[2023] JMSC Civ. 242

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2020CV01509

BETWEEN	**KASHEVA THOMAS**	**1ST CLAIMANT/ RESPONDENT**
AND	**CHARLES THOMAS (By Next Friend, Kasehava Thomas)**	**2ND CLAIMANT/ RESPONDENT**
AND	**SOUTHERN REGIONAL HEALTH AUTHORITY**	**1ST DEFENDANT/ APPLICANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**2NDDEFENDANT/ APPLICANT**

Mrs Taneisha Rowe-Coke, instructed by the Director of State Proceedings for the Defendants/Applicants.

Miss Sasha-Ann Boot, instructed by Robertson Smith Ledgister & Co. Attorney-at-Law for the Claimants/Respondents.

HEARD: May 11, 2023, June 7, 2023.

Civil Procedure— Rule 26. 3 (1) (c)—Application to Strike Out Statement of Case—Rule 20.6—Amendment to statement case—Limitation period expired—Rule 23.7 (4)—Failure to file Certificate of Next of Friend—Rule 10.3 (9)—Application to file defence out of time.

M. JACKSON, J (AG).

Introduction

[1] These proceedings involve a notice of application for court orders filed pursuant to Part 11 of the Civil Procedure Rules, 2002, seeking an order to strike out the statement of case as contained in the claim form. Before delving into the substantive

application, it will be necessary to give an outline of the factual background that gave rise to the claim being filed and the order that is sought.

The Background

[2] On May 15, 2015, Miss Kasheva Thomas, the "1st respondent", was admitted to the maternity ward at the Black River Hospital with a late-term pregnancy of forty-one weeks. She was referred to the ward by the High-Risks Clinic of the Hospital. The following day, May 16, 2015, her son, Charles Thomas, the "2nd respondent", was born. Sometime after that, it was discovered that he suffered from a condition called Hypoxic-ischemic encephalopathy (HIE). The 1st respondent blamed his condition on the treatment she received from the hospital's staff during the period leading up to his birth.

[3] On May 19, 2020, roughly five years after his birth and with only one year before the expiration of the limitation period, she commenced a claim for medical negligence against the hospital on behalf of the 2nd respondent and herself. The certificate of next friend, which gives her the authority to act on behalf of the 2nd respondent, was filed on July 3, 2020, approximately six weeks after the claim was filed.

[4] In so far as is relevant, the primary relief sought in the claim and the particulars of claim on behalf of both are as follows:

> *"…*
>
> *On the 15th day of June 2015, the 1st Claimant was admitted to the maternity ward of the Black River Hospital in the parish of St Elizabeth after being referred from the High-Risk Clinic as she was overdue for 41 weeks and two days pregnant. The 1st Claimant began experiencing excruciating pain in or around 7 p.m. of that evening. She then informed the nurses; however, her cries fell on deaf ears. The 1st claimant received medical attention on the 16th day of June 2015 as the medical staff determined that she was ready to give birth. Instructions were given by Dr Malcolm that the 1st Claimant be sent to do an emergency Caesarean section in or around 11 a.m. on the morning of June 16, 2015. As a result of the medical negligence of the 1st Defendant's medical staff or servants, the 2nd Claimant suffered an injury resulting in him being*

diagnosed with Hypoxic-ischemic encephalopathy (HIE) as a result of being deprived of oxygen to his brain near to or during birth. The effects of the 2nd complainant's condition have caused him to suffer from developmental delays, epilepsy, cognitive issues, motor skill developmental delays and neurodevelopmental delays.

And the Claimants claim against the Defendants for…

Special Damages

General Damages

Future Damages

…

Particulars of Claim

…

6. Dr Malcom, the attending physician, attended to Miss Thomas and gave instructions for an emergency Caesarean section to be done in or around 11:00 a.m. June 16, 2015.

7. That the said instructions were late in coming, resulting in the infant suffering Hypoxic-ischemic encephalopathy (HIE) as a result of being deprived of oxygen to his brain near to or during his time of birth. The effects are that young Thomas's injuries caused him to suffer from developmental delays, epilepsy, cognitive issues, motor skill development and neurodevelopmental delays.

<u>Particulars of Negligence of the Defendants</u>

(i) Failure of the 1st Defendant's medical staff in discharging its duty of care in monitoring the 1st Claimant from the time of admittance on the 15th day of June 2015 to the birth of the 2nd Claimant, June 16, 2015;

(ii) Failure to conduct certain critical tests to ensure a safe delivery of the child, which resulted in him suffering severe injuries, loss and damage;

(iii) Failure of the 1st defendant to manage its medical staff or its servants in such a way that this accident does not happen, Res ipsa loquitor.

<u>Particulars of Injuries</u>

The 2nd claimant, Charles Thomas, was delivered and was diagnosed with hypoxic-ischemic encephalopathy (HIE) as a result of being deprived of oxygen to his brain near to or during his time of birth. Currently, he is suffering from developmental delays, epilepsy, cognitive issues, motor skill developmental delays and neurodevelopmental delays."

The Application

[5] The applicants, the Southern Regional Health Authority, standing in the stead as the umbrella organisation with direct administrative and supervisory responsibility for the Black River Hospital and the Attorney General of Jamaica in its representative capacity, by virtue and under the **Crown Proceedings Act**, have set out the basis of their application on two main grounds and a further order, for permission to file a defence outside the time prescribed by the CPR, in the alternative. Essentially, their contention is that:

(i) The claim brought on behalf of the 1st respondent should be struck out because it discloses no reasonable grounds for bringing it.

(ii) The failure of the 1st respondent to file a certificate of next friend on behalf of the 2nd respondent when the claim was commenced on his behalf breached rules 23.3 and 23.7 (4) of the CPR. The certificate filed on July 3, 2015, is an abuse of the process of the court; accordingly, the claim should be struck.

The principal issues to be determined.

[6] From the foregoing, I deemed the following issues to be pertinent in the final resolution of the application:

(a) Whether the claim brought on behalf of the 1st respondent should be struck out because it discloses no reasonable grounds for bringing it.

(b) Whether the failure to file a certificate of next friend to commence the claim for the 2nd respondent renders his claim a nullity and the subsequent one filed is an abuse of the process of the court.

(c) Whether permission for an extension of time should be granted to file a defence outside the prescribed time limit if the court does not agree with (a) or (b).

Whether the claim brought on behalf of the 1st respondent should be struck out because it discloses no reasonable grounds for bringing it?

[7] The law regarding negligence and rule 26.3 of the CPR are appropriate starting points for a discussion on this issue. I propose to look first at rule 26.3 of the CPR.

[8] Rule 26. 3 of the CPR provides four circumstances in which a court may exercise its discretion to strike out a party's statement of the case. These are:

> *"26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court-*
>
> *a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;*
>
> *b)* ***that the statement of case or the part to be struck out is an abuse of the process of the court*** *or is likely to obstruct the just disposal of the proceedings;*
>
> ***c) the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or***
>
> *d) the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10." (My emphasis).*

[9] Over the years, both within and outside this jurisdiction, the courts have interpreted and provided helpful guidance concerning this provision in several cases.

[10] I have found the following principles distilled in those cases to be helpful:

(a) Because of its draconian nature, striking out must not be exercised hurriedly. It can, prima facie, deprive a litigant of immediate access to

the court, which could result in a denial of justice. See **Branch Developments Limited (t/a Iberostar Rosehall Beach Hotel) v. The Bank of Nova Scotia Limited, paragraph 29,** as per McDonald Bishop J (as she then was).

(b) The power to strike out a statement of case is discretionary and should only be exercised in plain and obvious cases of default and as a matter of last resort.

(c) Striking out a statement of case should only be exercised where the claim demonstrates, on the pleadings, that it is frivolous, vexatious, an abuse of the process of the court, or fails to disclose any reasonable grounds for bringing the claim.

(d) Striking out of a party's case is the most severe sanction the court may impose under its coercive power.

(e) Striking out is a summary measure that promotes efficiency in litigation. By focusing on hopeless claims, it reduces time and costs.

(f) Striking out is a summary measure and an essential gatekeeping tool that must be used with care so as not to hinder the law's development.

[11] I will now move on to consider the law when a claim is brought for negligence. McNair J, in **Wilsher v Essex Area Health Authority** [1988], AC 1074, on page 586, for those purposes opined on what negligence in law means. The definition is very apt for these proceedings. He stated as follows:

> *".. what in law we mean by "negligence." In the ordinary case, which does not involve any special skill, negligence in law means a failure to do some act which a reasonable man in the circumstances would do or the doing of some act which a reasonable man in the circumstances would not do; and if that failure or the doing of that act results in injury, then there is a cause of action…"*

[12] Arising from such a clear definition and having regard to the order sought regarding the claim brought by the 1st respondent, it behoves me to scrutinise her statement of case meticulously. This is because adopting the nuclear option to strike out a statement of case is not only a draconian measure but should be a measure of last resort. Therefore, in keeping with the law, I must, as a matter of law, find that the claim, as brought by the 1st respondent, detailed facts to demonstrate that the medical staff owed her a duty of care, that duty was breached, and that injury was caused to her as a result of the breach. Finally, she is entitled to damages.

[13] At this juncture, it will be necessary to set out what is the purpose of a statement of case. I find the reasons laid out by the judges in **Towler v Wills** [2010] EWHC 1209 and **Tchenguiz v Grant Thorton UK LLP** [2015] EWHC 405 (Comm) to be of great assistance.

[14] In **Towler v Wills**, at paragraph18 Teare J held that:

> *"The purpose of a pleading or statement of case is to inform the other party what the case is that is being brought against him. It is necessary that the other party understands the case which is being brought against him so that he may plead to it in response, disclose those of his documents which are relevant to that case and prepare witness statements which support his defence. If the case which is brought against him is vague or incoherent he will not, or may not, be able to do any of those things. Time and costs will, or may, be wasted if the defendant seeks to respond to a vague and incoherent case. It is also necessary for the Court to understand the case which is brought so that it may fairly and expeditiously decide the case and in a manner which saves unnecessary expense. For these reasons it is necessary that a party's pleaded case is a concise and clear statement of the facts on which he relies…"*

[15] Legggatt J in **Tchenguiz v Grant Thorton** at paragraph 1, also add the following caution:

> *"statement of case must be concise. They must plead only material facts, meaning those necessary for the purpose of formulating a cause of action or defence, and not background facts or evidence. Still less should they contain arguments, reasons or rhetoric. These basic rules were developed long ago and have stood the best of time because they serve the vital purpose of identifying the matters each party will need to prove by evidence at trial".*

[16] The learned authors, John O'Hare and Kevin Browne, in their text **O'Hare & Browne: Civil Litigation**, 20th edition, on this discussion at page 188 of the text, stated as follows:

> *"A good statement of case strikes a balance between the need to give enough detail to inform both the court and the other parties of the issues being raised and the need to omit details which would obscure those issues. It is always tempting when drafting a statement of case that alleges negligence to first copy the examples given in any relevant precedent and then to add all those that you think of drawing on the particular facts of the case. This just pads out the document with lots of irrelevant material even worse, it will obscure the claimant's real case. Simply list all the ways the loss or damage complained of can be explained as being caused by the opponent's negligence on the facts of the case and leave it at that…"*

[17] With this guidance, I will first consider the submissions by both counsel. Mrs Rowe-Coke, on behalf of the Director of State Proceedings for the applicants, was very concise and direct in her submission. She submitted that the 1st respondent had failed to outline in her statement of case the cause of action that gave rise to any breach of duty, injuries, and damages she suffered. She, therefore, submitted that the claim qualifies to be struck out in keeping with rule 26.3(1)(c).

[18] In support of her point, she directed the court's attention to the case of **Paula Whyte v The Attorney General and Others**, [2012] JMSC Civ. 85. She submitted that this case has a similar factual background to the current case and will, accordingly, be helpful to the court. She said that the claimant, Miss Whyte, because of similar high-risk obstetrics issues, had to be admitted to the Spanish Town Hospital, and the third day after she was admitted, the doctor had ordered a caesarean section to be performed on her. That was not done despite waiting a long time, and she gave birth naturally, and the child died shortly after. The reason, she further submitted, that the hospital stated that the failure to carry out the caesarean section was that the operating theatres were busy and continued to be so until very late in the night.

[19] Mrs Rowe-Coke also referred the court to paragraphs 5-6, where Sykes J, as he then was, sets out the statement of case as pleaded by Miss Whyte. The learned judge stated as follows:

> *"[5] The particulars of injury in the particulars of claim read:*
>
> *a. The claimant, who is now 30 years having been born on the 28th day of August 1977, suffered:*
>
> *i. Neonatal death of a female child*
>
> *[6] There was further pleading in respect of the baby under the heading 'Particulars of Injury of [Baby] Paula Whyte:*
>
> *a. Cerebral oedema with moved haemorrhage of the tentorial membrane.*
>
> *b. Subarachnoid haemorrhage, marked in the occipital lobes"*

[20] Mrs Rowe-Coke further asked this court to have regard to the reasoning of the learned judge who had a similar application. This, she highlighted, was contained in paragraphs 4, 7, 8, 10 and 11:

> *"[4] Miss Marlene Chisolm took the point that the claim as pleaded does not amount to a cause of action in that the injury alleged is not one that gives rise to a claim. Learned counsel submitted that it is well known that to succeed in negligence the claimant must allege and prove (a) duty owed, (b) the breach, and (c) damage or injury flowing directly from the breach of duty. Her submission was that the particulars of claim do not show any connection between the conduct of the hospital staff and any damage suffered by Miss Whyte. She also submitted that the particulars actually speak to injury to the child, but the child has not brought an action, and therefore, there is no claim in respect of the child before the court.*
>
> *[7] According to Miss Chisolm, the pleaded case is that the child died and, further, that the child suffered from the conditions stated under the particulars of injury to the baby. However, the particulars of claim do not say what the alleged acts of negligence are in respect of the death of the child. This, Miss Chisolm said, was vital because once the child was born alive, which it was, then the child has its own independent cause of action, which can be pursued by the appropriate adult as a next friend. This was not done. Just to say what the child suffered from would not be enough. It would be necessary to make the connection in the pleadings between the injury allegedly suffered by the child and the conduct of hospital staff. Also, the claim would have to be properly constituted, and that is not the case here.*

> *[8] Miss Chisolm also insisted that the death of a child born alive is not an injury to the mother. There may be an injury to the child, but that does not translate into an injury to the mother unless there is a claim for some kind of mental distress. The claimant's case has not been presented as one of mental distress or anything of the kind. Indeed, Miss Chisolm closed this aspect of her submission by pointing out that no injury to the mother was, in fact, pleaded, and the claim before the court is in respect of the mother and not the child.*
>
> *….*
>
> *[10] Mr Forsythe responded by saying that paragraph 23 was sufficient to make the case for Miss Whyte. Paragraph 23 of the particulars of claim reads:*
>
> *"By reason of the aforesaid, the claimant suffered excruciating pain, loss and expenses. The injury, loss and damage to the claimant were caused by the negligence of the defendants, their servants or agents."*
>
> *[11] As can be seen, this paragraph does not specify the injury allegedly suffered. It is also well known that pain in childbirth is not unusual and, therefore, is not necessarily the consequence of negligence on the part of the health professionals. Having read the case, this court agrees with Miss Chisolm's submissions. They are well supported by existing authority."*

[21] In this regard, Mrs Rowe-Coke stood firm in respect of her submission and asked the court to strike out the 1st respondent's statement of case.

[22] For her part, Miss Boot sought to counter her response with a submission that the court, in keeping with the overriding objective of dealing with cases justly, could permit an amendment to the statement of case instead of resorting to the draconian measure of striking out. In this regard, she asked the court to consider the case of **Jamaica Redevelopment Foundation Inc v Clive Banton & Sadie Banton** [2019] JMCA, Civ. 12 ("**The Jamaica Redevelopment Foundation")**.

[23] As expected, Mrs Rowe-Coke strongly opposed Miss Boot's submission. She argued that the **Jamaica Redevelopment Foundation** is of no valuable assistance to the court. She submitted that, in the first place, no application was before the court seeking an amendment of the 1st respondent's statement of case. She further submitted that this is necessary given the factual circumstances of the case.

[24] Secondly, she went on to submit that the limitation period had long expired, and any application for an amendment was required to be made either in 2020 or 2021. In this regard, she submitted that an amendment at this stage would prejudice the applicant's position, and this, she went on to submit, was exacerbated by the laconic way in which the pleadings were set out in the statement of case. Finally, she submitted that an amendment in those circumstances would be equivalent to the 1st respondent bringing a new cause of action, which the rules do not permit at this late stage.

[25] She further asked the court to consider the facts outlined in the claim and submitted that, on a clear reading of the statement of case as a whole, it was evident that the claim was meant primarily for the 2nd respondent.

[26] On the point regarding likely prejudice to the applicants, she further submitted that the applicants had made their application months before the limitation period had expired; accordingly, the 1st respondent would have had ample time to make an application to amend, she having been put on notice since 2020 and had sight of the application, yet none was made.

[27] I have listened keenly to both submissions on this issue and, as required, carefully scrutinised the 1st respondent's statement of case. Having done so, this court agrees with Mrs Rowe-Coke that the 1st respondent failed to set out the essential ingredients to successfully advance a claim for negligence in relation to her. This court accepts that a negligence claim must be non-ambiguous and specific. A failure to prove any one of the elements means the claim fails.

[28] The sole complaint of the 1st respondent in her statement of case was that she experienced excruciating pain, and her cries for help to the nurses "went on deaf ears". No material facts were pleaded for the injuries that were or may have been caused or that there was a breach of that duty. This was quite evident to the court. The pleadings needed to be precise so that the applicants could know the real matter of controversy. In these circumstances, I adopt the words of Lord

Woolf MR, “that pleadings remain important to make clear the general nature of the case which the other side should expect to meet”. See **McPhilemy v Times Newspapers Ltd and others** [1999] 3 All ER 775.

[29] Therefore, as submitted by Mrs Rowe-Coke, and for which I entirely agree, the claim form and the particulars of claim set out a clear breach of duty in relation to the 2nd respondent. I, therefore, find her particulars of claim to be devoid of a connection between the hospital staff and any harm suffered by her.

[30] The 1st respondent also averred that the medical staff, in discharging their duty of care, failed to monitor her from the time she was admitted to the time she gave birth. In this court’s view, while that may be so, much more was needed to be pleaded in the statement of case that was based on negligence.

[31] Rule 8.9 of the CPR is explicit. It sets out the duty of claimants to set out their case by including in their Claim Form or Particulars of Claim a statement of all the facts on which they rely. In **McPhilemy v Times Newspapers Ltd and others**, Lord Woolf MR expressed at page 793 that:

> *“The need for extensive pleadings, including particulars, should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party’s witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous.* ***Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader.”*** (My emphasis)

[32] In this court’s view, it was incumbent on the 1st respondent to have pleaded the facts she intended to rely on so that the applicants could, where necessary, formulate their defence in keeping with her cause of action. That, in essence, is the purpose of a statement of case. What is clear to this court is that a significant portion of her pleadings were background facts. This is not enough.

[33] In the text, **Bullen and Leake and Jacob's Precedents of Pleadings**, 12th edn, the learned authors, writing over forty years ago, indicated at page 3 that:

> *"The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purpose of informing each party what is the case of the opposite party, which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial."*

[34] I hold firm to this position. Further, this court also finds that the case of **Paula Whyte v The Attorney General and Others** is of significant relevance on two fronts. Firstly, as in this case, now before this court, the mother's pleadings were wholly deficient. Secondly, 1st respondent would also have to establish that the care she received at the hospital fell below that of reasonably competent hospital staff offering health care to pregnant high-risk mothers. As Sykes J aptly stated:

> *"[20] Miss Whyte would have to prove that the health care team did not act by accepted medical practice for the treatment of high-risk pregnant mothers and not merely that she could have been treated in another way. It has to be shown that the actions of the health care team fell below the standard expected of ordinary skilled persons professing to have the skill to manage high-risk pregnant mothers. …. Based on the facts, Miss Whyte's claim fails.*
>
> *[21] A faint suggestion was made that the healthcare team at the Spanish Town Hospital did not explore the possibility of transferring Miss Whyte to another institution. However, that was not the pleaded case. As is well known, what is not pleaded cannot be relied on."*

[35] Miss Boot has asked this court to consider allowing an amendment to the 1st respondent's statement of case rather than adopting the nuclear option to strike it out. I must now consider that submission.

[36] This claim was filed roughly five years after the incident occurred and approximately one year before the limitation period was set to expire. At this stage of proceedings, it is an indisputable fact that the limitation period has expired.

[37] The central plank of Miss Boot's submission in this regard is that the court, in keeping with the overriding objective of enabling the court to deal with cases justly, should permit an amendment given the factual circumstances of the case. In light of this submission, I must first consider Part 20 of the CPR.

[38] Part 20 of the CPR sets out the circumstances under which a statement of case can be amended. More specifically, rule 20.6 sets out the circumstances relating to an amendment in a statement of case after the relevant limitation period. This rule provides that:

> *"20.6 (1) This rule applies to an amendment in a statement of case after the relevant limitation period.*
>
> *(2) The court may allow an amendment to correct a mistake as to the name of a party but only where the mistake was-*
>
> *(a) genuine*
>
> *(b) not one which would in all the circumstances cause reasonable doubt as to the identity of the party in question."*

[39] The rule is clear, and the principles established in the decided cases are equally clear. At this juncture, I do not have an application for an amendment before me. Given the circumstances of this case, this court believes that any attempt to have me exercise my discretion would require evidence in the form of an affidavit. At this belated stage, the court is now being asked to consider an amendment by way of submission. There is no evidential basis to do so. This is equivalent to being done or asked to be considered in a vacuum. The court, for example, will be required to address its mind to the reason for the omission, the nature of the amendment and whether it would result in a new cause of action. More than just bare submission, at this late stage, will be required.

[40] Additionally, the 1st respondent will have the burden of proof to show that a limitation defence is not reasonably arguable. Again, this court is not able to weigh, measure, or evaluate any such evidence. In keeping with the spirit and tenor upon which the rules were promulgated, the court's approach to late

amendments cannot radically differ from the approach to enforcing compliance with any other process requirements and to the need to have effective case management generally.

[41] Miss Boot asked this court to exercise its discretion in accordance with the overriding objectives; it is essential to note that each party has a duty to help the court further the overriding objective. This application brought by the applicants was not a surprise, and as Mrs Rowe-Coke forcefully submitted, an application for an amendment could have been made in 2020. The respondents were served with the application in July 2020, which, at the time, was within the limitation period. To seek to do so at this time, a period way over the limitation period would not be in keeping with the overriding objective.

[42] Should this court accede to such a submission, it would no doubt send the wrong signal to litigants and their attorneys who failed to assess their cases promptly. Further, as in this case, the court's tolerance of a late application for an amendment may undermine its ability to manage the litigation process effectively.

[43] I find that this would also undoubtedly prejudice the applicants' position and cause a further delay in the efficient administration of justice. In these circumstances, I will strike out the 1st respondent's statement of case.

Whether the failure to file a certificate of next friend to commence the claim for the 2nd respondent renders his claim nullity, and the subsequent one filed is an abuse of the process of the court.

[44] Part 23 of the CPR sets out specific requirements for the commencement of proceedings for and against minors and patients. For these facts, rule 23.2 (1) provides that a minor must have a next friend to conduct proceedings on his behalf. Rule 23.3 (1) further provides that a minor must have a next friend to issue a claim, except where the court makes an order.

[45] Rule 23.3 (4) (b) states that any step other than an application in the proceedings before the appointment of the next friend is of no effect unless the court orders otherwise. Rule 23.6 sets out the conditions for an adult to be a next friend. It provides that a person may act as a next friend if that person can fairly and competently conduct proceedings on behalf of the minor and has no interest adverse to that of the minor.

[46] Rule 23.7 sets out the procedure for an adult person to become the next friend without a court order. 23.7 (1) provides that if the court has not appointed a next friend, a person who wishes to act as a next friend "must follow the procedure in this rule." 27.7 (3) states that a person who wishes to act as a next friend must file a certificate that satisfies rule 23.6. 27.7 (4) (a) provides that a person who acts as a next friend for a claimant must file the certificate as stipulated under paragraph (3) at the time when the claim is made**.**

[47] Rule 23.8 (1) provides that the court may make an order appointing a next friend with or without an application, and paragraph 23.8 (5) states that the court may not appoint a next friend unless it is satisfied that the person to be appointed fulfils the conditions specified in rule 23.6.

[48] In this case, the circumstances are devoid of whether, because of an oversight, error, or otherwise, the 1st respondent failed to file the certificate of next friend when she filed the claim on behalf of the 2nd respondent.

[49] Mrs Rowe-Coke submitted forcefully that rule 23.7 (4) is mandatory, and a certificate of next friend must be filed by the person so acting at the time the claim was filed. She further submitted that the 1st respondent had failed to do so, which meant that the 2nd respondent's claim was nullity, regardless of whether she was his mother. She emphasised that the claim was filed without the requisite authorisation to act.

[50] It was further contended by her that strict compliance with the rule was necessary. Accordingly, any subsequent filing of the certificate, as in this case,

amounts to an abuse of the process of the court. Counsel further submitted that the position is similar to cases that are required to be filed under the **Law Reform (Miscellaneous Provision) Act**, and where a claimant asked the court to consider the **Administrator General's Act**, the administrator, she submitted, must possess the authorisation by way of a grant of Administration before a claim can be issued. Otherwise, the claim cannot stand.

[51] Miss Boot asked this court to consider using rule 26.9, which gives the court a general power to rectify matters where there has been a procedural error. She further submitted that this rule applies where the consequences of not complying with a rule have not been specified and that the failure to follow the rule, as in this case, does not invalidate any steps taken in the proceedings unless there is a court order making it so. She further submitted that where there has been a failure to comply with the rule, as in this case, this court can make an order to put it right. Finally, she stated that the court can make such an order with or without an application. She, therefore, asked the court to make such an order to set the matter right.

[52] While preparing for this matter, I came upon the case of **Hinduja v Hinduja & Ors** [2020] EWHC 1533, from the English Chancery Court. The circumstances of that case mirror the issues to be resolved in this case. The CPR rules are also identical to ours. I brought it to the attention of both counsel and invited them to make further submissions. They kindly did so, and I am grateful for their prompt response. Having examined the case, Mrs Rowe-Coke has found it highly persuasive. That is indeed a candid concession. Miss Boot also found it instructive and of significant relevance to the disposal of the application in respect of the 2nd respondent.

[53] As stated earlier, sitting in the English Chancery Court, Falk J was confronted with similar circumstances. A certificate of suitability, as provided for under their rule 21.5, was required to initiate a claim for or against a mentally ill patient. In

that case, the certificate was not filed until after the claim was filed. An application was made to regularise it, but the defence objected.

[54] Falk J had to consider whether to regularise it and, if so, how it should be done. In relation to rule 21.5 and the late filing of the certificate of suitability, she stated as follows:

> *"Whether CPR 21.5 can apply in this case 20.*
>
> *20. In this case, through an oversight, a certificate of suitability was not filed until just over a month after the date of the claim. The procedure set out in CPR 21.5 was, therefore, not followed. CPR 21.5 is in prescriptive terms: paragraph (1) provides that the procedure " must " must be followed. Where a litigation friend is acting for the claimant, a certificate of suitability "must" be filed "at the time when the claim is made" (paragraph (3)).*
>
> *21. Mr Rajah, for the Claimant, submitted that the late filing was an error of procedure that was cured when the certificate was filed and relied on CPR 3.10. He pointed out that uncertainty or case. He suggested that the certificate could in any event only be filed when the claim exists, so it must be that some gap in time is contemplated by the rule. He pointed to the contrast with the position of litigation friends for defendants, where the certificate must only be filed when the litigation friend actually takes a step in the proceedings on the defendant's behalf. That means that a litigation friend could be appointed without court assistance where a defendant becomes incapacitated during proceedings, but if a strict approach was taken that avenue would not be available to a claimant. He also pointed out that CPR 21.5 (2), which deals with deputies appointed by the Court of Protection, also requires them to file a copy of the order conferring their power to act at the time the claim is made, when acting for a claimant, and if CPR 3.10 could not be relied on such a deputy would also need to seek a formal order under CPR 21.6.*
>
> *22. I am not persuaded by these arguments. CPR 21.5 sets out the manner, indeed the only manner, in which litigation friends can be appointed without a court order. It is followed by another rule that provides for appointment to be made in the alternative by court order. In addition, the relevant context includes the fact that CPR 21.3 (4) explicitly provides that any step taken before a protected party has a litigation friend has no effect unless the court orders otherwise.*

[55] Falk J also considered whether rule 3.10 (a) could cure the oversight or error, which is similar to rule 26.9. Regarding that, she had this to say:

> *"CPR 3.10(a) is of potential relevance in determining whether the failure to comply with CPR 21.5 has an impact on steps taken in the proceedings to date. However, in my view, as a matter of construction of the rules, this general provision must give way to the express terms of CPR 21.3 (4). Effectively, that provision reverses the usual rule under CPR 3.10 (a): the starting point is that steps taken before there is a litigation friend have no effect, rather than the starting point being that all steps taken are valid."*

[56] Rather than ruling on this issue, the learned judge took the view that the better course was to make a fresh order to appoint the daughter as litigation friend under rule 21.6. This provision is equivalent to our rule 28. 3 (1). She stated as follows:

> *"26. As a minimum, therefore, I would need to make an order under CPR 21.3 (4) to the effect that steps taken before Vinoo became a litigation friend are to be treated as having an effect. But in addition the question arises as to whether CPR 3.10 (b) can be used to treat Vinoo as having become a litigation friend under CPR 21.5 when the certificate of suitability was filed in December, or whether the court needs to exercise its power under CPR 21.6 to appoint her now.*
>
> *27. I consider that in these circumstances the sensible course is for the court to exercise its power under CPR 21.6 if it is appropriate to do so. I think that is preferable to reaching a final view on whether CPR 3.10 (b) can be used to remedy the procedural error under CPR 21.5. Either approach would require a court order, because even with the benefit of CPR 3.10 (b) I do not think that the requirements of CPR 21.5 can be overlooked without assistance from the court. An order would be required.*
>
> *28. The substantive requirements are the same under both CPR 21.5 and 21.6, in that the individual in question must be a protected party and the litigation friend must satisfy the conditions in CPR 21.4 (3). The possible differences are that under CPR 21.6 an application supported by evidence is required, and the court must positively be satisfied that those conditions are met (CPR 21.6 (5)), as compared to the position under CPR 21.5 which simply requires a certificate of suitability confirming that those conditions are met. Any differences are procedural in nature. Moreover, particularly in a case such as this where there is a dispute that is before the court about whether the substantive requirements are met, any distinction is really one without a difference. Any application under CPR 3.10(b) would also in practice need to provide sufficient evidence to convince the court that the appointment was an appropriate one to make. Any dispute about whether a person is a protected party or whether the conditions in CPR 21.4(3) are met would need to be resolved, whatever the procedure used for an appointment. A certificate of suitability obviously cannot be conclusive in the event of a dispute, and Mr Rajah did not suggest otherwise*

[57] Like Falk, J, I also conclude that the certificate of next friend filed on July 3, 2020, does not comply with the rule and, accordingly, has no effect. Therefore, at this stage of the proceedings, there is no next friend to carry on the minor's claim. I also deem the non-compliance a procedural error. I do not consider rule 26.9 applicable, as the defect or error occurred before the proceedings commenced. Rule 26.9 is appropriate when the error or failure to comply occurred during the proceedings. The certificate must be filed before the proceedings have begun.

[58] In this regard, all steps taken in the proceedings before the certificate was filed are of no effect unless the court orders otherwise. I will, accordingly, use the power conferred to the court under rule 23.8 (1) to appoint the 1st respondent as the next friend. The rule clearly states that this appointment can be made with or without an application. However, I accept that to appoint her as such, I must first be satisfied that the conditions set out in rule 23.6 are met. These are that she can fairly and competently conduct proceedings on behalf of the 2nd respondent and has no interest adverse to him. I find that she can, and further, the applicants have yet to place before me any evidence that Miss Thomas cannot reasonably and competently conduct the proceedings on behalf of the 2nd respondent or that she cannot also act in his best interest.

[59] In these circumstances, I will appoint Miss Kasheva Thomas as the 2nd respondent's next friend in accordance with rules 23.8 (1) and (5).

Whether permission for an extension of time should be granted to file a defence outside the prescribed time limit if the court does not agree with (a) or (b).

[60] In light of my ruling on the claim brought on behalf of the 2nd respondent, I must now consider whether the applicants should be permitted an extension of time to file their defence. A brief chronology of events will be most helpful as a start.

[61] On June 3, 2020, the applicants were served with the claim form and the particulars of the claim. They filed an acknowledgement of service on June 16, 2020, and June 17, 2020, respectively. However, instead of filing a defence on

July 16, 2020, which had become due, they filed the notice of application for court orders. With those unusual circumstances, Mrs Rowe-Coke submitted that there was no delay in making the application; instead, it was made promptly; there is good reason for the failure to file a defence on July 16, 2020, and the 2nd respondent would not be prejudiced.

[62] The court's power to consider this issue is derived from Part 10 of the CPR, specifically rules 10.3 (1) and 10.3 (9). Rule 10.3 (1) provides that the period for filing a defence is 42 days after the date of service of the claim form. Rule 10.3 (9) permits a defendant who has not filed a Defence within the prescribed time to do so upon an application to the court.

[63] Rule 10.3 (9) is required to be read in conjunction with rule 26.2 (c). Rule 26.2 (c) allows the court 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. As with rule 10.3 (9), there is an absence of the relevant factors that a court may need to consider when making such a determination. In the absence of such, I must have regard to the overriding objective as stipulated in rule 1.1 of the CPR and the plethora of cases that have interpreted those provisions.

[64] In **Strachan v The Gleaner Company Limited and Dudley Stokes**, Motion No. 12/1999, a judgment delivered on the 6th December 1999, over two decades ago the learned Judge of Appeal, Panton JA, as he then was, held that a court in considering whether to grant an extension of time to comply with an order of the court must consider the following: the length of the delay; the reasons for the delay; whether there is an arguable case for an appeal and the degree of prejudice to the other parties if such time is extended. The law has not changed. The obligation remains the same. I will, however, change an arguable case for an appeal to the merit of the case because this is a first-instance decision.

[65] Equally, in **Fiesta Jamaica Limited v National Water Commission** [2010] JMCA Civ. 4 at 15, Harris JA (as she then was) relied on the dictum of Lightman J in **Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd and Others** [2001] EWHC Ch 456 on the question of what the Court should consider in granting an application to extend time. Lightman J stated:

> *"In deciding whether an application for extension of time was to succeed…it was no longer sufficient to apply a rigid formula in deciding whether an extension has to be granted.* ***Each application has to be viewed by reference to the criterion of justice.*** *Among the factors which had to be taken into account were the length of the delay, the explanation for the delay, the prejudice to the other party, the merits of the appeal, the effect of the delay on public administration, the importance of compliance with time limits bearing in mind that they were to be observed and the resources of the parties which might, in particular, be relevant to the question of prejudice."*

[66] I accept that this case has its own intrinsic set of circumstances. Therefore, my approach to this issue has to be flexible. Mrs Rowe-Coke has submitted that the applicants would not have been in a position to file a defence without knowing the outcome of the application. I accept this as a good explanation.

[67] Miss Boot has asked me not to allow the defence to be filed as the 2nd respondent's claim would be prejudiced. She has advanced no evidence to substantiate such prejudice. Equally, I found that there was no delay in making the application. It is clear that the delay in failing to file a defence was hinged on the court's determination of the application.

[68] Therefore, in light of this case's unique circumstances and in keeping with the overriding objective of dealing with cases justly, I find no basis to deny the application for an extension of time to file a defence as prayed.

The Disposition

[69] The orders of this court shall be as follows:

(i) *The application to strike out the 1st claimant's claim because it discloses no reasonable grounds for bringing the claim is granted.*

(ii) *The application to strike out the claim against the 2nd claimant is refused.*

(iii) *Miss Kasheva Thomas is to be appointed Next Friend for the 2nd claimant, Charles Thomas.*

(iv) *The application for an extension of time to file a Defence is granted.*

(v) *The defendants are permitted to file a defence within 42 days of the date of this Order.*

(vi) *Where a Defence is filed within the 42 days as stipulated by the order herein, the parties are to proceed to automatic mediation in keeping with Rule 74 of the CPR. Mediation is to be completed by January 7, 2024.*

(vii) *Following the conclusion of the mediation, and where unsuccessful, the parties are to return to a case management conference via video conference, fixed for February 8, 2024, at 11 a.m. for a half hour.*

(viii) *The costs of the application to be costs in the claim.*

(ix) *The applicants' Attorneys-at-Law are to prepare file and serve this Order.*

……....
Maxine Jackson
Puisne Judge (Ag.)