtain legal advice until 2017, some three years later. In the court's view quite simply her inaction cannot be seen as being reasonable or prompt in those circumstances. She did nothing as it were to enforce her right for three years, then may have written a legal

letter but then proceeded to wait another year and five months before filing the claim.

Steps to obtain medical, legal or other expert advice s.9(3)(f)

20. It is clear that the claimant was aware that she had a cause of action against the defendant since August 2014. It is equally clear that she sought medical attention at the hospital at the time of the incident and twice from Dr. Agbeko. However, she failed to seek follow up medical attention for some three years thereafter and failed to seek any legal advice similarly until three years after she knew that she had a cause against the defendant. This all occurred nonetheless within the time limited for the claimant to file her claim. So that well before the expiration of the limitation period the claimant had been properly advised, may have written to the defendant but then failed without reason to initiate the claim before the expiration of the period.

Balance of prejudice

21. The court must weigh the consequences of the application of the limitation period to the claimant against the consequences of its disapplication to the defendant in the exercise of its discretion under section 9(1). The claimant will of course be prejudiced by the fact that the application of the limitation period will result in the loss of the opportunity to pursue her claim. Should she be successful on her claim she is likely to be compensated for her injuries including any long term injury. But this is not unique to this claimant as this is the general prejudice likely to be suffered by any claimant whose application to disapply the limitation period is unsuccessful.

22. The defendant on the other hand has set out no such prejudice and the court finds that it is likely to suffer none if the limitation is disapplied. As set out by Their Lordships of the Court of Appeal in Mohan supra, (page 26, paragraph 70), those factors are only part of the court's consideration and it is the duty of the court to have regard to all the circumstances of the case.

Exercise of the discretion

23. When all of the circumstances taken with the factors set out above are considered the court is of the view that the approach of the claimant towards litigating her case has been dilatory. There was no real effort to act on her entitlement to take legal action. She sat by for three years without enquiring into her health or obtaining legal advice and when she finally did, she once again sat by and did nothing until the time expired. Thereafter she did nothing until 5 weeks later. Through it all she has failed to provide a reasonable explanation for her inaction. The legislation is designed so as to ensure that parties do not adopt a laissez-faire approach to the institution of legal action. It is also designed to ensure a level of certainty to all litigants so that the proverbial sword of Damocles does not continue to dangle over any particular party in respect of liability. The conduct of the claimant therefore weighs heavily against her when all of the factors and circumstances are considered and she has therefore failed to satisfy the court that the limitation period should be disapplied.

Costs of the proceedings to disapply the limitation period

24. The issue of limitation was raised by this defendant in its Defence and so the court gave directions for the issue to be tried. It is in that context that

the claimant raised the issue of the disapplication of the limitation period. This was therefore not a separate application brought by the defendant but was a preliminary point made in the claim and so it does not attract a separate order for costs. The defendant is however entitled to its costs on the claim.

Disposition

25. The order is as follows;

- a. The claim is dismissed it having been filed outside of the period limited by section 5 of the Limitation of Certain Actions Act Chap 7:09
- b. The claimant shall pay to the defendant 45% of the prescribed costs of the claim calculated on a value of \$50,000.00 being costs up to and including service of the Defence in the sum of \$6,300.00.

Ricky Rahim

Judge