[2024] JMSC CIV.71

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2018HCV03998

BETWEEN	**YANETTE HOLNESS**	**CLAIMANT**
AND	**JAMAICA URBAN TRANSIT COMPANY LIMITED**	**1ST DEFENDANT**
BETWEEN	**WESTON CUNNINGHAM**	**2ND DEFENDANT**

IN CHAMBERS

Miss Allison-Gaye Bryan, Attorney-at-Law for the Applicant/1st Defendant

Mr. Oraine Nelson for the Respondent/Claimant

When does the Cause of Action Arise in Actions Grounded in Tort – Calculating the Limitation Period -– Striking Out Statement of Case after Expiration of Limitation Period – Application for Permission to File Defence Out of Time – Factors to be Considered by the Court in Deciding Whether to Grant an Application for Extension of Time to File Defence Out of Time – section 46 of the Limitation of Actions Act – Section 8(1)(a) of the Interpretation Act – Rules 26.3(b), 10.2(1),10.3(1), 10.3(9) of the Civil Procedure Rules

Heard: February 19, 2024, March 5, 2024, April 23, 2024, May 22 and 24, 2024

TRACEY-ANN JOHNSON, J (AG.)

THE CLAIM

[1] The Claimant filed a claim in this Honourable Court on October 11, 2018 seeking damages for injuries, loss and damage caused by the negligence of the 2nd Defendant, Weston Cunningham. She asserted that the 2nd Defendant was the duly authorized servant and/or agent and/or permitted driver of the 1st Defendant, the Jamaica Urban Transit Company Limited which was at all material times the owner of motor bus registered PF 2360. In the Claim Form, the Claimant stated that on the 11th October, 2012, she was travelling as a passenger in the 1st Defendant's motor bus along Discovery Bay main road, in the parish of St. Ann, towards the direction of Montego Bay. The 2nd Defendant negligently drove or manoeuvred the said motor bus when he began overtaking a motor truck and lost control of the motor bus and collided with the truck. The Claimant was propelled forward and backwards and as a result suffered injuries, loss and damage and incurred expenses. In the Particulars of Claim, the Particulars of Injuries were listed as follows:

"PARTICULARS OF INJURIES

i. Splinter injuries to anterior chest, both upper limbs;

ii. Restricted painful neck movements;

iii. Bruises over forehead;

iv. Grade 3 whiplash injury to neck;

v. Focal spinal cord abnormality at C2 level;

vi. Multiple lacerated wounds on both arms and forearms;"

[2] In the Particulars of Claim, the Claimant stated that she will rely on the Medical Report from Tretzel Medical Center dated May 2, 2013 and the Medical Report from May Medical Centre dated January 9, 2013. In the medical report of Dr. Srivardhan Chilekampali from Tretzel Medical Center, the doctor indicated that

Miss Holness was involved in a road traffic accident on the 11th October 2012. She was seen at his clinic. She sustained splinter abrasions to face, anterior chest and both forearms. She sustained blunt trauma to the neck. She was complaining of neck pain and numbness to right upper limb. Her wounds were cleaned and dressed. He further indicated that repeat examinations revealed the following findings:

- *"Splinter injuries to anterior chest, both upper limbs*
- *Neck movements are restricted and painful*
- *Power right upper limb 4/5*
- *Bruises over the forehead*
- *Reflexes were normal*
- *Examination of Respiratory and Cardiovascular systems were normal*
- *Stable vital signs"*

[3] In terms of treatment, he assessed her as having Grade 3 Whiplash injury and advised her to do further investigations (x-ray). He further indicated as follows:

> **"TREATMENT**
>
> *She was seen at Trinity Medical Center Montego bay (sic) and x-rays were done, she was reviewed by me again, she was complaining of persistent neck pain since the incident and weakness to right upper limb, she is a teacher by profession and her capacity to perform her regular duties are affected. After clinical examination I advised her to do a MRI scan of Cervical spine, which was done on April 4-2013. Report shows Focal spinal cord abnormality at the C2 level suggesting syrinx, probably post traumatic. For which she needs Neurology and orthopaedic consultation and further management.*

PROGNOSIS

The prognosis of Whiplash injury is variable, [a] recent review found that of all patients suffering a whiplash injury as a result of a road traffic accident, over 66% make a full recovery and 2% are permanently disabled.

Suissa et al found the following to be independently associated with a slower recovery from whiplash injuries,

Female gender, old age, neurological symptoms and signs (sick)

This particular patient definitely needs further Neurologist consultation and management."

[4] The medical report of Dr. Aung Tha Thein of May Medical Centre states as follows:

"She has sustained injuries while traveling on a chartered JUTC bus sitting at a window seat on the second to last row. The bus was collided (sic) with a truck, which caused the glass window to be chattered.

1. *Nature of injuries: superficial, multiple, lacerated wounds on both arms and forearms (upper limbs right and left) – as seen on camera picture.*

2. *11 October 2012, she was seen at Trezel Discovery Bay Medical Centre…, and received first aid treatment.*

3. *Next morning, she was seen by Dr. Chapman, Trinity Medical Centre*

4. *7 December 2012, she was seen by me at my office.*

5. *No history of hospitalization*

6. *Skin wounds are healed completely without leaving any scars or disfigurements.*

7. Prognosis: No permanent residual impairment/disability"

THE APPLICATION

[5] The Applicant, Jamaica Urban Transit Company Limited (the 1st Defendant) filed a Notice of Application for Court Orders on June 7, 2019 in which it seeks the following Orders:

"1. That the Claimant's claim be struck out as it is an abuse of the court's process the limitation period having been expired.

2. Alternatively the 1st Defendant be granted an extension of time to file Defence.

3. The Defence of the 1st Defendant dated June 6, 2019 be allowed to stand as filed.

4. That the costs of this application to the 1st Defendant or no order as to cost.

5. Further and other such reliefs as deemed fit by this Honorable Court."

[6] The application was made on the following grounds:

"1. That the proceedings was (sic) initiated outside of the limitation period as such the claim is statute is (sic) barred

2. Pursuant to Rule 26.3 (1)(b) and (c) this Honourable Court has the jurisdiction to strike out the claim

3. Pursuant to Part 10.3 (9) of the CPR the court may grant an extension to file Defence

4. The 1st Defendant has a good Defence to the claim

5. That there has been no undue delay prejudicial to the Claimant

6. That it is fair and necessary in the circumstance"

[7] The Applicant relied on an Affidavit in Support of Notice of Application for Court Orders which was filed on June 7, 2019. The summary of Miss Christina Howell's evidence as given in her Affidavit is that on the 11th April 2019, the 1st Defendant received the Claim Form and Particulars of Claim filed herein by registered mail. Based on the company's policy, any file relating to an incident which occurred after six (6) years is placed in the archive. As a result, since the claim was filed in 2012, instructions were given for the archive trailer to be searched and for the file relating to that incident to be found. The file could not be located after a week of searching. Contact was made with the Accident Department of the 1st Defendant which also did its searches which were also unsuccessful. The Operations Department was also contacted and a search was done for that bus and it was discovered that the company had no bus bearing PF2360 being driven by the 2nd Defendant. The Claimant having alleged that the accident happened on the 11th October 2012, the claim having been filed on the 11th October 2018 was filed after the relevant period which expired on the 10th October 2018. Due to the long period that elapsed since the incident, the 1st Defendant is significantly hindered from properly defending itself. In the circumstances, the claim should be struck out.

[8] She further stated that the 1st Defendant transports the public along the Kingston Metropolitan area and parts of St. Catherine. The 1st Defendant does not own a bus bearing that registration number being driven by the 2nd Defendant as alleged in the Claimant's claim. She also stated that if the accident occurred where the Claimant alleged, at the material time, the bus was not being driven for the business of the 1st Defendant. The 1st Defendant at times engages in the business of hire to third parties who engage in business for their sole purposes. Based on the contract of hire, the 1st Defendant and the third parties agree that the 1st Defendant bears no liability for any loss, injury or damage caused to any passenger at the time. In such circumstances, the third party would be solely responsible for any incident. The 1st Defendant has a good defence to the claim. The delay in filing the Defence was not intentional as it took some time to get instructions. The Claimant will not be prejudiced as no steps have yet been taken

by the Claimant to have judgment entered. The delay has not been inordinate as the Defence was filed only fourteen (14) days after the period for filing a Defence.

THE SUBMISSIONS

[9] Counsel for the Applicant and the Respondent relied on their written submissions which were amplified by oral submissions made to this Court. The Court has considered the submissions and authorities relied on by counsel and will make reference to them to the extent that they are relevant for these purposes.

ISSUES

[10] In this case, the Court has to determine the following issues:

1) Whether the claim is statute barred?

2) If the claim is statute barred, should the claim be struck out as an abuse of the process of the court?

3) If the claim is not statute barred, whether the Applicant should be granted an extension of time to file its Defence out of time?

LAW AND ANALYSIS

Issue 1) – Whether the claim is statute barred?

[11] This claim has brought into sharp focus two critical peripheral issues that are pertinent to the determination of the issue of whether the claim is statute barred which are as follows:

1) When did the cause of action arise? and

2) How is time calculated for the purposes of determining the limitation period?

[12] In seeking to determine this issue, the Court will first discuss these two peripheral issues and then indicate its conclusion in relation to whether the claim is statute barred.

When did the cause of action arise?

[13] Counsel for the Applicant submitted that in examining the specific circumstances of this case, it becomes apparent that the cause of action in the Claimant's claim for negligence arose from an incident that occurred six (6) years prior to the filing of the claim. However, crucially, the Claimant's claim was not filed until six (6) years after the alleged incident. She argued that the cause of action was completely constituted on the date of the incident itself, which falls squarely within the legal principles established in **Reeves v Butcher** [1891] 2 QB 509.

[14] Counsel for the Respondent, relying on the dicta in **Reeves v Butcher** submitted that the earliest time the action could have been brought was not on the date of the actual injury which was the 11th October 2012 but rather at its earliest, the day after. He stated that this is because even where the Claimant was of the view that she had suffered injury, this could not be confirmed except by expert evidence. He argued that consequently, the earliest time at which the action could commence would be when an expert confirmed that the Claimant did in fact suffer injury. Counsel for the Respondent further submitted that when regard is had to the ingredients of the tort of negligence, the absence of any of the ingredients would mean that a claim in negligence must fail. Therefore, where the negligence under consideration is personal injury, it being a species which requires expert evidence, he submitted that the confirmation of the injury (by a doctor who is the expert in such cases) would have been necessary in order to identify the 'earliest time' at which the action could be brought. He further submitted that the injury must be proved and not only proved but proved as having resulted from the Defendants' actions. He relied on the cases of **Barnett v Chelsea & Kensington Hospital Management Committee** [1969] 1 QB 428 and **Robinson v Post Office** [1974] 2 All ER 737. He submitted that the earliest possible time in this case and in personal injury matters in general, would be the day subsequent to the incident and not the day of the incident. This he stated is because the Claimant would likely see or be able to see a doctor the day after the incident or if she was able to see a doctor on the day of the incident, she would not be in a position (depending on the severity

of the injuries) to immediately pursue legal proceedings. He further submitted that for the cause of action to be complete, it would have to be confirmed that the Claimant had in fact sustained injury – not that she believed herself to have sustained injury but that it had been established by an expert (this being a doctor) that she had in fact suffered injury.

[15] He further submitted that in the instant case, the Claimant relies on the medical report of Tretzel Medical Center dated May 2, 2013 prepared by Dr. Srivardhan Chilekampalli. While the report confirmed that she was involved in a road traffic accident on the 11th October 2012, it does not confirm that she was seen on that date and that her injuries were confirmed on that date. The report of May Day Medical Centre dated January 9, 2013 and prepared by Dr. Aung Tha Thein indicated that she was seen by that doctor on December 7, 2012. It further indicated that she received first aid treatment on the 11th October 2012 at Trezel Discovery Bay Medical Centre. However, it does not confirm that she suffered injury only that she received first aid treatment, the nature of which is not stated on the face of Dr. Thein's report. There is the indication that the Claimant saw Dr. Chapman at Trinity Medical Centre the next morning, which if this is taken as the morning after the 11th October 2012 would be the 12th October 2012. In this case, the cause of action was complete on the 12th October 2012 as even if it is assumed that she saw the doctor on the 11th October 2012, it is apparent that she needed to see the doctor the next day which is presumably the 12th October 2012. This is indicative that her injuries were not determined or fully determined. This is supported by the fact that Dr. Srivardhan, even if he saw her on the 11th October 2012, could not have fully determined her injuries since he needed to have diagnostic tests done such as x-ray. He submitted that until the x-ray was done enabling the doctor to confirm the injury, the cause of action was not complete.

[16] The primary purpose of a limitation period is to protect a defendant from any injustices inherent in having to face a stale claim which he never expected to have to face: See **Donovan v Gwentoys** (1990) 1 WLR 472, HL per Lord Griffiths. Section 46 of the **Limitation of Actions Act** of Jamaica acknowledges the

applicability of United Kingdom Statute 21 James I, Cap 16 within this jurisdiction. Section 3 of the **English Limitation of Actions Act** of 1623 provides as follows:

> *"And be it further enacted, That all actions of trespass quare clausum fregit, all actions of trespass, detinue, action for trover, and replevin for taking away of goods and cattle, all actions of account, and upon the case, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty; all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding and imprisonment, or any of them which shall be sued or brought at any time after the end of this present session of parliament, shall be commenced and sued within the time and limitation hereafter expressed, and not after (that is to say) (2) the said actions upon the case (other than for slander) and the said actions for account, and the said actions for trespass, debt, detinue and replevin for goods or cattle, and the said action of trespass, quare clausum fregit, within three years next after the end of this present session of parliament, or within six years next after the cause of such actions or suit, and not after; (3) and the said actions of trespass, of assault, battery, wounding, imprisonment or any of them, within one year next after the end of this present session of parliament, or within four years next after the cause of such actions or suit, and not after, (4) and the said actions upon the case for words, within one year after the end of this present session of parliament, or within two years next after the words spoken, and not after."*

[17] In **Sherrie Grant v Charles McLaughlin and Another** [2019] JMCA Civ 4, Brooks JA (as he then was) in looking at the limitation period relating to actions grounded in tort and in contract stated at paragraph [30] of the judgment as follows:

> *[30] It is well established in this jurisdiction that actions grounded in tort and in contract are time barred after the expiry of six years. The authority usually cited for that principle, in the case of tort, is* ***Melbourne v Wan*** *(at page 135 F). This court also discussed the principle in* ***Bartholomew Brown and Another v Jamaica National Building Society*** *[2010] JMCA*

Civ 7, and explained that the limitation period for both contract and tort is six years. K Harrison JA, in delivering the judgment of the court stated, in part at paragraph [40] that:

> *"…actions based on contract and tort (the latter falling within the category of 'actions on the case') are barred by section III, subsections (1) and (2) respectively of the [English Limitation of Actions Act 1623 (21 Jac I Cap XVI), which has been received into Jamaican law] after six years (see **Muir v Morris** (1979) 16 JLR 398, 399, per Rowe JA)."*

[18] Therefore, it is now well beyond dispute that in this jurisdiction, the limitation period for actions grounded in contract and tort is six years. This principle received recognition in the case of **Lance Melbourne v Wan** 22 JLR 121 at page 135F where it was stated that:

> *"As the law now stands there is for Jamaica a rigid rule that actions for negligence must be brought within a period of six years from the time the cause of action arose and any failure to do so will render the action statute barred. "*

[19] While it is clear what the limitation period is for actions grounded in tort and contract, the issue has often been raised as to when the cause of action arises in such actions. In **Attorney General of Jamaica v Arlene Martin** [2017] JMCA Civ 24, P. Williams JA stated at paragraph [39] of the judgment that:

> *[39] The correct approach to be taken when calculating the limitation period was usefully discussed in **Blackstone's Civil Practice 2012** at paragraph 10.13:*
>
> > *"The rules on accrual fix the date from which time begins to run for limitation purposes. Lindley LJ in **Reeves v Butcher** [1891] 2 QB 509 said: 'it has always been held that the statute runs from the earliest time at which an action would be brought.' In **Read v Brown** (1888) 22 QBD 128 Lord Esher MR defined 'cause of action as***

> *encompassing every fact which it would be necessary for the [claimant] to prove, if traversed, in order to support his right to the judgment of the court. In other words, time runs from the point when facts exist establishing all the essential elements of the cause of action."*

[20] In the case of **Medical and Immunodiagnostic Laboratory Limited v Dorett O'Meally Johnson** [2010] JMCA Civ 42, K Harrison JA settled the issue as to when the cause of action arises in actions grounded in tort and in contract. These principles were highlighted and relied on in the case of **Sherrie Grant v Charles McLaughlin and Another** [2019] JMCA Civ where Brooks JA (as he then was) delivering the judgment of the court at paragraph [58] of the judgment stated the principles as follows:

> *"[58] The relevant principles concerning the commencement time for limitation purposes were conveniently set out in **Medical and Immunodiagnostic Laboratory Limited v Dorett O'Meally Johnson** [2010] JMCA Civ 42. K Harrison JA made the following points in paragraphs [5] through [8]:*
>
> *a. the general rule in contract is that the cause of action accrues when the breach occurs and not when the damage is suffered;*
>
> *b. where the contract is for the sale of goods the buyer's right of action for breach of an implied or expressed warranty relating to goods accrues when the goods are delivered and not when the defect is discovered or damage ensues;*
>
> *c. the general rule in tort is that the cause of action arises when the damage is suffered and not when the act or omission complained of occurs."*

[21] In **Sherrie Grant v Charles McLaughlin and Another,** the claim concerned the sale of a motor vehicle on or about the 17th day of February 2006. The Certificate of Title for the motor vehicle was pledged as security for a loan in August 2005, and was handed over to the bank that extended the loan. By January 2006, a new Certificate of Title for the vehicle was secured from the government authority,

based on a declaration that the original certificate had been lost. The vehicle, by then in a damaged state, was sold in February 2006, and the "replacement" Certificate of Title delivered to the innocent purchaser for value. The loan, however, had not been repaid. The purchaser repaired the vehicle at considerable cost and put it back into service. On the 9th day of March 2012, the bank which had a bill of sale over the vehicle, seized the motor vehicle in exercise of its powers contained in the bill of sale, by which the vehicle was pledged. The claim was filed on the 18th June 2013 and was brought against the bank alleging wrongful seizure of the car by the bank. In relying on the principles enunciated in the decision of **Medical and Immunodiagnostic Laboratory Limited v Dorett O'Meally Johnson**, the court found that time for the purposes of the limitation period, began to run "in tort…*on 9 March 2012, when the bank seized the vehicle, and Mr McLaughlin suffered his loss"*.

[22] The approach to be utilised in determining when the cause of action arise in cases where the incident and damage do not coincide was illustrated in the recent case of **Tamara Myrie-Jones v Nuttall Memorial Hospital Trust Limited & Dr. Barbara Noel** [2020] JMSC Civ 147. In that case, on the 23rd of February 2005, the Claimant, Mrs Myrie-Jones, had a Caesarean section at the Nuttall Memorial Hospital, the 1st Defendant. The 2nd Defendant, Dr. Noel, conducted the procedure during which she was assisted by nurses employed to the 1st Defendant. In 2008, the Claimant had a second surgery to remove her left ovary and fallopian tube. This surgery was also performed by the 2nd Defendant at the same hospital. In 2014, the Claimant began to experience microscopic haematuria (blood in the urine) and lower urinary tract symptoms among other issues. She was examined by Dr. William Aiken, a Consultant Urologist who provided a medical report. In this report he noted that the Claimant had a suture (foreign body) on the right bladder wall with a calculus on its end which required surgical removal and this was done on the 8th of July 2015. The doctor proffered the opinion that the suture was left in the Claimant's body during the Caesarean section which was performed in 2005. On the 21st day of July 2016, the Claimant filed a claim against the 1st Defendant for negligence. The Court considered the issue of whether the limitation period

accrued from the date of the surgical procedure on the 23rd of February 2005 or when microscopic haematuria and lower urinary tract symptoms were observed in 2014.

[23] At paragraphs [35] and [36] of the judgment, Hutchinson Shelly J concluded as follows:

> *"[35] It is my considered view that by emphasising that the cause of action would have accrued from the time at which the damage was done and not when the wrongful act occurred, the Court affirmed a departure from the approach which had been taken in the* ***Cartledge*** *decision. The legal position outlined by the respective Judges of Appeal in both the* ***Sherrie Grant*** *and* ***Medical Immunodiagnostic*** *cases, to my mind, appear to more (sic) in line with the principle stated in the Irish decisions which is that the tort of negligence was not complete until damage had been caused by the Defendant's wrongful act.*
>
> *[36] In light of this conclusion, I am unable to agree with the submissions of the Applicant that the action should be struck out on the grounds that it was brought outside the period of limitation."*

[24] In relying on the above cited authorities, the tort of negligence is complete when damage is caused by the Defendant's wrongful act or omission. Obviously, there will be cases where the date of the incident coincide with the date when the damage is suffered, therefore making it easy to determine when the cause of action arises. However, in instances (as in this case) where there is a dispute as to whether the damage was suffered by the Claimant at the time when the Defendant did the wrongful act or omission (that is, the date of the incident) or on a subsequent date, then it is important to examine the Claimant's case to determine when the damage in fact occurred.

[25] Based on the Claim Form filed in the claim, the Claimant alleged that the accident occurred on the 11th day of October 2012. Did the cause of action accrue on that

day or a subsequent date? This is dependent on when the Claimant can be said to have suffered damage. This Court is of the view that the Claimant suffered damage on the same day as the incident having regard to the following factors:

1) The nature of the injuries that were sustained by the Claimant which can be gleaned from the medical reports filed in the claim as well as from the Particulars of Claim filed on behalf of the Claimant. The injuries were such that they were easily observable by the Claimant from the date of the incident. The injuries were primarily superficial, multiple, lacerated wounds. They were noted on the chest, forehead, upper limbs. There was no need for expert advice for the Claimant to be able to attribute the injuries obtained to the act or omission of the Defendants. In these circumstances, there was nothing to prevent the Claimant from embarking on preliminaries such as the issue of a Claim Form and a Particulars of Claim with the indication that additional medical evidence would be obtained and provided.

2) Although Dr. Srivardhan Chilekampali from Tretzel Medical Center did not specifically state that he saw the Claimant on the 11th October 2012, the language of the doctor which followed upon his indication of the date when she was involved in the accident, suggests that she was seen by the doctor on the date of the accident. The doctor indicated that Miss Holness was involved in a road traffic accident on the 11th October 2012. She was seen at his clinic. She sustained splinter abrasions to face, anterior chest and both forearms. Blunt trauma to neck. She was complaining of neck pain and numbness to right upper limb. Her wounds were cleaned and dressed. The nature of the treatment received support the view that she was seen on that date. If the Claimant was not seen by Dr. Srivardhan Chilekampali on the 11th October 2012, then the Court notes that there is a clear discrepancy in the medical history or chronology of events provided by the doctors.

3) In the instant claim, the facts are significantly different from those in the **Tamara Myrie Jones case** where the Claimant needed medical intervention in order to determine the full extent and nature of her injury which was not easily discernible without more. The most the Claimant in this case would need to have confirm was that she had sustained Grade 3 whiplash injury but this did not mean that some aspects of the injuries were not discernible after the incident such as her n*eck* movements being restricted and painful or that she had sustained some trauma to her neck and visible injuries such as lacerations.

[26] Consequently, the Court finds that the cause of action arose on the 11th day of October 2012 as the Claimant suffered damage on that day. In the Court's view, the evidence before the Court is supportive of a finding that the 11th October 2012 was the earliest time at which an action could have been brought by the Claimant. There were facts which existed that were necessary to establish all the essential elements of the cause of action (negligence). The cause of action was complete as damage had occurred.

[27] Having determined when the cause of action arose, the next issue of critical importance in the matter at hand, is how should the time be calculated for the purposes of the limitation period. The Court will now consider that issue.

How should time be calculated for the purposes of the limitation period?

[28] Counsel for the Applicant relied on the case of **Peter Matthew and Ors v Barrie Sedman and Ors** [2017] EWHC 3527 (Ch) which she submitted is authority for the proposition that when a cause of action is completely constituted at the very first moment of a particular day, that day should not be excluded from the calculation for the purposes of the **Limitation Act**. On her submission, the cause of action accrued on the day of the incident and should be included in the calculation of the limitation period. Therefore, the limitation period expired on the 10th October 2018 and the claim is statute barred.

[29] On the other hand, Counsel for the Respondent submitted that the Court should adopt the approach stipulated in **Marren v. Dawson Bentley & Co. Ltd** [1961] 1 QB 135 which stipulates that time runs from the day following the day on which the cause of action arose as parts of a day are ignored. The court in the **Marren v Dawson case** also relied on the decision in **Radcliffe v Bartholomew** 8 T.L.R 43 as confirming the rule that the day on which the cause of action arose is excluded from computation. Reference was also made to the case of **Gelmini v Moriggia** [1913] 2 KB 549. In the latter case, it was stated that an action cannot be brought until the cause of action is complete and stated that the day on which the cause of action arises is not to be excluded from the computation of the limitation period. Therefore, he argued that the claim was brought within the limitation period.

[30] The approach utilised in the **Marren v Dawson case** is the approach posited by the learned author, Stuart Sime in his book, **A Practical Approach to Civil Procedure** 24th edition at page 238, paragraph 21.38 under the heading, 'CALCULATING THE LIMITATION PERIOD' where he stated as follows:

> *"Time runs from the day following the day on which the cause of action arose, as parts of a day are ignored [Marren v Dawson Bentley and Co. Ltd [1961] 2 QB 135). If a claim accrues at midnight on 18 July, time starts to run on 19 July (Matthew v Sedman [2022] AC 299). It runs until the claim is brought, as opposed to issued (Barnes v St. Helens Metropolitan Borough Council (Practice Note) [2007] 1 WLR 879) or served (per Lord Diplock in Thompson v Brown [1981] 1 WLR 744.*

[31] The Court also had regard to section 8 (1)(a) of the **Interpretation Act** which provides as follows:

> *"8 – (1)In computing time for the purpose of any Act, unless the contrary intention appears,*
>
> *(a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day in which the event happens or the act or thing is done;"*

[32] The Court considered the decision of **Matthew and others (Appellants) *v* Sedman and others (Respondents)** [2021] UKSC 19 which is the United Kingdom Supreme Court's ruling on an appeal from the decision of the Court of Appeal in the case cited by Counsel for the Applicant (**Peter Matthew and Ors v Barrie Sedman and Ors)**. The appeal related to the calculation of the limitation period in respect of causes of action which accrued at, or on the expiry of, the midnight hour at the end of Thursday, the 2nd June 2011. The court considered the issue of whether the 3rd June 2011, the day which commenced at or immediately after the midnight hour counted towards the calculation of the six-year limitation period. The court examined a number of authorities cited by the appellants and stated that none of the authorities cited established a general rule applicable to midnight deadline cases. The court further pointed out that the only midnight deadline case is ***Gelmini v Moriggia***, which the appellants submitted was wrongly decided. The appellants submitted that ***Gelmini*** was inconsistent with ***Radcliffe v Bartholomew*** and was expressly disapproved in ***Marren v Dawson Bentley & Co. Ltd***.

[33] At paragraphs 35 to 36 of the judgment, the court considered the position in **Radcliffe v Bartholomew** and stated as follows:

> *"35. The decision of the Divisional Court in Radcliffe v Bartholomew concerned the question as to whether a criminal complaint under the Prevention of Cruelty to Animals Act 1849 had been made within one calendar month after the cause of complaint had arisen. That question in turn depended on whether the day on which the alleged offence was committed was to be excluded from the computation of the calendar month within which the complaint was to be made. Willis J, giving the judgment of the court with which Lawrence J agreed, held that the day was to be excluded so that the complaint was therefore made in time, and the justices had jurisdiction to hear the case. In arriving at that conclusion Wills J (p 163) referred to the remarks at the end of the judgment of Parke, B in Young v Higgon (1840) 6 M & W, 49, as follows:*

> *"Apply the criterion which has been before suggested - reduce the time to one day, and then see what hardship and inconvenience must ensue if the principle I have stated is not to be adopted."*
>
> *Wills J then considered that those remarks were entirely applicable to the decision in Radcliffe v Bartholomew stating that "The result of reducing the time to one day would be that an offence might be committed a few minutes before midnight, and there would only be those few minutes in which to lay the complaint, which would be to reduce the matter to an absurdity".*
>
> *36. I do not consider that the decision in Gelmini is inconsistent with Radcliffe, as the decision in Radcliffe did not involve a midnight deadline. Furthermore, if one applied the criterion of reducing the time limit to one day in the present case then there would still be a complete day in which to commence an action. Indeed, if one excluded the day after midnight from the calculation of a one-day time limit then there would be two complete days in which to commence an action. On that basis the decision in Gelmini is consistent with the criteria suggested in Radcliffe."*

[34] At paragraph 37 of the judgment, the court considered the position in **Marren v Dawson** relative to the decision in **Gelmini**. The court stated as follows:

> *"37. Marren v Dawson Bentley & Co Ltd concerned an industrial accident in which the plaintiff sustained personal injuries. The accident occurred at 1.30 pm on 8 November 1954. On 8 November 1957, he issued a writ claiming damages for the injuries which he alleged were caused by the negligence of his employers, the defendants. By their defence the defendants pleaded, inter alia, that the plaintiff's cause of action, if any, accrued on 8 November 1954, and that the proceedings had not been commenced within the three-year limitation period contained in section 2(1) of the Limitation Act, 1939. Havers J was referred to a number of authorities including Gelmini v Moriggia but he did not approach that case as being an*

exception to the general rule applicable in midnight deadline cases. This meant that Havers J did not consider distinguishing Gelmini from the facts before him where there was a fraction of a day, the accident having occurred at 1.30 pm. Rather, Havers J considered that the approach in Gelmini was in conflict with Radcliffe v Bartholomew. He considered that he was bound by the decision in Radcliffe, but even if he were not bound by it, then he preferred the decision in Radcliffe and the reasons on which it was based to that in Gelmini. He accordingly declined to follow Gelmini. However, as I have indicated, I consider that the principle in Gelmini is an exception to the general rule applicable in midnight deadline cases. In this way the decision in Marren is consistent with Gelmini, which ought to have been distinguished."

[35] The court quite clearly clarified and stated the position at paragraphs 47 to 49 of the judgment as follows:

> *"47. I consider that the reason for the general rule which directs that the day of accrual of the cause of action should be excluded from the reckoning of time is that the law rejects a fraction of a day. The justification for that rule is straightforward; it is intended to prevent part of a day being counted as a whole day for the purposes of limitation, thereby prejudicing the claimant and interfering with the time periods stipulated in the Limitation Act 1980. However, in this case it was, in my opinion correctly, submitted that in a midnight deadline case even if the cause of action accrued at the very start of the day following midnight, that day was a complete undivided day. I consider that it would impermissibly transcend practical reality if the stroke of midnight or some infinitesimal division of a second after midnight, led to the conclusion that the concept of an undivided day was no longer appropriate. In that sense this would not only be impermissible metaphysics but also, in this context, such a minimum period of time does not cross the threshold as capable of being recognised by the law. Whether the issue is framed in terms of metaphysics, which the common law eschews, or of the principle that the law does not concern itself with trifling matters, the*

conclusion is the same: realistically, there is no fraction of a day. That being so, the justification in relation to fractions of a day does not apply in a midnight deadline case. During oral submissions Mr Cousins QC, in answer to an enquiry from Lady Arden seeking to identify the rational justification for excluding a whole indivisible day from the calculation of the reckoning of time, sought to do so based on continuing the application of the rule, as he submitted it had been understood since the 18th century, so that in relation to something as important as limitation there should be continuity of interpretation. I reject the premise to that submission. As I have indicated there is no long-standing authority which excluded a whole indivisible day. Furthermore, I consider that the premise is undermined by the decision of Channell J in Gelmini. So, I reject this argument as a sufficient justification for excluding a whole day from the reckoning of time in a midnight deadline case. Rather, I prefer to consider the impact of holding that a full undivided day in a midnight deadline case is to be excluded from the reckoning of time. If that day were excluded from the computation of time then the limitation period would be six years and one complete day. I consider that would unduly distort the six-year limitation period laid down by Parliament and would prejudice the defendant by lengthening the statutory limitation period by a complete day.

48. *I also consider that the impact of excluding 3 June 2011 can be seen by applying the criteria suggested in Radcliffe of imagining a limitation period of one day. If in this case 3 June 2011 were excluded from the computation and if the limitation period were a single day, then the impact would be to allow two complete days within which to commence an action (see para 36 above).*

49. *I consider that Gelmini is an exception to the general rule so that any part of a day (but not a whole day) happening after the cause of action accrues is excluded from the calculation of the limitation period for the purposes of the provisions of the Limitation Act with which this appeal is concerned. The 3 June 2011 was a whole day*

so that it should be included in the computation of the limitation period."

[36] This case provides clear support for the general rule that part of a day is excluded from the computation of the limitation period, thereby justifying the exclusion of the first day (that is, the day when the cause of action accrues) from the computation of the limitation period. It further stipulates that there is an exception to the general rule in midnight deadline cases. In the latter cases, even if the cause of action accrued at the very start of the day following midnight, that day was a complete undivided day and there was no fraction of a day. Therefore, that day is included in the computation of the limitation period.

[37] In this Court's view, the general rule regarding the calculation of the limitation period as posited in Sime's book and affirmed in the case of **Matthew and others (Appellants) *v* Sedman and others (Respondents)** is consistent with section 8 (1) (a) of the **Interpretation Act**. Consequently, the date the cause of action arises would be excluded from the calculation of the limitation period, in that the period would be calculated from the following day on which the cause of action arose. The Court is fortified in this position by the approach adopted by K. Harrison JA in the case of **Medical and Immunodiagnostic Laboratory Limited v Dorett O'Meally Johnson**. In that case, His Lordship made pronouncements in relation to when the cause of action arises in actions grounded in both contract and tort and went further to calculate the actual limitation period for the purposes of the claim. At paragraph [7] of the judgment, K Harrison JA stated as follows:

"[7] In the tort of negligence the cause of action arises when the damage is suffered and not when the act or omission complained of occurs. It is alleged that the claimant in this matter suffered damage on 3 June 2005, when a chair on which she was sitting in the appellant's place of business suddenly collapsed. The cause of action in tort would therefore expire on 3 June 2011."

[38] By virtue of the expiration date given for the negligence claim in particular, it is clear that K. Harrison JA applied the general rule stipulated in Sime's book and which is also consistent with section 8(1)(a) of t*he* ***Interpretation Act****.* An examination of the decision indicates that the calculation started from the day following the date when the cause of action arose. Had the date the cause of action accrued in tort been included in the calculation of the limitation period, then the period would have expired on 2 June 2011. This Court has found no authority emanating from this jurisdiction which stipulates a different approach. In fact, while a number of authorities consider the issue of when the cause of action arises in actions grounded in tort and contract, they do not specifically consider the issue of how the limitation period is to be calculated. Therefore, the Court is bound by the decision and approach adopted by K. Harrison JA in the **Medical and Immunodiagnostic** case.

[39] In placing reliance on this approach, the Court finds that the cause of action in this matter arose on the 11th day of October 2012 and, therefore, the limitation period expired on the 11th day of October 2018. The claim having been brought on the 11th day of October 2018, it was brought within the limitation period and is not statute barred.

Issue 2) – Should the claim be struck out as an abuse of the process of the court?

[40] In **Ronex Properties Limited v. John Laing Construction Limited [1982]** 3 All ER at page 961, Stephenson LJ made the following observation at page 968 of the judgment:

> *"There are many cases in which the expiry of the limitation period makes it a waste of time and money to let a plaintiff go on with his action. But in those cases it may be impossible to say that he has no reasonable cause of action. The right course is therefore for a defendant to apply to strike out the plaintiff's claim as frivolous and vexatious and an abuse of the process of the court, on the ground that it is statute barred. Then the plaintiff and court know that the Statute of Limitation will be pleaded; the defendant can,*

if necessary, file evidence to that effect; the plaintiff can file evidence of an acknowledgment or concealed fraud or any matter which may show the court that his claim is not vexatious or an abuse of process. "

[41] In **Attorney General of Jamaica v Arlene Martin** [2017] JMCA Civ 24, P. Williams JA pointed out at paragraph [36] of the judgment that:

> *"[36] Although the defence that a limitation period has expired is a procedural defence, it is one that usually has to be raised as such and be resolved at trial. However, it is permissible for the defendant to apply to have the claim, or the relevant parts of it struck out as being an abuse of process. This however will only be allowed in a case where the expiry of the limitation period is clearly established and unanswerable."*

[42] This position was acknowledged in the later case of **Sherrie Grant v Charles McLaughlin and Ors** where P Brooks JA (as he then was) stated at paragraph [42] of the judgment that:

> *"[42] A defendant may apply to strike out a claim if it appears on the face of the claim, that it is time-barred (see **Lt Col Leslie Lloyd v The Jamaica Defence Board and Others** (1978) 16 JLR 252). The basis of the application is that the claim amounts to an abuse of the process of the court (see rule 26.3(1)(b) of the CPR)."*

[43] Since the claim is not statute barred, there is no basis for this Court striking out the Respondent's claim as an abuse of the process of the court. Therefore, the Applicant's application to strike out the Respondent's case on this basis is without merit and must fail.

Issue 3) – Whether the Applicant should be granted an extension of time to file its defence out of time?

[44] Pursuant to rule 10.2 (1) of the **Civil Procedure Rules (CPR)**, a defendant who wishes to defend all or part of a claim must file a Defence. The general rule is that

the period for filing a Defence is forty-two (42) days after the date of service of the Claim form (see rule 10.3 (1) of the **CPR**). By virtue of rule 10.3(9) of the **CPR**, the court is empowered to extend the time for filing a Defence. Additionally, rule 26.1(2)(c) of the **CPR** enables the court to extend the time to comply with an order, direction or rule of the court after the prescribed time for compliance has expired. However, these rules do not provide any specific guidance as to the factors the court should consider when exercising its discretion to extend time. In the case of **The Attorney General of Jamaica and Western Regional Health Authority v Rashaka Brooks Jnr (a minor) by Rashaka Brooks Senior (his father and next friend)** [2013] JMCA Civ 16, Brooks JA (as he then was), highlighted the principle that should guide the court in the absence of specific guidance in a particular rule. At paragraph [14] of the judgment, His Lordship indicated that the court should have regard to the overriding objective in applying that rule, which is to ensure that cases are dealt with justly (see rule 1.1 and rule 1.2 of the **CPR**). The result of the application of that principle is that the court will not adopt an inflexible stance where the court is given a discretion and each case is decided having regard to its own facts (see paragraph [15] of the said judgment). This is consistent with the approach that was stipulated by Lightman J in **Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Limited and Others** *[All England Official Transcripts (1997-2008) delivered 19 January 2000],* where he stated that in considering such applications, *"It was no longer sufficient to apply a rigid formula in deciding whether an extension has to be granted. Each application has to be viewed by reference to the criterion of justice."* This principle was also recognised in the decision of **Fiesta Jamaica Limited v National Water Commission** [2010] JMCA Civ 4.

[45] In **Green and Green v Williams and Ors** [2023] JMCA Civ 5 Dunbar-Green JA at paragraph [81] of the judgment, highlighted the factors which the court should consider when assessing an application for extension of time to file a defence. These factors are:

1) The length of the delay;

2) The explanation for the delay;

3) The merits of the defence;

4) The prejudice occasioned by the delay to the other party;

5) The effect of the delay on public administration; and

6) The importance of compliance with time limits.

[46] The Court will, therefore, apply these principles, having regard to the relevant factors, in making the determination as to whether the Applicant's application should be granted.

The Length of the delay

[47] The Claim Form and Particulars of Claim in this matter were filed in this Honourable Court on October 11, 2018. Based on Miss Howell's evidence, the 1st Defendant received the Claim Form and the Particulars of Claim by registered mail on the 11th April 2019. This is supported by the Acknowledgement of Service of Claim Form which was filed on the 23rd April, 2019. A Defence was filed on the 7th June, 2019. The Defence was filed approximately fourteen (14) days outside of the time limit prescribed by the **CPR**. The application for extension of time to file the Defence out of time was filed on the same date that the Defence was filed.

[48] The Court agrees with the submission of Counsel for the Applicant that this delay is minimal. Additionally, no contrary view has been posited by Counsel for the Respondent. The Court finds support for this view, when the period of filing the Defence in this case is juxtaposed to the period in the decision in **Green and Green v Williams and Ors**. In that case, Dunbar-Green JA opined that the delay of twenty-five (25) days in filing the proposed Defence, though unacceptable, did not amount to an inordinate delay in the circumstances.

The Explanation for the Delay

[49] In this case, the Notice of Application for Court Orders is supported by evidence which is contained in the affidavit of Christina Howell. As recognized by Brooks JA (as he then was) in the **Rashaka Brooks** case, an application for an extension of time within which to file a Defence must be supported by evidence outlining the reason for the failure to comply with the prescribed time limit as well as demonstrating that there was merit in the defence. This was expressed within the context of his position which this Court previously mentioned that the court should not adopt an inflexible stance in its approach in assessing these matters. In **Fiesta Jamaica Limited v National Water Commission**, Harris JA stated that:

> *"16. …The question arising is whether the affidavit supporting the application contained material which was sufficiently meritorious to have warranted the order sought. The learned judge would be constrained to pay special attention to the material relied upon by the appellant not only to satisfy himself that the appellant had given good reasons for its failure to have filed its defence in the time prescribed by Rule 10.3(1) of the Civil Procedure Rules (C.P.R.) but also that the proposed defence had merit."*

[50] In the affidavit of Ms. Howell, the Company Secretary for the Applicant, she attributed the delay in filing the Defence to challenges in accessing archived records due to archiving policies relating to incidents which date back to more than six (6) years. Despite diligent searches conducted by different departments, no evidence supporting the Claimant's allegations were found. These searches were launched approximately thirteen (13) days after the Claim Form and Particulars of Claim were received. After searching the archive trailer for a week, the Accident Department was contacted for similar searches to be done. After not locating a file, the Operations Department was contacted and it was then that it was discovered that the 1st Defendant did not have a bus bearing the registration number given by the Claimant, being driven by the 2nd Defendant. She further explained that the time which elapsed between the incident and the filing of the claim hindered the 1st Defendant's ability to obtain instructions in order to prepare the Defence in time.

The large operation of the company and the need for exhaustive searches caused the delay.

[51] The Court bears in mind the background against which this application is made, in that, although the Court has found that the claim was filed within the limitation period, still a substantial amount of time elapsed between the incident and the filing of the claim. Since this claim was filed almost outside of the limitation period, it is not unreasonable for the agents and/or servants of the 1st Defendant to have concluded that if there was in fact an accident involving the Claimant and the 1st Defendant, that such a file would have been archived and as a result necessitating exhaustive searches to locate any such file or to unearth any facts that would have been pertinent to the filing of its Defence. The Court also considered that the searches were launched within a relatively short time of obtaining the Claim Form and Particulars of Claim despite the searches having been conducted throughout at least three different areas. All of this is considered within the context of the delay occasioned not being substantial or egregious in the circumstances of this case. In the circumstances outlined by Ms. Howell, the Court finds that the Applicant has advanced an acceptable, valid and reasonable explanation for the delay.

The merits of the Defence

[52] In **Kimaley Prince v Gibson Trading & Automotive Limited (GTA)** [2016] JMSC Civ 147, McDonald J at paragraph [22] of the judgment stated as follows:

> *"Having regard to the foregoing, it is apparent that the affidavit of merit ought to disclose facts which constitute the defence and in my view this obligation is not met by exhibiting a draft of the proposed defence…."*

[53] The application before this Court is supported by an Affidavit which also contains evidence as to the merit of the defence. The Defence filed on June 7, 2019 was filed out of time and, therefore, is not properly before the court until an extension is granted. Therefore, the Applicant has quite properly filed an application seeking an Order for an extension of time to file a Defence and for the said Defence which

was filed out of time to stand as properly filed in time. This Defence would be tantamount to a proposed draft Defence which is generally required for the purpose of these applications. This Defence does not contain material on which this Court can rely in making its assessment as to the merits of the Defence.

[54] In **Green and Green v Williams and Ors**, Dunbar Green JA at paragraph 78 of the judgments stated as follows:

> *"The authorities have shown that, on an application to enlarge time to file a defence, the salient issue is whether, on the evidence relied on by the party at fault, the court can, at the very least, form a preliminary view on the likely outcome of the case, and has "sufficient material which could provide a good reason for the delay in failing to comply with rule 10.3(1) of the CPR" (**Philip Hamilton v Frederick Flemmings and Gertude Flemmings**). See also **Thamboo Ratnam v Thamboo Cumarasamy** [1965] 1 WLR 8, at page 12, and the exceptional case, **Rashaka Brooks**, that demonstrated special circumstances which would make it just to allow the defence to proceed to trial in the absence of evidence of merit."*

[55] The position advanced by way of defence is that the company at the relevant time did not have a bus bearing PF2360 being driven by the 2nd Defendant. The 1st Defendant transports the public along the Kingston Metropolitan area and parts of St. Catherine. The 1st Defendant does not own a bus bearing that registration number as alleged in the Claimant's claim. If the accident occurred where the Claimant alleged, at the material time, the bus was not being driven for the business of the 1st Defendant. The 1st Defendant at times engages in the business of hire to third parties who engage in business for their sole purposes. Based on the contract of hire, the 1st Defendant and the third parties agree that the 1st Defendant bears no liability for any loss, injury or damage caused to any passenger at the time. In such circumstances, the third party would be solely responsible for any incident. The Applicant is therefore contending that:

1) it denies that there was an accident involving the Applicant's servant and/or agent and the Respondent since they have no record of any bus with that registration number being driven by the 2nd Defendant.

2) If any such accident occurred, the bus was not being driven by its servant and/or/agent or permitted driver but under a contract of hire which was being driven for the purposes of any such third party. Consequently, the 1st Defendant could not be held vicariously liable for the acts and/or omissions of the 2nd Defendant.

[56] Counsel for the Respondent argued that if the vehicle was being driven by a servant or agent of the 1st Defendant at the time of the incident, then it would be driven for the business of the 1st Defendant and, therefore, the principles of vicarious liability would be applicable. He also submitted that the matter is wider than those principles as the Claimant also pleaded that the 2nd Defendant was the permitted driver of the 1st Defendant. He argued that this was pleaded having regard to section 4(1) of the **Motor Vehicle Insurance (Third Party Risks) Act** which requires that the 1st Defendant as owner of the motor vehicle ensures that any person operating its vehicle, whether such person is an employee or otherwise, is indemnified by insurance in respect of the user of the motor vehicle. He also seeks to rely on section 18(1) of the said Act which he submitted contemplates that even if a motor vehicle is driven by an individual who is not the owner of the motor vehicle, the insurer is obliged to satisfy a judgment against the owner for the negligent operation of the motor vehicle. He concluded that the defence as to the vehicle not being driven on the business of the 1st Defendant does not of itself render the claim incapable of succeeding since by its pleadings the narrow terms of vicarious liability as it relates to servant and/or agent does not form the foundation of the claim but is one of the two structures on which the foundation rests.

[57] Having regard to the position asserted by the parties, there are a number of issues which arise on the claim. Some of these include:

1) Whether there was an accident involving the Applicant's motor bus while it was being driven by the 2nd Defendant, in which the Claimant was a passenger?

2) If there was, in what capacity was the 2nd Defendant driving the said motor bus?

3) Was the motor vehicle being operated for the business or purpose of the 1st Defendant or for the purpose of a third party under a contract of hire?

4) Can the Applicant be held liable for any proven negligence on the part of the 2nd Defendant?

[58] This Court is also mindful of authorities such as **Morgans v Launchbury** [1973] AC 127 and the earlier authority of **Hewitt v Bonvin** [1940] 1 K.B 188 which indicate that the mere fact of giving an individual permission or consent to drive one's vehicle does not create service or agency which is a question of fact. However, in the absence of any further explanation, an inference of service or agency may be drawn from the fact that an individual was driving a vehicle which at the time was the property of a particular individual. Therefore, there are questions of fact and law which arise in this case that are properly reserved for the trial of the claim, as their resolution will be dependent on a full ventilation of the issues through evidence to be elicited from the witnesses and the testing of the veracity of their accounts through cross-examination.

[59] In these circumstances, this Court is of the view that the defence raises triable issues. Additionally, sufficient evidence has been adduced on behalf of the Applicant which constitute a prima facie defence in support of its application for the Defence which was filed out of time to stand.

<u>The prejudice occasioned by the delay to the other party</u>

[60] Counsel for the Applicant submitted that the Applicant should not be penalized for its attempt to provide a complete response to the claim. The delay in filing is

minimal and any prejudice the Claimant will suffer can be relieved with payment of costs, if the court so finds or sees fit. Counsel pointed the Court to the case of **Biguzzi v Rank Leisure Plc** [1999] 1 WLR 1926 where the English Court of Appeal encouraged courts to utilise the greater powers afforded under the **CPR** to allow the trial of appropriate cases. This approach would allow for an extension of time in which to file a Defence and also allow for proportionate sanctions for the failure to file within time. Counsel for the Respondent indicated in his oral submissions that he is not opposed to the application for filing the Defence out of time and, therefore, he has not given any indication of any likely prejudice to the Claimant if the application is granted.

[61] The Court is of the view that in circumstances where the Claimant filed her claim almost at the very end of the limitation period, it would be unreasonable and surprising for the Claimant to complain that she would be prejudiced by any delay on the part of the Applicant in filing its Defence. In the circumstances of this case, bearing in mind that there was no substantial delay in either the filing of the Defence or the application for extension of time, the Court finds that there is no prejudice to be caused to the Claimant by the granting of the application.

The effect of the delay on public administration and the importance of compliance with time limits

[62] The Court is mindful of the position expressed by Panton JA (as he then was) in the case of **Port Services Ltd v Mobay Undersea Tours Ltd and Fireman's Fund Insurance Co** SCCA No 18/2001 delivered on 11 March 2002 where he stated as follows:

> *"In this country, the behaviour of litigants, and, in many cases, their attorneys-at-law, in disregarding rules of procedure, has reached what may comfortably be described as epidemic proportions. The widespread nature of this behaviour is not seen or experienced these days, I daresay, in those jurisdictions from which precedents are cited with the expectation that they should be followed without question or demur here. ... For there to be*

> *respect for the law, and for there to be the prospect of smooth and speedy dispensation of justice in our country, this Court has to set its face firmly against inordinate and inexcusable delays in complying with rules of procedure. Once there is a situation such as exists in this case, the Court should be very reluctant to be seen to be offering a helping hand to the recalcitrant litigant with a view to giving relief from the consequences of the litigant's own deliberate action or inaction."*

[63] The tardiness of the Applicant in this case is not of the nature as described by Panton JA in **Port Services Ltd v Mobay Undersea Tours Ltd and Fireman's Fund Insurance Co**. The minimal delay in the filing of the Defence, the filing of the application for extension of time at the same time, the efforts outlined to obtain the material necessary for the filing of the Defence are all factors which militate against a finding that the Applicant in this case was unmindful of the rules of procedure and the time limits prescribed by the rules for the filing of a Defence. There is no evidence of any inordinate or inexcusable delay on the part of the Applicant or its Attorney-at-Law. In fact, in the circumstances of this case, the entire justice of the situation demands that the Applicant is granted an extension of time within which to file its Defence and the Applicant has provided sufficient basis as required by law for its application to be granted in this regard.

CONCLUSION

[64] The Court finds that the claim was brought within the relevant limitation period and, therefore, cannot be struck out on the basis that it is an abuse of the process of the court as it is statute barred. In relation to the Applicant's application for extension of time to file its Defence out of time, the Court finds that the delay was minimal in this case and that the application for extension of time to file its Defence out of time was sufficiently timely. The Court is of the view that the Applicant has given an acceptable, valid and reasonable explanation for the delay. Given the circumstances that faced the Applicant owing to the Claimant's own tardiness in filing the claim, the Court also forms the view that there was no blatant disregard for the prescribed time limits. A meritorious defence which raises triable issues has

been advanced on behalf of the Applicant as evidenced in Miss Howell's affidavit. The Court cannot readily see any prejudice to the Respondent in the granting of the application and is of the view that the interest and administration of justice favour the granting of the said application. Therefore, the Applicant will be granted an extension of time to file its Defence.

DISPOSTION AND ORDERS

[65] In all the circumstances of this case and having regard to the foregoing, the Court Orders as follows:

1) The Applicant's/1st Defendant's application to strike out the Respondent's/Claimant's claim as an abuse of the Court's process is refused.

2) The Applicant/1st Defendant is granted an extension of time to file its Defence.

3) The Defence of the Applicant/1st Defendant filed on June 7, 2019 and served on January 11, 2023 is permitted to stand as filed and served in time.

4) The Respondent/Claimant is permitted to file and serve a Reply, if necessary, on or before June 10, 2024.

5) Case Management Conference is fixed for October 24, 2024 at 3 p.m. for 1 hour.

6) The costs of this application are to be costs in the claim.

7) The Applicant's/1st Defendant's Attorney-at-Law is to prepare, file and serve the Formal Order herein.