



[2021] JMSC Civ 6

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2019 CV 00969

BETWEEN	DAEDRIEL HAYLES	CLAIMANT
	(Administratrix in the estate of Rojae Romario Wright, deceased)	
AND	THE NATIONAL IRRIGATION COMMISSION LIMITED	DEFENDANT

IN CHAMBERS (VIA ZOOM)

Mrs Suzette Campbell instructed by Burton-Campbell Attorneys-at-law for the Defendant/Applicant

Ms Yualande Christopher instructed by Yualande Christopher & Associates Attorneys-at-law for the Claimant/Respondent

HEARD: October 28, 2020 and January 8, 2021

Civil Procedure - Application to strike out claim form – Section 2 of the Law Reform (Miscellaneous Provisions) Act – Limitation Period – when does time begin to run for claims brought against a defendant on behalf of an estate – CPR 26

MOTT TULLOCH-REID, MASTER

[1] Three applications were presented to me to be heard. They were:

- a. the Claimant's application for summary judgment and in the alternative for the Defendant's defence to be struck out filed on May 6, 2019;

- b. the Claimant's application to disallow amendment to defence filed on February 21, 2020; and
- c. the Defendant's application to strike out the Claimant's claim filed on April 3, 2019.

It was agreed that the Defendant's application should be heard first in time as the outcome of that application would determine the way forward with the Claimant's applications.

[2] I am grateful to both counsel for their submissions and cases provided to the court for its consideration. Although I have not mentioned each case in this judgment, I wish to indicate that all the cases provided were considered. I have chosen, in the interest of time, to refer to the ones that were most helpful to me.

[3] The Defendant's application to strike out the claim is grounded on the basis that the limitation period for filing the claim has passed and the claim is statute barred. The application is supported by the affidavit of Tiffany Augustine (also filed on April 3, 2019), the legal officer of the Defendant. Ms Augustine depones that the Defendant was made aware of an incident involving a minor who had drowned after having allegedly fallen into a trench which had been previously excavated by the company. The incident was alleged to have taken place on November 7, 2010. A claim form was filed on August 30, 2013 on behalf of the dependants of the minor child under the Fatal Accidents Act ("FAA") and on behalf of the deceased's estate under the Law Reform (Miscellaneous Provisions) Act ("LRMPA"). An Acknowledgment of Service and Defence were filed and mediation was embarked on. The claim filed under the LRMPA was struck out on the basis that the Claimant was not properly before the Court having not obtained a grant of Administration. A new claim was filed under the provisions of the LRMPA on March 11, 2019. This is the bone of contention with the Defendant. The Defendant is of the view that at the time the new claim was filed the statute of limitation had passed and the new claim should not be allowed to proceed as doing so would deprive the Defendant of its limitation defence, which is protected by the Limitations of Actions Act.

- [4] The Claimant is contesting the Defendant's application. An Affidavit sworn to by her was filed on September 26, 2019. In that Affidavit, Ms Hayles, depones to her interpretation of section 2(1) of the LRMPA. She says that a claim under the LRMPA can only be brought after someone is appointed administrator in the estate of the deceased because otherwise that person cannot lawfully represent the interest of the deceased's estate. At paragraph 6 of the Affidavit, she states that time begins to run from the date on which the Letters of Administration are granted not from the date the cause of action arose, as suggested by the Defendant. If the time ran from the date of the cause of action, the Claimant would not have had the authority to represent the deceased's estate as at that time she had not yet been appointed administratrix. She depones further that she was granted Administration on July 23, 2015 and that is when time began to run and as such she was in time at the filing of the claim as she would have had six years after the Administration was granted to file the claim. The new claim was filed in 2019 and so she was well within time.
- [5] The arguments put forward by counsel for the respective parties did not divert much from the grounds set out in the application and the evidence set out in the supporting affidavits. Written Submissions with authorities were filed on behalf of the Defendant on October 28, 2019 and on behalf of the Claimant on October 31, 2019. In addition, both Mrs Campbell and Ms Christopher made oral submissions on October 28, 2020 when the matter came up before me. The written submissions and the oral submissions are essentially the same.

Submissions on behalf of the Defendant

- [6] Mrs Campbell argues that when the new claim was filed in 2019, the claim would have been statute barred. She submits that the claim filed is a claim to recover damages for negligence and negligence claims have a limitation period of six years. Since the claim is a negligence claim and the cause of action arose on November 7, 2010, the limitation period would have expired on November 2016 so when the claim was filed in March 2019, it was statute barred and had been statute

barred for almost three years. She relies on Section 2(1) of the LRMPA which she submits allows a claim to be brought in tort to recover damages on behalf of the deceased's estate when the deceased died in an accident or as a result of an accident.

[7] Section 2(1) of the LRMPA provides as follows:

“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.”

[8] Counsel for the Defendant also relies on the case of ***Shaun Baker v O'Brian Brown and Angella Scott-Smith Claim No 2009 HCV 05631*** heard on April 19 and May 3, 2010 by Justice Carol Edwards (Ag) as she then was, to support her position that the time is not to be counted from the date the Letters of Administration were granted. She points out that in the ***Shaun Baker case*** time was counted from the date of the accident (when the cause of action arose). She drew this conclusion because from the date of the accident to when the claim was filed was 6 years and 17 days, but the Court held that it could not extend the time as the limitation period had elapsed and moreover the LRMPA did not make allowance for an extension of time of the limitation period as did the FAA (see section 4(2) of the FAA). Mrs Campbell argues that in the ***Shaun Baker case***, if time had run from the date the Administrator was appointed, then the Claimant would not have needed to apply for an extension of time to file the claim under the LRMPA.

[9] Another interesting argument put forward by Mrs Campbell is that relating to statutory interpretation. She submits that it could not be the intent of the legislature for statutory interpretation to result in an absurdity. She argues that if a person did not take the grant of administration until 40 years after the death, then it would be absurd that a defendant would have a potential claim hanging over his head for that duration of time until the grant was made. If this is how the legislation is to be

interpreted, she argues, then the Court would be sanctioning delay which would fly in the face of the overriding objective.

[10] The Defendant placed reliance on the case of ***Edna Tate v West Indies Alumina Company (Windalco) 2008 HCV 03952*** Judgment of Anderson J on April 26, 2013. As was the case in the case before me, the claim was filed before Letters of Administration were granted. The accident leading to the death occurred on August 17, 2005, the claim was filed without the grant but on August 20, 2011, the grant was obtained. The Claimant sought to amend the claim form so that a claim could be brought for the deceased's estate under the LRMPA. The Defendant objected on the basis that it would rob them of their limitation defence. In paragraph 24 of the judgment, Anderson J said that the amendment could not be made because it would deprive the defendant of its limitation defence even though only a few days would have passed since the expiration of the limitation period. Mrs Campbell argues that if the limitation period was being considered by the Judge as having expired it must have been because he counted the six years from the date of the death not the date of the grant of administration. Anderson J did not allow an amendment to statement of case filed by the claimants to remove the claimant and replace her with the appointed Administratrix as he was of the view that to do so would

“deprive the defendants of the limitation defence which otherwise they would now have”. (see paragraph 24 of the judgment)

Mrs Campbell implores me to follow the cases as a matter of precedent and common sense.

Submissions on behalf of the Claimant

[11] Ms Christopher also relies on the ***Edna Tate case***. Ms Christopher, not unsurprisingly, has interpreted the decision in a way that is different from the Mrs Campbell's interpretation. She argues that the case makes it clear that a claim cannot be brought for an estate until a representative has been appointed (see

paragraph 5 of the judgment). Although the limitation period for negligence is six years, when someone dies, the time to get the grant of administration must be taken into account. She further argues that by stating that the claim cannot be brought until a representative has been appointed, the **Edna Tate case** is suggesting that time is to be counted from the date of the grant not from the cause of action. Albeit that Anderson J had so stated, it would appear based on his reasoning that he did not count time from the date the Grant of Administration was made because if he did, the amendment would have been allowed because the limitation period would not have elapsed and would not have done so until August 2017. I hold this view based on the fact that Administration was granted in August 2011, the amendment was sought, presumably in 2013, but the amendment was denied on the basis that if the amendment was granted it would rob the defendants of their limitation defence.

- [12] Ms Christopher, in response to Mrs Campbell, argues that if 40 years elapse between the date of the death and the date on which an administrator is appointed under a Grant of Administration, then the limitation period is not in issue but an argument for prejudice can be made. She says no prejudice arises in the case at bar as the Defendant has always known of the case, especially since a part of it has always remained before the Court. In responding to the absurdity argument put forward by Mrs Campbell she argues further that although the result of the interpretation could lead to what Mrs Campbell called an absurdity, said that was not a matter for the Court. If there is a resulting absurd interpretation, the absurdity had to be remedied by Parliament. The Judge's role is to balance justice and so in the **Shaun Baker case** the seminal point which the court was making is that it would have been an injustice if the claimant were allowed to bring the claim at that point in time but here there is no injustice because the Defendant has not given the Claimant sufficient evidence or facts to make an assessment as to whether it will face an injustice if the claim is not struck out.

[13] Ms Christopher also relies on the case of ***Jamaica International Insurance Company Limited v The Administrator General for Jamaica (Administrator of the estate of Rohan Wiggins, also called Rhoan Wiggins (deceased))*** 2013 JMCA App 2. In that case, which came up for appeal, Master George, as she then was, concluded that under the LRMPA time began to run from the date the administration was granted and not from the date the cause of action arose. (see paragraph 22 of the judgment). She 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.” (see paragraph 21 of the judgment)

However, her position changed after reviewing two decisions of the Privy Council, ***SMKR Meyappa Chetty v SN Supramanian Chetty*** [1916] AC 603 (HL) and ***Chan Kit San and anor v Ho Fung Hang*** [1902] AC 257. In the latter case, Lord Parker said

*“For the purpose of the English Statute of Limitation time runs from the accrue [sic] of the cause of action, but a cause of action does not accrue unless there be someone who can institute the action. In the case of cause of action arising in favour of the estate of a deceased at or after his death time will at once begin to run if there by 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”. (see paragraph 9 of the ***Meyappa Chetty judgment***)*

[14] Master George, having had sight of the Privy Council’s decision concluded that time ran not from the date of the cause of action but from the date that administration was granted. The accident which had claimed the life of the deceased had taken place in 2004 and so when the claim was filed in October 2009 the limitation period had not elapsed under the LRMPA because administration had only been granted a few months earlier in June 2009.

[15] Phillips JA in considering the decision of Downer JA (which was raised in the **estate Rohan Wiggins case** and which will be considered in paragraph 17 below) asked the following questions as it related to the LRMPA:

“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?”*
(see paragraph 53 of the estate Rohan Wiggins case)

What caused concern is that the claimant had sought an extension of the validity of the claim form on September 8, 2010, when it was argued that the limitation period would have expired, the accident having taken place on August 27, 2004. Phillips JA also questioned whether it was correct to consider the application to extend the validity of the claim form with an understanding that the limitation period would not have expired until 2015 given that the administration was granted in 2009. Phillips JA concluded at paragraph 54 of the judgment that

“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.”

[16] I made inquiries at the Supreme Court Library as well as with the Registrar of the Court of Appeal as to whether a final decision on this issue was arrived at, at the Court of Appeal. I was informed that the matter was settled and as such the appeal was withdrawn.

[17] I must now make reference to the case of ***The Attorney General v The Administrator General of Jamaica (Administrator of the estate of Elaine Evans, deceased) SCCA No 11/2001 heard on December 3, 2001 and July 29, 2005***, which was also relied on by Ms Christopher. The decision of Downer JA on

behalf of the Court of Appeal which was supported by Panton and Smith JJA (as they then were) is important. At page 7 of the judgment, Downer JA said in reference to section 2(1) of the LRMPA:

“Therefore the standard limitation period of six years for torts is applicable for actions vested in her. Since the action is for the benefit of the Estate time begins to run from the time Letters of Administration were granted.”

I am to point out here that I was unable to find any Privy Council decision which overturns this dictum or for that matter any Court of Appeal decision which gives a different interpretation of that section of the statute.

Defendant’s response to Claimant’s submissions

[18] In responding to the Claimant’s cases, Mrs Campbell is of the view that cases of ***Jamaica International Insurance Company Limited v The Administrator General for Jamaica (Administrator of the estate of Rohan Wiggins) 2013 JMCA App 2*** and ***The Attorney General v Administrator General of Jamaica (Administrator of the estate of Elaine Evans, deceased) Supreme Court Civil Appeal No 11 of 2001*** were not relevant. In the latter case she argues that the claim was being brought against a deceased’s estate but in the case at bar, the case is being brought on behalf of the deceased’s estate. This is not correct as the Appellant in the decision was the Attorney General who was the Defendant in the case at first instant. Mrs Campbell ends by reminding the Court that the Claimant’s submissions are that the deceased can file a claim 6 months after the grant was issued in the deceased’s estate but even if those submissions are correct, she says, the Claimant is seeking to bring a claim FOR the deceased’s estate NOT against it and section 2(3) of the LRMPA speaks to actions in tort being brought against the deceased’s estate not on its behalf.

Analysis

[19] The English Statute of Limitation 1623 became a part of the Jamaican law when it was so received by section 46 of the Jamaican Limitations of Actions Act. The period of limitation for matters relating to tort is 6 years. This continues to be the case today. Justice Edwards in the **Shaun Baker** case referred to the decision of Rowe J in the case of **Lance Melbourne v Wan 22 JLR 131 at page 135** where he said:

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

[20] It is agreed that there is a limitation period of six years in negligence cases. What the parties disagree on is when time begins to run in instances where the deceased's estate is bringing an action against a defendant. The LRMPA sets out the limitation period for matters when a claimant is suing the estate of a deceased, that would be six months after the personal representative took out representation (see Section 2(3)(b) of the LRMPA). The LRMPA, however, does not provide that assistance when the estate is the claimant.

[21] The primary purpose of the limitation period is to protect the defendant from having to deal with an old claim which he did not expect to face (see the case of **Donovan v Gwentoy's Limited [1990] 1 WLR 472**). A defendant who is asked to defend a claim outside of the limitation period would be prejudiced as memories fade, witnesses die or migrate and cannot be traced and the administration of justice becomes more uncertain (see the case of **Heaven v Road and Rail Wagons, Limited, [1965] 2 All ER 409**).

[22] If the reasoning set out in the cases noted in paragraph 21 above is to be accepted, it means that the legislature and the Courts would prefer that cases are dealt with sooner rather than later. It means that counting should begin from the earlier event

(that is the time the cause of action arose) rather than from the later event (that is, when the administrator was appointed). I am drawn to the example set out by Mrs Campbell, when she said if the Defendant waited 40 years before making the application for grant of administration and obtaining it, it would mean that the defendant would have a potential claim over his head for 40 years plus an additional 6 years to file the claim. This she said would be an absurd interpretation of the statute. Ms Christopher said there would only be prejudice but the prejudice would to my mind, be great because it is very likely that the greater the length of the delay, the more likely it is that memories would have faded, witnesses would have died or cannot be traced and the administration of justice would become most uncertain. I would also say that a claimant has a duty to act with alacrity in obtaining a grant of administration after the death if he wishes to bring a claim on behalf of the estate. Indeed, the claimant in this case acted quickly in bringing the claim, the problem occurred because, initially, the claim was not properly brought. The result is that the claim was only properly before the court approximately nine years after Mr Wright's death and four years after administration was granted (Administration granted in 2015 and claim brought in 2019). Compare this to the case of **Attorney General v Administrator General of Jamaica (estate Elaine Evans)** where the claim was brought four years after the deceased's death and one year after letters of administration were granted.

[23] Notwithstanding the above, I have before me a Court of Appeal decision which clearly states that until someone is appointed administrator he is unable to bring a claim on behalf of the estate of a deceased and as such time must begin to run from the date when he is so appointed. For ease of reference I again set out what Downer JA in the case of **Attorney General v Administrator General of Jamaica (estate Elaine Evans)** had to say at page 7 of the judgment:

“Therefore the standard limitation period of six years for torts is applicable for actions vested in her. Since the action is for the benefit of the Estate time begins to run from the time Letters Administration were granted”.

[24] In this case before me, the Claimant has argued that the Defendant has always been aware of the Claimant's intention to bring a claim under the LRMPA against it and as such the Defendant will not be prejudiced if this claim is allowed to proceed. The Defendant's argument that if a defendant has to wait until an administrator is appointed in circumstances when there is no time limit on when grants of administration are to be applied for, it could result in a potential claim hanging over a potential defendant's head for a significant number of years, also has merit. Despite the merit in both arguments, the Court of Appeal's position must prevail.

CONCLUSION

[25] I therefore order as follows:

- a) The Defendant's application to strike out the Claimant's claim is denied.
- b) The Defendant's application for leave to appeal this decision is granted.
- c) The Claimant's application for summary judgment or in the alternative to strike out the Defendant's defence and the Claimant's application to disallow amendment to defence are stayed pending the hearing of the Defendant's appeal.
- d) Costs of the application are to be paid by the Defendant to the Claimant and these costs are to be taxed if not agreed.
- e) The Defendant's attorneys-at-law are to file and serve the Formal Order.