THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

**ANTIGUA AND BARBUDA**

**CLAIM NO. ANUHCV2009/0748**

**BETWEEN:**

**MALAKA PARKER**

Claimant

**AND**

**FIRST CARIBBEAN INTERNATIONAL BANK LTD**

Defendant

**Before:**

Master Cheryl Mathurin

**Appearances:**

Mr. Kendrickson Kentish for the Claimant

Ms Tracy Benn for the Defendant

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2010: November 18th;

December 20th

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## RULING

[1] **MATHURIN, M:** On the 16th December 2008 the claimant (Ms Parker) filed a claim against First Caribbean Bank (the Bank) for damages for Negligence in which she alleged that during the course of her employment between 1997 and 2008, she was exposed to mycotoxins caused by mold, poor ventilation and high levels of carbon dioxide which caused her pain and suffering and loss of amenities. The issue to be determined at this point is whether the alleged cause of action is statute barred by virtue of section 13 and 16 of the Limitation Act No. 8 of 1997.

[2] Ms Parker alleges that it is in 2007 whilst under the care of Dr Elaina George, an otolaryngologist; she was able to ascertain that there was a link between her episodes of illness and the place that she worked at High Street in St. John's.

[3] The Bank denies any causal connection and states that Ms Parker was pre-disposed to asthma which was the cause of her illness and in any event states that her claim is statute barred by virtue of the provisions of the Limitation Act No. 8 of 1997. The relevant provisions of the Act are as follows;

*"13(1) This section applies 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 or under a statute 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.*

*…*

*13(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) or (5).*

*13(4) Except where subsection (5) applies, the period is three years from-*

*(a) the date on which the cause of action accrued; or*
*(b) the date of knowledge (if later) of the person injured*

Subsection (5) is applicable if the injured person dies and is not relevant to these proceedings

*…*

*16(1) In sections 13 and 14 references to a person's date of knowledge are references to the date on which he 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;*

*…*

*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.*

*(2) the purposes of this section an injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.*

*(3) For the purposes of this section a persons' knowledge includes knowledge which he might reasonable expected to acquire –*

*(a) from facts observable or ascertainable by him; or*
*(b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek;*

*but a person shall not be fixed under this subsection with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain ( and where appropriate, act on) that advice."*

[4] The chronology of events as pleaded by the Bank leading to the determination of this issue shows that Ms Parker submitted several Medical Sick Leave certificates, 31 in all, commencing from the 6th October 1999 to 28th April 2008 which stated that the illness that she was placed on leave for was not an occupational one. That prognosis changed from August of 2008 when a total of 5 certificates stated that the illness she suffered then was occupational in nature.

[5] Ms. Parker, in support of her claim, has attached a medical report dated 14th August 2009 from Dr Elaina George who states that Ms Parker had been under her care from 2007 and in that report she states that "*she initially presented with a multitude of complaints including severe nasal obstruction, recurrent episodes of acute asthma, headaches, dizziness, memory loss, depression, initial consultation, she complained that over the nine years she has worked at the bank her symptoms have gotten progressively worse."*

[6] Dr George further stated that she noticed a pattern that when she treated Ms Parker the symptoms would improve then get demonstrably worse when she was at work in the Bank. Ms Parker underwent nasal surgery which apparently did not improve her condition and subsequently after allergy skin testing, Dr George states that she was severely allergic to dust and mold, particularly Penicillium and eventually opined that her work conditions at First Caribbean Bank caused her condition.

[7] The issue to be determined is whether Ms Parker's claim is statute barred by virtue of the provisions of the Limitation Act i:e whether the realization of the significance of her illness and its connection with the workplace was sufficient to afford the Bank the protection of the Limitation Act because she had the requisite knowledge of her illness requiring her to file this claim before December 2008.

[8] The Bank submits that Ms Parker had knowledge of her illness more than three years before the commencement of the claim and specifically relies on letters from Ms Parker to the Bank dated 15th August 2008 and 23rd February 2009. These letters are annexed to the Amended Defence filed on 5th November 2010.

[9] In the letter to the Bank dated 15th August 2008, Ms Parker writes "*For some time now, I have been lodging complaints on the adverse effect the Bank and its surroundings continue to have on my health. The gradual deterioration of my health and the aggressive nature of my symptoms have, over a period of years led to at least three letters from at least three different doctors, with little action from the Bank to create a healthy environment for staff.*"

[10] The letter of Ms Parker to the Bank dated 23rd February 2009, states;

> *"I have established over a period of 7 years and continue to maintain that the indoor quality at First Caribbean is below what would be deemed safe or healthy and it continues to be a threat to my health.*
>
> *I submit and wish to reiterate, that my complaints date back to well over 6 years ago. These complaints went unanswered. The non-responsiveness of the Bank led to a worsening of my situation, and over the years, I watched my condition further deteriorate.*

*Amidst my complaints, at least three doctors have made representation to the Bank about Caribbean."*

[11] Annexed to the Amended Defence is one such representation in a letter from Dr Delrose Christian to the Bank dated 7th December 2004 in which he states that "*Please be advised that Ms Malaka Parker is a patient in my care who has been diagnosed with Bronchial Asthma and other related illnesses (allergic rhinitis, atopic conjunctivitis and atopic dermatitis). She has informed me that her present condition at work specifically her small room with minimal ventilation has caused a deterioration of her health. Any courtesies extended to her in granting more ventilation will be greatly appreciated."*

[12] The Bank relies on the interpretation of similar provisions in the UK Limitation Act to ascertain Ms Parker's knowledge. In **<u>Nash v Eli Lilley & Co</u> (1993) 4 AER 383** in Purchas LJ, in considering the issue of "knowledge" for the purpose of the Act concluded at page 396 that;

> *"(2) "Knowledge" in the meaning of s 14 is a state of mind experienced by the plaintiff actually existing or which might have existed had the plaintiff, acting reasonably, acquired knowledge from the facts observable or ascertainable by him or which he could have acquired with the help of medical or other appropriate expert advice which it was reasonable for him to obtain.*
>
> *(3) The period of limitation begins to run when the plaintiff can first be said to have had knowledge of the nature of his injury to justify the particular plaintiff taking the preliminary steps for the institution of the proceedings against the person or persons whose act or omission has caused the significant injury concerned.*
>
> *(4)By s 14(3) "knowledge" for the purposes of 14(1) includes knowledge reasonably expected to be acquired. There will be cases in which a firmly held belief actually held by the plaintiff precluded consideration of any further steps which he might reasonably have taken to acquire from knowledge of further facts before initiating proceedings. In other cases the plaintiff's belief would make it reasonable for him to make the further inquiries envisaged in s 14(3). The temporal and circumstantial span of reasonable inquiry will*

*depend on the context of the case and the subjective characteristics of the individual plaintiff involved.*

*(4) It is to be noted that a firm belief held by the plaintiff that his injury was attributable to the act or omission of the defendant, but in respect of which he thought it necessary to obtain reassurance or confirmation from experts, medical or legal, or others, would not be regarded as knowledge until the result of his inquiries was known to him or if he delayed in obtaining that information, until the time at which it was reasonable for him to have got it. If negative expert advice is obtained, that fact must be considered in combination with all relevant facts in deciding when, if ever, the plaintiff had knowledge. If no inquiries were made, then, if it were reasonable for such inquiries to have been made, and if the failure to make them is not explained, constructive knowledge within the terms of s 14(3) must be considered. If the plaintiff held a firm belief, which was of sufficient certainty to justify the taking of the preliminary steps for proceeding by obtaining advice about making a claim for compensation, then such belief is knowledge and the limitation would begin to run."*

[13] Counsel for Ms Parker asserts that she only had the requisite knowledge in 2007 when she came under the care of Dr George. He states that Ms Parker has no medical qualifications and had no way of knowing the cause of her troubles and states that the best she can do is offer an unqualified opinion or a suspicion. Counsel states that after treatment from a family physician she sought other expert advice and was able to ascertain the cause of her problem in 2007. He states that this action was reasonable and submits in the circumstances the matter is not statute barred.

[14] Counsel relies on the case of **Adams v Bracknell Forest Borough Council (2004) UKHL 29** to support his contention that Ms Parker acted reasonably. In that matter the Mr. Adams sued the school he attended between the years 1977 and 1988. He had met, by chance, an educational psychologist who suggested he may be dyslexic in 1999 and upon a doctor confirming the diagnosis in 2002, issued a claim for negligence for neglecting to assess his condition causing failure to treat it to ameliorate its effects on him. The school pleaded that the claim was statute barred as it was made more than 3 years after suffering from the injury. Mr. Adams relied on the provision which allowed time to run from the date on which he had knowledge that his injury was attributable to the act or omission which constituted negligence. The judge at first instance held

that the Claimant did not know that his problems with reading and writing were attributable to the school in the sense that he had a condition in the sense that was capable of being addressed by the school and as such he did not have actual knowledge until 1999. The judge further ruled that a reasonable person with Mr. Adam's unaddressed dyslexia would have been unlikely to have sought professional help for his condition which would have alerted him to the possibility of a claim against the school and so Mr. Adams was not to be imputed with constructive knowledge at any time before the trial.

[15] Allowing the appeal, it was held by the House of Lords that in determining whether a claimant had knowledge which he might reasonably have been expected to acquire, the court was to consider how a reasonable person in the situation of the claimant would have acted; that in doing so aspects of character or intelligence were to be disregarded, that the normal expectation was that persons who were aware that they had suffered a significant injury would seek professional advice as to the cause of their problem; and that since Mr. Adams could reasonably have been expected to have sought professional advice before 1999,he had constructive knowledge more than three years before the commencement of the proceedings so as to make them statute barred.

[16] Unfortunately, Counsel has not pointed out how this case would have been of any assistance. Lord Hoffman explains how the test of reasonableness should be applied.

> *"In my opinion, s 14 (3) requires one to assume that a person who is aware that he has suffered a personal injury, serious enough to be something about which he would go to see a solicitor if he knew he had a claim, will be sufficiently curious about the causes of the injury to seek whatever expert advice is appropriate."*

In allowing the appeal he stated;

> *"In my opinion, there is no reason why the normal expectation that a person suffering from a significant injury will be curious about its origins should not apply to dyslexics. In the absence of such an expectation, there is no reason why the limitation period should not be prevented from running for an indefinite period until some contrary impulse leads to the discovery which brings it to an end."*

[17] Baroness Hale of Richmond in the same case took the following approach;

> *"We are not here concerned with knowledge that the claimant might reasonably have been expected to acquire from facts observable or ascertainable by him. We are concerned with knowledge he might reasonably be expected to acquire with the help of medical or other advice which it is reasonable for him to seek. The question is when is it reasonable to expect a potential claimant to seek such advice? Objectively it will be reasonable to seek such advice when he has good reason to do so. This will depend upon the situation in which the claimant finds himself, which includes the consequences of the accident, illness or other injury which he has suffered."*

[18] The question therefore is whether Ms Parker acted as reasonable person placed in her situation. She had visited her family physician over the period of approximately 7 years and her symptoms had not abated. She clearly believed all along that it was the conditions at her workplace that were responsible for her continuing and deteriorating illness but she only visited the specialist in 2007 when her belief was actually confirmed. In the circumstances, it is my opinion that the date of constructive knowledge was well before three years of the issuing of this claim and that Ms Parker had knowledge that her injury was significant on facts observable and ascertainable by her. In the circumstances I find that the claim is statute barred and dismissed.

[19] Costs are awarded on a prescribed basis in accordance with Appendices B and C. None of the parties applied under Parts 65.5 and 6 for a determination of the value of the claim and as such it is valued at $50,000.00. This claim is concluded after the defence was filed and up to case management which would mean that costs of 55% of a claim valued at $50,000.00 amounting to $7,700.00.

**CHERYL MATHURIN**
**Master**