[2025] JMSC Civ 39

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. SU2023CV02162

BETWEEN **THE ADMINISTRATOR-GENERAL FOR JAMAICA** **CLAIMANT**
(Administrator of Estate Kevin Andrew Robinson)

AND **WHITE DIAMOND HOTELS & RESORT LIMITED** **DEFENDANT**
(t/a Royalton White Sands)

IN CHAMBERS

Orania Lawrence, Attorney-at-law for the claimant
Samantha Grant instructed by DunnCox, Attorneys-at-law for the defendant

December 10, 2024 and March 31, 2025

Civil Practice and Procedure - Rule 11.11 (4) (a) - Time for service of affidavits in support of application for court orders - Whether application to be made pursuant to rule 26.1(2) (c) or rule 26.8 where there is non-compliance with order to file response to affidavit evidence - Whether order limiting reliance on further affidavits imposes a sanction to which rule 26.8 goes in aid - Rule 26.17 - considerations for variation of court orders.

Limitation of Actions Act - Section 56 - Whether exception applies to extend the limitation period for actions in negligence.

Law Reform Miscellaneous Provisions Act - Section 2 (1) - Whether time to bring claim starts to run from date of death of deceased or grant of instrument of administration - Scope of section 2(3)(b).

Fatal Accidents Act - section 4 (1) - Considerations on application to extend time to bring claim under the Act.

C. BARNABY, J

BACKGROUND

[1] Kevin Andrew Robinson (the deceased) died intestate on the 7th December 2016. An Instrument of Administration was issued to the Administrator-General for Jamaica (the Administrator-General or the Claimant) on 21st May 2018 to administer the estate of the deceased.

[2] On 5th July 2023 suit was commended with the filing of a Claim Form and Particulars of Claim. It is alleged that on or about the 21st October 2016, the deceased was electrocuted in the process of servicing the electrical plant at the Defendant resort and later succumbed to his injuries. The Administrator-General claims damages and other relief for the benefit of the dependents and near relations of the deceased pursuant to the **Fatal Accidents Act** (FAA), and for the benefit of his estate under the **Law Reform (Miscellaneous Provisions) Act** (LRMPA). The claim is grounded in negligence and/or breach of the **Occupier's Liability Act** (OLA).

[3] Also filed on the 5th July 2023 is a Notice of Application for Court Orders (the July 5 Application) whereby the Administrator-General seeks a declaration that section 56 of **the Limitation of Actions Act** is applicable to the matter, an order permitting the Claim Form and Particulars of Claim to stand as filed, and for an extension of time to bring a claim under the Fatal Accidents Act. An *Affidavit of Melissa White in Support of Notice of Application for Court Orders* (the First Affidavit of Melissa White) was also filed.

[4] In answer to the July 5 Application the Defendant filed the following evidence:

(1) *Affidavit of Allyson Mitchell in Opposition to Claimant's Notice of Application for Court Orders* sworn and filed 30th November 2024;

(2) *Supplemental Affidavit of Allyson Mitchell* sworn and filed 7th December 2024; and

(3) *Affidavit of Francine Molison* sworn and filed 6th and 7th December 2024 respectively.

[5] On the 10th December 2024 the following came on for hearing before me:

(1) the July 5 Application;

(2) the Defendant's Notice of Application for Court Orders filed 4th December 2023 for an extension of time to file a defence to the *"alleged claim … under the [LRMPA]"* in the event the July 5 Application was granted (the December 4 Application);

(3) a preliminary question raised on an order of the court otherwise constituted on 27th February 2024, as to the admissibility of two affidavits filed after the period limited by court order of 7th December 2023 for the filing of affidavit evidence in response to the affidavits filed by the Defendant; and

(4) the Administrator-General's Notice of Application for Court Orders filed 11th September 2024 and amended at the hearing, seeking relief from sanctions to enable the filing of an affidavit after the 27th February 2024 when the court ordered that the parties were not permitted to rely on any further affidavit evidence (the September 11 Application).

[6] It was agreed by both Counsel at the hearing that if the July 5 Application is granted, a consequential order permitting the filing of a defence should follow.

[7] On conclusion of arguments, decisions on the preliminary point and the applications were reserved to today's date. The decisions and reasons for them are addressed below.

THE PRELIMINARY POINT AND THE SEPTEMBER 11 APPLICATION

Applicable law

[8] In adjourning the July 5 Application on the 7th December 2023, it was ordered that

> *2. [t]he Applicant is permitted to file and serve affidavit(s) in response to the affidavits filed on behalf of the Respondent on November 30, 2023, and December 6 & 7, 2023 on or before January 5, 2024.*

[9] The order is called "the December 7 Order" hereafter. There is some dispute as to the circumstances under which the order was granted and its intended parameters based on discussions at the hearing. The December 7 Order is unambiguous in permitting responses to the Defendant's affidavits filed on the stated dates. The order, nor any other made on the occasion do not disclose that the responses should be limited only to specified averments in the Defendant's affidavits.

[10] On 20th February 2024 the Administrator-General filed the *Affidavit of Sheika Lawrence in Response to the Defendant's Affidavits* (the Initial Sheika Lawrence Affidavit) and the *Affidavit of Kevord Tullis in Support of Notice of Application for Court Orders* (the Tullis Affidavit).

[11] On 27th February 2024 consideration of the application was again adjourned, and the following order (the February 27 Order) was made.

> *4. No party shall be permitted to rely on any further affidavit evidence hereafter and as a preliminary point, this court shall hear and rule upon submissions to be made by the parties, as regards the*

respective affidavits of Sheika Lawrence and Kevord Tullis, which were filed on February 20, 2024, and whether either of those affidavits can and should properly be considered by this court, as regards the said application.

[12] On the September 11 Application the Administrator - General prays for *"relief … from sanctions that would have otherwise applied"*; a variation of the February 27 Order; leave to file and have stand the *Affidavit of Sheika Lawrence in Response to the Defendant's Affidavits* filed and served on 11th September 2024 and 11th November 2024 respectively. The application is pursued on the grounds that:

(1) the court may grant relief from sanctions pursuant to rule 26.8 of the CPR;

(2) the failure to comply with the December 7 Order was not intentional;

(3) there is a good reason for the failure to comply;

(4) the applicant has generally complied with all other relevant rules, directions and orders;

(5) the application was made as soon as possible;

(6) the granting of the orders would enable the court to deal fairly with the claim having regard to the overriding objective;

(7) the failure to comply has been remedied and the trial date can still be met if relief is granted;

(8) the applicant and the estate of the deceased would be prejudiced if relief from sanctions is not granted, and the Defendant would not be prejudiced by the grant of the relief.

[13] Ms. Lawrence indicated in oral argument that the September 11 Application relates to the order made on 7th December 2023. I do not believe it is so limited as a variation of the February 27 Order is specifically sought. The Orders are different

in nature and as I will endeavour to demonstrate below, the approach to relief also differs.

The December 7 Order

[14] The authorities cited by Ms. Lawrence in the written submissions filed for the September 11 Application concern sanctions imposed by the rules and or orders of the thus.

(1) **Victoria Meeks v Jeffrey Meeks** [2020] JMCA Civ 7 and **Kristin Sullivan v Rick's Café Holdings Inc t/a Rick's Café** 20027 HCV 03502 delivered on 31st March 2011 where the sanction of striking out was imposed by an unless order.

(2) **Oniel Carter and Ors. v Trevor South and Ors.** [2020] JMCA Civ 54, **Jamaica Public Service Company Ltd. v Charles Francis and Anor.** [2017] JMCA Civ 2 and **Ray Dawkins v Damion Silvera** [2018] JMCA Civ 25 in which sanction imposed by rule 29.11 of the CPR applied. In the **Dawkins case** an unless order also attached to the filing of witness statements.

[15] On consideration of the December 7 Order, it appears to me that rule 26.8 of the CPR was not engaged as there was no sanction imposed. The use sought to be made of the authorities do not assist the Administrator-General. It is my view that the appropriate application is one for an extension of the time to comply with the said order.

[16] It is nevertheless submitted by Ms. Grant that it is trite, that applications for extension of time which are made after time for compliance has passed must satisfy rule 26.8 of the CPR. I am unable to agree with the submission.

[17] Ms. Grant relies on the decision of Sykes, J. (as he then was) in **Lambert Carr and Anor. V Dudley Burgess** CL. C130/1997 delivered 19th April 2006. I was

determined there that rule 26.8 was implicated on an application for extension of time within which to file a defence and applies where an application is made after the time for compliance has passed. Justice Sykes reasoned that where the 42 days under the CPR for filing a defence have passed and there is no agreement by the parties for an extension as permitted by the rules, the defendant is required to approach the court for permission, with the practical effect being that the defendant cannot move forward with his defence. Justice Sykes remarked that *"if this is so, then it is appropriate to treat this as an automatic sanction imposed by the rules barring the defendant from filing his defence once the time has passed and he cannot secure agreement of his opponent for an extension of time."*

[18] I am unconvinced that the requirement for a defendant to approach the court to extend time to file a defence when the time for compliance has passed is an automatic sanction to which rule 26.8 applies.

[19] It is my view that the words "*sanction*" and "*imposed*" in Part 26 of the CPR and at rule 26.8 specifically, are entirely capable of their natural meaning. Accordingly, the term "*sanctions imposed*" means the establishment or application of a penalty. I agree that the practical effect of a failure to file a defence out time is that the defendant cannot move forward on it in the ordinary course. While that conclusion necessarily arises on the operation of the rules, it does not impose a penalty on the defendant. The rules leave open to the claimant the option to request judgement in default of defence and to the defendant, the pursuit of an application to the court to extend time, even though the time for compliance has passed.

[20] Affidavit evidence is the subject matter of the dispute here. Pursuant to CPR rule 11.9, an applicant need not give evidence in support of an application unless required by a rule, practice direction or court order. Evidence in support of an application must nevertheless be contained in an affidavit unless a rule, practice direction or court order otherwise provides. Rule 11.11 (4) (a) goes on to prescribe, as part of the suite of provisions made for service of notices of application, that they *"must be accompanied by … any affidavit evidence in support…"*

[21] It is my judgment that by use of the words *"must be accompanied"*, a temporal limit has clearly been imposed on the service of affidavit evidence in support of a notice of application. The limit is by reference to the event of service of a notice of a relevant application for court orders. Accordingly, where any such affidavit is served after the notice of application which it supports, there is non-compliance with rule 11.11 (4) (a).

[22] CPR rule 26.(1)(2)(c) permits the court, except where the rules provide otherwise, *"to extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed".* There are a plethora of decisions including from the Court of Appeal - which I believe to be correct and by which I am bound in any event - that have regarded this provision as engaged on applications for extension of time, even when the time for compliance has passed.

[23] It being my judgment that the December 7 Order simply delimits the time for filing of responses to the Defendant's affidavits without any sanction for non-compliance, and there being no sanction prescribed by the CPR for failure to file and serve affidavit evidence in time, the appropriate application to be made on the December 7 Order is an application for extension of the time within which to file affidavits in response. This is pursuant to CPR rule 26.(1)(2)(c).

[24] As expressed by McDonald-Bishop J.A. (as she then was) in **the Administrator-General for Jamaica (Administrator of Estate Andrew Wayne Lawrence, deceased) v Gary Whittaker** [2022] JMCA App 34, [26], the overarching consideration on an application to extend time is ensuring that justice is done. The court is required to specifically consider the length of the delay, the reason for it, whether there is an arguable case, and the degree of prejudice which would result to the other party if time is extended.[1]

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[1] See also **Rose Marie Walsh v Clive Morgan (Administrator of Estate of Yvonne Iona Robinson, deceased)** [2023] JMCA Civ 27, [16], [17] and [29].

The February 27 Order

[25] Outside of requiring an enquiry into the stated preliminary point, the February 27 Order imposes a limitation on the parties, that is, they *"shall [not] be permitted to rely on any further affidavit evidence".* It is applicable to further affidavit evidence in support of or in opposition to the applications then before the court. It is a tool often engaged in the management of applications or other processes which threaten to become unwieldly because of the introduction of affidavit evidence outside of the periods permitted by rules, directions or court orders.

[26] The proscription being part of the broader order requiring the court to enquire into whether the Administrator-General should be permitted to rely on affidavit evidence filed outside of the time permitted by the December 7 Order, it might appear to be an *in tempore* imposition of a penalty for failing to comply with the order. I am not inclined to view the February 27 Order in that way however as the limitation is expressly applicable to both parties, without any suggestion that the Defendant had engaged in conduct to which a penalty could attach.

[27] The Administrator-General wishing to rely on further affidavit evidence, she is obviously impeded by the February 27 Order. An application for its variation has appropriately been made.

[28] The September 11 Application does not appear to contain grounds for pursing the application for variation, and no authorities were cited or submissions made in this respect. That notwithstanding, pursuant to rule 26.1(7) of the CPR, the power under the Rules to make orders also includes the power to vary or revoke those orders. In exercising the power to vary, regard is to be had to whether there was a change in circumstances since the making of the order, and whether the affidavits sought to be introduced as a result of the changed circumstances are relevant. If it is determined that the affidavits are not relevant, the order should not be varied

but if they are, the court is then required to consider whether they are so prejudicial to the respondent, that they should not be admitted.[2]

The preliminary point

[29] The full name of the person before whom the Initial Sheika Lawrence Affidavit was sworn does not appear on the document. It therefore fails to comply with the requirement imposed by rule 30.4(1)(d) of the CPR for the making of affidavits. Its contents are inadmissible as affidavit evidence in my view. In any event, there is no application to the court for an extension of the time within which it is to be filed and served.

[30] As its name suggests and its contents disclose, the Tullis Affidavit is in support of the application for court orders. It is entirely outside of the scope of the December 7 Order which limited the Administrator-General to filing responses to the Defendant's affidavit evidence filed ahead of that date.

[31] While there is no sanction in the rules for failing to serve supporting affidavit evidence in time, and there was no order in imposing a sanction, the Administrator-General failed to comply with the temporal requirement under CPR rule 11.11 (4) (a). The July 5 Application which the Tullis Affidavit supports was served on the Defendant's Attorneys-at-law on 28th July 2023. The Tullis Affidavit did not accompany it. An application to extend the time to file and serve the Tullis Affidavit was therefore required, but no such application has been made.

[32] Further and in any event, if there was an application for extension of the time within which to file the referenced affidavits, I would refuse it. The Initial Sheika Lawrence Affidavit was filed and served in excess of forty (40) days after affidavits in response to the Defendant's affidavit were ordered to be filed; and the Tullis

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[2] See for example **SL v KS** [2024] JM Civ 4.

Affidavit was filed approximately seven (7) months after the service of the July 7 Application which it was filed to support. The affidavits were also filed and served after the Defendant filed and served its submissions opposing the July 7 Application, in which a number of serious deficiencies with application were addressed. When these deficiencies are considered in light of the contents of the affidavits, the allegation - which has in fact been made - that the affidavits were filed to plug evidential gaps identified in the Defendant's written submissions is warranted.

[33] Rules of court and court orders are to be complied with, accordingly, non-compliance, except of a minimal kind must be explained. Non-compliance with the December 7 Order cannot be regarded as minimal in the circumstances indicated in the preceding paragraph.

[34] While the absence of a good reason for non-compliance does not disentitle an applicant to the court's favourable exercise of its direction to grant and extension of time, some reason must be given.[3] Absent some evidence explaining non-compliance which prompts the court to give further consideration to an application, a decision to extend time could not escape being branded as arbitrary.

[35] An explanation for the failure to comply with the December 7 Order and CPR rule 11.1(4)(a) as relevant, was required. No explanation has been provided to explain the delays in filing and serving the Initial Sheika Lawrence and Tullus affidavits and in its absence, no indulgence is granted by the court.

[36] In these premises the preliminary point is determined in favour of the Defendant. The Administrator-General is not permitted to rely on the Initial Sheika Lawrence Affidavit and the Tullis Affidavits filed on 20th February 2024 in support of the July 5 Application.

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[3] See **Peter Haddad v Donald Silvera** (JMCA, 31 July 2007).

The September 11 Application

[37] As earlier indicated, CPR rule 28.6 is not implicated to require the court to consider the application for relief from sanction.

[38] Considering the orders sought on the application and Ms. Lawrence's submissions, the relief sought in respect of the February 27 Order has as its objective a variation. This would permit the *Improved Sheika Lawrence* Affidavit filed and served on 11th September and 11th November 2024 respectively to stand as filed and served and enable the Administrator-General to rely on it in pursuit of the July 5 Application.

[39] In written submissions filed on 12th September 2024, Ms. Lawrence makes reference to the Initial Sheika Lawrence Affidavit in explaining the basis for the September 11 Application. She indicates that the occupation of the affiant was omitted due to inadvertence in her initial affidavit. It suffices to say for now, that it appears to me that the appropriate step for addressing the omission would be the filing of a supplemental affidavit by the affiant herself, explaining and rectifying the omission. There is no such affidavit.

[40] On a reading of the Improved Sheika Lawrence Affidavit, it is discovered - contrary to Ms. Lawrence's submission that only the omission of the affiant's occupation is rectified - that the affidavit goes further. It appears to be witnessed by a different person altogether whose full name now appears in the jurat to the affidavit, as required by rule 30.4(1)(d) of the CPR. The admissibility defect on the initial affidavit is accordingly cured. It also now exhibits the police report, and the Notice of Discontinuance filed in a claim numbered SU2019CV04836. While these documents were stated as being exhibited in the initial iteration of the affidavit, they were not in fact exhibited.

[41] The first condition which must be satisfied on an application for variation of a court order is that of a change in circumstances since the making of the applicable order. The affiant's occupation must have been known to her at the time of the initial

affidavit. On perusal of the copy police report and Notice of Discontinuance exhibited to the affidavit, they were received by the Administrator-General's Department and filed on behalf of the Administrator-General on 13th June 2019 and 1st March 2023 respectively. No change in circumstance since the making of the order of February 27 is evident on the affidavit itself, nor has any been disclosed in the *Affidavit of Melissa White in Support of Notice of Application for Court Orders* sworn and filed 11th September 2024 (the Second Melissa White Affidavit), which goes in aid of the application of the same date. No variation is permitted in the circumstances.

[42] Additionally, the Improved Sheika Lawrence Affidavit filed 11th September retains its character as an affidavit in response to the Defendant's affidavits filed on 13th November and 6th and 7th December 2023. It ought to have been filed on or before 5th January 2024 pursuant to the December 7 Order. There would be an inordinate delay of over eight (8) months in complying with the court order. The Second Melissa White Affidavit provides no explanation for the delay. For reasons already stated in concluding that the Administrator-General is not permitted to rely on the affidavits filed on 20th February 2024, reliance on the Improved Sheika Lawrence Affidavit is also not allowed.

THE JULY 5 APPLICATION

[43] The First Affidavit of Melissa White was filed in support of this application. The full name of the person before whom it was sworn is not present. It fails to comply with CPR rule 30.4(1)(d) and is inadmissible as affidavit evidence. If I am wrong in so concluding, and having heard arguments on the substantive application, I will proceed to consider its merits.

Applicability of section 56 of Limitation of Actions Act

[44] The claim which the Administrator-General seeks to pursue is grounded in negligence and breach of the OLA. It is clear form a reading of section 2 of that Act that it is intended to replace the rules at common law which regulate *"the duty which an occupier owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them."* The foundation of that duty is the common law tort of negligence.

[45] It should be regarded as well settled in this jurisdiction that the limitation period for actions sounding in negligence is six (6) years. The deceased having died on 7th December 2016, in the normal course, a claim in negligence would become statute barred on 7th December 2022. The claim was not filed until 5th July 2023.

[46] Pursuant to section 18 of the **Administrator-General's (Amendment Act), 2015** (the 2015 Act), the Limitation of Actions Act (the Limitation Act) is amended to include this provision.

> *56. Notwithstanding the provisions of this Act, the calculation of any period of limitation fixed for an action brought by an administrator or executor in respect of an estate shall not include a period of one year, commencing on the date of death of the deceased.*

[47] The question which arises in the circumstances of this case is whether the exclusion of a period of one (1) year - commencing on the date of death of the deceased - in calculating the limitation period applies to actions in negligence. Ms. Lawrence relies on section 46 of the Limitation Act in contending that it does and Ms. Grant submits that limitation periods to which section 56 apply are those expressly set out in the Limitation Act, which does not prescribe a limitation for actions in negligence. There is merit in Ms. Grant's submission.

[48] Section 46 of the Limitation Act makes provision for limitation of actions of debt or cases grounded upon simple contract. Among other things not immediately relevant, it provides that acknowledgments or promises by words alone are

insufficient evidence in our courts of a new or continuing contract by which the cause would be taken outside of the **United Kingdon Statute 21 James I. Cap. 16** *"which has been recognized and is now esteemed, used, accepted and received as one of the statutes of this Island…"*

[49] While the section recognizes that **United Kingdon Statute 21 James I. Cap. 16** has been received and used here, the current expression of the automatic reception of the statute in this jurisdiction is found at section 41 of the **Interpretation Act** which states:

> *All such laws and Statutes of England as were, prior to the commencement of 1 George II Cap 1, esteemed, introduced, used, accepted, or received, as laws in the Island shall continue to be laws in the Island save in so far as any such laws or statute have been, or may be, repealed or amended by any Act of the Island.*

[50] As observed by Rowe, P in **Lance Melbourne v Christina Wan** (1985) 22 JLR 13, which was cited by Ms. Grant, the Limitation Act does not contain provisions limiting the time within which actions in tort may be brought and, in that regard, one must have recourse to **United Kingdon Statute 21 James I. Cap. 16**. Certain peculiarities in the UK statute caused some disquiet in that case about whether an action in negligence was an action upon the case, and it was determined that over the years our courts have so considered the action, to which the six (6) year limitation period applies.

[51] It is my view that the exception at section 56 of the Limitation Act does not apply to limitation periods which are fixed outside of the Act. Otherwise, I can see no reason for the legislature prefacing the words *"provisions of this Act"* with the word *"notwithstanding*", which is capable of bearing its ordinary signification *"in spite of"*. It is a propositional phrase that provides the context within which the exception is to apply.

[52] There is no limitation period fixed for actions in negligence in the Limitation Act, it is accordingly my judgment that section 56 and the formula for calculating periods

of limitation for actions brought by an administrator or executor does not apply to extend the limitation period in the instant case.

Status of the Claim under the LRMPA

[53] It was also contended by Ms. Grant that the claim under the LRMPA is statute barred. She relies on section 2(3)(b) of the said Act and submits that the Administrator-General's ability to bring the claim expired on 21st November 2018, which is six (6) months from the date of issue of the Instrument of Administration on 21st May 2018. I do not agree with the submission.

[54] Section 2(3)(b) of the LRMPA provides states:

> *(3) No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived* ***against*** *the estate of a deceased person, unless either –*
>
> > *(a) … or*
> >
> > *(b) the cause of action arose not earlier than six months before his death and proceedings are taken in respect thereof not later than six months after his personal representative took out representation.*
>
> ***[Emphasis added]***

[55] The section prayed in aid applies to causes of action which survive *"against"* the estate of the deceased and not causes of actions which *"vest in"* his estate. The section does not apply in this case.

[56] Section 2 (1) of the Act provides that

> *Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit*

> *of, his estate: Provided that this subsection shall not apply to causes of action for defamation.*

[57] Ms Lawrence relies in her submissions on the decision of Master Mott-Tulloch-Reid (as she then was) in **Daedriel Hayles (Administratrix in the estate of Rojae Romario Wright, deceased) v the National Irrigation Commission Limited** [2021] JMSC Civ 6. The learned Master felt herself bound by the Court of Appeal decision in **Attorney General v Administrator General of Jamaica (Administrator of the Estate Elaine Evans, deceased)** Supreme Court Civil Appeal No 11 of 2001, delivered July 29, 2005. In the latter case the limitation period of six (6) years for torts was stated as being applicable to actions which vested in the administrator of a deceased's estate, and that time begins to run from the time of the grant of letters of administration.

[58] The statement of Downer JA in the **Estate Elaine Evans case** relative to commencement of time has been said to be obiter on occasion, but whether or not it is to be so regarded is immaterial. It is my view that in the absence of an express limitation period under the LRMPA, the approach to calculation of time is well grounded. To conclude otherwise falls afoul of what McDonald-Bishop, J.A. (as she then was) aptly described in **Delroy Officer v Corbeck White (In her capacity as representative of the Estate of Berthram White, deceased)** [2016] JMCA Civ 45 [86] as

> *… a general principle of law that operates without exception. [T]that an administrator derives his title to sue solely from the grant of letters administration…*

This followed her pronouncement at [85] that *"… it is settled law that an administrator's right to bring proceedings runs from the date of the grant of the letters of administration …"*

[59] In these circumstances it is my judgment that the Administrator-General had six (6) years from the issue of the Instrument of Administration on 21st May 2018 to bring the claim grounded on a tort of negligence for the benefit of the deceased's

estate. The limitation period under the LRMPA would have accordingly expired on 21st May 2024. The claim was filed on 5th July 2023 within the limitation period for claims under the Act.

Application to extend time under the FAA

[60] In accordance with section 3 of the Act, actions are maintainable and damages recoverable against any person who causes the death of another. Such an action is required to be brought by the personal representative of the deceased person for the benefit of his near relations pursuant to section 4(1) and is to commence within three (3) years after the death of the deceased person or within such longer period as the court may allow, if the interests of justice require.

[61] It is submitted by Ms. Lawrence that the application for extension of time to bring a claim under the FAA should be granted for reasons appearing in the affidavit evidence, and in accordance with the overriding objective and the CPR.

[62] At the hearing, Ms. Grant largely relied and stood on the Defendant's submissions filed on 7th December 2023. It is conceded there that this court has the discretion to extend the time for filing a claim under the FAA but it is submitted that it should not be exercised in favour of the Claimant. I agree with the submission.

[63] Among the authorities cited by Ms. Grant is the **Estate Andrew Wayne Lawrence case** in which **Shaun Baker v O'Brian Brown and Angella Scott-Smith** Supreme Court, Jamaica, Claim No 2009 HCV 5631, 3rd May 2010 was cited with approval by McDonald-Bishop J.A..

[64] In **Shaun Baker**, C.C. Edwards, J (Ag.) (as she then was) observed that the FAA does not say how the discretion to enlarge time to make a claim under the Act should be applied. Guided by section 33 of the English Limitation of Actions Act and the decision in **Thompson v Brown** (1981) 1 WLR 744 HL, the following were

distilled as relevant considerations for the court on an application to extend time. I am guided by them.

(1) The length and reason for the delay on the part of the claimant;
(2) the cogency of the evidence, i.e., "how does the delay affect the evidence and the ability to defend";
(3) the conduct of the defendants after the cause of action arose;
(4) the extent to which the claimant acted promptly and reasonably once he knew that the act or omission of the defendant to which death is attributable might be capable of giving rise to an action;
(5) the possible prejudice; and
(6) the likely prospect of success if the claim were to proceed.

[65] While the above factors are to be considered, consistent with the approach generally taken to applications for extension of time, McDonald-Bishop, J.A. observed that the overarching consideration is that justice is done.

[66] In the **Estate Andrew Wayne Lawrence case,** issue was taken with the quality of the evidence on which the applicant was asking that the court to exercise the discretion to extend time. In this regard McDonald-Bishop, J.A. remarked, [22]:

> *In **Jenetta Johnson-Stewart v Attorney-General of Jamaica**, the case cited by the respondent, Jones J at para. [12] of his judgment correctly observed:*
>
> > *"[12] Undoubtedly, this court has a discretion to extend the time under the Fatal Accidents Act beyond the three years. However, …there must be a good reason or explanation for the delay together with evidence on which the court can rely to exercise its discretion. In addition, this evidence should be relevant and admissible."*

[67] Ms. Grant submitted as a preliminary point that no proper affidavit of merit accompanied the application for extension of time and in consequence, there is no proper application before the court. She relies on the following footnote appearing in **Aston Wright v the Attorney General of Jamaica** [2022] JMSC. Civ 25.

5. *Rule 11.9(2) requires all notices of application to be supported by affidavit evidence unless a rule, order or practice direction provides otherwise. Applications are not properly before the court until the supporting affidavit is filed. Applications to extend the time to file a defence have a further requirement that the supporting affidavit must include evidence outlining the defence to satisfy the requirement of a defence of merit and exhibit the draft defence. The affidavit must also explain any delay. While the required evidence need not be in one affidavit, all of the evidence must be before the court for the application to be properly before the court for the application to be heard.*

[68] I agree with the observation that applications for extension of time to file a defence are to be supported by affidavit of merit. To the extent that the footnote suggests that all required evidence must be present for the application to be regarded as properly before the court for consideration - I am unable to agree with it. Unless a rule, order or practice direction requires evidence to be filed in support of a notice of application for court orders, it is my view that an application can be heard whether or not there is evidence of all the material required to be considered by the court on the particular application. The sufficiency or otherwise of the evidence presented goes to whether the conditions required for the relief sought are satisfied and not whether the application can be heard by the court. An applicant who makes an application without relevant and material evidence which is necessary to obtain the relief claimed must be taken to accept the risk that his application will fail, unless a discretion is exercised to permit an opportunity to remedy the defect.

[69] No discretion having been sought or exercised by me on the 10th December 2024 to adjourn or part hear the application to facilitate the filing of further affidavits, I accordingly proceed with the consideration of the application.

[70] The First Affidavit of Melissa White was filed and served in support of the application. It is submitted by Ms. Grant that it contains irrelevant evidence, inadmissible hearsay and that certain of its paragraphs should not be allowed by the court in exercise of its power to control evidence.

[71] She goes further to submit that a fact is proved by original evidence not hearsay evidence and accordingly contends that paragraphs 5, 8-10, 12, 14, 16 -18 of the First Affidavit of Melissa White are irrelevant. Reliance is placed on **the Attorney General of Jamaica and Anor. v Shelton Sortie** [2023] JMCA App 1, [52] where McDonald-Bishop, J.A. cited with approval this extract from **Halsbury's Laws of England/Criminal Procedure**, Volume 28 (2021), para. 622(17).

> *"A fact is proved by original evidence when it is proved by oral testimony in the proceedings from witnesses who have first-hand knowledge of that fact. If a witness lacks first-hand knowledge (that is, if he did not personally perceive or experience the fact or event in question, but has merely heard or read about it through statements made by others) any evidence he purports to give on that matter will be second-hand evidence and thus hearsay. (footnotes omitted)."*

[72] Those general principles are incontrovertible, but they are not without exceptions. CPR rule 30.3 states:

> *(1) The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.*
>
> *(2) However an affidavit may contain statements of information and belief –*
>
> *(a) where any of these Rules so allows; and*
>
> *(b) where the affidavit is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application, provided that the affidavit indicates-*
>
> *(i) which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief; and*
>
> *(ii) the source for any matters of information and belief.*
>
> *(3) …*

[73] In **Jamaica Public Service Company Limited v Charles Vernon Francis and Anor.** [2017] JMCA Civ 2, [21] Edward, J.A. (Ag.) (as she then was) stated that

> *Hearsay evidence is generally inadmissible and can only be admitted based on the exceptions that exist at common law, by statute or by virtue of the CPR. Rule 30.3(2) of the CPR sets out the conditions that must be satisfied before a judge may admit hearsay evidence contained in an affidavit. If these conditions are not satisfied the court should not exercise its discretion to admit such evidence.*

[74] Having regard to the nature of the application, some statement of information and belief may properly be contained in affidavit evidence. Ms. White avers in paragraph 1 of her First Affidavit that she is an Attorney-at-law employed to the Administrator-General's Department and is authorised to swear the affidavit on behalf of the Administrator-General. She then goes on to say at paragraph 2 that her *"knowledge of the facts and matters deponed to [in the affidavit] is derived from [her] perusal of the Department's file and that as such, the facts, and matters, insofar as they are not within [her] knowledge are true to the best of [her] knowledge, information and belief."*

[75] In the **Jamaica Public Service case** the affidavit of an attorney-at-law engaged by the company and who was authorized to swear the affidavit on its behalf was found to be admissible, notwithstanding that the affiant failed to indicate that matters averred to were within or outside his personal knowledge. This was in circumstances where he stated that the facts and matter in the affidavit were taken from the company's records. It was recognized that the company could only explain its default through its officers and the information from the company's records were accordingly determined to be in the company's own knowledge. The court concluded that no question of hearsay arose. I can see no reason why the reasoning applied in respect of a company cannot also apply to the office of the

Administrator-General which is established by statute and relies on the engagement of officers of many kinds for the discharge of its functions.

[76] That said, a number of the impugned paragraphs are legitimately challenged by Ms. Grant, to which Ms. Lawrence offered no response. I will address the paragraphs in turn.

(a) In paragraph 5 it is averred that the matter was referred to the Department on 30th January 2017 by a named brother of the deceased. Delay and promptitude being matters for consideration on the application to extend time, the evidence is relevant and admissible.

(b) To the extent that paragraph 8 speaks to a claim numbered SU 2019 CV 04836 being filed on 5th December 2019 and served on the defendant, which was subsequently withdrawn, the paragraph is relevant in light of the provision under the FAA that only one action can be brought thereunder in respect of the same subject matter of complaint. It also provides some evidence as to the reason for the delay in filing the instant claim.

(c) Paragraphs 9, 10, 12, 14, 16 and 17 contain conclusions as to law, and matters which are properly reserved for submissions and are not admissible evidence. They are that:

i. the application seeks a declaration that section 56 of the Limitation Act is applicable;

ii. the application seeks an extension of time to bring a claim under the FAA as the deceased died on 7th December 2016 and the matter is outside of the limitation period in the Act;

iii. the time to bring a claim under the LRMPA has not expired by virtue of section 56 of the Limitation Act;

iv. the *"application has been filed as soon as was reasonably practicable",* without the evidence relied on for this conclusion;

v. the *"applicant's delay in filing the Claim Form and Particulars of Claim is not intentional and no disregard for [the] court was intended",* without the evidence relied on for this conclusion*;* and that

vi. the Claimant has a realistic prospect of success based on reports as to how the deceased came to be electrocuted which resulted in the death of the deceased, without the evidence relied on for this conclusion.

(d) It is averred at paragraph 18 that the Claimant through her attorneys-at-law has interviewed witnesses willing to participate in the proceedings if the extension of time is granted and so the claimant will not waste judicial time in advancing the matter through the court. Without more, it is difficult to see the relevance of this averment having regard to what the court is required to consider on an application to extend time under the FAA.

Length and Reason for delay

[77] On the basis of the below statement from McDonald-Bishop J.A. in **Estate Andrew Wayne Lawrence case** at [24], Ms. Grant referred to the claim numbered SU 2019 CV 04836 which was filed on 5th December 2019 against the defendant (the First Claim) but later withdrawn, and contends that that claim was also filed outside of the limitation period under the FAA as time began to run from *"the date of the incident on October 21, 2016 as alleged by the Claimant]"*.

> *…[T]ime with respect to the limitation period under the FAA would not have been suspended in abeyance pending a report being made to the applicant. Time would have started to run for the initiation of proceedings from the date of the alleged incident … the issue of delay should not be limited to the actions of the applicant but should be extended to the delay*

occasioned by the persons who would have reported the matter to the applicant after the period had elapsed…

[78] I do not believe reference to *"the alleged incident"* by McDonald-Bishop J.A. is in reference to an occurrence other than death, as no right of action arises under the FAA except that there is a deceased person. Reliance on the dicta for the contention that time began to run under the FAA on 21st October 2016, the date of the alleged electrocution, is therefore misplaced. The First claim would have been filed within the three (3) year limitation period under the FAA.

[79] Returning to the issue of delay in the filing of the instant claim, it is the Claimant's own evidence that a default judgment was entered against the Defendant on 6th May 2020 in the First Claim. The Defendant applied to set aside the said judgment by notice of application for court orders and supporting affidavit on 26th January 2023 on the ground that the default judgment was erroneously entered as the claim was not served. It appears that the Claimant conceded to the complaint because the claim was withdrawn on 1st March 2023, prior to the hearing of the Defendant's application. This is the only evidence presented which hints at the reason for the delay in filing the instant action and appears to be attributable to the Claimant in its entirety. The Defendant was well within its right to apply to set aside an irregularly obtained default judgment. The circumstances surrounding the discontinuation of the First Claim does not provide a good reason for the delay in making the instant claim.

[80] Further and in any event, four (4) months passed between 1st March 2023 when the First Claim was discontinued and the filing of the instant claim on 5th July 2023. Four (4) months is generally regarded as inordinate and is even more so in claims of the sort here. This delay is unexplained.

[81] In these circumstances the Claimant has failed to provide any, or any good and sufficient reason for the delay of over six (6) years in bringing a claim under the FAA.

Cogency of the evidence

[82] The claim alleges that the deceased was contracted at the material time by the Defendant and or its authorised agents or servants at the Defendant's property, for the purpose of conducting electrical installation work; that an agent or servant of the Defendant was responsible for a breaker room before the deceased commenced electrical installation; that the deceased was instructed by the agent or servant that the power lines had been turned off and so proceeded to conduct the electrical works; that while so engaged, the *"breaker reportedly exploded";* and that as a result of the explosion the deceased received burns for which he underwent treatment at hospital, where he succumbed to his injuries. Negligence of the Defendant, its servant and/or agent is alleged, and negligence under the OLA. Among the particulars of negligence are allegations that there was failure to provide a safe system and place of work. The claimant claims general damages, special damages and costs.

[83] Outside of the averment in the First Affidavit of Melissa White that the Claimant through her attorneys-at-law has interviewed witnesses who are willing to participate in the proceedings, the relevance of which I earlier doubted, the evidence or likely evidence on which the Claimant intends to rely in proof of the claim is not before the court. The court is unable to assess how the delay will affect the evidence if the claim is permitted.

[84] That notwithstanding, it is the Defendant's evidence that it became aware of a claim in November 2022 on receipt of an assessment notice in respect of the default judgment entered on the First Claim. Since then, both the Defendant and its insurers have been searching but have been unable to locate any record of the Claimant's alleged employment or other contractual relationship between the deceased and the Defendant, or of any alleged incident on or around October 2016. This, together with the non-service of the First Claim, the passage of almost seven (7) years between the alleged electrocution and the claim, and the failure to

bring the claim within the limitation period are relied on by the Defendant in contending that it is irreparably prejudiced in responding to the claim.

[85] The Defendant's evidence in these regards is unchallenged, and there is no basis on which to doubt it. Having regard to the allegations upon which the claim is premised and the evidence of the Defendant that it is unable to locate records in respect of the incident alleged to give rise to the claim, I find that delay has affected the Defendant's ability to defend the claim.

The Conduct of the Defendant

[86] There is no evidence before the court of any conduct on the part of the Defendant after the cause of action arose for which there can be any criticism.

Promptitude

[87] No evidence has been provided to the court as to the point at which the Claimant knew that the alleged acts or omissions of the Defendant - to which she attributes the death of the deceased - was capable of giving rise to an action. I am therefore unable to make an assessment that she would have acted promptly and reasonably in bringing the First Claim.

[88] Further and in any event, there was an inordinate delay of four (4) months between the withdrawal of the 1st Claim and the filing of the instant claim. There is no explanation for that delay.

[89] In these circumstances, I am unable to find that the Claimant acted with promptitude in the bringing of the claim which is the subject of the July 5 Application.

Prejudice

[90] It is Ms. White's evidence in her First Affidavit that the deceased died leaving a spouse and three children. There is obvious prejudice to the Claimant if the application is refused as she will be unable to pursue a claim under the FAA for the benefit of the near relations of the deceased on account of a procedural defect.

[91] In addition to the obvious prejudice which attends on the deprivation of a statutory limitation defence, Ms. Grant also submits that the Defendant will be prejudiced and cannot be compensated by an order for costs if the application is granted, on account of the evidential deficiencies on the July 5 Application; its inability to locate records to respond to the substantive claim; and the fact that it has had to expend costs in the defence of the First Claim.

[92] While I consider it prejudicial that the Defendant would have incurred costs to defend the First Claim which was discontinued by the Claimant, following the filing of the application to set aside the default judgment, I believe prejudice of this kind is remediable by an order for costs. While the filing and service of the Notice of Discontinuance in the First Claim brought it to an end, pursuant to CPR rule 37.5 (3)(b), proceedings relating to costs are not affected.

[93] The deprivation of a statutory defence which would follow the grant of the application is also a legitimate concern but that alone cannot operate to refuse the application as that prejudice is implicit in the FAA not only fixes the limitation period but also provides the court with the discretion to extend time where the interests of justice require. Coupled with the Defendant's inability to locate records to respond to the substantive claim however, it is my view that there is very real prejudice which cannot be remedied by an order for costs.

Likely Prospect of Success

[94] It is submitted by Counsel for the Defendant that the Claimant has not established that there is meritorious claim which is likely to succeed. I agree with the submission.

[95] Where an application is made to the court which requires consideration of the likely prospect of success of a claim, the application is to be supported by an affidavit of merit which discloses the facts which are constitutive of the claim. Absent such an affidavit, the court is not properly placed to consider the claim's prospect of success. The First Affidavit of Melissa White filed and served in support of the July 5 Application does not disclose any such facts. In the result, I am unable to conclude that the claim under the FAA has a likely chance of succeeding. The Defendant ought not to be required to respond to such a claim.

[96] In all the foregoing premises, it is my judgment that the interest of justice is served by refusing the July 5 Application for an extension of time to bring a claim under the FAA.

ORDER

1. The orders sought on the Notice of Application for Court Orders filed on 11th September 2024 are refused.

2. The preliminary point is determined in favour of the Defendant and in consequence the Claimant is not permitted to rely on the Affidavit of Sheika Lawrence in Response to the Defendant's Affidavits, and the Affidavit of Kevord Tullis in Support of Notice of Application for Court Orders, both filed on 20th February 2024.

3. The orders sought on the Notice of Application for Court Orders filed on 5th July 2023 are refused.

4. Consequent on order 3 herein, the Claimant is to file and serve an amended claim form and amended particulars of claim within fourteen (14) days of today's date in order to continue the claim under the Law Reform Miscellaneous Provisions Act.

5. The Defendant is permitted to file and serve a defence to the amended claim filed and served pursuant to order 4 herein, within forty-two (42) days of service of the amended claim form and amended particulars of claim.

6. The term "NEG 1" is to be inserted in the top center of the first page of any documents filed, prior to their filing at the Registry.

7. Costs of the applications to the Defendant, to be taxed if not sooner agreed.

8. The Defendant's Attorneys-at-law are to prepare, file and serve this order.

Carole S. Barnaby
Puisne Judge