

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**CIVIL JURISDICTION**

**Civil Action No HBC 118 of 2013**

**BETWEEN:**        **ARUNA DEVI** of Olosara, Sigatoka in the Republic of Fiji Islands as the Administratrix and Trustee of the **ESTATE OF DEVENDRA KUMAR**, Hotel Worker.

**PLAINTIFF/APPLICANT**

**AND:**                **AZNAL AZAD ALI** of Korotogo, Sigatoka in the Republic of Fiji Islands, Mechanic

**FIRST DEFENDANT/FIRST RESPONDENT**

**AND:**                **COASTAL RENTAL CARS LIMITED** a limited liability company having its registered office at Korotogo, Sigatoka in the Republic of Fiji Islands.

**SECOND DEFENDANT/SECOND RESPONDENT**

**Counsel**            : Mr J K Singh for applicant  
                              No appearance for respondent

**Date of Hearing**    : 22 January 2016

**Date of Ruling**    : 24 August 2016

## **R U L I N G**

### **Introduction**

[01] This is an application for extension of limitation period.

[02] Through notice of motion (*the application*) the plaintiff/applicant (*the applicant*) seeks leave of the Court to institute the within action beyond the normal limitation period.

[03] The applicant relies on two affidavits sworn on 14 July 2015 and 25 October 2015 to support the application.

[04] This application is made under sections 16 and 17 of the Limitation Act, Chapter 35, Laws of Fiji and the inherent jurisdiction of the Court.

[05] The respondents neither filed affidavit in opposition nor participated in the hearing of the application. The application was orally argued by the applicant. In addition she has also filed written submission.

### **Background**

[06] The plaintiff's claim stems out of an accident.

[07] The plaintiff, Aruna Devi is the legal wife and administratrix of the Estate of Devendra Kumar, the deceased.

[08] On the 5<sup>th</sup> day of July 2007 the First Defendant, Aznal Azad Ali and his wife and two children together with the deceased, Devendra Kumar were passengers in the motor vehicle registration number LR 1529 of which the second defendant, Coastal Rental Cars Limited is the registered owner. They were heading to Suva to witness the marriage ceremony of a Rohit Chetty. They reached Tradewinds Hotel at Lami, Suva and the First Defendant, the deceased and Rohit Chetty consumed 14 large bottles of beer. The deceased was seated in the front passenger seat of the car. The First Defendant drove the vehicle. On the way back to Sigatoka the First Defendant and the deceased stopped at Namatakula and bought some liquor vodka gin for consumption. The first Defendant

was drunk and drove the vehicle at a high speed and in zigzag manner. Then the First Defendant received a call on his mobile phone and started to have conversation. He lost control of the vehicle and it went on the right side lane off road and bumped a culvert and stumbled. As a result of the impact the deceased sustained injuries to his head and died in Hospital on 6 July 2007. The plaintiff filed the writ of summons on 4 July 2013. Ostensibly, the claim is out of time. The plaintiff seeks leave to institute the action beyond the normal limitation period.

### **The Law**

[09] The leave is sought after the commencement of the action. The claim is for personal injuries. So, sections 4 (1), 16 and 17 (3) of the Limitation Act ('the Act') would be applicable to the application.

[10] S.4 (1) of the Act, so far as material, provides:

*'4.-(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say-*

- (a) actions founded on simple contract or on tort;*
- (b) actions to enforce a recognizance;*
- (c) actions to enforce an award, where the submission is not by an instrument under seal;*
- (d) actions to recover any sum recoverable by virtue of any Act, other than a penalty or forfeiture or sum by way of penalty or forfeiture:*

Provided that-

- (i) **in the case of actions 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 any Act 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 any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years; and*****

(ii) *nothing in this subsection shall be taken to refer to any action to which section 6 applies.* (Emphasis added)

[11] S.16 of the Act deals with extension of time limit for actions in respect of personal injuries. That section provides:

**'16.-(1) The provisions of subsection (1) of section 4 shall not afford any defence to an action to which this section applies, in so far as the action relates to any cause of action in respect of which-**

(a) **the court has**, whether before or after the commencement of the action, **granted leave for the purposes of this section;** and

(b) the requirements of subsection (3) are fulfilled.

(2) 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 any Act 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.

(3) The requirements of this subsection shall be fulfilled in relation to a cause of action if it is proved that the material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which-

(a) either was after the end of the three-year period relating to that cause of action or was not earlier than twelve months before the end of that period; and

(b) in either case, was a date not earlier than twelve months before the date on which the action was brought.

(4) For the purposes of subsection (3), reference to the three-year period relating to a cause of action means a reference to the period of three years from the date on which that cause of action accrued:

*Provided that-*

*(a) in relation to any cause of action in respect of which, by virtue of section 11, an action could have been brought after the end of the period of three years from the date on which that cause of action accrued, any such reference to the three-year period relating to that cause of action shall be construed as a reference to the period up to the end of which an action could, by virtue of that section, have been brought in respect thereof;*

*(b) in relation to a cause of action in respect of which, by virtue of section 15, the period of limitation did not begin to run until a date after the cause of action accrued, any such reference to the three-year period relating to that cause of action shall be construed as a reference to the period of three years from the date on which, by virtue of that section, the period of limitation began to run.*

*(5) Nothing in this section shall be construed as excluding or otherwise affecting-*

*(a) any defence which, in any action to which this section applies, may be available by virtue of any provisions of any Act other than those contained in subsection (1) of section 4 (whether it is an Act imposing a period of limitation or not) or by virtue of any rule of law or equity; or*

*(b) the operation of any Act or of any rule of law or equity which, apart from this section would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.’ (Emphasis provided)*

[12] Section 17 of the Act explains how application for leave of court is to be made. It provides:

*‘Application for leave of court*

**17.***-(1) Any application for the leave of the court for the purposes of section 16 shall be made ex parte, except in so far as rules of court may otherwise provide in relation to applications which are made after the commencement of a relevant action.*

*(2) Where such an application is made before the commencement of any relevant action, the court may grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if such an action were brought forthwith and like evidence were adduced in that action, that evidence would, in the absence of any evidence to the contrary, be sufficient-*

*(a) to establish that cause of action, apart from any defence under subsection (1) of section 4; and*

*(b) to fulfil the requirements of subsection (3) of section 16 in relation to that cause of action.*

*(3) Where such an application is made after the commencement of a relevant action, the court may grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if the like evidence were adduced in that action, that evidence would, in the absence of any evidence to the contrary, be sufficient-*

*(a) to establish that cause of action, apart from any defence under subsection (1) of section 4; and*

*(b) to fulfil the requirements of subsection (3) of section 16 in relation to that cause of action,*

***and it also appears to the court that, until after the commencement of that action, it was outside the knowledge (actual or constructive) of the plaintiff that the matters constituting that cause of action had occurred on such a date as, apart from the last preceding section, to afford a defence under subsection (1) of section 4.(Emphasis added)***

*(4) In this section, "relevant action", in relation to an application for the leave of the court, means any action in connection with which the leave sought by the application is required.'*

[13] Section 18 of the Act explains how sections 16 and 17 apply to actions after the death of injured person. That section provides

*Application of sections 16 and 17 to actions after death of injured person*

***18.-(1) In relation to any action to which section 16 applies being an action in respect of one or more causes of action surviving for the benefit of the estate of a deceased person by virtue of section 2 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act, subsections (1), (3) and (5) of section 16, and section 17, shall have effect subject to the provisions of subsections (4) and (5). (Cap.27) [Emphasis added]***

*(2) Subsections (1), (3) and (5) of section 16, and section 17, shall have effect subject to the provisions of subsections (4) to (6), in relation to an action brought by virtue of the Compensation to*

*Relatives Act for damages in respect of a person's death, as they have effect in relation to an action to which section 16 applies. (Cap.29)*

### **Determination**

- [14] Upon filing the writ of summons, the applicant has also filed an application seeking leave of the court to institute the within action beyond the normal limitation period.
- [15] The applicant has filed this action as administratrix and trustee of the Estate of Devendra Kumar who died as a result of an accident. Sections 16 and 17 of the Act also applies to an action where cause of action surviving for the benefit of the estate of deceased person. (See, s.18 of the Act).
- [16] The claim is for damages for personal injury. In the case of damages in respect of personal injury to any person the limitation period is three (3) years, see proviso (i) to section 4 (1) of the Act.
- [17] The applicant's claim arises out of the accident that occurred on **5 July 2007** where the applicant's husband died. The applicant has filed her writ on **4 July 2013**. The action to which this application relates is 3 years out of time.
- [18] The application seeking leave to proceed with the action beyond the limitation period is made after the commencement of the action. Such an application may be made pursuant to section 17 (3) of the Act, see para 12 above.
- [19] As the applicant had filed the application after the commencement of the action, the court ordered that the application need to be served on the defendants. It was served on the defendants accordingly, but none of them was present on the day of the hearing.

## **Reasons for the delay**

[20] The applicant explains in her affidavit the reasons for the delay in bringing the action to the court. I will summarise what she says as regards the delay:

*'In 2008 she instructed Mr. Kuver Sharma of Messrs. Kuver Sharma & Associates in respect of the Probate and the claim.*

*In 2008 Messrs Kuver Sharma & Associates was wound up and all the files and documents in respect of her case and other cases were in the custody of the Fiji Law Society.*

*Sometimes in 2009 she recovered the file and handed over to Messrs Samusamuvodre Sharma Law, her current solicitors and they applied for Probate at the High Court sometimes in 2011 and it did take some time as advertisement needed to be done and preparation and drafting of documents took some time.*

*She was informed that the application for Probate was rejected by the High Court as there were certain changes which needed to be done.*

*She again executed the documents which were prepared by Messrs Samusamuvodre Sharma Law and they lodged the Probate at the High Court. The Probate was granted on the 24<sup>th</sup> day of June 2013.*

*The delay caused in lodging this civil claim by my Solicitors Messrs Samusamuvodre Sharma Law was due to the non-availability of documents and the Probate application being made to the Probate Registry late.'*

[21] Mr Singh, counsel for the applicant submits that the Plaintiff has satisfied all the elements of delay and in the interest of justice leave ought to be granted to the Plaintiff to file the Writ of Summons as the delay was on the part of the former Solicitor that the Plaintiff engaged and the other contributing factor was that the files could



not be located within the stipulated timeframe. He also submits that prior to engaging the services of present Counsel limitation period had already lapsed.

[22] I am mindful of the fact that limitation period must be considered in the light of the right of access to courts and tribunals guaranteed under section 15 of the 2013 Constitution.

[23] It is to be noted that limitation periods fulfil the legitimate aims that there must be certainty and conclusiveness in the litigation. Moreover, the courts should not be forced to consider claims where evidence is either no longer available or not reliable.

[24] The applicant in this case accepts that the cause of action accrued when the accident occurred and the injuries were suffered on the 5<sup>th</sup> day of July 2007. The time for commencing the action ended on 5<sup>th</sup> day of July 2010. This action commenced on 4<sup>th</sup> day of July 2013 was therefore 3 years out of time.

[25] It seems that the applicant is blaming her former solicitor for the delay. She states that her former solicitors Messrs Kuver Sharma & Associates was wound up in 2008 and all the files and documents in respect of her case and other cases were in the custody of the Fiji Law Society. If the applicant had acted with due diligence, she could have filed the action somewhere in 2008 or 2009. Her first probate application was struck out by the court as it was an incomplete or defective application.

[26] The applicant filed her second application for probate at the High Court in 2011 and the High Court granted probate to the applicant in June 2013. The she should have sought indulgence of the court to expedite the matter as it was her second application for probate

and expiration of limitation period for bringing personal injury claim. She failed to do so.

[27] In **Ganilau v FEA** [1997] FJHC 225; Hbc0508d.92s (7 August 1997), Pathik J extending the limitation period prescribed by the Limitation Act acting under section 17 of the Act said that:

*“For these reasons I grant leave to the Plaintiff under s.17 of the Act.*

*To summarise, the date of knowledge was later than the accrual date of the cause of action and the Court has the power to override the defence of limitation. In my view these fulfil the requirements of the provisions of the Limitation Act. The plaintiff had as required of her pleaded the fact and matters on which she relies in support of her contention and has stated why where was delay. But the first defendant I find has by raising the defence of limitation and denying the facts alleged by the Plaintiff has put these facts in issue. The following passage from the **SUPREME COURT PRACTICE** 1979 Vol 1 Or 18/8/8A is pertinent:*

*“So far as the defendant is concerned in such actions, he raised the defence of limitation and merely denies the facts alleged by the plaintiff as to the date of knowledge, he will merely put those facts in issue. If, however, the defendant intends to set up a positive case that the plaintiff first had knowledge of any of the specified facts before the date alleged by the plaintiff, it is incumbent upon him to plead such a defence expressly, and in particular he should plead the date as precisely as he can when he alleges the plaintiff first knew any of the facts specified and he should give particulars of the facts relating to such knowledge on the part of the plaintiff (O.18, r.12 (4) (a), *infra*). Moreover, if the defendant intends to rely on the provisions of s.2A (8) of the Act, so as to show that the plaintiff’s date of knowledge was or ought to be treated as having been before the date alleged by the plaintiff, the defendant must plead the facts and matters relied on to support his contention. Only in this way will the court be able to see and to be appraised of the precise issues between the parties on the question of the “date of knowledge” (underlining is mine for emphasis)*

*The plaintiffs have failed to comply with the requirements of pleading as contained in the above passage.”*

[28] The above case may be distinguished from the matter at hand. In Ganilau the deceased was electrocuted when he went to fetch pawpaws from his home at Quarters 43B at Korovou Prison Compound, when he held on to a brace-wire which was in fact a live wire which had him electrocuted' from which he died on 30 April 1989. The writ of summons was issued on 19 November 1992, which is after the three year limitation period. The verdict of the inquest that the deceased died by electrocution was delivered on 22 December 1989 (some 8 months after the electrocution). In the current case the accident occurred on 5 July 2007 and the deceased died next day at the hospital and autopsy was conducted on the same day. The cause of death was due to severe brain trauma secondary to a motor vehicle accident. Therefore, the applicant had knowledge that her husband died as a result of the accident immediately after the accident that occurred on 5 July 2007. The cause of the death in Ganilau was ascertained after some eight months of the incident. The applicant therefore could not rely on Ganilau's case.

[30] The applicant in this case had knowledge that the cause of action had been accrued more than three years before the action had been commenced. It was within the knowledge of the applicant that the matters constituting the cause of action had occurred on 5 July 2007.

[31] In ***AB and others v Ministry of Defence*** (SC(E) [2013]1AC 78, the court held that in nine other cases the necessary knowledge of attributability had been acquired more than three years before the action had been commenced and those actions should not be permitted to continue since they had no realistic prospect of success.

## Conclusion

[32] The applicant is blaming her previous solicitor for the delay. The applicant has to bear responsibility for delay whether it be caused by her or her solicitors (See, *Karan Chand* [2013] FJHC 552; HBC43.2010 (22 October 2013). The applicant acquired the necessary knowledge of the cause of action more than three years before the action had been commenced. The facts pleaded in the statement of claim reveal that the applicant's deceased husband had willingly travelled in a vehicle that was driven by drunk driver, the second defendant. Therefore the court should not permit the action to continue since it has no realistic prospect of success. For all these reasons I would refuse to grant leave to proceed with the action beyond the normal limitation period. Accordingly, I dismiss the action, but without costs.

## The result

- 1) Leave refused to commence the action beyond the normal limitation period.
- 2) Plaintiff's action is dismissed.
- 3) No order as to costs.

..... *M H Mohamed Ajmeer* 24/8/16

**M H Mohamed Ajmeer**

**JUDGE**

**At Lautoka**  
**24.08.2016**

