IN THE COURT OF APPEAL IN THE REPUBLIC OF VANUATU **Civil Appeal Case No.08 of 2000**

VANUATU BREWING LIMITED

V

JEFFREY ARU

Coram: *Acting Chief Justice Vincent Lunabek*
Mr. Justice Daniel Fatiaki
Mr. Justice Olivier Saksak
Mr. Justice Roger Coventry

Counsel: *Mr. Mark Hurley for the Appellant*
Mr. Hillary Toa for the Respondent

Judgment Date:22 December 2000

JUDGMENT

In 1990 the respondent-plaintiff started work with The Vanuatu Brewing Company Ltd, the appellants. On 6 December 1994 he was working at a conveyor belt carrying bottles when his right wrist was injured. He was treated at hospital but alleges there is permanent disability as a result of the injury. After recovery, he continued at work until he was dismissed from that employment on 14 December 1998.

On 15 December 1998 the respondent saw Dr. Cecil Ala about his disability and obtained a report. Later in the month he saw the Commissioner of Labour. He first saw the Public Solicitor on 11 January 1999 and proceedings were filed on 25 March 1999. A defence, pleading, inter alia, the Limitation Act (No.4 of 1991) was filed on 6 January 2000. It was agreed before the Court by the parties that the question of the Limitation Act had been raised in September 1999.

On 26 June 2000 the respondent filed his application under the Limitation Act for leave to proceed out of time, and filed a supporting affidavit on 4 August.

On 7 September Mr. Justice Marum heard the application including oral evidence from, and cross-examination of, the respondent.

The respondent stated that after the initial treatment he did not see, nor think to see a doctor between 1994 and 1998. He never lodged any formal complaint or claim although he did make oral complaint to the stock controller and the engineer. He said everyone knew of the problem. When asked "So you only thought to take action after you were terminated", he replied " Yes, but I was thinking to claim when I finish work". The final question in cross-examination was " You were told by Public Solicitor to start your action within 3 years"; he replied "No". The final question in re-examination was "As to starting action within 3 years, what were you told." He replied "You told me that it was out of time already".

Proviso (i) to Section 3 (1) Limitation Act states that

"(i) in 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 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 [limiting the time for bringing an action to six years] shall have effect as if for the reference to six years there were substituted a reference to three years;..."

Clearly the respondent was outside the three year period when he brought the action. Sections 15 and 16 of the Act provide for "Extension of Time Limit for Actions in Respect of Personal Injuries" and "Application for Leave of Court" respectively.

The respondent made his application for leave after the commencement of the action.

Section 16 states

(1) Any application for the leave of the court for the purposes of section 15 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 forth with 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 form any defence under subsection (1) of section (3); and

(b) to fulfil the requirements of subsection (3) of section 15 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 form any defence under subsection (1) of section 3; and

(b) to fulfil the requirements of subsection (3) of section 15 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 form the last preceding section, to afford a defence under subsection (1) of section 3.

(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.

Section 15 (3) states

(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.

The learned judge in his "Oral Interlocutory Decision" delivered on 13 September found that the application was brought under section 16 (3). He further found that the respondent-plaintiff had satisfied the requirements of section 15 (3), and ordered the limitation period be extended "to include the date of instituting the proceeding in court to make live the action for continuation".

The decision to grant leave involves the process of finding certain facts and then exercising a discretion.

Section 15 is substantive. It sets out the circumstances in which an extension may be granted. In particular, subsection 3 sets out the facts an applicant must prove.

Both section 16 (2) ("applications for leave before the commencement of any relevant action") and section 16 (3) ("where such an application is made after the commencement of a relevant action") require the proof of the matters set out in section 15 (3).

Both section 16 (2) and section 16 (3) require the applicant to adduce evidence such that if the like evidence were adduced in the action it would in the absence of any evidence to the contrary be sufficient to "... (a) establish that cause of action, apart form any defence under subsection (1) of section 3 and (b) to fulfil the requirements of subsection 3 of section 15 in relation to that cause of action".

The learned judge did not specifically address this requirement. However, it is clear on the information before us that there was sufficient evidence to satisfy this requirement.

Both section 16 (2) and section 16 (3) state the court "may" grant leave. This wording gives the court a discretion which is to be exercised when the factual foundation has been laid. In Raffey Taiwa and South Pacific Construction Ltd v Robson Edward (Appeal Case No.2 of 19998) the Court of Appeal stated at page 10 "The power to extend time is a discretionary power: see 16 (2) and (3). The court "may" grant leave"

The learned judge in this case considered he had a discretion and exercised it in the respondent's favour. It is not certain whether he exercised the discretion as part of the section 15 (3) matters, or, as the Act actually requires once the s15 (3) and the other factual bases had been established.

Section 16 (3) however lays down an extra requirement necessarily absent from section 16 (2), namely that " 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 3".

Not only is this an extra requirement, but it is also different from what is required under s16 (2) or section 15 (3).

The learned judge did not address this consideration in his decision. From the face of the evidence it would appear it was not addressed either. This in itself is sufficient for us to allow the appeal and return the case to the Supreme Court for rehearing.

It is difficult to discern whether the material facts came to the notice of the respondent-plaintiff before or after the commencement of the action.

For this reason also we consider this case should be sent back to the judge for reconsideration, and, if necessary, further evidence. It is possible that the procedure under section 16 (2) and not section 16 (3) should have been used.

One of the main arguments of the appellant-defendant before the learned judge and referred to on appeal related to the bona fides of the respondent in seeing a doctor the day after he was dismissed and shortly after that seeing the public solicitor, having taken no formal action for four years. This is a matter which will certainly bear upon the judge's exercise of his discretion and might have some relevance to the factual findings. If this argument is maintained on the rehearing then reference should be made in the ruling to the fact it has been considered. The learned judge should make his findings of fact and then exercise his judgment thereon.

The Court of Appeal of Fiji, in Surya Deo Sharma v Joresa Sabolalevu and the Attorney General of Fiji (Civil Appeal No ABV0043 of 1995S) stated at page 5 "The provisions of section 16 and section 17 (the equivalent sections of the Fiji Limitation Act) are in our view, unnecessarily complex and difficult to understand. Indeed they can fairly be described as convoluted. This is an undesireable feature of legislation that can affect the lives of ordinary citizens. It is our recommendation that the authorities give active consideration to the re-enactment of these provisions in a form that is simple, clear and easy to understand. A useful model is the provisions in the Limitation Act 1980 (UK) which fulfil these requirements, and which replaced the provisions of the 1963 UK Act, which were in terms substantially the same as those in the Fiji Act".

The Vanuatu Limitation Act is substantially the same as the Limitation Act 1963 of the United Kingdom. We can do no better than adopt the same words of the Fiji Court of Appeal in relation to the Vanuatu Act.

ORDER

The appeal is allowed. The matter is returned to the Supreme Court to be reheard.

REPUBLIQUE DE VANUATU
COUR D'APPEL
COURT OF APPEAL
REPUBLIC OF VANUATU

DATED at Port Vila, this 22nd Day of December 2000

BY THE COURT

Vincent Lunabek
Acting Chief Justice

Mr. Justice Olivier Saksak

Mr. Justice Roger Coventry

Mr. Justice Daniel Fatiaki