JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 11/2001

BEFORE: **THE HON. MR. JUSTICE DOWNER, J.A.**
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE SMITH, J.A.

BETWEEN: **ATTORNEY-GENERAL** **APPELLANT**

AND: **ADMINISTRATOR-GENERAL OF JAMAICA (Administrator of the Estate Elaine Evans, deceased)** **RESPONDENT**

Annaliesa Lindsay, instructed by the Director of State Proceedings for the Appellant.

Gillian Mullings and Alando Terrelonge instructed by Patrick Bailey & Co. for the Respondent Estate.

December 3, 2001 and July 29. 2005

DOWNER, J.A.

Introduction

Before Reckord J. in the Supreme Court, there were two summonses. In the first summons the plaintiff, the Administrator-General on behalf of (the Estate) of Elaine Evans sought leave for an extension of time to file a Statement of Claim. The second summons was filed by the defendant Attorney-General who sought to dismiss the first summons for want of prosecution. Both summonses assumed that the Writ of Summons which instituted proceedings was valid with respect to Law Reform (Miscellaneous Provisions) Act and the Fatal Accidents Act.

The Estate's summons to extend time appears at page 13 of the Record. It reads:

> "1. That the Plaintiff be granted leave to file Statement of Claim out of Time
>
> 2. Costs to be costs in the cause."

Apart, from the Attorney-General, three other defendants were named. They were The Ministry of Local Government and Works, James Wellington and Donovan Vassell. The Writ of Summons was filed on 30th July 1997 and served on 20th August 1997. The Order was made on 26th January 2000. That Order in so far as is material reads as follows at page 22 of the Record:

> "1. The Plaintiff is granted leave to file the Statement of Claim Out of Time within fourteen (14) days of the date hereof.
>
> 2. No order as to costs.
>
> 3. Defendant granted leave to appeal."

Turning to the summons by the Attorney-General to Dismiss for Want of Prosecution and Abuse of Process, at page 9 of the Record it reads:

> "1. The action against the First, Second and Third Defendants be struck out pursuant to Section 238 of the Judicature of Jamaica (Civil Procedure Code) Law and pursuant to the Court's inherent jurisdiction on the grounds that:
>
> **a.** it discloses no cause of action
>
> **b.** the action is therefore frivolous and vexatious and an abuse of the process of the Court.

2. This action be dismissed for want of prosecution pursuant to Section 244 of the Judicature (Civil Procedure Code) Law and pursuant to the Court's inherent jurisdiction on the grounds that:

   a. there has been an inordinate and inexcusable delay in prosecuting this action;

   b. the First, Second and Third Defendants will be prejudiced by the delay;

   c. there is a substantial risk that there cannot be a fair trial.

3. Costs of this Application be the First Defendant's.

4. The First Defendant be granted such further or other relief as may be just in the circumstances."

At this stage it is pertinent to point out that the Estate, on February 5, 2001, filed a Notice of Discontinuance with respect to the Ministry of Local Government and Works. While the inclusion of the Ministry is not strictly necessary it was certainly convenient that the Ministry was named as a defendant. I will return to this subject later. Also to be noted is that the 4th defendant Donovan Vassell was not represented in the proceedings below or in this Court.

The order dismissing the Attorney-General's summons was not exhibited, but in view of the Order granting the Estate leave to file a Statement of Claim out of time, the necessary implication is that the Attorney-General's Summons to Dismiss for Want of Prosecution and Abuse of Process was

refused. Moreover, the Attorney-General in his Notice and Grounds of Appeal at page 2 of the Record prayed:

> "FOR AN ORDER
>
> 1. (that) The Order dismissing the Summons to Strike Out Action be set aside."

Although the prayer concentrates on the Summons to Strike Out for Abuse of Process, the main submissions by both parties were largely on the issue of Dismissal for Want of Prosecution. There was no appropriate caption indicating the Grounds of Appeal, they are listed as follows on the same page:

> "2. The learned Judge erred in law in failing to give effect to section 2 (1) (a) of the Public Authorities Protection Act that was in force at the time the cause of action arose.
>
> 3. The learned Judge erred in law by holding that the provisions of the Law Reform (Miscellaneous Provisions) Act superceded the provision of the then Public Authorities Protection Act."

The matter was clarified in the Supplemental Notice and Grounds of Appeal at pages 1-2. Here are the grounds:

> "1. The learned Judge erred in law in failing to give effect to section 2 (1) (a) of the Public Authorities Protection Act which provision would have accrued to the benefit of the Defendant/Appellant one year after the cause of action arose.
>
> 2. The learned Judge erred in law by depriving the Defendant/Appellant of the Statutory Defence available to it.

3. The learned Judge erred in law by finding that Section 2 (1) (a) of the Public Authorities Protection Act was only relevant if the Defendant shows that when the negligent act complained of was done, it was done in pursuance of a public duty or authority.

4. The learned Judge erred in law by relying only on the provisions of the Law Reform (Miscellaneous Provisions) Act."

There were additional Grounds of Appeal at page 3 of the Supplemental Record which read:

"5. The learned Judge erred in Law by finding that the First Defendant/Appellant's failure to establish evidence of prejudice was fatal to its application to dismiss the action for want of prosecution.

6. The learned Judge erred in Law by not considering whether the delay occasioned by the Plaintiff was such as would give rise to a substantial risk that there cannot be a fair trial."

So formulated, these grounds raise issues of general public importance and are of exceptional interest to the parties in this litigation. It was a case of some difficulty and I must pay some tribute to Counsel on both sides for the cogency of their submissions.

The judgment in the Court below

Here is how Reckord J. ruled on issues at pages 27-31 of the Record:

"1. Summons for extension of time to file Statement of Claim.

2. Summons to strike out action as it discloses no cause of action.

> The first of these two summonses is by the plaintiff and the second by the 1st defendant.
>
> Arising from a fatal motor vehicle accident which occurred on the 14th March, 1993, wherein Elaine Evans met her death, the plaintiff, as the administratrix of her estate, filed this action by a Writ of Summons on the 30th day of July, 1997 claiming damages for negligence against the 4th defendant under the Fatal Accidents Act and under the Law Reform (Miscellaneous Provisions) Act."

There was a claim against all four defendants as joint tortfeasors. The learned judge further stated:

> "The plaintiff acknowledges that in the claim under the Fatal Accidents Act, the period of three (3) years after death had passed before the action commenced, but is asking the Court that in the interest of Justice, to allow a longer period to include the date of filing on the 30th of July, 1997."

It is difficult to discern when the Estate asked for extension of time to file and serve the Writ of Summons to commence proceedings. The Writ of Summons was filed on July 30, 1997, and served 20th August 1997. There is no evidence that leave was sought or granted in this regard. What was sought was an extension of time to file and serve the Statement of Claim and this is what was granted in the Order of the Court below.

The learned judge continues thus:

> "Again the plaintiff acknowledges that the statement of claim which should have been filed within ten days after the appearance, on the 3rd September, 1997 has not yet been filed due to an oversight.

> The defendant has not agreed to the statement being filed out of time on the grounds that the action is statute barred, and has filed a summons to strike out the action for that reason."

Further the learned judge found that:

> "Section 2 (1) of the Law Reform Act, provides that all causes of action subsisting against or vesting in her, shall survive against or for the benefit of the estate.
>
> Section 2 (3) provides that actions against the estate should be taken not later than 6 months after letters of administration is granted.
>
> However, no mention is made in that sub-section or any other for that matter about causes of action vested in her. The presumption therefore, is that the common law period of six (6) years should apply." (Emphasis supplied)

It is section 2 (1) of the Law Reform Act which is relevant to the circumstances of this case. It reads:

> "2.-(1) 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:"

Therefore the standard limitation period of six years for torts is applicable for actions vested in her. Since the action is for the benefit of the Estate time begins to run from the time Letters of Administration were granted.

As regards to the Public Authorities Protection Act, the learned judge seems to have accepted the Estate's submission when he stated:

> "The plaintiff has submitted that in order to rely on the Public Authorities Protection Act, the

> defendant has to show that when the negligent act complained of was done, it was in pursuance of a public duty or authority. The affidavit in the instant case does not disclose the circumstances of this case and these will only be revealed in a trial of the issues."

The learned judge did not trouble himself to consider whether the Statement of Claim disclosed any cause of action or whether the action was frivolous and vexatious or an abuse of process. More importantly, the learned judge did not consider whether a Writ of Summons could have been filed and served with respect to the Fatal Accidents Act without the expressed approval of the Court.

The affidavit filed on behalf of the Attorney-General and presumably James Wellington the 3rd defendant has the following paragraphs at page 11 of the Record:

> "2. That on the 20th day of August, 1997, the Director of State Proceedings was served with a copy of the Writ of Summons dated and filed the 30th day of July, 1997.
>
> 3. That on the 3rd day of September, 1997, the Director of State Proceedings entered an Appearance on behalf of the First Defendant.
>
> 4. That the Plaintiff took no further action in this matter until the 3rd day of April, 2000 when a Notice of Intention to Proceed was filed, same being served on the Director of State Proceedings on the 4th day of April, 2000."

Paragraph 3 above emphasises how error crept into these proceedings. The Estate having failed to comply with the mandatory provisions of the Fatal

Accident Act the correct procedure ought to have been to institute proceedings to strike out the Writ of Summons in that regard.

Be it noted that Letters of Administration were granted to the Estate on 11th of October 1996, and the evidence on behalf of the Estate was that it was difficult to trace the 3rd and 4th defendants. The 3rd defendant had died and it does not seem that a personal representative was ever appointed.

The affidavit continues thus:

> "5. That the accident giving rise to this cause of action occurred on the 14th day of March, 1993. Therefore there is a pre-writ delay of four (4) years and four (4) months.
>
> 6. That when the Writ of Summons was filed on the 30th day of July, 1997, the limitation period within which to bring the action had long expired.
>
> 7. That after the filing of the Writ of Summons, there has been a further post-writ delay of three (3) years. Such delay being inordinate and inexcusable in the circumstances.
>
> 8. That the limitation period having long expired, the present action against the First, Second and Third Defendants is frivolous and vexatious.
>
> 9. That in the event that the present action is continued, the First, Second and Third Defendants will be prejudiced.
>
> 10. That due to the Plaintiff's inordinate and inexcusable delay, there is a substantial risk that there will not be a fair trial on the merits of the case, due to the vast passage of time and its effect on the memories of witnesses for both the Plaintiff and the Defendants herein."

These paragraphs illustrate the dual nature of the Attorney-General's position. Paragraphs 6 and 8 grasp the essentials of the case. Since the limitation period had long expired and there was no extension granted pursuant to the Fatal Accidents Act, the action ought to have been struck out at the threshold. See **Riches v Director of Pubic Prosecutions** [1973] 2 All E.R. 935. The other paragraphs in the affidavit assumes that this was an ordinary procedural case of Dismissal for Want of Prosecution with respect to the Law Reform Act.

For clarity it should be stated that the 3rd defendant, James Wellington is alleged to be the driver of the motor vehicle owned by the Ministry of Local Government and Works. To reiterate, according to the affidavit evidence adduced by the Estate, the 3rd defendant is dead.

Reckord, J. disposed of the Attorney- General's contention thus at page 30 of the Record:

> "The defendant has asked the Court to dismiss the action on the ground of prejudice. In **Birkett v James** (1977) 2 AER P. 801, at 899 Lord Diplock had this to say on prejudice.
>
> > 'To justify dismissal for want of prosecution some prejudice to the defendant additional to that inevitably flowing from the plaintiff's tardiness in issuing his writ must be shown to have resulted from his subsequent delay.'
>
> In support of this view, the Privy Council in **Warshaw vs Drew** P/C Appeal No. 18 of 1998, said:
>
> > 'The onus is on the defendant to file evidence to establish the nature and extent

> of the prejudice occasioned by him by such delay.'
>
> No such evidence having been established, the defendant's application to strike out the action for want of prosecution is refused and the summons is dismissed."

Then the learned judge granted the Estate's prayer thus:

> "The plaintiff is granted leave to file its statement of claim out of time within fourteen (14) days from the date hereof.
>
> There will be no order as to costs."

In granting the relief to the Estate there was a Writ of Summons and Endorsement filed on 30th July 1997 and served 20th August 1997. The Endorsement reads as follows at page 5 of the Record:

> "**ENDORSEMENT**
>
> The Plaintiff claim is against the Defendants jointly and severally to recover damages:-
>
> 1. Under the Fatal Accident Act for the benefit of the Beneficiaries of the Deceased.
>
> 2. Under the Law Reform (Miscellaneous Provisions Act) for the benefit of the Estate of the Deceased for that on the 14th day of March 1993, the Deceased was a lawful passenger in a motor vehicle bearing registration No. TP 0501 and driven by the Fourth Defendant when the 3rd Defendant who was at all material times the servant and/or agent of the 2nd Defendant, so negligently drove, managed or controlled a Mercedes Benz Truck bearing registration No. 30 1218, that it collided with the 4th Defendants motor vehicle aforesaid. As a result of the said collision, the deceased received severe injuries and died."

The issue of whether the Writ of Summons could be filed and served in accordance with the Fatal Accidents Act and the Law Reform Act seems to have escaped the attention of the learned judge and counsel in the Court below.

The Statement of Claim runs as follows at page 17 of the Record:

> "1. The Plaintiff is the administratrix of the estate of Elaine Evans, deceased, who died on the 14th day of March 1993, having been, granted Letters of Administration on the 11th day of October, 1996. This action is brought for the benefit of the dependents of the deceased under the Fatal Accidents Act and for the benefit of the estate under the Law Reform (Miscellaneous Provisions) Act.
>
> 2. The First Defendant is sued by virtue of the Crown Proceedings Act.
>
> 3. The 2nd Defendant was at all material times the owner of Mercedez Benz motor truck bearing registration number 301218 and which was driven by the 3rd Defendant who was at all material times acting as the servant or agent of the 2nd Defendant.
>
> 4. The 4th Defendant was the driver of motor vehicle bearing registration number TP0501."

Then the Statement of Claim continues thus:

> "5. On or around the 14th day of March 1993 the deceased Elaine Evans was traveling as a passenger in motor vehicle bearing registration number TP0501 which was driven by the 4th Defendant when by reason of the negligence of the third defendant acting as servant and or agent of the second defendant in the driving managing and or controlling of motor vehicle bearing registration number 301218, or alternatively by reason of the negligence of the 4th Defendant in the driving managing or controlling of motor vehicle bearing registration number TP0501 or alternatively by reason of the negligence of both the

third and fourth defendants a collision occurred between the two said vehicles."

"Particulars of negligence of 3rd Defendant

a. Driving too fast in the circumstances.
b. Failing to keep any or any proper look out or to have any or any sufficient regard for other users of the road in particular oncoming traffic.
c. Overtaking in conditions which were manifestly unsafe for overtaking.
d Driving on the wrong side of the road and thereby colliding with the vehicle in which the deceased was travelling.
e. Failing to stop, slow down, swerve or in any other way manage and or control his vehicle to avoid the collision.

Particulars of Negligence of Fourth Defendant

a. Driving too fast in the circumstances.
b. Failing to keep any or any proper look out or to have any or any sufficient regard for other users of the road in particular oncoming traffic.
c. Failing to stop, slow down, swerve or in any other way manage and or control his vehicle to avoid the collision.

6. As a consequence of the aforesaid accident the said Elaine Evans sustained injuries from which she died on the 14th March 1993."

With respect to claim against the Fourth Defendant it was not included in the Endorsement of the Writ of Summons. It is therefore out of place in the Statement of Claim.

Then the Statement of Claim continues thus:

"PARTICULARS PURSUANT TO THE FATAL ACCIDENTS ACT

This action is brought by the Plaintiff for the benefit of the following dependents of the deceased who by reason of her death have lost support

(a) Howard Evans, the minor son of the deceased
(b) Ainsley Evans, widower of the deceased

At the time of her death the deceased was a self-employed dressmaker. She enjoyed good health and was earning on average the sum of $4000 per week. Out of this amount she contributed $2000 for household expenses and $1000 for the care of her minor son.

8. Further and or in the alternative this action is brought on behalf of the estate of the deceased.

Particulars

Funeral expenses	$129,000.00
Articles and damaged	$ 20,700.00"

And the prayer runs thus:

"And the Plaintiff claims

(a) Damages under the Fatal Accidents Act for the benefit of the dependents of the deceased.
(b) Damages under the Law Reform (Miscellaneous Provisions) Act for the loss to the estate.
(c) Special damages amounting to $149,700.00
(d) Interest on the damages at such rate and for such period, as the Court deems fit.
(e) Costs
(f) Further or other relief."

The Appeal

The initial issue to be considered is whether the Attorney-General's reliance on the Public Authority Protection Act as a basis to Strike out the Writ

of Summons and preclude the Estate from filing and serving a Statement of Claim, is correct. The Attorney-General's contention is set out in grounds 2, and 3 of his grounds of appeal cited previously.

To reiterate, the issue is whether the statement of principle by the learned judge below relating to the Public Authority Protection Act at this stage of the proceedings, is sound. The statement runs thus at page 29 of the Record:

> "The plaintiff has submitted that in order to rely on the Public Authorities Protection Act, the defendant has to show that when the negligent act complained of was done, it was in pursuance of a public duty or authority. The affidavit in the instant case does not disclose the circumstances of this case and these will only be revealed in a trial of the issues."

The authorities cited support the learned judge's ruling. The initial case is **Administrator-General v Desnoes & Geddes Ltd.**(1970)12 J.L.R. 3.

Fox J.A. said at page 6:

> "Now the public works department is admittedly within the scope and ambit of the Public Authorities Protection Law. Consequently, the statutory defence was capable of providing a complete answer to the counterclaim. As to whether it did, depended upon the character of the act of the driver of the Land Rover on the occasion; that is whether the driving was "done in pursuance, or execution, or intended execution, of any law, or of any public duty or authority." (Public Authorities Protection Law, Cap. 816, s 2 (1).) For, as LORD BUCKMASTER explained in **Bradford Corpn. V. Myers** [1916] 1 A.C. 242; 85 L.J.K.B. 146; 114 L.T. 83; 80 J.P. 121; 32 T.L.R. 113; 60 Sol. Jo. 74; 14 L.G.R. 130., the law was not intended to cover every act which a public authority might have the power to perform."

Then Fox J.A. continues thus on the same page:

> "The judgments in the House of Lords made it clear that although a contract for the sale and delivery of coke was *intra vires* the authority of the Corporation, the actual sale and delivery was not done in direct pursuance of the provisions of the statute, or in the direct execution of the duty or authority imposed or given by the statute. "The act complained of was negligence in breaking the respondent's window, and that arose in the execution of a private obligation which the appellants owed by contract to the respondent for the breach of which no one but the respondent was entitled to complain" (per LORD BUCKMASTER, L.C., ([1916] A.C. at p.246). The House held that an action for such negligence was not within the definite class of action contemplated by the Public Authorities Protection Law 1893 and that as a consequence the plea in bar was of no avail. This case is important in that it shows that there are some causes of action within, and others without the law, and that it is difficult to draw the line between these two categories."

Another case from this jurisdiction which supports the finding in the Court below is **McKay v Forrest** (1974) 12 J.L.R. at 1584 where Hercules, J.A. said at page 1588:

> "As ROMER, L.J., declared in a supporting judgment:
>
> > 'I should have thought that provided that a representative of a public authority is told to perform an act of public duty, then, if the other elements are present which are requisite to attract the operation of the Act, it will be attracted whatever be the position of the representative in question. Indeed, if one is to draw the kind of distinction which counsel for the plaintiff invited us to draw, it seems to me it would be a task of an impossible kind to classify

> officials who do qualify for protection as distinct from those who do not.'
>
> In the case under review the defendant was neither Minister of Health, Permanent Secretary in the Ministry nor anything of the sort. He was a truck driver. The appellant said in cross-examination that he "believed that Ministry of Health was marked on the truck. Defendant told me he was working at Ministry of Health and *I believe him".* Moreover, the evidence of the respondent was that he was a driver with the Ministry of Health since 1967 and on February 14, 1972, he was sent to Linstead and Lionel Town with drugs. The defence also called evidence from Leroy Pinnock, the Supervisor of the Medical Stores, Ministry of Health. This officer supported the evidence of the respondent's employment and that the respondent was detailed to take medical supplies to the Linstead Hospital on the day in question. There was therefore abundant evidence on which the learned resident magistrate could find that the respondent was driving in the course of his employment. Forsooth there was not even the slightest suggestion that he was on a frolic of his own."

The House of Lords decision of **Griffiths and Another v Smith and Others** [1941] 1 All E.R. 66 is also helpful. At page 71 Viscount Simon said:

> "There is, however, a second question connected with the construction of the Act on which it is difficult to reach precision. Assuming that the "person" is a public authority in the sense required, what kind of action by the public authority is to be regarded as satisfying the conditions of the section that the act must be "done in pursuance, or execution, or intended execution of any Act of Parliament or any public duty or authority," or that the neglect or default must be "in the execution of any such Act, duty, or authority?"

Then His Lordship continued thus on the same page:

> "There are thus two questions to be decided as to the application of the Public Authorities Protection Act, 1893, in the present case. First, are the managers a public authority? Secondly, was the neglect or default proved against them neglect or default in the execution of their statutory duty or authority? In my opinion, both these questions should be answered in the affirmative. As regards the first question, the body of managers are a statutory body created by the Education Acts for the discharge of public duties. They are not analogous to companies acting for profit, as in **A.-G. v. Margate Pier & Harbour Co. of Proprietors** [1900] 1 Ch. 749; 38 Digest 102, 734; 69 L.J. Ch. 331; 82 L.T. 448 nor to voluntary charitable associations, as in **Ayr v. St. Andrew Ambulance Association** [1918] S.C. 158; 38 Digest 125, case p. but rather to the long list of authorities set up by Parliament for carrying out public responsibilities, which have been held protected by the Act, of which insurance committee under the National Health Insurance Acts **(Mitchell v. Aberdeen Insurance Committee** [1918] S.C. 415; 38 Digest 115, case 825 vi. or the Wheat Commission (**Paul (R. & W.) Ltd. v. Wheat Commission** [1937], A.C. 139; [1936] 2 All E.R. 1243; Digest Supp.; 105 L.J.K.B. 563; 155 L.T. 305. are useful examples. The Court of Appeal has already held in **Greenwood v Atherton** [1939] 1 K.B. 388; [1938] 4 All E.R. 686; Digest Supp.; 108 L.J.K.B. 165; 160 L.T. 37. that the managers of a non-provided school are a public authority within the protection of the Act, and it appears to me that this view is right."

Then Lord Simon continues:

> "Lastly, was the action of the managers in authorizing the invitations to this school display an act done in the execution of their statutory duty or authority? It was strenuously contended for the appellants that this action was "voluntary" in the sense in which the sale of coke in **Bradford Corpn. V. Myers** [1916] 1 A.C. 242; 38 Digest 110, 784; 85 L.J.K.B. 146; 114 L.T. 83; affg. [1915] 1 K.B. 417 was voluntary. It is true that St. Clement's school could

> have been carried on without arranging to hold this display, but that is not the true test. The real question is whether the managers, in authorizing the issue of invitations to the display on the school premises after school hours, should be regarded as exercising their function of managing the school. To apply the distinction indicated by SIR WILFRID GREENE, M.R., was the manager's action "something incidental to, and part of the process of carrying on" their statutory duty? Both the trial judge and the Court of Appeal took the view that in this matter the managers were doing an act which formed part of the operation of carrying on a public elementary school. As SIR WILFRID GREENE, M.R., observed, a gathering such as this is a very familiar type of gathering in schools of all sorts. TUCKER, J., reached his conclusion in a passage which I must quote, at p. 538:
>
> > In my view, the managers had a material interest in inviting the plaintiff to the premises, in the sense that it was in the interest of the prosperity and success of the school to enlist the support and co-operation of the parents of the pupils in the work done at the school. The display in question consisted entirely of an exhibition of the work done by the pupils and of the singing of songs which they had learnt at the school. I accordingly hold that the plaintiff was an invitee and not a mere licensee. I am further of opinion than on the occasion in question the school was being used as a public elementary school, and not for some extraneous purposes unconnected with its functions as a school.
>
> I entirely agree with this view, which has prevailed in both courts below."

The principle demonstrated in these cases is that since the Attorney-General was relying on the Act, it was incumbent on him to show that the 3rd defendant, James Wellington, was performing a public duty on behalf of the Ministry of Local Government at the time of the accident. No such attempt was

made in the affidavit adduced. On this aspect the Attorney-General has not been successful.

The 4th Ground – Proceedings pursuant to the Law Reform Act

There was a complaint that the learned judge relied on the Law Reform Act to the exclusion of the Public Authorities Protection Act in deciding that the Estate had a right to commence proceedings within a six years limitation period. The six years commenced after Letters of Administration was granted.

There are statements of fact in the affidavit of Symone Bryan Mayhew on behalf of the Estate, which must be adverted to. The first at page 14 of the Record reads:

> "2. That the reason for the delay in filing the Writ of Summons in this matter is that it was necessary to obtain a grant of Letters of Administration before action could be filed herein under the Fatal Accidents Act and that a Grant was not obtained until October 11, 1996.
>
> 3. That after the filing of the Writ of Summons on the 30th day of July 1997 there was difficulty in effecting service of the Writ on the third and fourth Defendants herein. The fourth Defendant was served on the 18th day of April 1998 and by letter dated the 12th day of June 1996 the firm was advised by the Bailiff of St. Mary, to whom the documents were sent to be served, that the third Defendant died on the 12th day of June 1996. That the difficulty in effecting service on the third and fourth Defendants contributed to the delay in this matter. That steps were taken to ascertain whether there was a personal representative for the third defendant and whether any such personal representative was making an application for a grant of representation. No information was gleaned in this regard. In trying to

> ascertain this information there was a delay of several months."

In this context it is useful to note section 12 of the Administrator-General's Act, for the duties imposed on him by statute in relation to estates of a named category of persons.

Then at page 15 of the Record paragraph 4 of the aforesaid reads:

> "4. That even if the limitation period under the Fatal Accidents Act had expired before the filing of the Writ herein, the suit was also filed pursuant to the Law Reform Miscellaneous Provision Act and there is no contention that in relation to any claim under the Law Reform (Miscellaneous Provisions) Act the writ herein was filed well within the limitation period."

In addition paragraph 4 above ignores the fact that an application could have been made to the Court to file and serve a Writ of Summons three years after the death of the deceased pursuant to section 4 (2) of the Fatal Accidents Act. The affidavit continues thus:

> "5. That due to the above mentioned factors and inadvertence a Statement of Claim was not filed within the requisite period however once this became apparent, immediate steps were taken to file a Statement of Claim. That a consent to file Statement of Claim out of time was sent to the First Defendant on the 5th April, 2000. The said Defendant did not respond to our said request until September 2000 when in a letter dated the 5th September 2000 signed by Annalesia Lindsay, the First Defendant advised that their consent to file the statement of claim was not forthcoming as the claim against the Crown was statute barred. Nowhere in this letter did the First Defendant indicate that they would be prejudiced should the matter proceed.

> 6. That having not heard from the First Defendant regarding the Consent to file the statement of claim out of time the Plaintiff filed a Summons to file Statement of Claim out of Time on the 23rd June 2000. The said summons was served on the first defendant on the 14th August 2000."

The Writ of Summons and Endorsement was filed on 30th July 1997. Dates are crucial at this stage. The Letters of Administration were obtained on October 11, 1996 and Writ of Summons served on 20th August, 1997.

To my mind even if it were to be found that the Public Authorities Act was not applicable to the circumstances of this case there can be relief under the Law Reform Act.

The affidavit of the Attorney-at-Law, Stacey Olivia Caroline Allen on behalf of the Estate reads in part at page 7 of the Record:

> "2. That the Writ of Summons was made on the 30th day of July, 1997 herein and filed in this Honourable Court on the said date.
>
> 3. That on perusuing our file I noted that a Statement of Claim was not on the file and hence I gave instructions to our legal clerk Mrs. Coleen DaCosta-Henry to conduct a search at the Common law Registry of the Supreme Court to ascertain whether a Statement of Claim was filed herein.
>
> 4. That I am informed by Mrs. Coleen DaCosta-Henry, legal clerk employed to Messrs. Patrick Bailey & Company, that a Statement of Claim was not filed in this matter.
>
> 5. That it is my considered opinion that a Statement of Claim was not filed in this matter due to inadventance on our part."

Keith Williams v Attorney-General (1987) 24 J.L.R. 334 and the cases cited there, show how procedural errors on the part of Attorneys-at-Law ought to be treated in the interests of justice. The principle is summarized in **Gale v Super Drug Stores** [1996] 1 W.L.R. 1089 at 1098 by Millet L.J. who said:

> "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."

The errors are excusable and there would be no injustice to the

Proceedings 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 representative of the deceased person; or
>
> (b) where the office of the personal representative of the deceased is vacant, or where no action has been instituted by the personal representative within six 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 relations of the deceased person."

In the case of this Act the Court has a discretion to extend time.

Section 4(2) & (3) reads:

> "(2) Any such action shall be commenced within three 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.
>
> (3) Only one such action shall be brought in respect of the same subject matter of complaint."

To reiterate, the Writ of Summons was filed on 30th July, 1997 and served on the Crown on 20th August 1997. The deceased Elaine Evans died on 14th March 1993. Proceedings were commenced 30th July 1997. So the period since death is in excess of three years. However, proceedings could not be instituted without Letters of Administration which were obtained October 11, 1996. So proceedings were instituted some nine months after Letters of Administration were obtained.

In this instance, having regard to the relatively short period between obtaining Letters of Administration and the instituting of proceedings by Writ of Summons, it is arguable that had leave of the Court been sought to file and serve the Writ of Summons, the Court might have exercised its discretion favourably to permit commencement of proceedings. It seems this was faintly recognized in paragraph 4 of the affidavit of Symone Bryan-Mayhew.

However, in the instant case section 4 (2) of the Fatal Accidents Act is mandatory. To commence an action three years after the death of the deceased person requires leave of the Court. Leave was not sought and in any event it was not granted. So the proceedings were invalid. For a comparable situation see **R v Monica Stewart** (1971) 12 J.L.R. 465.

The strength of the Attorney-General's position would have been grasped from the outset, had it been recognised that proceedings under the Fatal Accidents Act, could have been disposed of by taking objection to the proceedings on a preliminary point of law.

The Attorney-General's Summons to Dismiss for want of Prosecution

To rehearse the position so far, I would say that in the light of the foregoing, it would not be appropriate to accede to the Attorney-General's prayer with respect to the Public Authorities Protection Act. As was explained previously as to whether the Act protects the Ministry of Local Government and Works and its servants, this must be determined when the relevant evidence is adduced at trial by the Attorney-General pursuant to the Crown Proceedings Act. The Public Authorities Protection Act provides a special defence and the onus is on the Attorney-General to adduce the relevant evidence.

The Minister of Local Government and Works has a constitutional status and the relevant ministries are published in the Gazette when ministerial duties are allocated by the Prime Minister. (See sections 69, 70 and 77 of the Constitution). That Ministry was therefore a proper party to the proceedings.

As for the claim under the Law Reform (Miscellaneous Provisional) Act, it was already decided that the claim would be barred so, on this aspect, the Attorney-General has succeeded. With respect to the Fatal Accidents Act, leave of the Court was not sought to file and serve a Writ of Summons three

years after the death of the deceased, Elaine Evans. Strictly speaking in the light of the foregoing the Attorney-General has succeeded. However, there were submissions on the issue of prejudice and abuse of process on the Attorney-General's summons and I will deal with them below. 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 fair trial because of the delay in commencing proceedings. There was no attempt to do this either by direct or circumstantial evidence. It is also necessary to state that, had the Attorney-General realized that the Writ of Summons was invalid he would not have filed and served a summons to Dismiss for want of Prosecution. Instead, he would have concentrated his submissions on the issue of the invalidity of the Writ of Summons.

It is appropriate in this context to recognize the issue of prejudice. In **National Westminster bank plc. V. Powney and others** [1990] 2 All ER 416 at 431 Slade L.J. said:

> "It is our judgment a cardinal principle of procedural law that no party should suffer unnecessarily from delay which is not his fault but rather a fault in the administration of justice. It is an unfortunate but unavoidable fact that courts cannot hear and determine every application on the day when it is first made. Indeed if they could there would probably be many more litigants seeking justice than there are at present, and a corresponding increase in demand for judges and courtrooms would be exponential. Various measures are taken to alleviate the consequences of delay of this type. For example, an action is commenced for limitation purposes when the writ is issued, even though the trial occurs many

> years later; interest can be awarded from the date of the writ (or earlier) to the date of judgment; an application to dismiss a claim for want of prosecution is judged on the facts as they were when the application was made, and not when it is heard months afterwards."

In **West Indies Sugar v Minnell** (1993) 3 JLR 542 at 549 the following passage appears:

> "A case ought to be dismissed for want of prosecution, if there has been inordinate delay and if there is prejudice to the appellant or that it is impossible in the interest of justice to have a fair trial: see **Department of Transport v. Chris Smaller** at page 900 (D & C). Maybe a citation from **Clough v. Clough** [1968] 1 All E.R. 1179 at 1181 is a good background to consider the prejudice to the appellant in this case. It reads:
>
> ". . . No excuse have been proffered to show why there has been this great delay: first three years before the issue of the writ, and then three years again and nothing done until the summons to dismiss for want of prosecution. It is plain to me that the delay here was both prolonged and inexcusable. Next, the question is whether the delay was such as to do grave injustice to one side or the other or both. I think it was. There was a serious question between the defendants where the responsibility lay. The second and third defendants said that they were not to blame at all. That enquiry is seriously prejudiced by the delay of six years that has taken place. It is impossible to do justice between the defendants at this distance of time. I would add too that the three passenger plaintiffs suffer a grave injustice. They had an unanswerable claim for damages for their injuries. Yet all these years have elapsed without anything being done.
>
> The essential feature to note is that inordinate delay by itself, can be relied on to show prejudice to the

> appellant and further to show that the enquiry itself would be prejudiced by the delay in this case."

In the instant case, assuming that the Writ of Summons was valid, an excuse was proffered, therefore the delay had not been prolonged and inexcusable with respect to the Statement of Claim.

The above authorities must be understood in the context of the statement of principle in **Birkett v James** (1978) A.C 297, **Department of Transport v Chris Smaller (Transport) Ltd.** [1989] A.C. 1197 **Warshaw, Gillings and Alder v Drew** (1998) 27 J.L.R. 189. In this latter case Lord Brandon cited Carberry J.A. at page 195 as follows:

> "It is clear that the onus is on the defendant to file evidence to establish the nature and extent of the prejudice occasioned to him by such delay.
>
> Nothing of this sort appeared in the affidavit filed by the defendant, and it appears that before the Master the defendant's attorney went so far as to argue that it was not necessary to prove that the delay would prejudice the fair trial of the action. This of course is not correct, and the Master has specifically found 'that having regard to the nature of the case that delay would not cause (defeat) any claims to a fair trial of the issues nor any grave prejudice to the defendant."

Then Lord Brandon said at page 196:

> "Their Lordships accept that the continuing existence of the injunction provided an additional reason for expeditious prosecution of the action by the respondent or his attorneys-at-law. They do not, however, accept that the appellants suffered any serious prejudice by reason of the injunction. Their Lordships agree with the view expressed by Carberry, J.A., in his judgment that the onus was on the

> appellants to establish by evidence the nature and extent of any prejudice caused to them by the delay on which relied. There was, however, no evidence filed for the appellants that they had been prejudiced, either seriously or at all, by the continuing existence of the injunction, and their Lordships do not consider it would be right to infer such prejudice in the absence of any such evidence. In particular, there has been no suggestion that the appellants ever took any steps to obtain the discharge or modification of the injunction. In these circumstances counsel's fresh argument for the appellants can only be regarded as a gallant but inevitably unsuccessful attempt to make legal bricks without evidential straw."

In **Hornagold v Fairclough Building Ltd.** Solicitors Journal Vol 137 No. 24, 25th June 1993, the following passage appears:

> "ROCH LJ said to succeed in an application to strike out a defendant must produce some evidence that there had been a significant addition to the substantial risk that there could not be a fair trial caused by the post commencement of proceedings or by periods of inordinate and inexcusable delay or that there had been a significant addition to the prejudice to a defendant either as between the defendant and the plaintiff or as between the defendant and another party to the action caused by such delays. In the present case what was contained in the affidavits was insufficient as the defendant had neither identified the particular witnesses nor the particular respects in which their evidence had been impaired. It was always incumbent on the defendants to do so or to show a particular reason why they said there was a substantial risk that there could no longer be a fair trial of the issues. Were the mere assertion of prejudice to be sufficient, then that would in effect transfer the burden of proof on that issue to the plaintiff, a submission that was expressly rejected by the House of Lords in **Department of Transport v Chris Smaller Ltd** [1989] AC 1197
> LORD JUSTICE GLIDEWELL gave concurring judgment."

In **West Indies Sugar v. Minnell** there was the evidential basis adduced by the defendant to demonstrate prejudice. In this case there was no direct or circumstantial evidence in Ms. Lindsay's affidavit for the Attorney-General from which a finding of prejudice could be made.

Govit v Doctor [1997] 2 All ER 417 was also cited by the Attorney-General. In the instant case there was no inordinate and inexcusable delay to find that there was an abuse of process. The following passage from the speech of Lord Woolf in **Govit's** case at page 424 is instructive on this issue:

> ". . . I am satisfied that both the deputy judge and the Court of Appeal were entitled to come to the conclusion which they did as to the reason for the appellant's inactivity in the libel action for a period of over two years. This conduct on the part of the appellant constituted an abuse of process. The courts exist to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in **Birkett v James.** In this case once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings when there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings."

It is arguable that to institute proceedings pursuant to the Fatal Accidents Act three years after the death of Elaine Evans without leave of the Court was an abuse of process. Equally to institute proceedings under the Law Reform Act later than six months after Letters of Administration had been obtained was an abuse of process. The more appropriate procedure under these two Acts however would have being to take an objection to the proceeding on a preliminary point of law.

Conclusion

The order of Reckord J. must be set aside as the Attorney-General has succeeded with respect to proceedings pursuant to the Law Reform Act.

PANTON, J.A.

I share, with my learned brothers, the view that the appeal is on good ground so far as the Fatal Accidents Act is concerned, seeing that the writ was filed out of time, and there has been no application to rectify that situation. In respect of the Law Reform (Miscellaneous Provisions) Act, the claim thereunder is good, having been filed within time. It was therefore appropriate for the learned judge below to have extended the time for the filing of the statement of claim. In the circumstances, I agree that the appeal should be allowed in part, in the terms proposed in the Order.

SMITH, J.A.

I have had the benefit of reading in draft the judgments of Downer and Panton JJA. I agree that the appeal should be allowed in part.

The appeal is from orders of Reckord J:

(i) dismissing the appellant's summons to strike out the respondent's Writ of Summons; and

(ii) granting the respondent's application for leave to file Statement of Claim out of time.

In my opinion the appeal in so far as (i) is concerned may be disposed of by the interpretation and application of the provisions of three statutes viz:

(1) Section 2 of the Public Authorities Protection Act

(2) Section 2 of the Law Reform (Miscellaneous Provisions) Act

(3) Section 4 of the Fatal Accidents Act

The Application to Strike Out
The Public Authorities Protection Act

Section 2 (1) (a) provides:

> "2.-(1) Where any action, prosecution, or other proceeding, is commenced against any person for any act done in pursuance, or execution or intended execution, of any law or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such law, duty, or authority, the following provisions shall have effect -
>
> (a) the action, prosecution, or proceeding, shall not lie or be instituted unless it is commenced within one year next after the act, neglect or default complained of, or, in case of a continuance of injury

> or damage, within one year next after the ceasing thereof;..."

This section is now repealed in part but is applicable because the action arose before the repeal.

The accident that gave rise to these proceedings occurred on the 14th March, 1993. The Writ of Summons was filed on 30th July, 1997, that is, 4 years 4 months after the cause of action arose. The Attorney General, the appellant, is contending that the Respondent's writ should be struck out on the ground that by virtue of section 2(1)(a), the action is statute barred. The authorities (see judgment of Downer, J.A.) establish that as to the application of the Public Authorities Protection Act, there are two questions to be decided:

(i) Is the person or entity claiming protection, a public authority? If so,

(ii) What kind of action by the 'public authority' is to be regarded as satisfying the conditions of section (2)(1)?

The authorities also establish that the onus is on the 'person' relying on the Act to show that the act complained of was "done in pursuance, or execution, or intended execution of any law or any public duty or authority..." Nothing of this nature appears in the affidavits filed by the appellant. I agree with my brothers that the protection claimed by the appellant can only be determined when the relevant evidence is adduced. Accordingly, the appellant's application to strike out the writ on this basis cannot at this stage, succeed.

The Law Reform (Miscellaneous Provisions) Act

The relevant provision is section 2(3):

"2- (1)...

(2)...

(3) 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 either-

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

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

Reckord J was correct when he said:

"Section 2 (3) provides that actions against the estate should be taken not later than six (6) months after Letters of Administration is granted. However, no mention is made in that sub-section or any other for that matter about causes of action vested in her. The presumption therefore is that the common law period of six (6) years should apply".

The proceedings were instituted on behalf of the estate and not against the estate, thus section 2(3) does not apply.

The appellant's application to strike out the Writ on the ground that it contravened the limitation period prescribed under this statute must therefore fail.

The Fatal Accidents Act

Section 4 of this Act reads:

> "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 representative of the deceased person; or
>
> b) where the office of the personal representative of the deceased is vacant,
>
> c) or where no action has been instituted by the personal representative within six 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 relations of the deceased person.
>
> (2) Any such action shall be commenced within three 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.
>
> (3) Only one such action shall be brought in respect of the same subject matter of complaint..."

Subsection (2) is to my mind of decisive importance. It mandates that any action brought under the Fatal Accidents Act, shall commence within three years after the death of the deceased or within such longer period as a court may allow. Now it seems to me that unless the Court first allows it, any action brought outside of this statutory period is a nullity. I will repeat the following facts for convenience:

> The death occurred on the 14th March 1993; the Writ of Summons was filed on the 30th July, 1997. Thus the action was commenced some four years and four months after the death of the deceased. No order was obtained from the court allowing a longer period within which to commence proceedings.

Therefore, in my view, the Writ of Summons is null and void as it was filed outside of the statutory limitation, without the Court's permission.

Counsel for the respondent conceded that the claim under this Act contravened the limitation period but argued that the judge properly exercised his discretion in enlarging the time. However, no such application was properly before the learned judge. He therefore had no jurisdiction to enlarge the time.

In sum the appellant's application to strike out the respondent's claim under the Fatal Accidents Act should succeed. However, his application to strike out the claim under the Law Reform (Miscellaneous Provisions) Act must, in my view, fail.

The Application for Leave to file Statement of Claim Out of Time

The learned trial judge granted the application of the respondent to file the Statement of Claim out of time. No reasons were given for so doing.

The issues involved in the respondent's application have been fully explored and analysed by my brother Downer JA.

I agree with my learned brothers that no good reason has been shown for this Court to interfere with the learned trial judge's exercise of his discretion in extending the time for the filing of the statement of claim.

DOWNER, J.A.

ORDER:

1. Appeal allowed in part.

2. Order below varied to state that the statement of claim be amended to confine claims pursuant to the Law Reform Act.

3. The Statement of Claim is also amended so as to confine the claims to the proper parties.

4. There shall be no order as to costs.