COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2011/CLE/gen/01196

DANIEL SEARS

Plaintiff

AND

CENTRAL BANK OF THE BAHAMAS

Defendant

Before Hon. Mr. Justice Ian R. Winder

Appearances: **Keod Smith for the Plaintiff**

Keith Major Jr with Dennise Newton for the Defendant

11 April 2022

RULING

WINDER, J

This is my decision on the Defendant's application for an amendment of its Defence to plead the Limitation Act as a defence and for the subsequent striking out of the Plaintiff's claim on the basis that it is statute barred.

[1.] A brief chronology of this matter is as follows:

13 Oct 06	Plaintiff alleges that he suffered lower back injury as a result of a fall at the Defendant's workplace. Plaintiff is attended to at the Doctor's Hospital Emergency Room where he is treated and referred to an orthopaedic specialist.
14 Oct 06	Plaintiff attempts to return to work but is unable to work due to the pain and is rushed back to the Doctor's Hospital. Plaintiff is treated and referred to Dr. Magnus Ekedede.
12 Nov 06	MRI taken which reflected injury to the Plaintiff's lower back. Dr Bullard advises that the Plaintiff be placed on restrictive duties and restricted to not lifting anything above 20 pounds.
2 Nov 07	Second MRI ordered by Dr Ekedede confirming the injury sustained by the Plaintiff.
13 Nov 07	Plaintiff underwent back surgery which was performed by Dr Ekedede.
06 Sep 11	Plaintiff commences action by generally indorsed Writ of Summons.
14 Sep 12	Statement of Claim filed on behalf of the Plaintiff.
1 Oct 12	Defence filed on behalf of the defendant.
1 April 16	Defendant applied to amend Defence and for striking out.
12 May 16	Plaintiff applies for further and better particulars of the Defence.

[2.] This action has clearly not been prosecuted with any sense of alacrity. The incident, the subject of the action, took place in 2006 however the action was not filed until 2011. Some 11 years later we remain only at the close of pleadings.

[3.] It was agreed, in terms of priority, that the Defendant's application to amend and to strike out (which I determined would be heard together) would be heard ahead of the Plaintiff's application for further and better particulars.

[4.] The central issue on the striking out application is the question of limitation. The Defendant claims that the action is statute barred. If this is a viable defence the amendment ought to proceed, having regard to the early stage of the proceedings as notwithstanding the action was filed since 2011, we remain at the close of pleadings.

[5.] In respect of the claim that the action is statute barred, the Defendant relies on Sections 9(1) and (2) and 12(1) and (2) of the Limitation Act which provides:

> 9. (1) Subject to subsection (6), this section shall apply to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by any written law or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.
>
> (2) Subject to subsection (3), an action to which this section applies shall not be brought after the expiry of three years from —
>
> (a) the date on which the cause of action accrued; or
>
> (b) the date (if later) of the plaintiff's knowledge.
>
> ...
>
> 12. (1) Where any action, prosecution or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the provisions of subsection (2) shall have effect.
>
> (2) The action, prosecution or proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or in the case of a continuance of injury or damage within twelve months next after the ceasing thereof.

[6.] The Defendant says, at paragraph 4.1.3 of its submissions, that:

As the Writ was filed on 5 September 2011, the Plaintiff can only claim with respect to personal injuries, in relation to causes of action which accrued within the three years prior to that date. Therefore, the Plaintiff's personal injury claims, in the ordinary course, must be limited to events which took place on or after 6 September 2008.

[7.] The Plaintiff argues an absence of knowledge and submits as follows:

> 5.12 The Plaintiff accepts that by Section 9(2) of the LA-1995 the Action herein is for a claim by the Plaintiff in damages for, inter alia, negligence or breach of duty in respect of personal injury to the Plaintiff so long as it was brought before the expiration of three (3) years from the day on which cause of action accrued or from the date of the Plaintiff's knowledge, if later.
> 5.13 Aside from the fact that there appears to have been an inferred agreement by the parties to bypass the provisions of the LA-1995 until the Defendant was satisfied with Plaintiff being seen by a doctor whose professional qualities and character they could work with, the provisions of Section 10(1) of the LA-1995 seem not to have been met on the facts.
> 5.14 As such, the facts do not evidence that "knowledge" could be imputed to the Plaintiff prior to when Dr. Ekedede rendered his professional report thereby, for the benefit of the Plaintiff, an ordinary man, connecting his injuries to that of the industrial accident he sustained.
> 5.15 Before Dr. Ekedede, who appears to have been accepted by the Defendant, albeit nearing the end of the 3-year period, the Plaintiff could not determine:
>
> > 5.15.1 that at the time, his injury was significant; and/or
> > 5.15.2 that injury was attributable in whole or part to the act or omission which constituted the negligence that led to the injury; and/or
> > 5.15.3 the identity of the Defendant as the Defendant was selling to the Plaintiff that they were not responsible for the accident, but that it was the entity who delivered and stacked the money for the Defendant.

[8.] The strikeout application has been brought pursuant to Order 18 rule 19 (1)(b) of the Rules of the Supreme Court. The allegation is that the cause of action is frivolous and vexatious having regard to the limitation period. Striking out under this ground is reserved for cases which are clearly unsustainable. Case where the limitation period has passed have been found to fall into the category of cases that are frivolous and vexatious

and/or an abuse of the process of the Court. See ***Romex Properties Ltd. v John Laing Construction Ltd.*** **[1983] QB 398.**

[9.] Section 10(1) of the Limitation Act provides:

> 10. (1) In section 9, references to a person's date of knowledge are references to the date on which that person first had knowledge 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 which is alleged to constitute negligence, nuisance or breach of duty; (c) the identity of the defendant; and (d) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant, and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.

[10.] Respectfully, the Plaintiff's submissions are untenable. The suggestion that the Plaintiff could not determine, prior to 6 September 2008, that:

(a) his injury was significant; and/or

(b) that injury was attributable in whole or part to the act or omission which constituted the negligence that led to the injury; and/or

(c) the identity of the Defendant.

is contrary to the accepted facts and the Plaintiff's own pleaded case.

[11.] Paragraph 10(a) - (k) of the Statement of Claim provided:

(a) The Plaintiff was born on 27th April, 1958 and was 48 years old at the time of the accident.

(b) The Plaintiff was not allowed to leave work after the time of the accident and injury to be medically examined, assessed and treated.

(c) The Plaintiff was simply sent to the Security Department of the [Defendant] to be administered pain medication.

(d) In the evening of the day of the said accident, the Plaintiff attended the emergency department of Doctor's Hospital where he was treated and released by Dr. Bullard but referred to Dr. Gibson an orthopedic surgeon.

(e) The Plaintiff returned to work the next day but was unable to work because of pain. Security of the Plaintiff called an ambulance, but because of delay, Mr. Cleveland Brown, Supervisor, took him to Doctor's Hospital (*Dr. Bullard*) where more tests were done. He was given some time-off during which more tests were conducted. In the end, Doctor's Hospital referred him to Dr. Magnus Ekede (sic).

(f) Mr. Ian Fernander took issue with the qualification of Dr. Bullard and insisted, for and on the Bank's behalf, a second opinion. The Plaintiff was sent to another doctor who actually concluded that his condition was worse.

(g) The Bank then sent the Plaintiff back to Dr. Bullard who referred him to Dr. Magnus.

(h) On 12th November, 2006 a MRI of the spine was conducted at the Diagnostic Imaging Centre of Doctor's Hospital where the findings suggested "..degenerative arthritis with osteophytic spurring at L4 to S1, type 2 endplate changes at L5-S1 margins & desiccation at L4-5 to L5-S1 with posterocentral disc bulge at L4-5 and L5-S1 causing ventral thecal indentation and bilateral neural foraminal encroachment." This MRI was ordered by Dr. Colin Bullard who specified that owing to the injury sustained by the Plaintiff on the job, he should be put on restrictive duties not lifting anything over 20 pounds in weight. It was also noted that the Plaintiff would require frequent breaks and not allowed on his leg or standing for more than thirty (30) minutes at a time. After such period he would have to take a five (5) minute break so as to not exasperate the injury.

(i) On 2nd November, 2007 after having attended Dr. Magnus Ekedede, the Plaintiff, upon Dr. Ekedede's order, underwent a further MRI of the lumbosagral spine where Radiologist Mr. Abner Martin Landry, III, MD, FACR confirmed the findings of 12th November, 2006 more particularly set out in paragraph 5(b) above.

(j) Dr. Landry concluded that:-

  (i) "There is a large disc herniation at the L4-5 level with compromise of both traversing L5 nerve roots."
  (ii) There is left sided foraminal compromise secondary to a combination of discogenic and facet joint pathology at the L5-S1 level leading to compromise of the left L5 nerve root.
  (iii) There is multilevel hypertrophic osteoarthritis of the synovial articulating facet joints.

(k) From end of October, 2006 the Plaintiff continued physical therapy and treatment at Doctor's Hospital which led to him having to

undergo surgery by Dr. Magnus Ekedede on 13th November, 2007 to extract discal material compression on his nerve roots.

[12.] The contention therefore, that the Defendant was not fixed with the knowledge required by Section 10(2) of the Limitation Act, is unsustainable. The Defendant was under doctor's care from the date of this incident to the date of surgery in November of 2007. It would be incredible to assert that the requirement of surgery, of the back, is not an indication of significant injury.

[13.] Whether a 12 month limitation period (Section 12) or the three year period (Section 9) applied, both would have expired in the period after the surgery and the commencement of this action in 2011.

[14.] The Plaintiff contends that "there appears to have been an inferred agreement by the parties to bypass the provisions of the LA-1995 until the Defendant was satisfied with [the] Plaintiff being seen by a doctor whose professional qualities and character they could work with..." Such a contention is likewise unsustainable and devoid of any evidential support. The Plaintiff was being seen by the same principal doctor, Dr Ekedede from shortly after the incident and throughout. It was in fact Dr Ekedede which performed the surgery and made the salient diagnosis on his behalf.

[15.] In the circumstances therefore, the amendment is granted and the claim struck out as frivolous and vexatious. The Defendant shall have its reasonable costs of the action, save for the costs of the application to amend, which costs should inure to the Plaintiff in any event.

Dated this 27th day of April AD 2022

Ian R Winder
Justice