[2013] JMCA App 2

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 22/2012

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**JAMAICA INTERNATIONAL INSURANCE COMPANY LIMITED**	**APPLICANT**
AND	**THE ADMINISTRATOR GENERAL FOR JAMAICA (ADMINISTRATOR OF THE ESTATE OF ROHAN WIGGINS, ALSO CALLED RHOAN WIGGINS, (DECEASED))**	**RESPONDENT**

Jerome Spencer and Hadrian Christie instructed by Patterson Mair Hamilton for the applicant

Miss Tavia Dunn and Miss Ayana Thomas instructed by Nunes Scholefield Deleon and Co for the respondent

4, 5 February, 1 and 15 March 2013

PANTON P

[1] Since we announced our decision in this matter, I have had the benefit of reading the draft reasons for judgment written by my learned sister Phillips JA. I am

content in saying that the questions posed by my learned sister in paragraph [41] are sufficient to indicate the basis for our decision. I am of the view that every effort should be made to hasten the disposition of this matter. The reason advanced for the delay in this matter would be hilarious, were it not bordering on tragic.

PHILLIPS JA

[2] On 19 May 2011 there were two applications before Master George (Ag as she then was) in claim no 2009 HCV 05364 between the Administrator-General for Jamaica (Administrator of Estate Rhoan Wiggins otherwise called Rhoan Wiggins (deceased)), (the claimant in the suit below and the respondent herein) and Jermaine Williams. The first application was filed on 8 September 2010 on behalf of the respondent and claimed the following orders:

> "1. That personal service of the Claim Form and Particulars of Claim and all subsequent process herein on the Defendant, Jermaine Williams be dispensed with.
>
> 2. That the Claimant be permitted to serve the Defendant by serving the Claim Form and Particulars of Claim on the Jamaica International Insurance Company, his insurer's [sic] at the time of the accident.
>
> 3. That the validity of the Claim Form and Particulars of Claim be extended for a period of 6 months in order to facilitate service of same on the Defendant.
>
> 4. That the near relations of the deceased be permitted to make a claim under the Fatal Accidents Act against the Defendant for damages for negligence arising out of a motor vehicle accident which occurred on the 29th June 2004.
>
> 5. Such further order and or relief as this Honourable Court deems fit."

This application was supported by three affidavits sworn to by Alvira Wiggins, Anthony Bentley and Ayana Thomas.

[3] The other application before Master George was filed on behalf of the applicant herein, on 2 November 2010, and asked for the following orders, that:

> "1) Jamaica International Insurance Company Limited, having been served with The Claimant's Notice of Application for Court Orders dated September 8, 2010, be permitted to intervene;
>
> 2) The Claim Form and Particulars of Claim filed herein on October 14, 2009 stand struck out as having no validity."

[4] The learned master ruled as follows:

> "(1) Order granted in terms of paragraphs 1 - 4 of the Claimant's Notice of Application filed September 8, 2010.
>
> (2) Paragraph 2 of the Intervener's application filed on November 2, 2010 dismissed. (Paragraph 1 previously granted).
>
> (3) Permission to appeal granted.
>
> (4) Claimant to serve Defendant by serving JIIC within 7 days of this order and proceedings be stayed for 30 days thereafter.
>
> (5) Costs agreed to the Claimant in the sum of $ 30,000.00

[5] The notice of appeal, however, was not filed in time in accordance with the provisions of the Court of Appeal Rules (CAR) and so the applicant was forced to file an application for court orders on 9 February 2012 asking that it be permitted to file its notice of appeal within seven days (paragraph 1), with costs of the application being

costs in the appeal (paragraph 2). The application was vigorously opposed and that was the matter that was before us for determination. On 1 March 2013, we made the following orders:

> "1. Paragraph 1 of the notice of application to extend time to file notice of appeal dated and filed 9 February 2012, is granted.
>
> 2. Costs of the application to the respondent."

We promised to provide reasons for the orders granted. This is a fulfillment of that promise.

[6] The application for extension of time was based on five grounds, which read thus:

> "1. The Applicant was granted leave to appeal the decision of Master George (Ag) on May 19, 2011 in Claim No. 2009HCV 05364 but has to date not filed its Notice of Appeal.
>
> 2. The delay in filing the Notice of Appeal, which is not excessive, was due to a misunderstanding on the part of the Applicant's current Attorneys-at-Law and ought not to be attributed to the Applicant.
>
> 3. The Applicant's prospective appeal has a real prospect of success and the prejudice to the Respondent were leave granted as prayed would be minimal, particularly in a context where the Respondent was guilty of far more lengthy delays in the proceedings in the court below.
>
> 4. The overriding objective favours the grant of the orders herein.
>
> 5. This application is made pursuant to Part 1 of the Civil Procedure Rules, 2002 and Rules 1.7(2)(b) and 1.11(2) of the Court of Appeal Rules, 2002."

[7] This application was supported by three affidavits namely, those sworn to by Trevor Patterson, Jeffrey Mordecai and Treveen Little. The respondent filed an affidavit in response which was sworn to by Ayana Thomas.

The proceedings below

[8] The claim form and particulars of claim were filed on 14 October 2009, the claimant claiming in her capacity as administrator of the estate of Rohan Wiggins and on behalf of the dependants of his estate, Javian Wiggins, born on 10 December 1991 and Brittany Wiggins, born on 4 May 2002, minor children of the deceased, against Jermaine Williams damages for negligence and interest under the Law Reform (Miscellaneous Provisions) Act (LRMPA) for the benefit of the estate of the deceased. The deceased had died on 29 June 2004 at the age of 33 years, as a result of a motor vehicle accident which occurred on 29 June 2004 along the Old Harbour Road in the parish of Saint Catherine. It was alleged that as a result of the accident the deceased's life expectancy had been shortened and his estate had suffered loss and damage and had incurred expenses. There was also a claim made pursuant to the Fatal Accidents Act (FAA) brought on behalf of the said minor children, dependants of the deceased, as it was pleaded that the deceased was an affectionate and dutiful father, and by his death his dependants would have been deprived of the deceased's support. Particulars of negligence and of special damages were duly set out.

[9] Subsequent to the filing of the originating proceedings, the applicant was served the notice of proceedings, which had been filed in court as required by the Motor Vehicles Insurance (Third-Party Risks) Act. The respondent's said application referred

to in paragraph [2] herein, filed on 8 September 2010, was served on the applicant's attorneys-at-law on 23 September 2010. The application was supported firstly by the affidavit of Anthony Bentley sworn to on 29 October 2010 who deposed to his unsuccessful efforts to effect service of the claim form, particulars of claim and other accompanying documents prescribed by the Civil Procedure Rules (CPR) on Mr Williams at his known place of abode at 851 Willowdene Thruway Spanish Town in the parish of Saint Catherine. Mr Bentley stated that he had made several attempts in the month of December 2009 to locate Mr Williams but had found no-one there. He had also made several inquiries in the area up to June 2010 and had been unable to obtain any information as to his whereabouts. He therefore returned the documents to the attorneys for the respondent. This affidavit was filed on 1 November 2010.

[10] The affidavit of urgency of Alvira Wiggins, mother of the deceased, was also sworn to on 29 October 2010. It spoke to the death of her son in the motor vehicle accident and attached the police report of the accident dated 27 August 2004 and a letter of 13 January 2006 from the Jamaica Constabulary Force attaching statements of passengers in the deceased's vehicle at the time of the collision. The letter, which was written by the superintendent of police of the St Catherine North Division, in respect of the estate of Rhoan Wiggins, stated that Mr Williams had been convicted of the offence of causing death by dangerous driving for which a fine of $100,000.00 or nine months imprisonment had been imposed. The statements were from Jennifer Monteith who claimed to be the fiancé of the deceased and who had been seated in the front passenger seat of the deceased's motor car. In her statement she said that she had

seen a motor vehicle approaching the deceased's car while overtaking another car around a corner at a fast speed. There was a collision; she felt the impact of the same and could not recall anything else. She was taken to the hospital. She received injuries to her head, chest and her right leg which had been broken in two places.

[11] The second statement was from Mr Dennis Wiggins, the brother of the deceased, who was seated in the rear of the car. He too suffered injuries to his face, mouth, neck, chest, right leg and his right arm had been broken.

[12] The third statement was from Corporal Wilfred James who had investigated the motor vehicle accident. His statement contained information about the width of the road, the damaged vehicles, and his visit to the Spanish Town Hospital where he saw Miss Monteith, Mr Wiggins and the body of the deceased. He stated that he had later visited Lot 421, St General Road, Green Acres in Spanish Town where he had spoken to Mr Williams who denied that he had been overtaking at the material time. He nonetheless warned Mr Williams for prosecution.

[13] Miss Wiggins also indicated in her affidavit that the deceased's father, herself and the two minor children were the deceased's dependants. She stated that the respondent had experienced difficulties obtaining information in relation to the estate, and so was unable to instruct attorneys in the matter; also the beneficiaries had not been ascertained as there was a dispute as to who was the spouse of the deceased at the time of his death. She deposed further that she had been informed that although several attempts had been made to serve Mr Williams, they had been unsuccessful and

the time for serving the claim form had by then expired. She also stated that she had been advised that if the claim form and the particulars of claim were served on the applicant they would or were likely to come to the attention of Mr Williams.

[14] Miss Ayana Thomas, one of the attorneys at the law firm representing the respondent, indicated that the law firm had been retained on 26 June 2007. She confirmed the difficulties the respondent had been experiencing in relation to ascertaining who were the relatives of the deceased, and whether an application for administration of the estate had been made by any of the relatives. She also deposed to experiencing difficulties even obtaining information as to the employment of the deceased and particulars in respect of his income.

[15] She deposed that there had been two applications to the court, one by Miss Monteith and another by Miss Pauline Morgan asking the court to declare them spouses of the deceased. It was therefore uncertain, she said, at the time whether either or both had taken out letters of administration on behalf of the deceased, as Miss Monteith had certainly entered into settlement negotiations with the applicant in respect of a claim on behalf of the deceased's estate. She indicated that she too had communicated with the applicant concerning entering into negotiations to settle a claim on behalf of the estate, which were somewhat forestalled due to the communications from the attorneys representing Miss Monteith. Eventually, she stated, the respondent was informed that the applications for spouseship on behalf of Miss Monteith and Miss

Morgan had been denied by the court and the respondent thereafter had obtained letters of administration to administer the estate of the deceased on 18 June 2009.

[16] Miss Thomas stated that she had filed the claim form and particulars of claim on 14 October 2009 and had intended to file an application simultaneously to ask the court for extension of time to bring a claim under the FAA but had inadvertently omitted doing so, which was not discovered until much later, and was filed on 8 September 2010. She had, however, filed and served on the applicant on 16 October 2009, the notice of proceedings informing it of the filing of the claim under the LRMPA and the intention to bring a claim under the Fatal Accidents Act.

[17] Miss Thomas confirmed the difficulties the process server had experienced locating Mr Williams and deposed that the respondent and the beneficiaries could not afford the services of a private investigator to ascertain the address of Mr Williams. She therefore asserted that as the applicant was in a contractual relationship with the deceased being his insurer at the material time, it stood in a "very special position" and so was a fit and proper person on which to serve the originating process. She deposed that in her belief the proceedings were likely to come to the attention of Mr Williams. She indicated that the application to extend the validity of the claim form for service had been filed on 8 September 2010 and the claim form expired for service on 16 October 2010, pursuant to the CPR, but the claim under the LRMPA had not yet expired as the six year limitation period did not begin to run until after the grant of the letters of administration.

[18] She asked that the claim form be extended to facilitate service in the interests of justice, and stated that there would not be any prejudice to the applicant as it had known about the potential claim from as early as 2005 from the attorneys representing Miss Monteith.

[19] The applications were heard by Master George and she disposed of them as indicated previously. I will set out summarily the basis of the pertinent rulings made by her.

The rulings of Master George

[20] The learned master reviewed the competing positions of counsel in the matter particularly with regard to the interpretation of section 2(1) and (2) of the LRMPA in respect of whether the time for filing the claim had expired. The issue was whether the time for limitation of the action began to run from the cause of action, being the date of the accident (being also the death of the deceased) for a period of six years or from the date of the grant of letters of administration. The master referred to the dictum of Downer JA in the case of **Attorney General v Administrator General of Jamaica** SCCA No 11/2001, delivered 29 July 2005, where he had opined that it was the latter. He said:

> ".. Since the action is for the benefit of the Estate time begins to run from the time Letters of Administration were granted."

The contrary position, from the applicant, was that as the statute makes no specific provision for limitation of actions, the standard period of six years for actions in tort must be applicable, and run from the date of death.

[21] The learned master at first had concluded that if it had been the intention of parliament that the limitation period should commence from the grant of letters of administration, the statute would clearly have said so. She referred to two Trinidadian cases, namely, **Young and VLugter v Pegus** CV 2008-00876, delivered 17 December 2010 and **Krishnadaye Chandree v Joseph Gilbert & Another** (1996) 51 WIR 314 which she indicated had supported that position. However, as she stated, on perusal of two Privy Council cases, which were later brought to her attention, namely, **SMKR Meyappa Chetty v SN Supramanian Chetty** [1916] AC 603 (HL) and **Chan Kit San and Another v Ho Fung Hang** [1902] AC 257, she was persuaded, by the following statement, made by Lord Parker (in paragraph 9 of **Meyappa Chetty**), who gave the leading judgment in the case, that:

> "For the purpose of the English Statutes of Limitation [similar provisions to the Jamaican Statute] time runs from the accruer [sic] of the cause of action, but a cause of action does not accrue unless there be some one who can institute the action. In the case of a cause of action arising in favour of the estate of a deceased person at or after his death time will at once begin to run if there be an executor, even though probate has not been obtained… but if there be no executor, time will run only from the actual grant of letters of administration.."

The learned master stated that she was bound by that dictum. She, however, maintained that it was not necessary for her to determine at that stage of the

proceedings, whether the limitation period under the provisions of the LRMPA with regard to the action had expired. She did say, however, that based on the latterly cited cases she was of the opinion that at the time the notice of application was filed to extend the validity of the claim form, the limitation period under the LRMPA would not have expired. She was of the view, however, that as the time had clearly expired with regard to filing an action under the FAA (section 4(2)), that was of significance in exercising her discretion as to whether to enlarge time to grant an extension under that Act, and that it was also of significance in relation to whether to grant an extension of time to serve the claim form having regard to factors such as the degree of prejudice.

[22] She disagreed with counsel for the applicant that in order for the applicant to rely on its obvious limitation defence she should decline to extend the validity of the claim form and the respondent would then be forced to file a second claim in which the applicant could raise its limitation defence successfully. The master indicated that that submission was based on cases which had interpreted the statutes in England and had no relevance in this jurisdiction. There were no provisions generally here, she stated, for the court to exercise a discretion to extend the validity of the claim if the limitation period had passed. There was also no established solicitor's indemnity fund. The absence of these would influence her decision. She stated:

> "...justice required different lenses – we have to take into account that there is no possibility of a second action and inadequate or no compensation. A denial of an application to extend the life of the claim form at this stage, is likely to severely prejudice the Claimant, with little prejudice to a Defendant who has not yet been served and cannot be found to be served – a Defendant who has been convicted

> of manslaughter for the death of the deceased in the subject matter. For him this would be a mere 'windfall'."

[23] The learned master examined the evidence of the efforts made to serve Mr Williams and indicated that the matters set out in rule 8.15(4) were clear and she was satisfied that they had been complied with, having accepted the evidence of the process server, Mr Bentley. The master decided that it was obviously more prejudicial if the application to extend the validity of the claim form did not succeed as the beneficiaries were minor children; the respondent, through the claim, had been endeavouring to obtain financial relief to assist them through childhood; and the children should not be penalized for trying to find Mr Willliams, although not having been able to do so. The only claim, she maintained, which was statute-barred was the claim under the FAA, and that statute contained clear provisions for extension of time to file the claim in spite of the time bar. She therefore granted the extension of time to serve the claim and refused the application to strike it out.

[24] The learned master then examined whether to exercise her discretion to extend the time for the near relations to make their claim under the FAA, as they had been entitled to do so from the date of death of the deceased. The cause of action, she stated, was vested in them, and so the period of limitation runs from the date of death. Pursuant to the statute, the action should have been filed within three years of the death and so it was woefully late; over two and one-half years approximately. The master set out her understanding of the factors she should take into consideration based on the authorities cited, for example, inter alia, the length and effect of the

delay; the degree to which the claimant is prejudiced by the three year limitation period; the conduct of the parties since the cause of action arose; and the steps taken by the parties since obtaining advice. She stated that the court must have the evidentiary material before it in order to exercise its discretion along the lines indicated. She examined the time frame set out in the affidavits and the bases for the inaction by the respondent and its attorneys, and concluded that the explanations given were inadequate, but she stated that that was not fatal to the application.

[25] The learned master referred to the procedural error by counsel in failing inadvertently to file the notice to bring the matter under the FAA and to do so timeously, which explanation, the master indicated, she found unacceptable. However, she stated, the overriding factor to be considered was one of prejudice. On the basis of several authorities cited she concluded that evidence of prejudice ought to have been placed before her, for her consideration, and no such evidence had been submitted. She recognised that in certain cases there can be a presumption of prejudice on the basis of delay by itself, especially, she said, in circumstances wherein Mr Williams was not before the court. She referred to the evidence which had been adduced by the respondent which she found compelling, which had been documented, and the contents of which she presumed "formed part of the basis for the charge and conviction of the Defendant in the criminal proceedings where the standard of proof is much higher than in civil proceedings". The statements of Jennifer Monteith, Dennis Wiggins and Corporal James, she noted, were still available, including the police report. In her view, the issue of the evidence being less cogent as a result of the delay carried little weight. She

concluded that the prejudice against Mr Williams was slight and in any event whatever prejudice he may suffer in the lessening of the cogency of any evidence being called on his behalf by the passage of time was, she stated, "far outweighed by the preponderance of evidence against him". The learned master stated that in her view Mr Williams did not have a good case, and she was therefore unimpressed by any argument that it may cause him expense to raise it. She felt that he had lost nothing by having to meet the claim as extended if permitted, as "the evidence against him is such that he must face the consequences of his actions". In her view, the English Court of Appeal case of **Ministry of Defence v AB and Ors** [2010] EWCA 1317 which indicated that "a fair trial could still go ahead despite the passage of time" and "the assessment of the merits of a case should be carried out objectively and was a significant factor," was decisive of the point.

[26] She therefore concluded that:

(i) It was an appropriate case in which to exercise her discretion to extend time for bringing proceedings under section 4(2) of the FAA.

(ii) The delay in bringing the action was not inordinately long and though the explanations for the same were somewhat inadequate and not from the Administrator General herself or directly from some person in the department and therefore hearsay, as the application was

interlocutory and she found the evidence truthful, it was accepted. Also the applicant was aware of the potential claim on behalf of the estate for some time, having entered into discussions for settlement with attorneys on behalf of Miss Monteith shortly after the accident, and later with attorneys representing the applicant.

(iii) In her view, the likelihood of success of the respondent's claim was high, and conversely, the likelihood or prospect of success of any defence of Mr Williams was "almost non-existent". In her opinion, "There is no dispute that he was convicted of manslaughter as a result of the said motor vehicle accident which led to the demise of Rohan Wiggans. Liability does not seem to be an issue in the case…."

The application in this court

[27] The order of Master George was interlocutory in nature and permission to appeal was granted by her. However, no appeal was filed within seven or 14 days as required by the CAR. In fact, the notice of application to extend the time to file the notice of appeal was not filed until 9 February 2012. There were three affidavits filed in support of the application: all by attorneys namely, Trevor Patterson, partner of the law firm of Patterson, Mair, Hamilton, and Jeffrey Mordecai, both sworn to on 9 February 2012, and Treveen Little, legal officer for the applicant, sworn to on 2 May 2012.

[28] Mr Patterson's explanation for the delay was that he had received a telephone request from Mr Mordecai for an opinion with regard to several legal issues, the most important of which was: when did a cause of action accrue for the benefit of an estate under the LRMPA? Was it the date of the grant of the letters of administration or the date of the accident/death? He expected correspondence confirming the request for the opinion to follow this conversation, and it did. However, when the letter dated 2 June 2011 came with all its enclosures, he said that as he had been expecting it, he merely glanced at the letter, confirming that it related to the subject matter about which they had spoken. He did not read the entire letter and therefore was unaware that Mr Mordecai was not only requesting an opinion on the law but on the issue of whether to pursue an appeal on behalf of the applicant, and that if that was advised, he was requesting Mr Patterson's firm to proceed to protect the interests of the applicant accordingly.

[29] That request was couched in the third to last paragraph, on the last page of the four page letter sent by Mr Mordecai. The letter enclosed a full and comprehensive brief including the claim form and particulars of claim, the submissions in the court below, the master's reasons for judgment and several authorities that the writer thought relevant for Mr Patterson's deliberations. Despite some subsequent queries from Mr Mordecai to Mr Patterson for a response, as Mr Patterson was travelling in connection with various matters and was under, as he described, immense pressure of work, those items of correspondence appeared to have gone unnoticed. In his affidavit, Mr

Patterson confirmed that he only became aware of the full import of the request in the letter, when he spoke to Mr Spencer, another attorney in his offices, in December 2011.

[30] Mr Mordecai's affidavit confirmed most of the above and attached all the documents sent to Mr Patterson in the brief as mentioned. He indicated that in December 2011, he received communication from Mr Spencer who informed him that in reviewing the matter he had noticed that the firm had been asked to file an appeal if thought necessary. He stated that once the outstanding obligation of Mr Spencer's firm had been recognised, subsequently, through Mr Spencer's industry, the long awaited opinion was produced with expedition, and the application for extension of time to pursue the appeal was filed as the appeal was by then many months out of time. Miss Little endeavoured to explain that the applicant had been awaiting the opinion from Mr Patterson also, and was of the view that as the proceedings in the court below had not advanced much further since the ruling of Master George, not having even reached case management conference, this court acceding to the request for the extension of time to file the appeal, he stated, would not prejudice the respondent in any way.

[31] The affidavit filed in opposition to the application was sworn to by Miss Ayanna Thomas and focused on the fact that, contrary to the grounds expressed in the application before this court, the applicant had not taken issue in the court below, with regard to its ability to bring the claim form to the attention of its insured. She also deposed to the fact that in the proceedings below, Mr Williams had been represented

by Messrs Samuda and Johnson and that that firm had filed an application dealing with the same issues being raised in the proposed appeal. She stated further that the applicant's *locus standi* in the Supreme Court and in the Court of Appeal was on the basis of its subrogation rights pursuant to the contract of insurance and "accordingly it stands in the place of the Defendant at all times". She was therefore adamant that to allow the appeal to be filed out of time would be an abuse of process.

[32] I must mention at this point, that counsel for the applicant at the outset of the hearing of the application before us, indicated to the court, that the application filed on behalf of Mr Williams in the court below, on the same issues as those before this court for determination, had been withdrawn in the court below, some time before.

Submissions and analysis

[33] Counsel for the applicant submitted that this was an appropriate case for this honourable Court to grant an extension of time because:

"a. there is a good explanation for the delay which is attributable to the applicant's attorneys-at-law;

b. the applicant's prospective appeal had a real prospect of success; and

c. the interests of justice favours [sic] the grant of the extension."

Counsel indicated that he would endeavour to address each reason in turn and commenced with what he referred to as the check list of matters to be considered by the court when exercising its discretion to extend time, as set out in **Leymon Strachan v The Gleaner and Another** Motion No 12/1999, delivered 6 December

1999 and **Jamaica Public Service Company Limited v Rose Marie Samuels** [2010] JMCA App 23, namely:

> " (1) Rules of court providing a time-table for the conduct of litigation must, prima facie, be obeyed
>
> (2) Where there has been a non-compliance with a time-table, the Court has a discretion to extend time.
>
> (3) In exercising its discretion, the Court will consider-
> (i) the length of the delay;
> (ii) the reasons for the delay;
> (iii) whether there is an arguable case for an appeal; and
> (iv) the degree of prejudice to the other parties if time is extended
>
> (4) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for extension of time, as the overriding principle is that justice has to be done."

Delay

[34] Counsel submitted that the length of delay in this matter was not substantial and if the period in respect of the long vacation was not computed, throughout which time does not run for the filing of the notice and grounds of appeal, the period of six months could not be considered to be inordinately long. With regard to the reasons for the delay, counsel submitted that there was a good explanation for the delay, and it was all attributable to the applicant's attorneys-at-law. He referred to the unfortunate history in respect of what had taken place between Mr Mordecai's request of Mr Patterson and his firm in relation to their representation in this matter, and the latter's handling of the same. He referred to several authorities namely

Keith Williams v Attorney General (1987) 24 JLR 334, **Highton & Others v Treherne** (1878) 48 LJQB 167, **Collins v The Vestry of Paddington** (1880) 5 QB 368, **CVM Television Ltd v Fabian Tewarie** SCCA No 46/2003, delivered 11 May 2005, **Bentley Rose v City of Kingston Co-operative Credit Union** [2011] JMCA App 15, **Jamaica Public Service** and **Salter Rex & Co v Ghosh** [1971] 2 All ER 865 and **Jamaica Public Service** to support the contention that the litigant should not be punished for the mistake of the attorney-at law. He relied heavily on the statement made by Denning LJ in **Salter Rex** and endorsed by Morrison JA in **Jamaica Public Service**, that is, "We never like a litigant to suffer by the mistake of his lawyers."

[35] Counsel for the respondent vigorously disagreed with the contention of counsel for the applicant on the issue of delay. She submitted that the delay was inordinate and without good reason. She pointed out that the time for filing the appeal had run out long before the long vacation had commenced, so the argument with regard thereto was misconceived. She submitted that the application for extension of time to file the appeal was woefully out of time, and there had been no good explanation for the period June to December 2011 and even moreso thereafter. There was, she submitted, no explanation whatsoever for the further delay of approximately seven weeks after the opinion had apparently finally been rendered and when the matter presumably could then have been filed in court. Counsel distinguished the authorities cited to indicate that in those cases the attorney had either misunderstood the law or was unaware of the specific time frame in which

action was required, for instance, whether the appeal related to an interlocutory or final order (**Keith Williams v Attorney General** and **Jamaica Public Service**), but none involved a situation such as in the instant case, where counsel could only find the time, and considered it appropriate conduct, to glance at instructions received, and as a consequence failed to comply with the rules.

[36] In my opinion, not much needs to be said on the delay in this matter. Even if eight months could not be considered to be an inordinate amount of time, the explanation tendered by the applicant is inadequate. One would certainly have expected that senior counsel with many years of experience at the Bar would have acted with greater diligence, responsibility and expedition. I agree with counsel for the respondent that this was not a matter of mistake of the law or a misunderstanding of the rules but a careless approach to one's professional obligation. As a consequence, had the application been dependant on this alone it may not have succeeded.

Merit

[37] There were several issues raised by counsel for the applicant in an effort to support his assertion that the appeal had a real prospect of success.

<u>Was the claim form valid for service?</u>

[38] Counsel for the applicant submitted that the applicant had a real chance of success on appeal. The first basis was that the application to extend the time for service of the claim form was not made within the time permitted in the rules,

namely 12 months, as the application had not been filed with an affidavit as was required in the rules. This argument had not been made before the master but as it related to the interpretation of the rules, it could be made in this court. Counsel relied on rules 8.15(3) and 11.11(4) of the CPR in support of this submission. He recognized that the general rule is that evidence is not needed to support an application unless required by an order (11.9(1)); however, according to counsel, rule 8.15(3) requires that the application to extend the time for serving the claim form must be made within the period of time that the claim form is valid for service, must be supported by affidavit and must be served with the affidavit. In this case, he submitted, that had not been done as the application to extend the validity of the claim had been filed on 8 September 2010, and had been served on 23 September 2010 and the affidavits in support were not filed until November 2010 and served thereafter.

[39] Counsel for the respondent submitted that the application filed was within the time required by the rules, as the claim form was filed on 14 October 2009, and so the application filed on 8 September 2010 was well within the period of 12 months, of issue of the claim form. Counsel argued that initially it was the applicant's position that the application was invalid unless filed with the affidavit, then the submission had changed to say that the application was invalid if not served with the affidavit. It was initially counsel's contention in her written submissions that if the rules required that the affidavit in support had to be served within the same time period as the application the rules would have expressly said so, as has been stated in other

provisions in the CPR. This submission, which was in error, was not pursued at the hearing before us. Counsel argued instead, that prior to the application being heard, no adjudicating function was taking place, and the purpose of the affidavit is to put before the court the evidence on which the person making the application intends to rely at the hearing. In any event, counsel submitted, the documents having not been served together, could only be a procedural irregularity, as that, she maintained "would not go to the root of the application". Counsel stated that in those circumstances, rule 26.9 of the CPR would be applicable, as it is the general rule that the court ought to rectify a procedural error, especially when no particular sanction has been expressed.

[40] As this is an application for extension of time to file an appeal, and if granted, the appeal must be heard, I will say very little about the merit on the various grounds submitted. However, if certain issues in law arise on the competing contentions of the parties on the application, and those issues could provide the basis for a ruling in favour of the applicant under rule 1.7 (2) (b) of the CAR, I will mention them for clarity.

[41] Rule 11.4 of the CPR states that if an application must be made within a specified period it is made if it is received by the registry or made orally within that period. Rule 11.11(4) states that the application must be accompanied by any evidence in support. Rule 8.15(3)(a) and (b) states that an application for extension of time for serving a claim must be made while the claim form is valid and must be

supported by evidence on affidavit. Rule 8.14(1) states that if the claim form is not served within the 12 month period the claim form ceases to be valid. From the above rules, in my view, several issues arise:

- Is the application valid if filed without the affidavit?
- Is the application made when received in the registry or when served with the affidavit?
- In this case would the claim form be invalid if the application was only made when served?
- Does the service of the affidavit validate the earlier service of the notice of application?
- No specific sanction having been provided, can the failure to make the application in time be considered an irregularity and curable pursuant to rule 26.9 or does rule 8.14(i) apply, in that the failure to file and serve the application with an affidavit is fatal to the claim?
- What, if any, effect, could the true and proper interpretation of the rules with regard to the above have had on the exercise of the discretion of the learned master, if at the time the application was being heard the limitation period under the FAA had lapsed and under the LRMPA had potentially lapsed?

It appears clear to me that it is at the very least arguable that the application may not have been made within the required time frame in the rules, and therefore could have

lacked efficacy at the material time. It is also arguable, whether, if an irregularity, the defect could be cured.

Was there sufficient evidence to renew the claim form?

[42] Counsel for the applicant submitted that on a true interpretation of rule 8.15 (4)(a) no evidence had been submitted to comply with the mandatory conditions stated therein. The respondent, he argued, must show that she took all reasonable steps to trace and serve the defendant, and the affidavit evidence of Mr Bentley fell far short of that. He relied on the dictum of Rowe JA in **Muir v Morris** (1979) 28 WIR 131 to submit that exceptional circumstances ought to have existed in order to persuade the master to extend the time to serve the applicant, which did not exist in the instant case.

[43] Counsel for the respondent indicated that the evidence given concerning efforts to locate Mr Williams was reasonable, in all the circumstances, and sufficient to persuade the learned master who had properly exercised her discretion in the respondent's favour, and this court should only interfere with that exercise if she had done so in error, which was not so in the instant case. She referred to the Privy Council case of **Dr CW Thompson v Administrator-General for Jamaica (Administrator for Estate of Carol Morrison, deceased**) (1991) 39 WIR 285. Counsel submitted also that **Muir v Morris** was inapplicable as the application to renew the writ in that case was being made after the time for extending the same had expired.

[44] In my opinion, this appeared to be a matter for the exercise of the discretion of the learned master, and the applicant may therefore have a real difficulty persuading this court to interfere with her reasoning and conclusion on the same.

Ought time to have been extended to bring the action under the FAA?

[45] Counsel for the applicant submitted that the master erred in the exercise of her discretion in extending the time for the respondent to pursue her claim under the FAA as the burden lay on the respondent to prove that this was an appropriate case and there was no evidence on which the master could have exercised her discretion to conclude that the burden had been discharged. Counsel argued that the master had stated that the applicant had not shown any prejudice, but since there was no duty, he submitted, placed on the applicant to do so, the discretion of the master had been wrongly exercised. Additionally, she seemed to be of the view, he argued, that the defence of Mr Williams before the court had no merit whatsoever, but this she had concluded by taking into consideration Mr Williams' conviction for manslaughter arising out of the said incident. Counsel submitted that based on the rule in **Hollington v Hewthorn** [1943] 2 All ER 35 the evidence of the conviction was inadmissible and the master ought not to have referred to it at all in her deliberations. Further, counsel submitted, the factors that the master considered in relation to the delay in bringing the proceedings under the FAA, such as the difficulties in obtaining the grant of the letters of administration, the issue of spouseship, and the information on the deceased in respect of his financial earnings were inapplicable, as the near relations could have

filed the action on the death of the deceased, and in addition, they had in fact given no explanation for the delay in filing their claim.

[46] Counsel for the respondent countered by submitting that the master had canvassed the authorities relative to this ground and examined the possible prejudice to both parties, weighed the evidence in the balance and exercised her discretion accordingly. Her analysis, counsel submitted, was reasoned and could not be faulted.

[47] In my view, the fact that the master appeared to have taken into consideration the conviction for manslaughter of Mr Williams in the exercise of her discretion does appear to be a matter which this court can review. This court has held on countless occasions that the rule in **Hollington v Hewthorn** remains applicable to this jurisdiction (see **Samuels and Others v Davis** (1993) 30 JLR 284 and **Julius Roy v Audrey Jolly** [2012] JMCA Civ 53). How this may ultimately affect the outcome of the very detailed, comprehensive and insightful deliberations of the master on this application will be a matter for this court, but it is arguable that in the exercise of her discretion she proceeded on a wrong principle of law.

Did the master err when she ordered specified service of the claim form on the applicant?

[48] Counsel for the applicant submitted that the master erred in ordering that service on the applicant could be deemed good service as there was no evidence that service on the applicant would have enabled Mr Williams to ascertain the contents of the claim

form. Counsel for the applicant also argued that the evidential requirements of rule 5.14 of the CPR had not been met. Counsel submitted that the fact that Mr Williams had been the insured of the applicant for over six years did not mean that the documents were likely to come to his attention. There should, he asserted, be more information with regard to contact existing between the applicant and the insured, and the means used by the applicant to communicate with its insured. He relied on a case out of this court, **ICWI v Shelton Allen and Others** [2011] JMCA Civ 33, for support of that contention.

[49] Counsel for the respondent submitted that the applicant had the opportunity to place evidence before the court indicating that it would not be able to bring the documents to the attention of its insured. Having not done this, it was within the purview of the master to conclude as she did, and that was unlikely to be changed by this court.

[50] In my opinion, on this ground also, it appears to be a matter for the exercise of the discretion of the learned master, and the applicant may be hard pressed to persuade this court to interfere with the same.

Is the claim under the LRMPA statute-barred?

[51] Counsel for the applicant submitted that the master erred when she ruled that, at the time the application to extend the time for serving the claim form was made, the claim for damages pursuant to the LRMPA was not statute-barred. The competing contentions as indicated previously were firstly on the part of the applicant that a cause

of action under the LRMPA arising from instantaneous death of a deceased arises immediately before the person's death, regardless of whether the person died testate or intestate and thus the date from when the six years, as a limitation of action in tort, is to be computed is the date of death of the deceased. Several authorities were cited in this regard, namely **Morgan v Scoulding** [1938] 1 All ER 28, **Rose v Ford** [1937] 3 ALL ER 359, **Ingall v Moran** [1944] KB 160, **Young and VLugter v Pegus**, **Krishnadaye Chandree v Joseph Gilbert & Another** and **Reading Co v Koons** 271 US 58 (1926). It was submitted that the dictum of Downer JA in **Attorney General v Administrator General of Jamaica** (mentioned in para [20]) was obiter.

[52] The respondent's contention was that the period of limitation under the LRMPA commenced after the appointment of the administrator of the estate, and not from death as there was no will, and therefore no executor to speak for the testator from death. Counsel relied on the two Privy Council cases referred to earlier, namely **Meyappa Chetty** and **Chan Kit San and Another v Ho Fung Hang**. As indicated previously, on this issue the master herself seemed to have had some doubt, as she indicated that she had initially agreed with the position adopted by the applicant, but then later changed her mind having had sight of the two Privy Council cases referred to above. She did state, however, that her changed view on the law did not ultimately affect her reasoning on, and the outcome of the application. Counsel for the respondent posited that in any event the submission of the applicant was misconceived, as by 29 June 2010, six years from the death of the deceased, the claim on behalf of the estate had been filed and was valid, and the application to extend the validity of the

claim form for service had been filed and therefore made before the claim form had expired. There were therefore valid proceedings in existence, and no limitation defence had accrued. The issue, she submitted, as to whether the period of limitation under the LRMPA accrued from the date of the accident or from the date of the grant of letters of administration was therefore a moot point and irrelevant.

[53] In my opinion, several issues arise from these competing contentions, some of which appear to me to be as follows:

(i) In the light of the dictum of Downer JA in **Attorney General v Administrator General** (challenged as being obiter):

(a) When the cause of action is in tort, is there a difference, as to when time begins to run for the purposes of the Limitation of Actions Act, between a person who dies testate and a person who dies intestate?

(b) When does time begin to run for a person who dies intestate?

(ii) If the answer to i(b) is from the date of death of the deceased, was the application to extend the validity of the claim form in this case made (a) when the claim form was still valid, or (b) at a time when the action was statute barred, and the limitation defence had accrued (bearing in

mind the issues arising in paras [38]-[41] herein, in respect of the validity of the application)?

(iii) What is the effect of the learned master considering the issue of whether to extend the validity of the claim form for service, if at the time she did so, she was of the view that there were valid proceedings existing and that no limitation period had yet accrued, as the letters of administration had been granted on 18 June 2009? And would it be different if those bases were wrong in law?

(iv) Was it correct to consider the application with the understanding that the period of limitation under the LRMPA would not expire until 2015, in which case her decision, on this point in the exercise of her discretion could perhaps not be faulted?

[54] It is my opinion that it appears to be at least arguable that the learned master may have proceeded in the exercise of her discretion on a wrong principle of law, and her decision can therefore be reviewed by this court.

[55] On the basis of all that I have said in paras [34] et seq, herein, in my view, not much needs to be said on the issue of prejudice and the interests of justice as this action was brought on behalf of minor children, as the duty of the respondent is to

endeavour to protect their interests, and the action was filed in an effort to benefit them.

[56] In the light of all of the above, and in spite of the fact that I did not think that there was a satisfactory explanation for the delay, I am of the view that the proposed appeal is arguable, which is why I agreed that the application should be granted, with the applicant filing its appeal within seven days, with costs of the application to the respondent. I would recommend that the appeal be heard as early as possible in the upcoming term.

BROOKS JA

[57] I have read the draft reasons for judgment of my sister Phillips JA and agree with her reasoning and conclusion and have nothing to add.