

EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT & THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SVGHCV 2013/0201

BETWEEN:

DYLAN BAILEY
(By his next friend Veda Creese)

Claimant

and

[1] KENROY JOHN
[2] JUNIOR CUPID

Defendants

Before:

Ms. Agnes Actie

Master [Ag.]

Appearances:

Mr. Duane A. Daniel of counsel for the Claimant

Ms. Shirlan Barnwell holding for Mr. Jomo Thomas of counsel for the Defendants

2013: December 9;
2014: June 3.

JUDGMENT

[1] **ACTIE, M. [AG.]:** This is an application to strike out a statement of claim on the ground that it is statute barred.

Background

[2] The claimant by claim number 424/2011 filed on 9th November 2011, began an action for damages for personal injuries against the defendants. The claim was served on the insurance company by subrogation. Counsel for the insurance company entered an acknowledgment of service on 8th December 2011. The

claim was not served on the defendants within the time prescribed by the **CPR 2000**.

- [3] Counsel who filed the initial claim on behalf of the claimant died sometime in November 2012. On 23rd November 2012 new counsel placed himself on the record in place of the deceased counsel.
- [4] On 20th March 2013, the claimant sought an extension of time to serve claim number 424/2011 on the defendants. The application came before Thom J on 11th April 2013 where the claimant was granted leave to withdraw the application. On 3rd September 2013, the claimant issued a new claim number 201/2013 which is substantially the same as claim number 424/2011. Counsel for the defendants filed an acknowledgment of service on 23rd September 2013.
- [5] on 23rd September 2013, the second defendant pursuant to CPR 26.3(1) applies to strike out the claim form and statement of claim filed by the claimant on 3rd September 2013. The second defendant contends that the claim for personal injuries made in breach of section 13(4) of the **Limitation Act** of St. Vincent & the Grenadines is statute barred having been brought in excess of the three (3) years limitation period. The second defendant also alleges that the claimant is in breach of CPR 8.8 which requires a certificate of value if the amount of damages claimed is not specified.
- [6] The application to strike out is opposed by the claimant. The claimant contends that CPR 26.1(1) empowers the court to extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even when the application for an extension is made after the time for compliance has passed. The claimant contends that there are reasonable grounds for bringing the second claim pursuant to section 33 (1) & (3) of the **Limitation Act** of Saint Vincent and the Grenadines¹.

¹ Cap 129

[7] Before proceeding any further it is to be noted that the assertion of the claimant that the court may extend the limitation period pursuant to CPR 26.1 is fallacious. The jurisdiction of the court to grant an extension of the limitation period is governed by section 33 (1) & (3) of the **Limitation Act** of Saint Vincent and the Grenadines² and not CPR 26.1. CPR 26.1(1) confers jurisdiction on the court to extend or shorten the time to enable compliance with any rule, practice direction, order or direction of the court.

[8] The claimant submits that the defendant has not filed a defence and consequentially cannot rely on the limitation period as a defence. The claimant relies on CPR 10.7 which provides that "the defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the court gives permission." The claimant alleges that the defendants' application is premature and procedurally incorrect as an alternative approach was to make an application under CPR 9.7 (1) & (6)(c) which could have stayed the time for filing a defence. The claimant in support relies on **Halsbury Laws** at para 945³.

The Law

[9] Section 13(1) of the **Limitation Act** of the Laws of Saint Vincent & the Grenadines provides as follows:

"13. (1) This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists 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.

(2) None of the time limits given in the preceding provisions of this Act shall apply to an action to which this section applies.

(3) An action to which this section applies shall not be brought after

² Cap 129.

³ Halsbury laws of England Volume 68 (2008) 5th Edition.

the expiration of the period applicable in accordance with subsection (4) or (5).

- (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.

[10] The claimant contends notwithstanding the three (3) years limitation period provided in section 13, it is equitable to allow the action to proceed pursuant to section 33 (1) & (3) of the **Limitation Act**. Section 33 (1) provides as follows:

- “(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree which –
- (a) The provisions of Section 13 or 14 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 shall not apply to any specified cause of action to which the action relates”.

Section 33(3) outlines the matters which should guide the court when considering an application to dis-apply the limitation period. The claimant cites **Claudia Guy v Ricardo Watson**⁴ in support of the assertions.

Striking out

- [11] The court has power pursuant to CPR 26.3 and through its inherent jurisdiction to strike out a statement of case if it appears that: –
- (a) there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings
 - (b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;

⁴ SVGHCV2011/0410 Delivered on 4th April 2014.

- (c) the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings; or
- (d) the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10.

[12] The claimant in reply to the defendants' application to strike out relies on the provisions of section 33 of the **Limitation Act**. Section 33 of the **Limitation Act** gives the court a broad discretion to dis-apply the limitation period in personal injuries matters. The House of Lords in **Horton v Sadler and Ors**⁵ quoting Lord Denning M.R in **Firman v Ellis** ⁶ states:

"In a personal injury case a plaintiff is not absolutely barred by the three-year time limit. The judges have discretion to override the time limit where it is fair and just to do so".

The House of Lords held that parliament conferred on the court a virtually unfettered discretion to allow any action for damages for personal injuries to proceed after the nominal three year limitation has expired "if it appeared to the court "equitable" to do so".

Analysis

[13] Section 33 of the **Limitation Act** of Saint Vincent & The Grenadines has given the court an overriding discretion to allow an action to proceed after the limitation period subject to the provisions of sub-section 33(3). Section 33(3) outlines the matters which should guide the court when considering an application to dis-apply the limitation period. It means that in personal injuries cases a plaintiff is not absolutely barred by the three-year time limit. The court has discretion to override the time limit where it is fair and just to do so. The practice adopted in such cases is for a plaintiff to make an application to the court for permission to proceed with the claim. I note that the claimant has not applied to the court for permission to

⁵ [2006]UKHL27

⁶ 1 Q.B 886 at page 909

proceed with the second claim number 201/2013 filed on 3rd September 2013 after the limitation period. The claimant has instead pleaded the provisions of section 33 of the **Limitation Act** to defeat the defendants' application to strike out the claim.

[14] A section 33 application is to be determined on its merits as a preliminary issue so that defendant can assert the statutory defence. Evidence of the degree of prejudice to the parties caused by granting or refusing to apply section 33 is required. The court would be in breach of CPR 26.2 if a determination of section 33 is made on its own volition without notice. Having regard to the matters to be considered in exercising the discretion under section 33 of the **Limitation Act**, I am of the opinion that an application is required to give the parties an opportunity to marshal their evidence.

[15] The jurisprudence is replete with decisions where it has been held that striking out is a draconian measure which should be used sparingly and only in exceptional circumstances. In the most recent decision of the Privy Council on the issue of striking out in **Real Time Systems Limited (Respondent) v (1) Renraw Investments Limited (2) CCAM and Company Limited (3) Austin Jack Warner**⁷ Lord Mance states:

"....., the court has an express discretion under rule 26.2 whether to strike out (it "may strike out"). It must therefore consider any alternatives, and rule 26.1(1)(w) enables it to "give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective", which is to deal with cases justly. As the editors of *The Caribbean Civil Court Practice* (2011) state at Note 23.6, correctly in the Board's view, the court may under this sub-rule make orders of its own initiative. There is no reason why the court, faced with an application to strike out, should not conclude that the justice of the particular case militates against this nuclear option (Emphasis added), and that the appropriate course is to order the claimant to supply further details, or to serve an amended statement of case including such details, within a further specified period. Having regard to rule 26.6, the court would quite probably also feel it appropriate to specify the consequences (which might

⁷ [2014] UKPC 6 Delivered on 3rd March 2014

include striking out) if the details or amendment were not duly forthcoming within that period."

[16] Having regard to the facts, authorities and the most recent decision of the Privy Council in **Real Time Systems Limited (Respondent) v (1) Renraw Investments Limited (2) CCAM and Company Limited (3) Austin Jack Warner** I am constrained not to grant the order to strike out the second claim filed by the claimant in September 2013. The limitation period of three years is not an automatic bar in a claim for personal injuries. Section 33 of the **Limitation Act** gives the court an unfettered discretion to dis-apply the three year limit. The court in exercising its discretion under section 33 is mandated to take the matters outlined in subsection 33(3). The court cannot exercise this discretion in a vacuum and rely on the scant evidence in reply to the application to strike out defence. It must be on an application with supporting evidence.

[17] The defendant's application to strike out is also grounded on failure to comply with CPR 8.8 which requires a certificate of value. The failure to provide a certificate of value does not invalidate a claim. A certificate of value would guide the court in relation to jurisdiction of the Magistrate to deal with a claim if it falls within the statutory value of claims which the magistrate has jurisdiction to determine.

Conclusion

[18] Having regard to the facts and the authorities cited I will not allow the defendants' application to strike out the claim at this juncture but order the following instead:

1. Unless the claimant file and serve an application for leave to proceed with the second claim form and statement of claim number 201/2013 filed on 3rd September 2013 within 14 days of today's date, the claim shall stand dismissed without further order.
2. I take into consideration the claimant's dilatoriness in pursuing the matter, the failure to apply for permission to continue the second claim and the fact that the claimant only raised the provisions of section 33 of the

Limitation Act on the defendants' application to strike out the claim and would accordingly award costs to the first defendant in the sum of \$350.00.

Agnes Actie
Master [Ag.]