

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 40/88

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

BETWEEN THE JAMAICA FLOUR MILLS LIMITED DEFENDANT/APPELLANT
AND THE ADMINISTRATOR GENERAL FOR JAMAICA (ADMINISTRATOR FOR THE ESTATE OF CLINTON ALFRED COX, DECEASED) PLAINTIFF/RESPONDENT

Mr. Gordon Robinson for the appellant

Mr. David Muirhead, Q.C. and Miss Dorothy Lightbourne
for the respondent

May 4, 1989

ROWE, P.:

By an action which was commenced by Writ on the 15th of April, 1987, the respondent as plaintiff, claimed as Administrator of the estate of Clinton Alfred Cox, deceased, under the provisions of the Law Reform (Miscellaneous Provisions) Act for damages in respect of injuries suffered by Clinton Alfred Cox on the 2nd of April, 1981, and his subsequent death on the 21st of April, 1981. The injuries and death were allegedly caused by the negligence and/or breach of duty and/or breach of statutory duty and/or breach of the contract of employment on the part of the defendant, its servants or agents.

A Statement of Claim was delivered on the 14th of April, 1988, and paragraph 9 of that Statement of Claim states that:

"By reason of the matters aforesaid, the deceased during his lifetime suffered pain and suffering from the said injuries sustained by him from which he died

"19 days later on the said 21st day of April 1981. The said deceased had a normal expectation of life, and by his death, his expectation of a healthy and happy life was considerably shortened and his said estate has suffered loss and damage."

The appellant by the amended summons of the 26th of April, 1988, asked the Court for an Order to strike out the Writ of Summons and the Statement of Claim on the ground that they reveal no reasonable cause of action or that they were vexatious and an abuse of the process of the Court.

The application went before the learned Master on the 10th of May, 1988, and he dismissed the Summons and granted leave to the appellant to appeal to this Court.

The appellant adhered to the leave of the Master and in the grounds of appeal filed in support of that leave, complained that:

- "1. The Learned Master erred in finding that the action was maintainable because of the provisions of the LAW REFORM (MISCELLANEOUS PROVISIONS) ACT when in fact that Act does nothing more than permit the representative of an estate to file an action if a cause of action vested in the deceased prior to his death.
2. The Learned Master erred in finding that a cause of action was created upon the death of the deceased by virtue of the provisions of the LAW REFORM (MISCELLANEOUS PROVISIONS) ACT when the Act only makes provisions for causes of action created before death to survive the death of the deceased.
3. The Learned Master erred in dismissing the Defendant/Appellant's Summons completely when the Plaintiff/Respondent's Counsel had conceded in submissions that a part of the Plaintiff/Respondent's claim should be struck out as being statute barred.
4. The Learned Master erred in dismissing the Defendant/Appellant's Summons when it was clear on the Pleadings that it was impossible for the Plaintiff/Respondent to escape the provisions of the LIMITATION OF ACTIONS ACT."

Mr. Robinson has argued in support of grounds 1 and 2 that it was clear on the face of the pleadings of the plaintiff that the cause of action accrued on the 2nd of April, 1981, and that applying a period of six years limitation, the period within which the action could be filed, expired on the 2nd of April, 1987, and consequently a Writ filed on the 15th of April, 1987, was clearly beyond the limitation period and on the authority of Riches v. Director of Public Prosecutions [1973] 2 All E.R. at 935, the appellant was entitled to have the Writ of Summons struck out as also the Statement of Claim as being an abuse of the process of the Court.

Mr. Muirhead, in reply to these submissions, has relied rather heavily upon the decision of the House of Lords in the case of Rose v. Ford [1937] 3 All E.R. at 359. He relied in particular on the statements in the judgment of Lord Wright for his submission that in a case where a person having been injured dies shortly after the accident, that the cause of action which is maintainable for the shortening of the deceased's normal expectation of life, arises at the moment immediately before death.

We are of the view that Rose v. Ford (supra) was really concerned with whether or not the particular type of action could survive for the benefit of the estate and was not at all concerned with the time at which the cause of action arose and is in no way helpful to any of the issues which we have to determine in this case.

Mr. Muirhead referred to the Limitation Act and to the decision of this Court in Melbourne v. Wan, Supreme Court Civil Appeal No. 55/83 in which the judgment of the Court was given on the 22nd February, 1985, and submitted that that case dealt with the common law tort. In his submission the Statute of 1623 did not deal expressly with speciality claims and one of the causes of action which is referred to in the Writ, that of breach of statutory duty, is akin to a speciality. He submitted that a breach of the Factory Acts is not governed by the six year limitation period set out in the 1623 Limitation Act.

Mr. Robinson in his reply said that the Statute of 1623 need

not have mentioned the breach of statutory duty because such a breach is an action upon the case, is a tort, and falls squarely within the six year limitation period.

In our view, that argument might not be sustainable.

Mr. Muirhead said that the Summons to strike out the Writ and Statement of Claim filed by the appellant, is defective and incurably defective, in that it did not make any specific reference to the period of limitation. The Summons as amended simply asked that the Statement of Claim and the Writ be struck out as they reveal no reasonable cause of action or they were vexatious and an abuse of the process of the Court. It is open to a defendant to waive his right to rely upon a defence founded upon the Statutory Limitations. As the appellant in this case did not make any reference to the Statute of Limitation in the Summons it was submitted that he cannot be allowed to make any use of the limitation period in arguments before the Court.

In the case of Riches v. Director of Public Prosecutions (supra) the Summons in that case did make specific reference to the Statute of Limitations, and that it was the intention of the defendant to rely upon the Statute. That Summons did say that the period which applied was six years and therefore, it brought to the attention of the parties at the very earliest moment what was the period of limitation that was being contended for.

We think that in this case if the appellant wished to rely upon the period of limitation he ought to have set out in his Summons, not only the fact that he wished so to do, but also to set out what he considered to have been the applicable period. If that had been done the question as to whether a breach of statutory duty was a tort or was to be treated as a tort for purposes of the Limitation Act would have been litigated before the Master and would not have come fresh before this Court.

We think that applying the principle that the point of law should be crystal clear and should be on the face of it unanswerable

before the Writ and Statement of Claim ought to be struck out, the appellant has not met the standard of proof required because the matter is left in a state where it is unclear to the Court what is the applicable period of limitation where the claim is for a breach of statutory duty. It is also unclear, on the face of the Summons, whether or not the appellant intended to rely on any Statute of Limitations.

We, therefore, think that the appeal should be dismissed with costs to the respondent to be agreed or taxed. Leave granted to the defendant/appellant to file defence within twenty-one days hereof.

Summerville v. [illegible] (1973) 2 A.I.R. 32
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