[2009] CA (Bda) 15 Civ

The Court of Appeal for Bermuda

CIVIL APPEAL No. 4 of 2009

Between:

GEORGINE LORETTE LUCY SYMONDS

Appellant

-V-

CAMBRIDGE BEACHES RESORT

Respondent

Before: **Zacca, President**
Evans, JA
Ward, JA

Date of Hearing: **Thursday, 4 November 2009**
Date of Judgment: **Thursday, 19 November 2009**

Appearances: **Allan Doughty of Trott & Duncan for the Appellant**
Keith Robinson of Appleby for the Respondent

JUDGMENT

ZACCA, P

1. The appellant was, on 31 May 2000, employed as a chef at Cambridge Beaches Resort. Whilst carrying out her duties in the respondent's kitchen she was injured by a knife which was in the back pocket of a colleague chef, with the blade in an upward position. The appellant alleged that the respondent was negligent in failing

to operate a safe system of work. We understand that the appellant continues to be employed by the respondent.

2. The appellant's writ was filed on 10 January 2008, some eighteen months beyond the period fixed by the Act.

3. The respondent applied pursuant to Order 18 R 1 19 (1)(a) to strike out the claim as disclosing no reasonable cause of action on the ground that the action was barred by section 12 (4) of the Limitation Act 1984. (the Act)

4. The appellant relied on section 34 of the Act which provides a discretion in the Court to allow a claim to proceed despite the provisions in section 12 (4)(a) of the Act.

5. Section 34 provides:

> "(1) if it appears to the Court that it would be inequitable to allow an action to proceed having regard to the degree to which—
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> (a) section 12 or 13 prejudice the plaintiff or any person whom he represents; and
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> (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.
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> (2) the Court shall not under this section disapply section 13 (1) except where the reason why the person injured could no longer maintain an action was because of the time limit in section 12.
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> (3) in acting under this section the Court shall have regard to all the circumstances of the case and in particular to –
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> (a) the length of, and the reasons for the delay on the part of the plaintiff.
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> (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 t he action had been brought within the time allowed by section 12 or (as the case may be) by section 13.
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> (c) the conduct of the defendant after the cause of action arose, including the extent (if any)

> 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;
> (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at the 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."

6. It must have been apparent to the appellant that her injury might be capable at the time of giving rise to an action for damages. However, it was not until 31 January 2003 that the appellant's attorneys wrote to the respondent seeking an admission of liability.

7. Then followed correspondence between the appellant's attorneys and the respondent's insurers. In a letter dated 10 June 2005 the appellant's attorneys wrote to the insurers advising them that they would shortly forward medical reports in support of their claim. However, it was not until 28 May 2007 that the medical reports were forwarded to the respondent' insurers. The dates on all three of the reports pre-date the date on which the claim would have become statute barred.

8. On 16 July 2007 the respondent's insurers wrote to the appellant's attorneys informing them that the claim was statute barred. Despite this it was not until 10 January 2008 that the writ was filed.

9. In her first affidavit the appellant stated:

> "I am satisfied with my employment with the defendant and was reluctant to instruct my former attorney; Mr. Leo Mills, to file a writ against the defendant as I am generally happy with my working environment at Cambridge Beaches."

She further stated that Mr. Mills was attempting to reach a settlement of her claim with the defendants per her instructions.

10. Having received the letter of 16 July 2007 informing him that the appellant's claim was statute barred, Mr. Mills, on 20 July 2007 wrote to the respondents insurers saying:

> "It was partly out of her (appellant) continued loyalty to the resort that our client instructed us to pursue a negotiated settlement of the matter since she did not wish to cause any embarrassment by taking legal action against her employer."

11. There was no evidence either from the appellant or her attorney as to whether or when instructions were given to file a writ.

12. The learned trial Judge found that the defendant would have been given the impression that the appellant did not wish to pursue her claim through the Courts.

13. For the respondent it was submitted that the Judge was in error in making such a finding and in any event there was no affidavit evidence from the respondent that the respondent had formed such an impression; or that the respondent would be prejudiced by allowing the appellant to pursue her claim despite the limitation period. The Judge was therefore in error in ruling that the respondent had demonstrated sufficient prejudice to justify the striking out of the plaintiff's claim on the ground that the limitation period had expired.

14. It was also submitted that the appellant had a good claim against the chef, Mr. Sisayan, who it was alleged was negligent in causing the injury to the appellant. He had, in a statement admitted liability. His admission would not in itself result in a finding that the respondent would be liable.

15. Section 34 of the Limitation Act 1984 provides that the decision of the Court is in the exercise of the Judge's discretion. In *Cory v Simpson* [1983] 3ALLER 369, Stephenson L.J. at 373 stated:

> "When is it equitable or inequitable to allow a claim which is barred by the statute to go ahead? It is a very vague term;

> the statute confers an unfettered discretion, and I repeat what has been said in this court and in the House of Lords, that it is not for an appellant court to reverse the discretion of the judge, to whom Parliament has committed it, unless he has gone very wrong."

16. In *Cain v Francis*. *McKay v Hamlin and another* [2009] 3 W LR 551, Smith L.J. at pages 572 stated:

> "In the exercise of the discretion, the basic question to be asked is whether it is fair and just in all the circumstances to expect the defendant to meet this claim on the merits, notwithstanding the delay in commencement. The length of delay will be important, not so much for itself as to the effect it has had. To what extent has the defendant been disadvantaged in his investigation of the claim and/or the assembly of evidence, in respect of the issues of both liability and quantum? But it will also be important to consider the reasons for the delay. Thus there may be some unfairness to the defendant due to the delay in issue, but the delay may have arisen for so excusable a reason, that, looking at the matter in the round, or balance, it is fair and just that the action should proceed. On the other hand, the balance may go in the opposite direction, partly because the delay has caused procedural disadvantage and unfairness to the defendant and partly because the reasons for the delay (or its lengths) are not good ones."

17. It is inconceivable to think that the attorney for the appellant was not aware of the statutory period in the Act. As observed above no explanation has been given by the attorney as to the reason for not filing the writ within the time period.

18. In the application of section 34, Counsel for the appellant referred the Court to the case of *Ward v Foss*, the *Times*, November 29, 1993 where Hobhouse L.J. in considering s 33 of the English Act which is similar to Bermuda's s34 stated:

> "For the purpose of section 33, if a defendant is to say that he is prejudiced, he must show something more than merely that he is going to be required to meet his legal liabilities. The prejudice must arise from some other additional element—some change of his position which would not have occurred if the action had been brought within time; some belief by the defendant that he was not going to be troubled with the claim; some alteration in his financial position or some failure to make provision for the claim the loss of relevant evidence; some difficulty in having a fair trial after

the lapse of time. No list can be exhaustive and the statute requires the court to have regard to all the circumstances of the case, but it must be some factor over and on top of the legal liability of the defendant which created the prejudices."

19. In a sworn affidavit Mr. Michael Winfield, President and Chief Executive Officer of the respondent company, stated:

> (14) "I note that the plaintiff affidavit exhibits an accident report which is signed by Rodrigo Sisayn, Mario Fritzche, the executive sous chef, and Jean Claude Garzia, the executive chef. While I believe that Mr. Garzia remains resident in Bermuda, I do not believe that this is the case with Mario Fritzche. I have made enquiries within the defendant's staff and I have been informed that Mr. Fritzche was last heard from while working in the Middle East. From my knowledge of the work of a restaurant kitchen, I believe that it is likely that Mr. Fritzche, as Executive Sous Chef, would have been the senior member of staff working in the kitchen at lunch time. I therefore say that it is possible that an important witness will likely be very difficult or impossible to trace."

20. We set out hereunder the findings and conclusions of the trial Judge:

> "18. There was however bound to have been an impression given to the Defendants that the Plaintiff was no longer interested in pursuing her claim. That impression would have arisen from the failure of the Plaintiff's attorneys to forward the medical records to the Defendant's insurers once invited to so do. No explanation was given for that failure. Almost two years transpired between the Plaintiffs's counsel indicating that he would be shortly in a position to forward the medical reports and the date said report was actually sent. At least one of those reports would have been available to send with the earlier letter.
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> 19. By the time the reports had been sent, the Plaintiff's claim had been statute barred for one year and the Defendants informed them that they intended to rely on that defence. The defendants also made it clear that they would not consider an out of court settlement. Not withstanding this Plaintiff's attorneys did not file a writ until a further six months had expired.
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> 20. On a proper analysis of the Plaintiff's correspondence two things become clear. Firstly the Plaintiff had not wanted to pursue the matter through the courts. Secondly, notwithstanding this, the Plaintiff's attorneys are taken to have been well aware of the approaching limitation period,

and they could have either concluded a negotiated settlement; or if they were unable to get instructions from their bereaved client they could have preserved the Plaintiff's options by filing a writ within the limitation period. If for no other reason to protect themselves from a later claim of negligence.

21. In the first instance the Plaintiff cannot be said to suffer prejudice if her writ is stuck out because she never intended to file a writ in the first place. In the second instance, counsel for the Petitioner has shown a wanton disregard for the time periods fixed in regard to personal injury claims. What is more contumacious is his delay in filing the writ after notification of the limitation defence.

22. In either instance the Plaintiff cannot be said to have suffered prejudice because of the strictures of the limitation period. She will have been the author of her own demise in the first instance; and she and or her attorneys the cause of her demise in the second instance."

21. We are satisfied that the trial Judge considered all the circumstances of the case and it was open on the evidence for the judge to draw the inferences which she did. In coming to her decision she exercised the discretion which is vested in her under the Act.

22. We are unable to say that the conclusion arrived at by the Judge was in error. We see no reason to say that she exercised her discretion wrongly.

23. The appeal is dismissed and the ruling of the Judge below affirmed.

Signed

Zacca, President

Signed

I agree

Evans, JA

Signed

I agree

Ward, JA