IN THE SUPREME COURT OF JUDICATURE OF JAMICA

IN THE CIVIL DIVISION

CLAIM NO. 2004 HCV03036

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| BETWEEN | ELISE KELLY<br>(Mother and Administratrix of the Estate of Daniel Garciano Burgess deceased | CLAIMANT |
| A N D | ORLANDO BURGESS<br>(Father and Administrator of the Estate of Daniel Garciano Burgess Deceased | 2ND CLAIMANT |
| A N D | GARFIELD MINOTT | 1ST DEFENDANT |
| A N D | ROBERT NELSON | 2ND DEFENDANT |

Miss Tasha McDonald instructed by Nunes, Scholefield, DeLeon and Co., for Applicants/Defendants
Mrs. Marvalyn Taylor-Wright and Co., for Respondents/Claimants

Notice of Application for Court Orders that the Order of Her Ladyship Master Lindo (Ag.) on the Claimants Ex-parte Application for Court Orders to extend the Validity and time for service of the Claim Form and for Substituted Service granted on November 10, 2005 be set aside

**Heard: Tuesday, 22nd March 2007**

**Coram: MORRISON, J (Ag.)**

The Claimants/Respondents are the natural parents of young Daniel Garciano Burgess who met his demise as a result of a motor vehicle accident on the 28th day of December 1999. It is alleged that the second Defendant being the servant and/or agent of the first Defendant so negligently drove and/or maneuvered and/or operated a Camry motor-car that it violently collided with Daniel Burgess resulting in his decease.

The Applicants/Defendants were sued for damages for negligence under the Law Reform Miscellaneous Provisions Act and the Fatal Accidents Act. The Claim Form issued out of the Registry of the Civil Division of the Supreme Court bears the date 10th December, 2004.

It appears from the records that on the 10th day of November 2005 the Claimants sought and obtained from Master Lindo (Ag.) certain pertinent orders in terms as stated below:

1. That pursuant to Rule 5.15 of the Civil Procedure Rules 2002 the Claimants have leave to serve the Claim Form, Particulars of Claim and all subsequent process on NEM Insurance Company Limited, the Defendants insurers with registered offices at 9 King Street, in the city and parish of Kingston.
2. That pursuant to Rule 8.15 of the Civil Procedure Rules 2002 the validity of the Claim Form and the time for servicing the Claim Form be extended to six months from the date of the Order herein.

It is from the above offending Orders I have been asked to set my face against. I am t o do so says the Defendant Insurers as:

a. Pursuant to Rule 8.14 of the Civil Procedure Rules 2002 the Claim Form Filed herein on December 10, 2004 ceased to be valid on June 9, 2005 as the Claimants failed and/or neglected to effect service before the expiration of the six months from the date when the Claim Form was issued.

b. The Claimants application for substituted service on the Applicant and for an extension of time within which to serve the Claim Form was made after the expiration of the validity of the Claim Form contrary to Rule 8.15(3)(a)(i) of the Civil Procedure Rules 2002.

c. The balance of hardship between the parties weighs heavily in favour of the Applicant because the Defendants cannot be found notwithstanding diligent searches being undertaken by the Applicant.

d. The first Defendant has not been insured with the Applicant since the date of the accident.

The Applicant insurance company relied on the affidavit evidence of one Mr. Joseph Murray, Claims Consultant to NEM Insurance Company, it is dated 9/6/2006. Having sketched the chronology of the events leading from the accident to the filing of the Claim Form on 10th December 2004 he avouched, "that the life span of the Claim Form herein expired on June 9, 2005 and the Claimants failed or neglected to effect service of the Claim Form on the Defendants before the expiry thereof." Further, that the Claimants made no application to this Honourable Court for an extension of the validity of the Claim Form before it expired. Thus the ex-parte application by the Claimants for Court Orders dated July 25, 2005 heard and granted by Master Lindo (Ag.) on November 10, 2005 resulting in NEM Insurance Company being served with the Claim Form and the Particulars of Claim is unmaintainable.

The Claimants/Respondents response was a *damatio in globo*. Mrs. Taylor-Wright maintains that she has a valid order from the Master, unless it is set aside by a Court of competent jurisdiction. Further, she asserts, that the Applicant is not a party to the action and cannot stand in a better position than the Defendant; that the Applicants did not apply to the Curt to be allowed to intervene. Mrs. Taylor-Wright cites the authority of **Egon Baker v Guyton Carr** Claim No. C.L. 1999/B055 heard on May 19, 29 and June 1, 2006 by Sykes, J. Again, she contends that the Applicant is trying to challenge the order of a court of concurrent jurisdiction which challenge ought properly to fall under the purview of the Court of Appeal.

The Applicant submitted that the application to set aside must be made within 14 days after the order was made. She announced that apart from the fact that the application was not supported by an affidavit, it was outside the stipulated time as prescribed by the Civil Procedure Rules.

The Applicant posits that the Intervenor does not require leave in order to proceed.

Further, it is the Applicant's contention that the Respondent action under the Fatal Accidents Act is ill-advised as it fell outside of the 3 year limitation period as prescribed.

A good starting point, I believe, is to look to the groundings of the cause of action as instituted by the Respondent/Claimant. As earlier adverted to the Claimant/Respondent confronted the Defendants/Respondents arising from the death of Daniel Burgess. The action was foregrounded on the basis of damages for negligence under the Law Reform Miscellaneous Provisions Act and the Fatal Accidents Act. Under S. 2(3) of the latter it states:

> *"Whensoever the death of a person shall be caused by wrongful act, neglect or default and the act, neglect or default is such as would if death had not occurred) have entitled the party injured to maintain an action, and recover damages in respect therof, then and in every such case the person who would have been liable, if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as amount in law to felony."*

Section 4 (1) of the said Act describes the mode and manner of commencement of an action and assessment of damages.

Section 4(1)(b) states that where the office of the personal representative of the deceased is vacant or where no action have been instituted by the personal representative within (6) months of the death of the deceased person .... and in either case any such action shall be for the benefit of the near relations of the deceased person, then says S. 4(2), any such action shall be commenced within (3) years after the death of the deceased or within such period as a court may, if satisfied that the interests of justice so require, allow . (emphasis mine). Under S.2(1) of the Law Reform (Miscellaneous Provisions) Act 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 (6) months after his personal representative took out representation.

It is to be observed that the accident occurred on the 20th day of December, 1999 whereas the Claim Form dated 10th December 2004 was not filed until that said date.

It is clear from the instant case that the action was not filed until some (4) years plus after the accident had occurred. It follows inexorably then that the Court can allow the action to be filed if it is satisfied that the interest of justice so require. I am unable to glean from the case file that any determination by the Court of that issue was made so as to justify the action being filed it being clearly outside the permissible time limit. Mrs. Taylor-Wright submitted that the action was brought under both afore-mentioned Acts and that by the already cited provisions this Court decided that the (6) year limitation period applies under the Law Reform (Miscellaneous

Provisions) Act. She relied on the case of **Administrator General v. Attorney General et al** Suit No. C.L. A-195 of 1997. Tersely put, Reckord J, relied on S.2(3) of the Law Reform (Miscellaneous Provisions) Act in stating that actions against the estate should be taken not later than (6) months after Letters of Administration is granted. (his emphasis) He went on to say that as no mention was made in that sub-section or any other about causes of action vested in her (the opposite party) (his emphasis) .... The presumption therefore, is that the common law period of (6) years should apply. Thus, the applicant having failed to show that prejudice would be occasioned as a result of the tardiness of the respondent in filing the claim within the required time, he was loath to dismiss the claim for want of prosecution.

In her partly written submissions Mrs. Taylor-Wright withdrew her submissions that, "the limitation period under the Fatal Accidents Act is now in accord with the regular (6) year period which applies to negligence matters."

Notwithstanding, she reminded that the Court has power to extend the time for filing a claim under the Act.

Further, she quoted from Halsbury's Laws of England (4th ed.) at Vol. 28, paragraph 822 in endeavouring to say that a cause of action does not accrue until there is someone who can sue and be sued. Thus she says, a cause of action fructified under the Law Reform (Miscellaneous Provisions) Act when Letters of Administration were obtained on the 1st day of March 2004 thus she had until 2010 to file the claim.

Miss Tasha McDonald urged the Court to say that the Claimant/Respondent should be debarred from using the Fatal Accident Act as any claim thereunder must be brought within (3) years. Further, no explanation was offered by way of affidavit evidence for the failure so to do within the limitation period.

She challenges the order of the Master by saying that no judgment and no statutory liability attaches to NEM Insurance Co. and thus the order was wrong. She also attacked the order for substituted service made by the Master on the basis that, among other things, the second Defendant, the driver of the first Defendant's motor vehicle is not nor was he at the material time insured with the Applicant nor was he included in the class of persons entitled to operate the first Defendants motor vehicle. She relied on Mr. Joseph Murray's affidavit in this regard.

Quaere: ought NEM be allowed to intervene?

In **Jacques v. Harrison** (1883) 12 Q.B.D 136 judgment in default of appearance was set aside on an application by the equitable mortgagees. Not dissimilarly the insurer in **Windsor v. Chalcraft** (1939) 1 K.B. 279 successfully intervened in setting aside a judgment in default of appearance. Back home in **Linton Williams v. Jean Wilson, Harris Williams and The Insurance Company of the West Indies** (1989) 26 T.L.R. the Court of Appeal held that the Insurance Company was properly allowed to intervene in setting aside a default judgment.

It seems to me that the proceedings being interlocutory and because the insurance company will be impacted by my judgment adverse to its client it must needs be allowed to avail itself of the process if so advised. By parity of reasoning it seems to me to follow that when the faulty substituted claim form was served on NEM Insurance Co. (Ja.) Ltd., it had a right to intervene to contest any irregularity, perceived or real.

Contextually, **Egon Baker v Novelette Malcolm and Steadman supra,** is inapplicable as it only dealt with the viability of serving a valid claim form on the insurance company where their clients, the insured, could not be found to effect service upon them.

In the instant case, the claim form not having being renewed the gratuitous permission granted for substituted service does not revive an already moribund state of affairs. The pre-amendment rules (September 10, 2006) is most apposite in dealing with the proposition as advanced by Miss McDonald. Rule 8.1 reads: "that the period by which time for serving the claim form is extended may not be longer than six months on any one application." Rule 8.15 permits an applicant to apply for an order to extend time within which the claim form may be served. It says that such an application --

a) must be made within the period

1) for serving the claim form prescribed by rule 8.15: or

4) the court may make an order for extension of validity of the claim form only if it is satisfied that the Claimant has taken all reasonable steps

i) to trace the defendant; and

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

One cannot fail to observe the mandatory language of 8.15(3(a), that is, the application must be made within the period. I have seen no proof and certainly none was forthcoming to show that there was any basis in the rules for extending the time within which the claim form may be served.

I have certainly not seen any affidavit evidence depicting the reasonable steps taken to trace the Defendant so as to serve on him/her the claim form and a failure so to do. Consequently, when the matter went before Master Lindo on November 10, 2005 the claim form had no life of its own. It could only have been reinforced by an application which, it granted, would have breathed new life into its being. Thus, it remained unresuscitated. Any order for

substituted service on NEM Insurance Co., could not have altered the status of the claim form as it was dead.

With due difference to all the legal submissions made it seems to me superfluous to delve into the cited cases as the Respondent being unable to scale the first hurdle cannot, as it were, complete the rest of the course.

In closing it has to be said that it is trite law that the nature of the proceedings being interlocutory that the order of the Master is or can be competently challenged before any court having concurrent jurisdiction.

That being the case it perforce follows that the order as prayed for by the applicant NEM Insurance Company (Jamaica) Ltd in terms of paragraph (1) of the Notice of Application for Court Orders dated June 8, 2006, must succeed.

The costs of this application is to be borne by the Respondent whether it be agreed or taxed.

Liberty to appeal is hereby granted to the Respondent.