

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION**

Cause No: G 0015/2014

BETWEEN:

LEONEL BUSH WHITTAKER

PLAINTIFF

AND:

McALPINE LIMITED

DEFENDANT

Appearances:



Mr. Dennis Brady of BRADY for the Plaintiff

**Mr. James Stenning of Stenning & Associates
for the Defendant**

Before:

Mr. Justice Paul Worsley Q.C. (Actg.)

Heard:

25th April 2016

JUDGMENT

1. The Plaintiff seeks to recover damages for personal injuries sustained as a consequence of the Defendant's alleged negligence. The cause of action arose on 30th September 2008, some seven and a half years ago. The Writ was issued on 5th February 2014. The limitation period expired on 30th September 2011. The claim is therefore statute barred by 2 years and 158 days.
2. The Plaintiff applies to this Court for an Order that the limitation provisions should not apply in this case and relies upon s.39(1) of the Limitation Law (1996 Revision).
3. The Defendant resists the application and submits that the claim is barred, relying upon three matters in the alternative:

- a. by virtue of the Limitation Law (1996 Revision);
- b. by virtue of the Workmen's Compensation Law (1996 Revision);
- c. the Plaintiff entered into a contract in 2009 for the full and final settlement of his claim.

4. The brief facts giving rise to the claim are these. The Plaintiff is now 53. On 30th September 2008 he was 45 and was employed by the Defendant as a labourer. He was working on a site in West Bay where the Motor Museum was being built. He was required to move some sand so that a plumb line could be used. In order to do so, he stood on a board, which collapsed, causing him to fall onto a piece of metal, which protruded from the ground. He thereby suffered significant life changing, but fortunately, not life threatening, injuries. He suffered a tear in the urethra as a result of which he has suffered from obstruction of his urinary flow and erectile dysfunction.

5. On 6th October 2008 the Plaintiff completed, in hand, and signed, a Workmen's Compensation Claim Form which was headed '*Particulars of the accident to be furnished by the employer*' and by which he initiated a claim for compensation for his injuries.

6. On 6th March 2009 the Plaintiff signed a document stating :

"I, Leonel Bush, having been injured in an accident that occurred on or about September 30, 2008, at approximately 4.45PM, at job site next to the Cracked Conch, West Bay, and arising out of and in the course of my employment with McAlpine Ltd, do hereby elect and agree to be compensated in accordance with the Workmen's Compensation Law (1996 Revision). I therefore agree to accept the lump sum of CI\$3,057.21 in complete settlement and satisfaction of my claim for any and all injuries arising out of the said accident now or hereafter."



It was dated, signed and witnessed.

7. Thereafter the Plaintiff continued to receive wages and payment of his medical bills. He left the Defendant's employment in about October 2013.
8. The chronology thereafter is this:
 - a. 13th September 2013: a letter of intent was sent;
 - b. 13th December 2013: an Originating Summons was issued;
 - c. 5th Feb 2014: the Writ of Summons was served. This was 5 years and 128 days after the cause of action arose;
 - d. 3rd March 2014: the Defence was served. It avers that the Defendant was not negligent and that the Plaintiff was the author of his own misfortune;
 - e. 18th June 2014: a Preliminary Issues Hearing took place;
 - f. 26th November 2014: a skeleton argument on behalf of the Defendant was filed;
 - g. 28th November 2014: the Plaintiff's skeleton argument was filed;
 - h. 13th August 2015: The date set down for a Final Ancillaries Hearing.
9. The burden of satisfying the Court that the claim should be allowed to proceed lies upon the Plaintiff on the balance of probabilities.



10. By s.13 of the Limitation Law, in a claim for damages for personal injuries arising from an allegation of negligence, no action shall be brought after the expiry of 3 years from the date upon which the cause of action accrued.

11. s.39(1) of the Law states:

“39. (1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which -

- (a) section 13 or 16 prejudices 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.”

12. s.39(3) of the Law states:

“(3) In acting under this section, the court shall have regard to all the circumstances of the case and, in particular, to -

- (a) the length of, and the reasons for, the delay on the part of the plaintiff;
- (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 the action had been brought within the time allowed by section 13 or 16 (as the case may be);
- (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 that time of giving rise to an action for damages; and
- (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.”



13. The following authorities in respect of applying the Limitation Law have been referred to:

- a. *Cornish v Kearley & Tonge Ltd*¹ - where the Court accepted that the Plaintiff's disinclination to consider action against his employers whom he regarded as good employers was a matter to be weighed in the Plaintiff's favour in dis-applying s.11.
- b. *Hartley v Birmingham CDC*² - where the Court said: "*what is of paramount importance is the effect of the delay on the Defendant's ability to defend.*".
- c. *Collins -v- Secretary of State for BIS*³
- d. *Nugent Care Society -v- Wirral MBC*⁴
- e. *W -v- W*⁵

14. The Plaintiff's submissions are these:

- a. the delay is not so great in the context of the facts of this case;
- b. the Defendant cannot point to any significant prejudice caused by the delay;
- c. the Plaintiff is not well educated or a Cayman National and would not understand the nature or significance of the documents he signed;
- d. the Defendant was the dominant party in the settlement transaction and may therefore have pressurized the Plaintiff into signing the settlement agreement;

¹ (1983) 133 NLJ 870

² (1992) 2 AER 213

³ (2014) EWCA Civ 717

⁴ (2009) EWCA Civ 827

⁵ [Grand Court Cayman: Smellie CJ] (2011) (1) CILR 382



- e. the Defendant's employee Foreman is still available as a witness;
- f. the Court should infer from his Affidavit that pressure was put on the Plaintiff to sign the settlement agreement of 6th March 2009 such that it would not be just to rely upon its terms.

15. The Defendant's submissions on the limitation issue are these:

- a. There is no good reason advanced for the delay – the injury was appreciated as being serious as soon as it occurred and of itself did not prevent the Plaintiff from advancing his claim promptly;
- b. There is no evidence of pressure placed upon the Plaintiff to delay proceeding with his claim and indeed he was still employed when in July 2013 he first approached an attorney for advice, thus the argument of not wanting to lose his job by suing is unsustainable;
- c. The only eye witness – Jayme Salvacion – left the defendant's employ in 2009 and is untraceable;
- d. The available defence witness Foreman did not see the incident himself;
- e. Records - if any existed - according to Foreman are now no longer available;
- f. The Affidavit of the Plaintiff of 9th December 2013 does not indicate any pressure put on him to sign the final settlement document;



- g. The Plaintiff must have appreciated that the final settlement document signed by him on 6th March 2009 some six months after the accident was a significant document and he failed to take legal advice or delay signing it or taking any action over the next two years and thus he should be bound by its terms and is precluded by s.17(1) and (2) of the Workmen's Compensation Law from pursuing a further claim in respect of the same cause of action;
16. In my judgment the Plaintiff has failed to demonstrate to this Court that the statutory limitation period should not apply or that he is not bound by the settlement agreement in which he accepted a sum in full and final settlement of his claim.

REASONS FOR THE DELAY

17. I accept that the Plaintiff is a carpenter of limited education and may not be expected to have a full working knowledge of the Law nonetheless the Workmen's Compensation Claim (WCC) form was signed within days of the accident. It demonstrates that the Plaintiff was rightly and understandably pursuing his claim for damages from the earliest opportunity. By that early date the P would not fully be aware of the long term effects of the accident. However by the signing of the final settlement document of 6/3/09 he would have had knowledge of the medical consequences of the accident. I am satisfied that he was in a position to make an informed decision to agree a final settlement figure in the agreement. On the face of it is binding upon him. Of particular significance is the fact that he makes no reference to it at all in his Affidavit of 9th December 2013. I have received no explanation that disturbs that conclusion. He refers only to vague assertions by the Defendant's employees that 'he would be compensated'.



EFFECT OF THE DELAY UPON THE EVIDENCE

18. A possible witness known as 'William' has died. The eye witness Jayme Salvacion left the country some 7 years ago and is untraceable. The available witness Mario Agüero was not an eye witness to the accident. There is only a limited entry in the accident book. There are no remaining photos, plans, witness statements or expert reports. There is no evidence that the Plaintiff ever sought legal or expert advice or indicated in any way to the Defendant that he was going to pursue a claim in the Courts.

THE CONDUCT OF THE DEFENDANT:

19. There is a WCC Form completed by the Plaintiff in his own hand completed within six (6) days of the accident. Thereafter the final settlement document is signed on 6th October 2009. So far as the Defendant was concerned the matter was closed. They have not dragged their feet or acted unreasonably or misled the Plaintiff.

THE PROMPTNESS OF THE PLAINTIFF'S ACTIONS

20. He pursued the claim promptly by way of seeking compensation in the WCC Form dated 6th October 2008. Thereafter I am completely unpersuaded that there was any, or any sufficient, reason for his failing to pursue his claim expeditiously. He eventually consulted lawyers at a time when he was still employed by the Defendant. I reject the argument that he did not earlier pursue his claim for fear of risking the displeasure of the Defendant by making a claim. In his Affidavit he makes no reference at all to signing the settlement document only six (6) months after the accident.
- He does not claim to have been pressurized by the Defendant's employees nor does he assert that he was told that the compensation he was paid was to be an initial installment only. He advances no persuasive reason for his delay in pursuing his claim.



STEPS TAKEN BY THE DEFENDANT

21. The steps taken by the Defendant are set out in the Affidavit of the Defendant's foreman dated 13th November 2014. The Court accepts the prejudice to the Defendant as described in now seeking to establish the true facts of the accident or to raise a proper defence.
22. It is also submitted by the Defendant that by signing the WCC form on 6th October 2008 the Plaintiff had reached a final view that he was going to accept compensation and was thus barred from pursuing a claim in the Courts. On its own, that argument is not sufficient to prevent the Plaintiff from pursuing this claim. It was signed only days after the accident and at a time when the Plaintiff would not have known the long-term effects of the injury and was simply a preliminary step towards claiming damages.
23. However by 6th March 2009 the Plaintiff would have had a far clearer view of the overall nature of his injuries and their ongoing effects. The document he signed, and which was witnessed, was one which the Plaintiff must have appreciated was a legal document of importance. He also received just over CI\$3000 in consequence. I do not accept the argument that the Plaintiff, as an uneducated man, did not realise what he was signing. I have seen his imperfect but careful handwriting on the WCC Form where his command of English is clearly not so limited that he did not appreciate what had happened to him, or how serious it was.



He was a man who from the outset indicated that he wished to pursue a claim. I do not accept that his failure to act in his own best interests for some four years can be explained by his lack of education or by assurances claimed to have been given by the management. There is nothing to support that contention. The signed settlement document is to the contrary. I find the lack of reference to this document in his Affidavit a telling omission.

24. Accordingly I dismiss the Plaintiff's application under the Limitation Law provisions and find that he is bound by the terms of the settlement document. Accordingly he is refused leave to proceed with his claim.
25. The Plaintiff will pay the Defendant's reasonable costs – to be assessed if not agreed.

Dated this the 6th May 2016



**Mr. Justice Paul Worsley Q.C. (Actg.)
Acting Judge of the Grand Court**

