IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2009 HCV 05364

BETWEEN	**ADMINISTRATOR GENERAL (Administrator of Estate Rohan Wiggins o/c Rohan Wiggins, deceased)**	**CLAIMANT**
AND	**JERMAINE WILLIAMS**	**DEFENDANT**

Ms. Ayana Thomas instructed by Messrs. Nunes Scholefield Deleon & Co. for the Claimant

Mr. Jeffrey Mordecai for the Intervener

Error in procedure – limitation of actions – extension of time to serve claim form – Enlargement of time under The Fatal Accidents Act

HEARD: 7th February, 2011, 19th April, 2011 & 19th May, 2011

IN CHAMBERS

MASTER SHARON GEORGE (Ag.)

1. The Claimant in her capacity as Administrator of the deceased (Rohan Wiggins) estate on behalf of his dependants and his estate sues the Defendant in negligence and for damages under the Law Reform (Miscellaneous Provisions) Act and under the Fatal

Accident Act, further to a motor vehicle accident on or around the 29th June, 2004, resulting in the death of the said Rohan Wiggins.

2. This claim was filed on the 14th October 2009. An application was filed on the 8th September, 2010 for among other things, to which I will return, personal service to be dispensed with and for substituted service based on the claimant's assertion by affidavit evidence, that the Defendant could not be found, and requesting substituted service on the insurers, the intervener in this matter.

3. The intervener has not taken issue with whether or not the Court is able to make such an order and so I will assume that the litany of cases both locally and abroad, which establish and rationalize substituted service on an insurer, where the insured cannot be found and even where the Insurer is not in contact with the defendant or able to locate him is accepted by the intervener, Jamaica International Insurance Company Ltd.

4. I will therefore now turn my attention to the bones of contention, which are the other matters sought in the Claimant's Notice of Application filed on the 14th October, 2010 and the intervener's contending Notice of Application filed 2nd November, 2010.

5. **The other matters requested in the Claimant's Notice of Application are:**

(1) That the Claimant be permitted to make a claim out of time, for damages under the Fatal Accidents Act against the Defendant Mr. Jermaine Williams

(2) That the Claim for damages under the Fatal Accidents Act which is presently incorporated in the Claim Form and Particulars of Claim filed on the 14th of October 2009 be allowed to stand.

(3) That the validity of the Claim Form and Particulars of Claim be extended for a period of 6 months in order to facilitate service on the Defendant.

The Intervener's Notice of Application filed 2nd November, 2010 sought the following:

(1) Permission to intervene

(2) That the Claim Form and Particulars of Claim filed on the 14th October 2009 has expired as at the time of the filing of the Claimant's Notice of Application, the 6 month period of validity stated on the Form had expired and therefore the claim should be struck out as having no validity.

Permission to Intervene

There might have been a possible contention as to the locus standi of the Intervener in the matters, other than the application for substituted service, but by Consent an Order granting Jamaica International Insurance Company Limited (JIIC) permission to intervene was granted

thus disposing of the 1st aspect of the Application, without the raising of any issue of locus standi.

6. **Issues**

1. The time of the expiration of the claim form is given on the Claim form as 6 months and not 12 months; whether the claimant is now estopped from relying on the usual validity for 12 months as they are seeking to do. If this is so, then the Court would need not consider the other aspects of the Claimant's application and would be left with no alternative but to strike out the claim
2. The accident took place on the 29th June 2004. In order to file a claim for damages in relation to the death of the deceased section 2 of the Fatal Accidents Act allows for this to be done within 3 years. The Claim was filed October 2009, some almost 2½ years after the time permitted.
3. The Claim was filed within 6 yrs of the limitation period allowed for actions in tort. The parties agree that as no specific provision is made as to a time period for a claim on behalf of the Estate/Dependants, in the Law Reform (Miscellaneous Provisions) Act that therefore the usual 6 year for actions in tort is applicable. This would therefore make the expiry period 6 yrs from the 29th June 2004 and would take us at a minimum to around the 29th June 2010. They disagree as to when the

cause of action accrued. The Claim having been filed in October 2009 is filed in time, under the Law Reform (Miscellaneous Provisions) Act. This is so whether the cause of action accrued from the date of death or from when letters of administration was granted. The issue which arises is whether it expired by the time the Notice of application was filed for extension of the period in which to serve the Claim Form and if so, the relevance of this factor for the application to extend time to serve the Claim Form.

4. Whether as the Claimant submits and the Defendant/ Intervener rejects, the period for calculating the period, begins to run from the date of the grant of Letters of Administration and not the date of the incident/accident (death of the deceased) giving rise to this action.

5. Whether the expiry of the limitation period of the Claim under the Fatal Accidents Act, would be further compounded by any expiry of the claim under the Law Reform (Miscellaneous) Provisions Act prior to any application to extend the Claim Form.

6. Whether the Claimant should in the event that the Claims have so expired, be denied the application to extend the period for service of the Claim form as otherwise the Defendant would be prevented from relying on any limitation defence.

7. If there be some doubt or dispute as to whether it has indeed expired to deny the application, thereby requiring the Claimant to re-file the Claim, if so desired, and so give the Defendant an opportunity to persuade the Court at that stage that the Claim is indeed statute barred and so raise/rely on any Limitation Defence.

7. **Factual Position /Submissions Put forward by Applicant**

1. On 29th June, 2004 Rohan Wiggins met his death as a result of motor vehicle accident allegedly caused by the Defendant, Mr. Jermaine Williams.
2. A police report is exhibited as AVWJ to affidavit of Victoria Wiggins, mother of deceased, in support of application.
3. The police report of 27th August, 2004 indicates that the Defendant Jermaine Williams was overtaking several vehicles along the Old Harbour Road and in so doing, collided with the vehicle of the deceased.
4. The Claimants have also produced police statements from passengers who are said to have been in the vehicle of the deceased at the time of the collision, which supports the police report.
5. The deceased was 33 years old at the time of his death and left behind 4 dependants being 2 children as well as his mother and father.

6. There was some dispute as to who was the 'spouse' of the deceased at the time of his death and the Administrator General had difficulty obtaining information regarding his estate hence the delay in making the application under Fatal Accidents Act prior to 2009.

7. Attempts were made to serve the Defendant, Jermaine Williams but the process server was unable to locate him to effect personal service and in the interim the Claim form expired.

8. The Defendant was insured to Jamaica International Insurance Company Ltd. at the time of the accident.

9. JIIC have negotiated other claims arising out of the same motor vehicle accident.

10. Significantly, a letter from the Jamaica Constabulary Force indicates that the Defendant was convicted of Causing Death by Dangerous Driving on 8th December, 2005.

11. Difficulties (deponed by Counsel Ms. Thomas) of the Administrator General to administer the Estate included (i) ascertaining the location of relatives of the deceased and obtaining proof of the beneficiaries under the estate in particular proof of paternity and spouse-ship.

b. Ascertaining whether an application was already made for Letters of Administration by any of the relatives of the deceased.

c. Ascertaining the place of employment of the deceased and particulars regarding his income.

d. Two women made separate applications to be declared spouse of the deceased – one woman, a Ms. Monteith retained counsel to bring a claim on behalf of the estate and had thereby entered into negotiations with JIIC in that regard.

e. It was uncertain whether letters of Administration had been obtained on behalf of the estate of the deceased and on any claim filed in respect of the said motor vehicle accident.

f. Correspondence passed between the parties, involved, counsel Ms. Thomas of Nunes, Taylor, Deacon and Company and between Mr. Mordecai for JIIC and Scott and Associates, the initial lawyer for Ms. Monteith.

g. The Administrator General was not advised until May 2009 that neither women were declared 'spouse' (No documentary evidence of this was supplied).

i Thereafter Administrator General obtained letters of Administration (18th June, 2009) (exhibited to affidavit of A. Thomas as ALT4).

j. Particulars of claim and Claim filed on 14th October, 2009.

k. No notice of application to extend time filed at this stage due to oversight on the part of Counsel

l. This was corrected on September 8, 2010 when the subject Notice of Application for Court Orders was filed.

m. Notice of Proceedings advising of filing of claim under the Law Reform (Miscellaneous Provisions Act) and under the Fatal Accident Act was filed and served on JIIC on October 16, 2009 – (exhibited to affidavit of A. Thomas as "AT5")

n. The reference in the Claim Form that it is valid for 6 months was an error.

8. **The Intervener's Contentions/Submissions**

a. In respect of the Claim under the Law Reform Miscellaneous Provisions Act, this expired on the 29th June 2010, before the filing of the Notice of Application to extend time to serve the Claim form as the 6 year limitation period for actions in Tort applies and this commenced from the date of the incident/death of the deceased and that therefore, this aspect of the application, ought not to be granted.

b. The general limitation period at Common Law can be exempted by a statutory provision stating a specific period of limitation, for example section 2(3) of the Law Reform Miscellaneous Provision Act which provides a specific limitation period for claims that survive **against** an Estate. There is no specific statutory limitation period provided by

the Law Reform Miscellaneous Provision Act or any other statute for claims brought **for the benefit** of an estate.

c. A fundamental issue such as the expiry of the limitation period is one that should be left to be decided at trial and as there is a dispute as to such expiry, the Claimant's application ought to be denied, requiring them to file a new claim.

d. On the other hand, if the Defendant/Intervener, can satisfy the Court that there is a proper legal basis to assert that the statute of Limitations has expired, then the Court should not make the order requested to extend the validity of the Claim Form for service.

e. If the Claimant truly believes that the 6 year limitation period applicable to this matter starts to run from the date of grant of Letters of Administration, then the Court should refuse the Claimant's application and let the Claimant be forced to start new proceedings, if still wants to proceed on that basis and thus allowing the Defendant to argue a limitation defence in the new proceedings.

f. Rule 8.14(1) refers to "the general rule is that a claim form must be served within 12 months..." This reference to 'general rule' allows for exceptions and where the Claimant has given notice in unambiguous and clear language to the

Defendant in the Claim Form, (albeit by error) that the Claim form is valid for 6 months, this provides for an exception to the general 12 month rule and the Claimant ought to be bound by it. This would mean that the Claim form expired in April 2010, 6 months after filing and is now invalid by virtue of the fact that it was not amended/extended in the 6 month validity period. The Notice is valid as it merely states a permissible lesser time for the validity of the Claim Form as a valid exception to the 'general rule' stated in Rule 8.14(1).

g. Even if the Claim form was valid, despite the notice of 6months, the claim would have expired by virtue of the statute of limitations on the 29th June 2010 prior to the Claimant filing the application to extend the life of the claim form and therefore the Court should give full consideration as to whether to grant the Claimant's application to extend is necessarily to deny the Defendant, who has not been served within the limitation period, the right to raise the Defence that the statute of limitations has expired without him being served a valid Claim Form.

9. Rule 26.9 (2) of the CPR 2002, is not relevant as the error was not one of procedure but a substantive provision of the Claim form which affects the parties.

ANALYSIS

6 months stated in error in the Claim Form

10. It is prudent to firstly consider whether the Claimant is bound by the error in placing 6 months as the time within which the claim form would expire on the claim form. This is because the court's ruling on this, will determine whether or not it will be necessary to deal with the other aspects of this application.

11. The Civil Procedure Rules, 2006 had initially stated the validity of a claim form to be 6 months. However by Part 8.14 of the Civil Procedure Rules 2002, amended in 2006, (the CPR), the validity of the claim form is now for a period of 12 months.

12. Counsel for the intervener/Defendant contends in his submissions that "The NOTICE in Form 1, by erroneously stating 6 months is not incompatible with Rule 8.14 as the Claimant's Attorneys would have had the opportunity within the 6 months to amend to state twelve months. However, if by a second error the Claimant's Attorneys did not amend the Claim Form, it would be invalid a day after 6 months."

Rule 8.14 of the Civil Procedure Rule provides as follows:-

(1) "**The general rule is that a claim form must be served within 12 months after the date when the claim was issued or the claim form ceases to be valid."**

13. Both parties agree that there was a period of 6 months expressed on the claim form as its validity period. The parties are in dispute as to the effect of this. Counsel for the Defendant argues that it makes the claim form invalid. He argues that Rule 8.14 allows for exceptions as it refers to the 12 months as the "general rule".

14. For Mr. Mordecai, the Claimant's expressed provision of a 6 month expiry date is by way of an exception to the "general rule" and therefore they should be bound by it. For him, whether or not the Claimant intended it to be a period in accordance with the Civil Procedure Rule – i.e. 12 months, is irrelevant as the content of the claim form and Notice to Defendants is prepared by the Claimant's Attorneys and is clear and unambiguous. He further submits that any amendment to the 6 months, should have been done before the 6 month period had passed, whilst the Claim Form would still have been valid and it is therefore now too late.

15. The difficulty I have with this submission is that (i) an error in procedure does <u>not necessarily bind</u> the litigant making that error, even in circumstances where the other side has been misled by the error and this is why the civil litigation rules allow amendments, sometimes with and sometimes without the permission of the Court. It also allows the Court to correct/rectify errors of procedure. The underpinning philosophy in all of these is the

concept of justice, enshrined in the overriding objective of dealing with cases "justly".

16. The Civil Procedure Rules are binding on all parties. A party cannot choose by error or otherwise to override the express provisions of the Civil Procedure Rule. In looking at the reference to "the general rule" in Rule 8.14, this must be viewed in its context. It cannot mean, the "general rule" subject to the parties deciding what validity period they want to impose. If this were so, what would prevent a party from stating the validity to be for example 24 months, thereby giving him/her self a greater period of time within which to serve the claim form.

17. It is my view that the "general rule" in this context is a qualification, allowing for Rule 8.15, whereby the validity of the claim form can be extended up to 2 times for a period of 6 months on each occasion. Therefore, although the general rule is that the claim form is valid for 12 months, there is recognition for the provision which allows for it to be valid for a further 6 months – i.e. 18 months and another further period of 6 months – i.e. 24 months.

18. It is also of significance that the Form 1 set out at the back of the current Civil Procedure Rules, still has 6 months as the period of validity stated on it and this is also true of the electronic versions of this form. It would be rather burdensome to the administration

of justice, if parties were permitted to rely on this to say that the claim form is invalid after 6 months, despite the clear provisions of Rule 8.14.

19. Of even more significance is the fact that this claim form has not yet been served. Therefore any "Notice" to the Defendant has not yet come to his attention. It would therefore render the application to strike out the claim form at this stage, rather premature. Perhaps there might have been a little more value in such an application after its service, and even then, it is unlikely that such an application would succeed for all the reasons stated above. I find that the claim form was initially valid for 12 months despite the error of stating on the claim form, the period of 6 months as the relevant time limit.

Extending the period for service of the claim form for a further period of 6 months.

20. Having found that the claim form is valid for 12 months, I believe that the next issue for consideration is whether the Court ought to extend the period for service of the claim form for a period of 6 months.

21. In considering whether to extend the time to serve the claim, the Defendant/intervener contends that the Court must have regard to the fact that prior to the making of this application both claims,

i.e. under the Fatal Accidents Act and the Law Reform Miscellaneous Provisions Act had expired and that having so expired, the Defendant would be denied his statute barred/limitation defence, if the application was granted.

22. As stated earlier, there is some dispute as to whether the claim under the Law Reform Miscellaneous Provisions Act has expired and to this I will return. It is not in dispute that the claim under the Fatal Accidents Act had expired. In fact this expired in 2007, well before the claim or this application was made. The parties agree that the limitation period which applies is the period of three years as set out in Section 2 of the Fatal Accidents Act.

23. It is further agreed that the Law Reform (Miscellaneous Provisions) Act makes no specific provision for limitation of actions and therefore the standard period of 6 years for actions in tort applies.

24. In relation to the provisions of the Law Reform Miscellaneous Provision Act, the Claimant's contend that this had not expired prior to the filing of the Notice of Application to extend the time within which to serve the claim form, as time for this action began to run <u>at the grant of letters of administration and not the date of the accident (being also the death of the deceased)</u>.

25. They support this position with the case of **Attorney General v. Administrator General SCCA 1/2001** in which Downer J A appeared to have put forward such a position. The

Defendant/Intervener contends on the other hand, that this was not so and that Downer J A's references relied upon by the Claimant's were mere obiter, and not supported by statute nor by his brothers and therefore not binding on this Court.

26. Reliance is placed by the Claimant's upon the statement of Downer J. A. at page 7 that "***since the action is for the benefit of the Estate time begins to run from the time Letters of Administration were granted."***

Mr. Mordecai argues that this statement is an erroneous statement of law because:

1. Section 2(1) of Law Reform Miscellaneous Provision Act (LRMPA) does not contain a time period or a reference to Letters of Administration.
2. It is Section 2(3) of the Law Reform Miscellaneous Provision Act that contains a reference to a time period and a reference to when "his personal representative took out representation."
3. No reasoning is apparent.
4. No cases are cited.

27. According to the Claimant Justice Downer was of the view "***that under the Law Reform Miscellaneous Provision Act, in respect of claims being brought by the estate of a deceased person, the personal representative of the estate had 6 years within***

which to bring the claim … the six year period did not begin to run until after Letters of Administration were granted."

28. The relevant provisions of the Law Reform Act – Section 2(1) provides that ***"subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of his estate."***

29. The Act at section 2(3) provides that "**No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person, unless:**

(a) proceedings against him in respect of that cause of action were pending at the date of his death;

(b) the cause of action arose not earlier than 6 months before his death and proceedings are taken in respect thereof not later than 6 months after his personal representative took out representation.

30. It is clear that sub-section (b) gives specific limitations in relation to actions referred to in section 2(3) – that is, cause of actions in tort which has survived <u>against the estate of the deceased person</u> – for these actions section 2(3) provides that in order for the

proceedings to be maintained either subsection (a) or (b) must be satisfied – hence it uses the word "unless."

31. For an action against the deceased to be maintainable section 2 (3) (a) provides that proceedings against him must have been pending against him at the date of his death or section 2 (3) (b) the cause of action arose within 6 months of his death and proceedings against him was taken out no later than 6 months after his personal representative took out representation. This appears to be an attempt to prevent the possibility of uncertain litigation against a deceased estate.

32. Initially, I had agreed with the intervener that limitation periods are provided by statutory enactments and that if it was the intention of Parliament that the limitation period in these circumstances, should commence from the grant of letters of administration, it would clearly have said so. I considered the cases of **Young v. Lugter CV 2008 – 00876** and **Krishnadaye Chandree v. Joseph Gilbert & Anor H.C.A. No. 340/1996**, both Trinidadian cases, which supports the above position. I also considered the case of **Reading Co. v. Koons; 271 U.S. 58 (1926)** submitted by Mr. Mordecai for the intervener. These cases support the position that the limitation period commences from the time of death.

33. However Counsel for the Claimant had provided to the Court two old Privy Council decisions, which I had not considered during my research. Counsel had submitted these separate from the bundle of submissions and legal authorities she had initially submitted and were overlooked in my deliberations. I had indicated my preliminary position as being in agreement with the intervener on this aspect of the submissions when the matter came before me on 19th April, 2011. It was subsequently adjourned to 19th May, 2011. It was during this interval that I became aware that these cases were overlooked. Having perused them, as it relates to this aspect of the submissions I have come to a different position. This does not in any way affect the outcome of my judgment. The first of these cases is the very old case of **Mayappa Chetty vs. Supranamia Chetty 2/3/1916** – Privy Council. This case concerns a Privy Council decision from Malaysia in which Lord Parker gave the leading judgment. The facts briefly are that the Administrator instituted a claim asking for a declaration that the partnership existing between the testator and the Defendant had been dissolved by the testator's death and asking for the usual partnership accounting.

35. The Court had to firstly consider whether the claim was statute barred by the relevant Limitation Act (Section 17 Restraints Settlements Ordinance No. 6 of 1896). This Act prescribed a

period of 3 years limitation for actions of this nature – i.e. in a claim for account and a share of the profits of a dissolved partnership. This would be 3 years from the date of the dissolution. The date of dissolution was the testator's death and therefore it was contended that time would begin to run from this date.

36. The distinguishing feature in this case appears to be that the Malaysian Statute specifically provides that when a person who would, if he "were living have a right to institute a suit or make an application dies before the right accrues, the period of limitation shall be computed from the time when there is a legal personal representative of the deceased capable of instituting or making such suit or application. Hence, here there was a specific enactment providing specifically for actions for the benefit of a deceased estate. In this case no legal representative was appointed until 7th March 1910 and therefore his Lordship found that the limitation period commenced from this date.

37. However, His Lordship went on to hold that "for the purpose of the English Statutes of Limitation (similar provisions to the Jamaica Statute) time runs from the accrual of the cause of action "but a cause of action does not accrue unless there be some one who can institute the action." In the case of a cause of action arising in favour of the estate of the deceased person at or after his death

time will at once begin to run if there be an executor, even though probate has not been obtained… but if there be no executor, time will run only from the actual grant of letters of administration…"

Paragraph 9 of the Judgment. The second case was that of Chan Kit San & Anor v Ho Fung Hang (1902). The Court has been persuaded by the reasoning set out in these cases and is indeed bound by them.

38. I remind myself that although the limitation period might have expired, this does not extinguish the cause of action. The cause of action can still be alive and a limitation defence be open to the defendant at the time of trial and becomes an issue for determination of the trial judge. Therefore, it is not for me to determine whether or not the limitation period has expired. It is however, of significance in exercising my discretion as to whether to enlarge time to grant an extension under the Fatal Accidents Act and to grant an extension of time to serve a claim form, having regard to factors such as the degree of prejudice to the Defendant, if any.

39. In view of the cases referred to above, I am of the opinion that at the time the Notice of Application was filed to extend the validity of the claim form, the limitation period under the provisions of the Law Reform (Miscellaneous) Provision Act would not have expired. Therefore the only claim which has expired is that of the Fatal

Accidents Act and for which there is a special provision for enlargement of time, where the interests of justice so requires.

40. The question for the court now is therefore, what is the relevance or significance of any of the claims being statute barred or where there is doubt as to whether this is so or not, at the time of the application to extend the validity of the claim form? The Defendant/Intervener argues that it has significant impact and therefore the validity of the claim form ought not to be extended and that the defendant should be given the opportunity to raise a limitation defence. This they cannot do unless the Claimants were forced to re-issue their claim by the denying of this application. Counsel relies on several authorities, albeit persuasive authorities from the United Kingdom.

41. Having considered the cases cited by Counsel it is clear to me that aspects of these cases are quite unique to the United Kingdom as they have provisions which are non-existent in Jamaica.

The cases cited in support were:

(1) ***Vinos v Marks & Spencer 2001 3 ALL ER 704***

(2) ***Hoddinott v Ramismmon Homes 2008 1 WLR 806***

(3) ***Atlas v Adepta – 2010 SCWA CW 1170***

42. The **Vinos** case (supra) really concerns an application to extend the life of a claim form/period to serve after the claim form had expired. The English rules are very different in that it allows an

application to be made after a claim has expired but only in two limited circumstances and outside of these limited circumstances there is no discretion. None of these circumstances applied to the application before the court and so it was denied. In fact the court made it clear that had they had discretion, they would have exercised it in favour of Claimant and this seems to be so, although the claim was statute barred.

43. This was an appeal from a decision and orders of His Honour Judge McDowall at 1st instance. The Court upheld the ruling of the district Judge. May L.J. at paragraph 12 stated that:

> "**In this matter I find myself distinctly unhappy as to the correct approach. Then instinct that one has is to say "No harm is done, let the action proceed" so that the appropriate person, that is the defendant's insurers, can meet the claimant's apparently justified claim for compensation. But on the other hand, it does seem to me that where the rules have specifically provided for failure to serve a claim form within a set time and provided too, only two circumstances under which extension can be given, that it would be wrong to ignore those. I would make it clear that if and insofar as I was persuaded that I did have discretion, it seems to me overwhelmingly a case where I would have exercised it in favour of the Claimant."**

44. The passage cited by Counsel of paragraph 20 of May L.J. **"There is nothing unjust in a system which says that if you leave**

issuing proceedings to the last moment <u>and then do not comply with this particular requirement and do not satisfy the conditions in Rule 7.6(3)</u>, your <u>claim is lost and a new claim will be statute barred</u>" is quite apt in the instant case and is in fact in support of the claimant's position as the Claimant did not just sit and do nothing. 7.6(3) of the United Kingdom rules provides:

45. **"If the Claimant applies for an order to extend the time for service of the claim form after the end of the period specified by rule 7.5 or an order made under this rule, the court may make such an order only if –**

    a. **the Court has been unable to serve the claim form; or**
    b. **the Claimant has taken all reasonable steps to serve the claim form but has been unable to do so; and,**
    c. **in either case, the claimant has acted promptly in making the application.**

46. The Claimant in this matter before me is claiming that in fact they have made attempts to serve the defendant but he cannot be found – for May L.J. it was not so much the issuing of proceedings at the last moment which was the problem. It would have been otherwise had the proceedings been issued and "reasonable steps were taken to serve the claim form but the Claimant was unable to do so."

47. In **Hoddinott & others v Persimmon Homes Wessex Ltd [2007] EWCA Civ. 1203**.

The Claimants appealed against an order setting aside an extension of time for service of the claim form and a striking out of the claim. Counsel relies heavily on the thrust of the principle enunciated by Dyson L.J at paragraph 52 of the judgment. – 11 52 that.

> **"It is clear beyond doubt that the claim for breach of contract is time – barred for several years – There is no basis for a contrary argument and the contrary does not seem to have been argued. Where there is doubt as to whether a claim has become time-barred since the date on which the claim form was issued, it is not appropriate to seek to resolve the issue on an application to extend the time for service or an application to set aside an extension of time for service. In such a case, the approach of the court should be to regard the fact that an extension of time might "disturb a defendant who is by now entitled to assume that his rights can no longer be disputed" as a matter of "considerable importance" when deciding whether or not to grant an extension of time for service."**

48. I submit that his Lordship's pronouncement should be viewed in a context where if the application for an extension of time is not granted, the Claimant can issue fresh proceedings within which the issue of the limitation defence and the interests of justice

criteria can be fully ventilated unlike the position in Jamaica. In Jamaica, the interests of justice demands the full ventilation at the earliest opportunity because if the claim is struck out based on there being some dispute, in the event that it has so expired, there will be no further opportunity for any "interests of justice" consideration as it relates to the claim.

49. Counsel further relies on paragraph 87 of Rix L.J's judgment in **Atlas v Adepta 2010 EWCA cw 1170 & Dixie v British Polythene Industries Pic** ***"where it is clear that a time bar has not expired, that fact may be taken into account. Where however, it is uncertain, the statute of limitation should be left to the second action, if any. Where, however, it is clear that the limitation has expired with the failure of service, subject to any extension, that fact should count in the defendant's favour."***

50. The cases of **Atlas and Dixie** came before the court by way of conjoined appeals, raising the issue as to whether a Claimant whose claim form had been issued towards the very end of a limitation period and has been struck out owing to a failure to serve it in time can be revived in a second action under section 33 of the United Kingdom Limitation Act of 1980, which gives the court discretion in personal injury cases, to allow an otherwise statute-barred claim to proceed.

51. Counsel for the Intervenor/Defendant noted that English law allows a second action at the court's discretion under its Limitation Act and although no such statutory action is possible under Jamaica Law, the distinction is irrelevant. I disagree. The limitation period has now expired in relation to the Fatal Accidents Act and it is possible for the Court to enlarge time. However, if it had so expired under the Law Reform Miscellaneous Provision Act, there is no possibility of a second action seeking the discretion of the Court to enlarge time. The possibility of a second action gives the Defendant an opportunity to raise his limitation defence. In a jurisdiction where there is no opportunity for a second action, then where the claim has expired after filing, the claimant is unlikely to re-file an expired claim, in order to give the Defendant the opportunity to raise his limitation defence. In any event an expired claim would be a waste of time and costs because if it is so expired a limitation defence will succeed except for those limited cases where statutory authority is given to the Court to enlarge time.

52. In deciding whether or not to grant an extension of time to serve the claim form, a relevant consideration is that if it has now or will become statute-barred before re-filing, the Court will have no discretion in any second action. It would appear therefore to be highly prejudicial to the Claimant to make this the determinant factor in deciding whether to refuse the application and strike out

the claim, because if it is indeed statute-barred, that would be the end of the matter. A perfectly valid claim, filed in time could after being struck out due to a dispute as to whether it has expired, be out of time and so out of remedy once it is re-filed – such as the present case.

53. A perusal of the authorities do indicate that a significant factor, when considering whether to extend a claim form is whether the limitation period of the claim has expired as this would in effect deprive the defendant of a limitation defence. I agree that this is a significant consideration.

54. It is interesting to note that the authorities cited by counsel for the Respondent are all United Kingdom authorities. Counsel submits that the fact that the United Kingdom permits a second action even after the expiry of the limitation period is irrelevant. I however, disagree. I believe that a court in exercising discretion will bear in mind all the factors which might help to bring justice to bear on a particular case. Thus factors such as the possibility of a second action and the well established solicitor's indemnity fund are matters for consideration as a claimant might nevertheless be adequately compensated or be given the opportunity to proceed with a statute-barred action despite failing in the first action. This is not so in Jamaica and therefore balancing the interests of the parties and the prejudice, if any, to each, are vital considerations

of the Court and can only be equitable if these are considered, within the given context.

55. For us, justice requires different lenses – we have to take into account that there is no possibility of a second action and inadequate or no compensation. A denial of an application to extend the life of the claim form at this stage, is likely to severely prejudice the Claimant, with little prejudice to a Defendant who has not yet been served and cannot be found to be served – a Defendant, who has been convicted of manslaughter for the death of the deceased in the subject matter. For him this would be a mere "windfall".

56. This takes me to the provisions of rule 8.15(4) this provides that:

"(4) The court may make an order for extension of validity of the claim form only if it is satisfied that:

(a) The claimant has taken all reasonable steps –

(i) to trace the defendant, and

(ii) to serve the claim form but has been unable to do, or

(b) there is some other good reason for extending the period.

57. In Jamaica these are the salient factors for consideration, in exercising a discretion to extend the time for serving a claim form. There is no reference to limitation of actions or the expiry of any other relevant limitation period, say as it does in Part 19.4 in relation to the addition and substitution of parties. Although, I

have no doubt that this might be a subsidiary factor and that there may be other subsidiary factors to be taken into account.

58. In considering the application under 8.15 (4) of the Civil Procedure Rules, I am satisfied that the claimant has taken all reasonable steps to trace the defendant and to serve the claim form. Civil Procedure Rules at 8.15 (4) does not make it mandatory for the court to grant the application if it is so satisfied. It expressly states "may" make an order for extension of the validity of the claim form. It a prerequisite however, before the exercise of any discretion that I am satisfied as to the matters at 8.15 4 (a) (i) and (ii) and I am so satisfied. I accept the affidavit evidence of the process server, Mr. Anthony Bentley, in this regard.

59. In exercising my discretion thereafter, I have taken into account the overriding objectives set out in part 1 of the Civil Procedure Rules. There is a limitation Defence, as it relates to the Fatal Accidents Act claim, which would have been available to the Defendant if the application to extend the claim form was not granted and to this extent he has suffered some prejudice. However, the respective rights of the parties have to be balanced in order to deal with the case justly, thereby achieving the overriding objective as I am required to do.

60. In balancing the interests of the parties, I take note of the fact that the only prejudice expressed as likely to be suffered by the

defendant is that he will not be able to avail himself of a limitation defence. The claim under the Law Reform Miscellaneous Provision Act was filed within the time limit given for actions in tort and as such this defence is not open to him at the time of filing the Notice of Application to Extend time and even if it is that it has now expired, this is only one of the factors to consider. It would be against public policy and not in the interest of the administration of justice, if a defendant could evade service or for any other reason not be found, after a collision resulting in the death of a road user; after a conviction for manslaughter and after his insurers to whom he has paid premiums to indemnity him in such instances and whom have communicated with persons regarding settlement and who has full knowledge of the claim and potential liability of the Defendant to escape the detriment of the contract at this stage, when the Defendant has disappeared and the deceased dependents in danger of being left without a remedy.

61. It is my view more prejudicial to the claimant to refuse this application to extend time to serve the claim form. The claimants make a claim on behalf of the estate and beneficiaries of the deceased. He has left behind two young children. The Claimant is hoping to get some financial relief to assist them through childhood. They had filed the claim under Law Reform (Miscellaneous) Provisions Act within the relevant limitation period.

They are at this stage, seeking an extension of time of the claim form due to an inability to find the Defendant. They should not be penalized for trying to finding him and being unable to do so. They seek an extension of time to file the claim form by way of substituted service on the defendant's insurers. The insurers, on behalf of the Defendant, should not now be permitted to succeed in an application to strike out the claimant's claim in these circumstances, where only the claim under the Fatal Accidents Act is statute barred and there is clear provision for its extension in spite of the available statute-barred defence. It should not also, for the foregoing reasons, be able to succeed even if the Law Reform (Miscellaneous) Provisions Act had expired by the time of the application to extend the validity of the claim form.

62. In view of the foregoing I will grant the claimant's application to extend time to serve the claim form and deny the defendant/interviewer's application to strike out the claimant's claim.

EXTENSION OF TIME UNDER THE FATAL ACCIDENTS ACT

63. The accident occurred June 29, 2004 – Application for extension filed September 8, 2010. Section 4(1) of the Fatal Accidents Act is somewhat different from the provisions of the Law Reform (Miscellaneous) Provisions Act. The Fatal Accidents Act allows for

the near relations of the deceased to sue where a personal representative has not been appointed. It therefore follows that from the outset – i.e. the date of the death of the deceased there was person or persons with capacity to sue and herein lies the difference. The cause of action is therefore vested in them and the period for the purposes of the limitation period begins to run from the date of death. Therefore it is not in dispute that the 3 years began to run from the 29th June, 2004 and therefore expired by the 29th June, 2007.

64. **Extension of Time to file claim under the Fatal Accidents Act.**

Section 4 (1) of the Fatal Accidents Act reads as follows:-

"4(1) Any action brought in pursuance of the provisions of this Act shall be brought –

a. **by and in the name of the personal representatives of the deceased person;** or

b. where the office of the personal representatives of the deceased is vacant, or where no action has been instituted by the personal representative within 6 months of the date of death of the deceased person, by or in the name of all or any of the near relations of the deceased person.

And in either case any such action shall be for the benefit of the near relation of the deceased person"

65. In fact section 4(2) is clear on the point. It states categorically that ***"any such action shall be commenced within 3 years after the death of the deceased..."***

By section 4 (2) and 3 – The court has a discretion to extend time –

> ***"(2) Any such action shall be commenced within 3 years after the death of the deceased person or within such longer period as a court may, if satisfied that the interests of justice so require, allow."***

66. Further to section 4 (2) to commence an action after 3 years of the death of the deceased person requires leave of the court. This is mandatory. The date of commencement of an action in this jurisdiction is the issue of proceedings. Proceedings are issued by the filing of the Claim Form. The Claim in this matter was filed or commenced on the 14th October 2009. At that time the claim relating to the Fatal Accidents Act was some 5½ years old and so not in compliance with the provisions of Section 4 (2) of the Fatal Accidents Act, having been filed some 2½ years out of time. Therefore before the filing of the Claim under this Act, leave ought properly to have been sought by the Claimant. This was not done. The Claimant submits that this was not done due to an oversight by Counsel and that consequently, they now seek an enlargement of time and for this permission to relate back to the filing of the

claim, thereby allowing for the remedy of filing without permission and allowing for the claim to stand as filed.

67. The explanation given by the Claimant for failing to file the claim within the 3 year limitation period is to be found in the affidavits of Afleira Victoria Wiggins filed on November 1, 2010 and Ayana Thomas filed November 3, 2011.

68. Ms. Wiggins deponed that Letters of Administration was granted on the 18th June 2009 and that this had taken so long as the Administrator General's office had difficulty in obtaining information regarding the estate and so was unable to "properly instruct" counsel and that the beneficiaries of the estate were not "clear as there was a dispute as to who was the spouse of the deceased at the time of his death." This affidavit is further buttressed by that of Ayana Thomas. She depones that Nunes, Schofield, Deleon and Company were instructed by the Administrator General since June 26, 2007 to act for the estate – the accident having occurred June 29, 2004, this was 3 days before the expiry of the 3 year limitation period.

69. Significantly there is no affidavit from the Administrator General nor any of its officers. Paragraph 2 of the said affidavit finishes with the statement that, "the facts stated herein are within my personal knowledge." Yet counsel being an Attorney from the instructing firm can only speak of any difficulties faced by the

Administrator General, not from her personal knowledge but as she was advised – and so in paragraph 5, she indicates that she was "advised by the Administrator General and do verily belief that it faced significant difficulties clearly these difficulties are not within her "personal knowledge" and would have carried far greater weight if it came from the Administrator General or any staff with conduct of the matter.

70. Be that as it may, some of the difficulties Ms. Thomas indicates that the Administrator General had experienced are (i) in locating and ascertaining the relatives of the deceased and proof in particular, as it relates to paternity and spouse-ship (ii) in trying to find out whether any application was made for Letters of Administration by any relative of the deceased and (iii) ascertaining the place of employment of deceased and particulars regarding his income.

71. There is no indication as to when the Administrator General became involved and at whose behest. It is not clear how long the Administrator General had the matter before retaining counsel. If there is no indication of the periods involved, then it is difficult to establish whether there was significant delay. Although I can appreciate that there might be some delay caused by the necessity of making enquiries as to the beneficiaries and as to paternity in relation to the estate, I fail to see why there can be any justification

as to the delay in ascertaining whether any previous application had been made for administering of the estate and to find out where the deceased was employed and details of his income.

72. In fact an examination of the documents annexed to the claim form and affidavit, reveals a letter from the Department of Correctional Services sent to Nunes Schofield and marked for Ayana Thomas's attention dated February 29, 2008 and which speaks to a letter dated February 5, 2008 from the addressee and to which they appeared to be responding by providing employment and income details of the deceased Rohan Wiggins.

73. Counsel's affidavit at paragraph 6 indicates that 2 women had made separate applications to be declared spouse and that one (Ms. Monteith) had retained counsel to bring a claim on her behalf and was in negotiations with Jamaica International Insurance Company, the intervener herein. There was uncertainty as to whether Letters of Administration had been obtained and that the particular applicant who had retained counsel had now changed counsel.

74. In December 2007, Ms. Thomas, still being unclear as to the status of these respective applications wrote Ms. Monteith's Attorneys-at-Law, Taylor, Deacon & Company enquiring as to the status of these applications. A copy of this letter is exhibited to the said Affidavit and marked ALT1. To this the Attorney's responded that

they indeed had made an application for a Declaration of Spouse, but not Letters of Administration – ALT2.

75. Settlement discussions were proposed with the Intervener in 2008 and Mr. Mordecai on their behalf, by letter dated March 5, 2008, making reference to letters sent to Scott & Associates of January 24, 2005 (whom were previously retained by Ms. Monteith) indicating his instructions to enter into without prejudice settlement discussions on behalf of the intervener and posing certain questions relating to the relevant computation of any compensation of damages. However, the response received from Scott & Associates was that they were no longer retained. Mr. Mordecai in his letter of the 5th March, 2008, indicated that discussions ended by way of the response from Scott & Associates and this suggests that no further discussions took place.

76. The Administrator General was advised in May of 2009 that both women were denied a declaration of spouse-ship. It was following this that the Administrator General obtained Letters of Administration to administer the estate of Rohan Wiggins on the 18th June, 2009.

77. As it relates to the delay following the grant of letters of administration, she deponed that the Claim Form and Particulars of Claim and Notice of Application to Extend Time under the Fatal Accidents Act were drafted and forwarded to the Administrator

General's Department. She does not state whether these were all returned. However, she indicates that the Claim Form and Particulars of Claim were filed on October 14, 2009 and that due to an 'oversight' the Notice of Application was not also filed. This inadvertence was discovered and corrected by her on the 8th September, 2010, almost a year later.

78. That Notice of Proceedings advising of the filing of a claim under the Law Reform Miscellaneous Provisions Act and of an intention to bring proceedings under the Fatal Accidents Act was filed and served on the intervener on the 16th October, 2009. The Notice of Proceedings does not in fact speak for an "intention to bring proceedings under the Fatal Accidents Act" but indicates that **"an action was commenced... by the... Administrator General... under the Law Reform Miscellaneous Provisions Act and the Fatal Accidents Act."**

79. In **Cain v. Francis** and **McKay v. Hamlain (2009) 3 WLR 551** – Smith L. J. in giving judgment opined that

> **"the basic Question to be asked was whether it was fair and just in all the circumstances to expect the defendant to meet the claim on the merits, notwithstanding the delay in commencement... <u>in fairness and justice, a tortfeasor only descried to have its obligation to pay damages removed if the passage of time had significantly diminished his opportunity to defend himself on liability and/or</u>**

quantum. The disapplication of the limitation period, which would restore his obligation to pay damages, was only prejudicial to him if his right to a fair opportunity to defend himself had been compromised... the reason for the delay might be relevant."

80. Using this passage as a guide, it can be gleaned that some of the factors for consideration in exercising my discretion are:

(i) The length of the delay

(ii) Whether the passage of time has caused prejudice to the defendant in that it has significantly reduced his ability to defend himself because for instance, evidence might have been lost, witnesses have died or cannot be found or their memories might have faded.

(iii) The reason for the delay.

81. These are factors relevant to an extension of time generally and not specifically to extension of time under the Fatal Accidents Act. In fact this statute gives no guidance to the Court as to the factors to be considered when dealing with an application to enlarge time under section 4 (2).

82. The English provisions assist the Court in examining the factors to be considered in an application of this nature. Section 11 of the current United Kingdom Limitation Act limits actions in respect of personal injuries to a period of 3 years. However section 33 gives the Court a discretion to allow claims to be filed following the

expiry period, if it would be equitable to do so. The Court is required to have regard to inter alia the degree to which the Claimant is prejudiced by the 3 year limitation period; the length of the delay; the reason for delay, the effect of the delay on the evidence to be adduced by both parties; the conduct of the defendant after the cause of action arose; whether the Claimant acted promptly and reasonable after being aware that there was a possible remedy in damages against the defendant as a result of his action and the steps that may have been taken by the Claimant to obtain advice, such as medical and legal advice and the nature of any such advice.

83. In considering whether the interests of justice requires that the time for bringing a claim under the Fatal Accident Act should be granted, theses factors (if not all) are matters which a Jamaican Court and based on guidance provided by case law, would properly have regard to in dealing with an application of this nature and therefore these considerations are not unique to the United Kingdom.

84. In order for the Court to consider these factors, it must have evidence and material before it, on which it can rely to exercise its discretion – **Carlton Edwards et al v. Attorney General** (unreported) Claim No. 146 HCV 2004. Although there is some material before the Court, they are lacking in detail and some of

the explanations inadequate. However, I do not find that this is fatal to the application.

PROCEDURAL ERROR/DELAY

85. Procedural errors on the part of Attorneys-at-Law ought to be treated by looking at whether the errors are excusable and whether there would be any injustice to the other side – **Keith Williams v. Attorney General (1987) 24 JCR 334**.

86. This principle is further supported by Millet L. J. in **Gale v. Super Drug Stores (1996) 1W.L.R. 1089 at 1089:**

> **"The administration of justice is a human activity and accordingly cannot be made immune from error. When a litigant or his adviser makes a mistake, justice requires that he be allowed to put it right even if this causes delay and expense, provided that it can be done without injustice to the other party."**

Ms. Ayana Thomas deponed that the delay was a result of the difficulties experienced by the Administrator General as well as the fact that she had "overlooked" that she had not filed the application to extend time at the time of filing the claim. It is absolutely important that time periods are adhered to and that parties are sanctioned for failing to do so. This explanation is not acceptable. However, I consider that the overriding factor is the issue of prejudice caused to the Defendant by virtue of the delay.

PREJUDICE

87. In **Attorney General v. Administrator General of Jamaica (Administrator of the Estate Elaine Evans deceased)** SCCA 11.2001 – delivered December 3, 2001 and July 29, 2005 – Downer J.A. at page 26 stated that **"the authorities indicate that the onus is on the Attorney General to demonstrate that he would be so prejudiced and that there could not be a new trial because of the delay in commencing proceedings. There was no attempt to do this either by direct or circumstantial evidence."**

88. Further in **Warshaw, Gillings and Ailder v. Drew (1998) 27 JLR 189,** Lord Porender at page 195 had this to say **"It is clear that the onus is on the defence to file evidence to establish the nature and extent of the prejudice occasioned to him by such delay."**

No such evidence of prejudice to the Defendant has been put before me. Although I accept that sometimes a presumption can be made that inordinate delay by itself can be relied on to show prejudice, especially in circumstances where the Defendant is not before the Court for the purpose of the application. This presumption can be rebutted.

89. In considering the prejudice to the Defendant or the Claimant I have considered whether the evidence adduced or likely to be adduced by them is likely to be less cogent than if the action had been brought within the 3 years allowed by section 4 of the Fatal Accidents Act. There are statements from witnesses collected by the police at the time of the accident. Therefore the evidence to be adduced by the Claimants have already been documented. It is presumed that the contents of the statements formed part of the basis for the charge and conviction of the Defendant in the criminal proceedings where the standard of proof is much higher than in civil proceedings. These statements are still available including the police report. The issue of the evidence being less cogent as a result of the delay carries little weight.

90. There is of course the possibility that the Defendant will bring witnesses or himself give evidence and the Court is not aware of any such evidence being documented and forms the view, that even if there was a chance that the Defendant would suffer prejudice as a result of any evidence being called being less cogent due to the passage of time, the degree of this reduction in cogency since the accident is not likely to be significant and in any event, this is far outweighed by the preponderance of evidence against him.

91. Section 4(2) empowers the Court to direct that the primary limitation period shall not apply to a particular action or cause of action. This is by way of exception because otherwise the limitation period will continue to apply. The effect of this is to deprive the Defendant of what would otherwise be a complete defence to the action. Therefore in these circumstances there is always some prejudice to the Defendant, for even though he may have a good defence on the merits, he will be put to the trouble and expense of having to establish it. If he has no defence to liability, as I believe he does not in this case, he has lost almost everything or put another way, perhaps he has lost nothing. He has lost everything as without the exercise of the Court's discretion in favour of the Claimant, he would not have to meet this claim. He has lost nothing, because the evidence against him is such that he must face the consequences of his actions.

92. The cogency of the evidence and the ability to defend a stale claim are very important considerations when analyzing the issue of prejudice. However, careful consideration should be given to "all of the circumstances" including a broad assessment of the merits of the claim.

93. Having balanced the prejudice to the Claimant against that of the Defendant, I find that the prejudice to the Defendant is small, based on the evidence against him. The prejudice to the Claimant

in being prevented from pursuing her claim far outweighs the prejudice to the Defendant.

94. This point is well illustrated in the recent case of **B v. Ministry of Defence [2010] EWCA 1317**. The Court of Appeal held that:

(1) A fair trial could still go ahead despite the passage of time.

(2) The assessment of the merits of a case should be carried out objectively and was a significant factor.

CONCLUSION

95. I am of the view that this is an appropriate case in which the Court should exercise its discretion to extend the time limit for bringing proceedings pursuant to section 4(2) of the Fatal Accidents Act.

96. The length of the delay in bringing the action is somewhat mid-way between being short and long but is not considered inordinately long. The reasons put forward for the delay, failed to explain adequately why there was an oversight in filing the application to extend time and failed in providing affidavit evidence from the Administrator General as to the difficulties she might have faced and steps she may have taken to address them.

97. I am cognizant of the fact that in these interlocutory matters hearsay evidence can be relied on. However, I am of the view that the weight attached to such evidence should be measured

cautiously. I accept the evidence as truthful but would have liked more of an explanation which I think could only properly come from the person with conduct at the Administrator General's Department.

98. The Court is also cognizant of the fact that the Defendant's insurers were aware of the potential claim by beneficiaries of the estate, be it by way of interest of a spouse or otherwise. There was correspondence between the insurers solicitors and persons claiming the benefit of the Estate. The correspondence suggests that the Insurance Company was minded to settle and in fact invited a response of this nature.

99. In considering the Claimant's claim, the likelihood of success is very high. Conversely therefore, the likelihood or prospect of success of any defence is almost non-existent. There is no dispute that he was convicted of manslaughter as a result of the said motor vehicle accident which led to the demise of Rohan Wiggins. Liability does not seem to be an issue in this case and in these circumstances, the Court finds that it would be "in the interests of justice" to allow the application.

(1) Order granted in terms of paragraphs 1 – 4 of the Claimant's Notice of Application filed September 8, 2010.

(2) Paragraph 2 of the Intervener's application filed on November 2, 2010 dismissed. (Paragraph 1 previously granted).

(3) Permission to appeal granted.

(4) Claimant to serve Defendant by serving JIIC within 7 days of this order and proceedings be stayed for 30 days thereafter.

(5) Costs agreed to the Claimant in the sum of $30,000.00.