IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2010 HCV 00874

BETWEEN	**THE ADMINISTRATOR GENERAL OF JAMAICA**	**CLAIMANT**
AND	**GAMAL ESSOR (Administrator Ad Litem for estate Errol Essor, deceased)**	**DEFENDANT**

IN CHAMBERS

Mr Canute Brown instructed by Brown Godfrey and Morgan Attorneys-at-law for the Claimant

Mrs Lorraine Moore – Mills instructed by Racquel Dunbar & Co Attorneys-at-law for the Defendant

Civil Procedure - Application to allow claim filed outside of the limitation period to stand – Fatal Accidents Act - Application for Summary Judgment and to strike out claim brought under the Fatal Accidents Act after the 3 year limitation period had passed

Heard: 20 February 2019 and April 11, 2019

MASTER T MOTT TULLOCH-REID (AG)

INTRODUCTION AND BACKGROUND

[1] There are two applications before me. One brought by the Defendant on January 15, 2019 seeking orders that there be summary judgment for the Defendant against the Claimant and for the Claimant's claim to be struck out on the basis that the limitation period had expired at the time when the claim form was filed. The Defendant's Application is supported by an Affidavit of Racquel Dunbar and an Affidavit of Gamal Essor, the Administrator *Ad Litem,* both filed on January 17,

2019. The other application is the Claimant's application, which was filed on February 7, 2019, presumably after having been served with the Defendant's application and affidavits in support. The Claimant's application is for the Claim filed on February 25, 2010, after the period in which an action under the Fatal Accidents Act must be initiated, to be allowed to proceed in the interest of justice, by extending the time allowed to the date of the filing of the claim.

[2] The claim has arisen because of an accident which claimed the life of Clifton Joehill. On February 6, 2016, by order of Mr A Rattray J, the Administrator General of Jamaica was appointed to bring the claim on behalf of Mr Joehill's near relations in substitution for Julian Joehill, his widow. Originally, Errol Essor was named as the Defendant but following his death in 2012, his name was removed as a party in the proceedings and his son, Gamal Essor, has been appointed Administrator *ad litem* in substitution for Errol Essor deceased, by order of the Court.

[3] Both applications before me are significant in that if the Claimant's application fails, then the Claimant who, according to Mr Brown's submissions, has had an interest in bringing the claim from the time of Mr Joehill's death will be prevented from doing so because the claim was filed after the limitation period had passed. If the Defendant is not permitted to rely on his limitation period defence, then it is clear that he too will suffer some degree of prejudice because if his substantive defence fails, then he would not have been afforded the opportunity to rely on his statutory defence.

THE LAW

Section 4(2) of the Fatal Accidents Act provides that

> *"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****". (my emphasis)*

[4] Mr Brown submits that by virtue of the wording of the statute his claim is not yet dead as the Court has discretion to extend the time within which the Claimant is to file the claim. It is clear from the statute that the limitation period is not absolute and the Court is allowed to exercise its discretion to extend the time within which the Claimant can commence his claim under the Fatal Accidents Act, if it is just to do so. It means therefore that if the Defendant's application for summary judgment and for an order striking out the claim is to be granted **solely** on the basis that the claim is filed outside of the limitation period, it must fail. Mrs Moore-Mills seemed to have realised her error having been served with the Claimant's submissions on the issue and she informed the Court that having seen the Claimant's submissions with respect to the limitation period under the Fatal Accidents Act she had to change her submissions. It is to be noted however that no Amended Application with amended grounds were placed before the Court and what was before the Court was only the application for summary judgment and striking out on the basis that:

(a) There was no valid claim before the court
(b) Section 4 of the Fatal Accident Act provides that a claim is to be made within 3 years of the death of the deceased
(c) The deceased, Clifton Joehill died on or about February 29, 2004
(d) The claim was filed outside of the limitation period and as such the Defendant seeks the court's order to strike out the claim and grant summary judgment in favour of the Defendant
(e) The interest of justice
(f) The Claimant's claim amounts to an abuse of the process of the Court.

[5] Mrs Moore-Mills' oral submissions with respect to the Defendant's application were mainly to the effect that the Claimant's application to file the claim outside of the limitation period was too late and that the delay in filing was prejudicial to the Defendant and amounted to an abuse of the process of the court. She submitted further that before the claim was filed, permission and an extension of time within which to file the claim should have been obtained. This was not done and so, she

argues, that the Claimant is not properly before the Court and his application should fail. She relies on the case of **Delkie Allen v Trevor Mesquita** (2011) JMCA Civ 36 to support her position.

[6] Mr Brown disagrees, he argued instead, relying on the reasoning of Phillips JA in the case of **Sadler v Sadler** SCCA No 57/2009 and **Fitzgerald Hoilette v Valda Hoilette and anor** SCCA 137/2011, that

> *"a claim filed without first obtaining leave is not a nullity, it is in procedural purgatory. Its validity is suspended and the issue is whether it is fair and just to expect the defendant to meet the claim."*

I agree with Mr Brown's submissions and base my decision on the reasoning set out in the **Sadler v Sadler** *case,* which examined the absoluteness of the limitation period set out in the Property Rights of Spouses Act ("PROSA). Like the Fatal Accidents Act, the PROSA allows the court to use its discretion to extend the period within which a party can initiate proceedings after the limitation period has passed. Phillips JA at paragraph 45 of the **Sadler v Sadler** judgment had this to say

> *"a claim which is filed out of time is not invalid, but cannot proceed, as an application for extension of time must be made and if granted, the time must be extended from the time allotted in PROSA to the date of the filing of the claim, for the claim originally filed to stand, or if the claim is not yet filed, to a determined date for the filing of same."*

[7] The questions then become:

(a) whether the Claimant ought to have sought permission to file the claim and seek an extension of time under Section 4 of the Fatal Accidents Act; and

(b) having not obtained leave and or extension of time prior to the filing of the claim form, whether the application for leave and/or extension of time can be subsequently made for the continuation of the claim.

[8] The answer was set out in the **Sadler** case by Phillips JA who referred in her judgment to the case of **Re Saunders**; and **Re Testro Brothers Consolidated Ltd** [1965] VicRp 4. In **Re Saunders** it was held

> *"The court had power, in appropriate circumstances, to give leave to commence proceedings under s 285(3) of the 1986 Act,* ***notwithstanding that the proceedings in question had already commenced, as it was the long recognised practice of the English courts to treat proceedings begun without the stipulated leave as not an irretrievable nullity but rather as existing and capable of redemption by the late giving of leave…"*** *(my emphasis)*

[9] After considering many cases, Phillips JA in the **Sadler** case held that the provision under PROSA, is a procedural one, which meant that any irregularity in a claim could be remedied by a subsequent order in the interest of justice, especially in circumstances where the grant of the order is under the court's control through the exercise of its discretion (see paragraph 86(iv)). Phillips JA went on to say at paragraph 86(v):

> *"The claims could be considered to be irregular or at worst, in a state of suspended validity until the application for extension of time was granted."*

[10] Like PROSA, there are no express words in the Fatal Accidents Act which says permission must be sought before the claim form could be filed. Even if permission had to be sought before the claim form was filed, filing the claim without the leave of the Court would amount to an irregularity and nothing more. Since the Claim Form in the case at bar, has been filed outside of the three-year limitation period, if it is to be regularised so that the Claimant can pursue her claim, the Court must allow an extension of time but I do not find that it is necessary for an application to be made before the claim form is filed.

[11] I must now consider whether the Claimant's application can succeed in circumstances where the Claim Form was filed three years after the limitation period had expired. Counsel for both the Applicant and the Respondent in both applications, referred me to several cases in support of their respective positions. I wish to thank both counsel for their very detailed research and the cases they provided in support of their respective positions, which assisted me in grappling with the issues before me. However, I have referred in this judgment, only to those cases which were most helpful to me.

[12] While the law is clear on the absoluteness of the limitation period of the Fatal Accidents Act, the Act does not however indicate how that discretion is to be exercised. Both Mrs Moore-Mills and Mr Brown set out the factors the Court should consider and both counsel made reference to the case **Shaun Baker v O'Brian and Angella Scott-Smith** Claim No 2009 HCV 05631 heard April 19 and May 3, 2010. The judgment of Ms Carol Edwards J (Ag) as she then was, is instructive. Edwards J was guided in her determination of the factors to be taken into account by relying on section 33 of the English Limitations of Actions Act which is similar to the Fatal Accidents Act and the case of **Thompson v Brown** [1981] 1 WLR 744 and highlighted the following factors as factors that a court should consider in deciding whether or not to exercise its discretion to enlarge time:

(a) Delay;
(b) Prejudice;
(c) Conduct of the Defendants;
(d) Extent to which the Claimant acted promptly; and
(e) The likely prospect of success.

I will consider each factor in turn *vis a vis* both applications.

Delay/Extent to which the Claimant acted promptly

[13] Mr Clifton Joehill died in the motor vehicle accident on February 29, 2004. The Claimant filed the claim form and particulars of claim on February 25, 2010. The limitation period would have expired on February 28, 2007. The claim is therefore three years late. A limitation period protects the defendant against the injustice of having to answer to a claim that is very old and which he, many years having passed, had been of the opinion, he would not have to defend. In determining whether to exercise my discretion in favour of the claimant, I am guided by Lord Griffith's statement in **Donovan v Gwentoys Limited** *[1990] 1 WLR 472; 479* who at paragraph D of the judgment had this to say

"*In weighing the degree of prejudice suffered by a defendant, it must always be relevant to consider when the defendant first had notification of the claim and thus the opportunity he will have to meet the claim at the trial if he is not to be permitted to rely on his limitation defence."*

[14] Mr Delford Morgan's sworn evidence in the form of Affidavits filed on December 3, 2015 and February 11, 2019 were put forward on behalf of the Claimant. Mr Morgan in the affidavits, states that he has had conduct of the case since 2004, as an attorney at Godfrey, Brown and Morgan, attorneys-at-law for the Claimant when he was retained by Julian Joehill, the wife of the deceased to act on behalf of her husband's estate. From as early as August 16, 2004, he wrote to Guardian Insurance Brokers. I do not see that letter exhibited to his affidavit but there are letters dated in the year 2005 to and from Guardian Insurance Brokers Limited which, do not provide me with any information about what was requested and whether the information requested was forthcoming. The only thing that tells me the communication concerned the accident is the notation made at the caption of both letters.

[15] Mr Morgan goes on further to explain the delay by stating the following reasons:

(a) the deceased's death certificate was not made available until April 2007. It is to be noted that in April 2007, the limitation period would have already expired;

(b) the Coroner's Inquest was never concluded and was adjourned *sine die* in 2008;

(c) the Administrator General did not give instructions to proceed with the claim until February 9, 2010;

(d) the Claimant's attorney also submitted that he was unable to proceed with bringing the claim as he did not have any knowledge of who was a proper party to the claim until they received a statement from Andrew Morgan dated January 27, 2010; and

(e) the Letters of Administration was also not available until September 17, 2010 when the limitation period would have expired.

[16] I accept the delay in the Coroner's Inquest as a good reason for the delay in filing the claim. A party cannot proceed against someone if he is unable to identify that person. The Coroner's Inquest is expected to provide that information in instances where there are no immediately available witnesses or results from police investigations to name a possible Defendant. The other reasons are not very strong. The availability of the death certificate would have put the Claimant in no better position to file a claim if she did not know who to sue. The Attorneys need not have waited on instructions from the Administrator General to proceed, as when the claim was filed it was filed in any event in the name of Julian Joehill, from whom their original instructions came. To say then that the Claimant was waiting for the Administrator General to be granted letters of administration would be a faulty submission. I accept that Mrs Joehill was not strictly speaking a proper party to the claim but the fact is that, it was not that the attorneys were waiting to name the correct person as claimant because they got it wrong nevertheless. Further, an order could have been sought from the court, asking that Julian Joehill be appointed administratrix for the purpose of bringing the claim (administratrix ad litem) or at the very least, directions could have been sought from the Court as to how best to proceed in the circumstances. Also of note is that the letter dated January 27, 2010 does not in my opinion give any clarification as to who was a proper party to be sued as it is vague in terms of how the accident happened. It is not clear why the driver swerved and more importantly, Mr Andrew Morgan, the witness, has stated that

"I had fallen asleep during the journey. I woke up at the point of impact".

One has to wonder if Mr Andrew Morgan is a witness of merit. Did he in fact see the swerving since he woke up from his slumber at the point of impact? I will address this question later in my judgment. I also note that the Administrator General only sought assistance from the police as to who was the driver of the ill-fated car on January 2, 2009 and although they received a response to the letter on January 27, 2009, the Claimant did not immediately file the claim then. Instead

a year passed before the claim was filed, after the witness Andrew Morgan made his statement notably on the same day.

Prejudice

[17] I am asked to balance the prejudice that the Claimant will experience in not being able to purse her claim *vis a vis* the prejudice the Defendant will experience in being unable to adequately respond to the claim because of the passage of time, the interest he will be asked to pay if his defence does not succeed and his ability to put forward evidence on his own behalf. The latter is most critical as the initial Defendant, Errol Essor is dead and has been dead since 2012.

[18] Mr Brown argues that even though the years had passed, the Defendant would always have known that there were deaths as a result of an accident involving his motor vehicle, which his insurers were investigating. Mr Brown asks in his oral submissions,

> "*what possible prejudice could Errol Essor have suffered? Lack of his ability to investigate? Inability to locate witnesses? Documents relevant no longer available?*"

These, he says, are questions I must ask myself in order to determine if the Errol Essor would have suffered real prejudice.

[19] If I am to answer these questions only, then there would appear to be no prejudice because the insurers have long tied up their investigation and Mr Essor was able to file his defence. The witness he needs would be his son Gamal Essor, who is still available. The relevant documents are supposedly still available in the form of a passport, copy pages of which he has appended to his defence. However, these are not sufficient questions. In the interest of justice there are other factors worthy of consideration and they are considered below.

[20] The claim form and particulars of claim were served on Errol Essor on April 29, 2010. It cannot be said that he has had early notice of the claim. When he was served with the documents in April 2010, he would have by this time anticipated

that a claim would not be filed against him as the limitation period had passed. For that reason, he puts forward the limitation period as a defence to the claim in his defence filed on June 10, 2010. I am of the view that in these circumstances, the prejudice to the Defendant will be significant.

Cogency of the Evidence/Likely Prospect of Success

[21] Mr Errol Essor also puts forward a defence that Mr Kongal, the driver of the ill-fated motor vehicle was not his servant and/or agent and that he could not have given him permission to drive his motor vehicle because he was outside of the jurisdiction. The absence of Errol Essor from the jurisdiction, if a court accepts that this is true, does not in and of itself negate his ability to give permission. He could have done so via the telephone or a Whatsapp message, Skype or Facetime. This defence of no servitude/agency is supported by the Affidavit of Gamal Essor, Errol Essor's son who states that it was he who allowed Mr Kongal to drive the motor vehicle and that the motor vehicle was not being driven at Errol Essor's behest or for his business but was used to transport Mr Kongal and Mr Joehill to a friend's wedding. Andrew Morgan was also a passenger in the motor vehicle.

[22] I am of the view that whatever prejudice Mr Errol Essor will suffer by a trial being held at this late stage would be minimised by the fact that his son, Gamal Essor, can give that evidence as to how Errol Essor's car came to be driven by Mr Kongal. It is also possible that Gamal's evidence may be stronger than Mr Errol Essor's evidence given the defence that was raised. Errol Essor could say, in his evidence, no more than what he said in his defence because if it is accepted that he was outside the jurisdiction and that Mr Kongal was not his authorised driver, the evidence of how the car came to be in the hands of Mr Kongal could only come from Gamal Essor who has given sworn written evidence that he is the person who lent Mr Kongal the car unbeknownest to Errol Essor.

[23] The Claimant is required to prove that Mr Kongal was the servant or agent of Errol Essor. He cannot call Mr Kongal because he is dead, he cannot call Mr Errol Essor

because he is dead. He cannot call Andrew Morgan to give evidence as to that relationship because Mr Morgan may not have been privy to it. All Mr Morgan can say is how the accident happened, and even his ability to do so is questionable.

[24] Mr Brown in his submissions has asked the court to say that the defence is insufficient as it does not satisfy the requirements of CPR 10 which says that a denial in a defence must be followed by the Defendant's version of how the incident took place. Mr Essor's allegation that he did not give his car to Horace Kongal to drive or to do any business on his behalf at the material time or at all, says Mr Brown, should be followed up with an alternative version of how the car came to be in the hands of Mr Kongal and so the defence is deficient in that regard. I am afraid I do not agree with Mr Brown. In my opinion, the pleadings are sufficient on the issue of servitude/agency. Pleadings ought not to be riddled with evidence. I am of the view as stated above that there is no more that Mr Errol Essor could have pleaded at that time.

[25] Mr Brown further submits that the issue of agency is an issue of fact, which should not be determined summarily but at trial. He relies on the cases of **Rambarran v Gurrachurran** UKPC 2 of 1969 and **Eric Rodney v Allan Werb** SCCA 136/2008 and **Allan Werb v Eric Rodney and anor** SCCA 138/2008 to support his submissions. The latter case relies heavily on the decision in **Rambarran** and so I have paid more attention to the case of **Rambarran** to assist me with my decision on this point.

[26] In the case of **Rambarran** the owner of the motor vehicle was sued in circumstances where his son had caused an accident. The Respondent's claim alleged that the son was driving as the servant/agent of his father, the Appellant. The Privy Council highlighted the fact that a person who drives the owner's vehicle is presumed to be driving as his servant or agent. However, that presumption is rebuttable on evidence being presented to the Court to the contrary. The evidence before the Court was that the son was not driving as the Appellant's agent as he was on his chicken farm on the day in question, he did not know the son had taken

the car and that at the time of the accident his son was not driving the car to carry out the Appellant's business, but was driving it for his own benefit and concerns. The Privy Council held that in those circumstances the presumption was rebutted and there was no servant or agent relationship between the father and the son when the son drove the car.

[27] Mr Brown appears to rely on the Court of Appeal's judgment (which was overturned by the Privy Council) to argue that the Defence is deficient in not setting out the true facts. It is however to be noted that the Chancellor at the Court of Appeal did not say that that evidence was to be in the defence. My understanding of the reasoning is that the Chancellor was saying that to rebut the prima facie evidence of servitude or agency the defendant who alone knows the facts must give evidence of the true facts. In Jamaica, this evidence is not set out in the pleading document but in a witness statement which then stands as evidence if so allowed by the trial judge.

[28] Mrs Moore-Mills for the Defendant has emphasized the fact that Andrew Morgan was sleeping at the time of the accident and only woke at the point of impact to say that the sole witness of the Claimant is neither reliable nor credible. I am however mindful of the fact that summary judgment cannot be granted in circumstances where a mini-trial has to be held (see the case of **Swain v Hilman** [2001] All E R 91). On the face of it, Andrew Morgan's statement could be described as being shaky but I find that Mr Morgan's evidence ought properly to be subject to cross-examination, in the appropriate forum, that is, a trial.

[29] In this case, there are issues of fact that a trial judge must determine, these include whether there was in fact an agency relationship which can support a conclusion that Mr Kongal was driving at the behest of Mr Errol Essor. The issue can only rightly be determined after the parties have been examined and cross-examined. The other issue the Court will have to consider is whether the Claimant's chief witness, Andrew Morgan, is a witness whose evidence can be relied on. A trial is the proper forum for these issues to be determined.

[30] In conclusion, although I find that there was delay in the bringing of the claim and that the delay could cause prejudice to the Defendant, I am of the view that any prejudice the Defendant will face will be lessened by the fact that the Administrator *ad litem* is able to bring strong evidence in support of the defence put forward. I also find that the evidence that both sides can bring in support of their respective positions must be tested in the usual manner at a trial, and so in the circumstances, I therefore order as follows:

(a) The Claim Form filed on February 25, 2010 and served on the Defendant on April 29, 2010 is allowed to stand.

(b) The Defendants' application for summary judgment and to strike out the claimant's claim is refused.

(c) The parties are to attend mediation on or before June 14, 2019.

(d) Given the date the claim was filed, the Dispute Resolution Foundation is to treat this case as a priority.

(e) Should mediation fail, the parties are to return for Case Management Conference on July 8, 2019 at 2:00pm.

(f) Costs in the Claimant's application to extend the time within which to file the claim in the amount of $40,000.00 are to be paid by the Claimant to the Defendant. There shall be no orders as to costs in the Defendant's application for summary judgment and for striking out.

(g) The Claimant's attorneys-at-law are to prepare, file and serve the orders made herein.