EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim Number: BVIHCV2018/0124

Between

Asiyah Grant

Claimant

and

Javier Maduro

Defendant

Before: MASTER Ermin Moise

Appearances:

Ms. Victoria Thomas holding for Ms. Tamara Cameron of Counsel for the Claimant
Mrs. Asha Johnson-Willins of Counsel for the Defendant

2018: October, 3rd
December, 5th

JUDGMENT

[1] MOISE, M.: On 15th June, 2018 the claimant filed this action claiming damages for personal injury as a result of a road traffic accident which occurred on 1st February, 2014. The defendant contends that this action is statute barred in accordance with section 11A of the Motor Vehicles Insurance (Third-Party Risks) (amendment) Act 2000. On that basis an application was filed on 28th August, 2018 seeking the following orders:

(a) That the statement of claim herein be struck out pursuant to CPR 26.3(1)(b); and/or

(b) That summary judgment be granted to the defendant pursuant to CPR 15.2(a) and

(c) That the costs of the application and the claim be borne by the claimant, to be assessed if not agreed.

[2] **The court's power** to strike out a statement of case is found in rule 26.3 which states that:

"*In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court:*

...

(b) that ***... the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim."***

(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;*

...

[3] The defendant has grounded the application on rule 26.3(b) and argued that due to the fact that this claim is statue barred, the statement of case does not disclose any reasonable ground for bringing the claim. However, in my view, reliance on this provision is not well founded. The statement of claim certainly provides ample evidence that there is more than a reasonable ground for bringing this claim. It is not disputed that this accident took place and the claimant has suffered significant personal injury. In my perusal of the authorities on this issue it would appear that an application to strike out due to the claim being statute barred may succeed as an abuse of the process of the court. In that regard I refer to the decision of *Clifford Robertson v H M Bhola & Co Ltd*[1] where Master Taylor-Alexander (as she then was) stated that ***"****a claim filed where the cause of action is statute barred is an abuse of process.****"*** In such a circumstance it is not that the court is deciding that the claim is without merit. It is however filed out of time and may be deemed to be an abuse of the process and the court is empowered to strike out the claim under the provisions of 26.3(c).

[4] Neither party referred the court to the case of *Hazeline Maynard et al v Saint Christopher and Nevis Solid Waste Management Corp et al*[2]. However, I believe that the approach adopted by the court of appeal is worthy of consideration in applications such as the present. In that case the master struck out the claim as an abuse of process on the grounds that it was statute barred. Her decision was however overturned on appeal. At paragraph 30 of her judgment, the Honourable Chief Justice made the following observation:

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[1] GDAHCV2011/0037

[2] SKBHCVAP2015/0006

Before concluding, I make this general observation in respect of the application as was made herein to strike out the claim. While I note the statement of Barrow JA [Ag.] in St. Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited31 to the effect that the issuance of a claim after the expiration of a limitation period could amount to an abuse of process as contemplated under CPR 26.3, this certainly should not be taken as suggesting that in every claim where there is an assertion that the claim is statue barred this automatically translates to being an abuse of process in respect of which the nuclear weapon of striking out should be deployed. It is well established that the resort to striking out is a draconian step, ordinarily of last resort and one which should be exercised with caution. Also, I entertain grave doubt as to whether such an application is appropriate where a defence of limitation is raised save in the clearest of cases. The question as to whether a claim is time barred can be in and of itself fact sensitive and thus not at all suitable for this approach but should be left for trial.

[5] It must be observed that the power to strike out a statement of case is a most draconian one and as former CCJ President de la Bastide has noted ***"[a] judge dealing with an application to strike*** *out, should start off by reminding himself that to strike out* ***a party's case and so deny him a hearing on the merits, is an extreme step not to be lightly taken."***[3] In considering these authorities I am reminded of the need for caution in such applications and to ensure that the claimant is not deprived of an opportunity to fully ventilate the substantive issues of her claim. What is important to determine therefore is whether the issues raised on this application are fact sensitive which makes it unsuitable for a summary approach as opposed to allowing full consideration by a trial judge.

[6] The applicant also submits that the court should enter summary judgment in his favour. Rule 15.2 of the CPR empowers the court to grant summary judgment if the claimant has no real prospect of succeeding on the claim. Both parties have referred to the case of *Swain v. Hillman*[4] in which it was determined that the word real implies that there is a realistic as opposed to fanciful prospect of

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[3] Barbados Redifusion Services Limited v. Asha Merchandani et al CCJ Appeal No. CV 1 of 2005

[4] [2001] 1 All ER 91

success. The court should be slow to dismiss cases and shut its doors to litigants who have a chance at some measure of success in the prosecution of their case. However, as has been noted in the case of *Michael Wilson & Partners Limited v. Temujin International Limited et al*[5], a judge, in the appropriate case should make use of its powers under rule 15.2 as it saves expense, achieves expedition and avoids the court's resources from being used up in cases where it serves no purpose. Indeed, if a claim is filed outside of the prescribed limitation period where there is no discretion for the grant of an extension, the court should exercise its powers in striking out the claim and entering judgment in favour of the defendant.

[7] The defendant's contention is that section 11A of the Motor Vehicles Insurance (Third-Party Risks) (amendment) Act 2000 establishes a 3 year limitation period for injuries arising from road traffic cases from the date of the injury. The section states as follows:

> ***"Notwithstanding anything contained in any enactment or any rule of law or equity, no** action shall be brought in any court by or on behalf of any person after the end of the period of three years from the date on which a cause of action accrued for any injury or damage against or in respect of which a motor vehicle is required to be insured **under this act."***

[8] Both parties have referred the court to section 4 of the Limitation Ordinance which provides that actions in tort are generally subject to a 6 year limitation period. The defendant argues however, that section 11A of the Third-Party Risks Act was specifically designed to modify this and to reduce the limitation period for personal injury arising from a motor vehicular accident to 3 years. Counsel for the defendant refers the court to Bennion on Statutory Interpretation at page 549 where it is stated that where the legal meaning of the statute is plain it must be followed. In this paragraph, Bennion also references Halsbury's Laws of England where it states that ***"if there is nothing to** modify, alter or qualify the language which a statute contains, the words and sentences **must be construed in their ordinary and natural meaning."*** Given its ordinary meaning, it is argued, section 11A clearly states that no cause of action can arise for injury or damage against or in respect of which a motor vehicle is required to be insured. One such cause of action is a claim for personal injury arising out of a road traffic accident.

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[5] BVIHCV2006/0307

[9] The claimant, on the other hand, argues that section 11A of the Third-Party Risks Act does not apply to claims for personal injury arising from motor vehicular accidents. It is argued that the limitation placed in the section only relates to causes of action which arises from the provisions of the act itself. At paragraph 19 of her submissions she states as follows:

> ***"… section 11A does not operate to reduce or override the limitation period set out*** *in section 4 of the Limitation Ordinance as section 11A does not generally apply to claims in negligence involving motor vehicle accidents, which is a claim founded in tort. Instead, section 11A is germane to claims which may be commenced under the Act relating to recovery of dam****ages in respect of motor vehicle insurance policies."***

[10] In support of this proposition, counsel for the claimant relies on the principles of statutory interpretation. The court was referred to Chapter 9.2 of Bennion on Statutory Interpretation which states that ***"words are not deployed in a vacuum … the overall*** *context of the Act provides the colour and background to the words used and thus helps the interpreter arrive at the* ***meaning intended by Parliament."*** The claimant also refers to the case of *Attorney General v. Prince Ernest Augustus of Hanover*[6] were Viscount Simmons stated the following:

> ***"… words, and particularly general words, cannot be read in isolation; their colour*** *and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a sta****tute in its context, and I use "context" in its*** *widest sense, which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statues in pari material, and the mischief which I can by those and other legitimate* ***means, discern the statute was intended to remedy."***

[11] The claimant argues that in order to give effect to the provisions of section 11A of the Third-Party Risks Act, the court must consider the historical context within which the legislation was passed. In that regard the court is referred to the case of *Eastern Caribbean Insurance Ltd. v. Edmund*

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[6] [1957] AC 436

Bicar[7] in which George-Creque JA (as she then was) noted that a similar Act in Saint Lucia was intended to extend rights to third parties to recover compensation from the insurer even if the injured party or the driver were not privy to the contract itself. Prior to the passage of this legislation, third parties had no right to recover from insurers in such circumstances as they are not parties with enforcement rights to these contracts. According to counsel for the claimant, it is within this narrow context that section 11A must be construed.

[12] The claimant argues further, that a claim in negligence for personal injury arising from motor vehicular accidents existed at common law prior to the introduction of the Third Party Risk Act. This Act did nothing to alter the status of this common law principle, given that its sole purpose was to address a third party's right to claim compensation from an insurer who has a contractual duty to indemnify the insured. In that regard the claimant refers the court to the case of *National Assurance Board v. Wilkinson*[8] were Delvin J stated that ***"it is a well**-established principle of construction that a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion.***"**

[13] The claimant also refers the court to the authorities of *R v. Montilla*[9] and *Stephens v. Cuckfield RDC*[10] in support of the submission that it is entitled to have regard to heading and marginal notes of the statute as an aid in determining the exact meaning to be ascribed to the section in question. The case of *R (Westminster City Council) v. National Asylum Support Service*[11] is also referred to as authority for the submission that the explanatory notes can cast light on the meaning of the section. In that case it was also stated that it is wrong to suggest that the contextual scene can only be considered where there is an ambiguity in the wording of the statute. The marginal notes assist in assessing the context. The marginal note to section 11A refers to "Limitation Periods for proceedings under the Act." Although the Act does not contain a preamble, counsel further refers the court to the explanatory notes which states as follows:

[7] SLUHCVAP 2008/014
[8] [1952] 2 QB 648
[9] [2005] 1 Cr. App. R 26
[10] [1960] 2QB 373
[11] [2002] UKHL 38

"The Bill** also introduces new provisions relating to limitation periods for the institution of proceedings under the Act and general offences and penalti**es...

*It is hoped that the enactment of this bill will bring about much needed improvement I claims settled within t**he insurance industry."***

[14] The claimant submits further, that the Act established three circumstances in which civil proceedings can be commenced within its provisions. These are (a) where the insurer fails to indemnify the insured, (b) where the insurer fails to indemnify a person authorized under the policy to use the motor vehicle and (c) where the insurer fails to satisfy a judgment obtained by an injured party against the insured or authorized persons. The claimant's submissions can therefore be summarized in saying that section 11A applies only to causes of action which arise under the act and that a claim for personal injury arising out of a road traffic accident does not fall within this provision.

[15] After due consideration of the very cogent submissions of the claimant, I find myself unable to accept this proposition. Despite the fact that the court is entitled to the use of the headnotes and explanatory notes as a guide to interpreting the true meaning of section 11A, these do not necessarily enable the court to ascribe an interpretation outside of the plain and ordinary meaning of the words used by parliament when it is unnecessary to do so. I have no doubt that counsel for the claimant is correct in her assertion that the context of the statute ought to be considered in the interpretation of the meaning of the section in question. This must however also give due consideration to the express meaning of the words used by parliament. Former Chief Justice Sir Vincent Floissac highlights the manner in which the court ought to proceed in the case of *Charles Savarin v John Williams*[12]. He states the following at paragraph 25 of that decision:

***"In order to resolve the fundamental issue of this appeal, I start with the basic** principle that the interpretation of every word or phrase of a statutory provision is derived from the legislative intention in regard to the meaning which that word or phrase should bear. That legislative intention is an inference drawn from the primary meaning of the*

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[12] Dominica Civil Appeal No. 3 of 1995

word or phrase with such modifications to that meaning as may be necessary to make it concordant with the statutory context. In this regard, the statutory context comprises every other word or phrase used in the statute, all implications therefrom and all relevant surrounding circumstances which may properly be regarded as indications of ***the legislative intention. "***

[16] No doubt, as it relates to section 11A of the act currently under consideration, parliament's intention was to ensure that third parties who were not privy to the contract of insurance were given additional rights to recover damages from the insurer once liability has been established. However, the words of section 11A appear to be much broader in scope than the narrow interpretation put forward by the claimant; despite the wording of the head note to that section. In the case of *Abel v. Lee*[13] Wiles J noted that ***"...*** *the general rule is that the language of an Act is to be read according to its ordinary grammatical construction unless so reading it would entail some* ***absurdity, repugnancy, or injustice.... But I utterly repudiate the notion that it is*** *competent to a judge to modify the language of an Act of Parliament in order to bring it in accordance* ***with his views as to what is right or reasonable."*** Further in the case of *Hazel Maynard* referred to above I note that in assessing the decision of the Master the Chief Justice noted that at paragraph 16 of her judgment that ***"the*** *master was not at liberty to disregard the expressed and* ***unambiguous language of section 14 of the SWMA."*** She went further in the paragraph to conclude that ***"the language of section 14 of SWMA, according it its ordinary meaning, is unambiguous and must be applied."*** I am of the view that the meaning of section 11A is not ambiguous, neither is it absurd, repugnant or unjust. It must therefore be given its plain and ordinary meaning.

[17] I wish also to refer to the case of *Universal Caribbean Establishment v James Harrison*[14] where Byron CJ stated that ***"t****he dominant purpose in construing a Statute is to ascertain the intention of the legislature as expressed in the Statute, considering it as a whole and in its context. It is only where the words of the Statute are not clear and unambiguous that it is necessary to enlist aids for interpretation*..." I pause to note that Byron CJ's use of

[13] (1871) L.R. 6 C.P. 365

[14] ANUHCVAP 1993/0021

the word unambiguous in the final sentence is clearly a typographical error and that he is indeed making the point that aids to statutory interpretation are only resorted to when the words of the statute are not clear and ambiguous. Finally, I wish to refer to the case of *Pinner v Everett*[15] where Lord Reid Stated the following:

> ***"****In determining the meaning of any word or phrase in a statute the first question is what is the natural or ordinary meaning of that word or phrase in its context in the statute. It is only when the meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature that it is proper to look for some other* ***permissible meaning of the word or phrase."***

[18] After considering these authorities I do not accept the submissions of the claimant where it is argued that the court should defer to the headnote in order to assist in interpreting the meaning of the content of section 11A of the Act. There is clearly an incompatibility between the headnote and the clear meaning of the words in the section. I refer, example to the case of *Kaim Sexius v. Attorney General of Saint Lucia*[16]. That case involved the constitutionality of the section 909 of the Criminal Code of Saint Lucia which mandated the filing of a defense statement. Despite the fact that the issue of statutory interpretation did not arise, the Privy Council appeared to be quite prepared to accept that the provisions of that section were mandatory notwithstanding the fact that the headnote referred to the voluntary filing of a defence statement. Clearly the express words of the section could not be reconciled with the headnote. In such circumstances the ordinary meaning of the words must be applied and it is not for the court to apply a meaning which is so far outside of the broad scope of the exact words of the section.

[19] I observe that the section 11A of the Act in question in this case begins by insisting that nothing ***"****contained in any enactm****ent or any rule of law or equity…"*** would work to undermine the express provisions contained therein. This clearly seeks to broaden the scope of the provisions of that section to any enactment or rule of law or equity which existed prior its enactment. Further, I do not agree that by altering the limitation for personal injury claims arising from motor vehicle accidents, the act would serve the purpose of fundamentally altering the common law origins of

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[15] [1969] 3 All E.R. 257
[16] [2017] UKPC 26, see paragraphs 7 and 11 of that decision

such claims. It would simply serve the purpose of ensuring that persons who have such a cause of action must commence proceedings within a 3 year period. This is not so far outside of the context of the legislation in question as argued by the claimant. It is not unfathomable that parliament, in its quest to extent third-party rights in such claims, would also consider placing a limitation period within which to commence such actions for which an insurer may ultimately be liable to pay an indemnity. That appears to me to be precisely what the section was designed to do.

[20] In my view, the express words of the section must be taken into consideration. The limitation established by section 11A relates expressly to *a cause of action accrued for any injury or damage against or in respect of which a motor vehicle is required to be insured under this* ***act."*** It seems to me that if parliament intended for a 3 year limitation to be placed on causes of action narrowly arising under the act it would have certainly said so in clearer and less ambiguous terms. The section does not even go as far as demanding that an actual policy of insurance be in place in order for this limitation period to be invoked. It speaks to a cause of action for which a policy of insurance is required under the act. I am of the view that a motor vehicular accident which results in personal injury is clearly a cause of action in respect of which a motor vehicle is required to be insured under the provisions of the Act. This falls squarely within this definition provided for in section 11A and therefore subject to the limitation period contained therein.

[21] Counsel for the claimant argues that since the passing of this amendment to the act in 2000, many cases have been brought for personal injury beyond this 3 year limitation period established by section 11A. In fact it would seem that the provisions of this section have largely been ignored and the 6 year limitation for actions in tort established by the section 4 of the Limitation Ordinance is still widely regarded as what is currently in force for road traffic claims in the British Virgin Islands. Counsel referred the court to the case of *Celia Hatchett v. First Caribbean International Bank*[17] *and Azim Edward.* This is a case filed after the expiration of 3 years from the date of the injury. However, it seems to me that the issue of the limitation period never arose in that case. It is certainly not an authority for the proposition put forward by the claimant. The fact that litigants in the BVI have continued to apply the 6 year limitation without raising the point in proceedings prior to this one does not negate what, in my view, are the express words of the statute.

[17] BVIHCV 2006/0227

[22] I have not come to this conclusion lightly. Having examined the claim it would seem that the claimant has suffered significant injury and an inability to prosecute this case is more than unfortunate. I am of the view that this application is not fact sensitive as expressed by the Honourable Chief Justice in the case of *Hazeline Maynard.* In that case the master had to give consideration to a number of factual issues in order to determine whether a particular limitation period applied. In my view, and it would seem to be the court of appeal as well, these issues ought to have been the subject of a trial. However, in this case the application before me is one which hinges on the narrow construction of the provisions of section 11A of the act. The facts are not in dispute and in that regard I have concluded that it is appropriate to determine at this stage that the matter should not be subject to a full trial if indeed the limitation period of section 11A is what is applicable to motor vehicular accidents of this nature. I have also considered that the Honourable Chief Justice did express the view that if there are two possibly conflicting limitations period, the one more favourable to the claimant ought to be adopted. However, in my view section 11A clearly set out to establish a limitation period for causes of action for which a policy of insurance is required under the Act. Injury arising from a motor vehicle is one such cause of action and the limitation of 3 years ought to apply as the express intention of parliament. In the circumstances the application is granted and I make the following orders and declarations:

(a) The claim, having been filed on 15th June, 2018 is statute barred in accordance with the provisions of section 11A of the Motor Vehicles Insurance (Third-Party Risks) (amendment) Act 2000;
(b) The claim is therefore struck out as an abuse of process;
(c) Summary judgment is entered in favour of the defendant as the claimant has no prospect of successfully prosecuting this claim given the fact that it is statute barred;
(d) Costs is granted to the defendant in the sum of $2000.00

Ermin Moise
Master

By the Court

Registrar