

BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 1338 of 2007

BETWEEN

KEELEY HOLDER

PLAINTIFF

AND

**STOUTE'S CAR RENTAL LIMITED
BEN GREENE**

**FIRST DEFENDANT
SECOND DEFENDANT**

Before the Honourable Mr. Justice William Chandler, Judge of the High Court

Decided upon Written Submissions

Date of Decision: 2015 December 3rd

Mr. John A. Connell CHB, Q.C. in association with Mr. Branford McG. Taitt, Attorneys-at-Law for the Plaintiff.

Mr. Patterson K. H. Cheltenham Q.C. in association with Ms. Rhea A. Cheltenham, Attorneys-at-Law for the Second Defendant.

DECISION

Background

[1] On or about the 22nd day of July 2004, a vehicular accident occurred along Highway 1 in the vicinity of Sunset Crest, Holetown in the parish of Saint James in this Island involving a vehicle, registration number O 272, driven by the Plaintiff and motor vehicle registration number H 192

which at the material time was owned by the First Defendant and driven by the Second Defendant Ben Greene, a tourist. As a result of the collision the plaintiff sustained personal injuries loss and damage.

[2] On the same day the Plaintiff notified her Insurer, the Insurance Corporation of Barbados Limited (ICBL) situate at Roebuck Street in the parish of Saint Michael in this Island of the accident. The following day the Plaintiff was informed by ICBL that it had communicated with the insurer of the motor vehicle registration number H 192, United Insurance Company Ltd (now called Massy United Insurance Limited) situate at Lower Broad Street in the City of Bridgetown (“the Insurer”).

[3] The Plaintiff submitted a quotation to start the process of having the car repaired and the cost was settled by the Insurer. The cost of repair in the sum of \$2,241.56 was paid for by the Insurer on or about February 17 2005. By letter dated April 27, 2005 to the Insurer’s Claims Manager, the plaintiff’s Attorney-at-Law, Mr. Taitt, informed the Insurer that he was instructed that the said accident was caused by the negligence of the said Ben Greene in driving, managing and controlling the said vehicle and that Ben Greene was a non-national visitor to the island and that he accepted liability at the scene of the accident. Mr. Taitt also stated in his letter that he was informed that liability had been accepted in this matter. In that letter Mr. Taitt also inquired of the Insurer if it would be prepared to

advance funds to the Plaintiff upon production of the relevant bills in order that her medical treatment may continue without any interruption.

[4] The Insurer responded to Mr. Taitt by letter dated 4th May, 2005 stating that the circumstances surrounding this accident had been reported to it and asked that Mr. Taitt quantify and submit the Plaintiff's claim supported by medical evidence. It further confirmed that it was prepared to entertain the request to advance funds and asked that the bills be forwarded for its consideration. The Insurer also requested permission to have the Plaintiff medically examined by Mr. Arthur Edghill of the Diagnostic Clinic situate at Beckles Road in the parish of Saint Michael in this Island.

[5] Correspondence by letters continued between the plaintiff's Attorney-at-Law and the Insurer. The Insurer was informed of and paid for medical expenses incurred on behalf of the Plaintiff for the total sum of \$10,756.20. On the 20th day of July 2007 a generally endorsed Writ of Summons was filed on behalf of the Plaintiff against the Defendants and a Notice of Proceedings was served on the Insurer on the 24th day of July, 2007. By letter of 7th August 2007 the Insurer acknowledged receipt of the Notice of Proceedings against the Defendants.

[6] On the 25th day of June 2008 a certified copy of the Writ of Summons was duly served on the First Defendant. It was not served on the Second

Defendant because the Second Defendant could not be located. On July 21, 2008 the Writ against the Second Defendant expired.

[7] On or about October 19, 2009, an Acknowledgment of Service was filed on behalf of the First Defendant. By letter dated 12 October 2009 the Insurer forwarded to Mr. Taitt an unsigned report dated September 24 2009 authored by the Plaintiff's tutor Dr. Lyndon Waterman of the University of the West Indies. This report had been recommended by Dr. Edghill, a medical practitioner to whom the Plaintiff had been referred by the Insurer. In 2009 Mr. Taitt received a medical report from Dr. Jeffrey Gay dated May 15, 2008. On the 6th day of April 2010 Mr. Taitt received the aforementioned report from Dr. Lyndon Waterman duly signed. An updated version of the medical report from Dr. Gay dated May 15 2008 was received by Mr. Taitt on October 21 2011.

[8] A quantified claim dated December 19, 2012 was sent to the First Defendant's Attorney-at-Law, who responded by letter dated 20 December 2012 claiming that, in the absence of service of the writ on the Second Defendant or an extension of time for service by the Court, the writ had died due to the failure to serve the Second Defendant within the one year window. Interestingly, the letter did not deny liability for the accident by the Insurer.

The Applications

[9] On July 19 2013 the First Defendant applied to the court, by way of Summons (the Defendants' summons), seeking the following relief:

- (i) An order that the First Defendant be removed as a party to the action, on the ground that there is no contractual or tortious relationship between the Plaintiff and the First Defendant and consequently, the First Defendant is not a proper or necessary party to the action.

[10] On the 24th September, 2013 the Plaintiff filed an Affidavit in Reply to the First Defendant's Application and averred the following:

- (i) The First Defendant's application is unwarranted.
- (ii) Furthermore, the First Defendant's application is premature and or improperly before the court.
- (iii) In any event the First Defendant's application must fail ab initio for failure to disclose sufficient grounds.

[11] By way of Summons filed on August 15, 2013 (the Plaintiff's summons) the Plaintiff applied to the court seeking the following orders:

- (i) The Defendants are estopped from relying on the provisions of **section 20(2) of the Limitation of Actions Act Chapter 231 of the Laws of Barbados**;
- (ii) The provisions of **section 20(2) of the Limitation of Actions Act Chapter 231 of the Laws of Barbados** shall not apply to this action;

- (iii) The Writ of Summons filed herein and issued on the 20th July, 2007 shall stand renewed for one year as against the Second Defendant;
- (iv) The Plaintiff shall be at liberty to serve the renewed Writ of Summons on the Second Defendant outside of the jurisdiction or by substituted service by way of advertisement in a local Newspaper;
- (v) Leave is granted to the Plaintiff to continue her action on the question of quantum only as liability had earlier been admitted or conceded by or on the behalf of the Defendants or by virtue of the conduct by or on behalf of them;
- (vi) The Plaintiff be at liberty to amend the Writ of Summons filed herein and issued on the 20th July, 2007 by adding or substituting United Insurance Co. Ltd as a Defendant to the action;
- (vii) Such further or other orders as the Court may deem fit.

The Affidavits in Support of the Applications

[12] The Plaintiff filed an affidavit in support of her application on 16 August 2013 the salient points of which are as follows:

1. That I am the Plaintiff herein.
2. That on or about the 22nd day of July 2004 I had brought motor vehicle registration number O 272 which I was driving to a complete stop along Highway 1 in the vicinity of Sunset Crest. Hometown in the parish of Saint James in this Island when my said motor vehicle was struck in the rear by motor vehicle registration number H 192.
3. When I got out my vehicle the driver of the said motor vehicle registration number H192 identified himself to me as Ben Greene, a tourist, apologised for colliding with me and acknowledged that it was his fault. He also admitted liability in the presence of the Police.

4. As a result of the collision I sustained injuries loss and damage.
5. On the same day I notified my Insurer the Insurance Corporation of Barbados Limited situate at Roebuck Street in the parish of Saint Michael in this Island. The following day I received a call from my said Insurer indicating that it had communicated with, and liability had also been accepted by, the Insurer for the owner of motor vehicle registration number H 192, United Insurance Company Limited situate at Lower Broad Street in the City of Bridgetown (hereinafter referred to as '*the Insurer*') and to submit the quotation to start the process of having the car repaired and the cost settled by the Insurer.
6. I complied with that and all of the requests made of me by my Insurer pursuant thereto.
7. That cost of repair was the sum of \$2,241.56 which I am aware was ultimately paid for by the Insurer on or about the 17th day of February 2005. Attached hereto and marked "Exhibit KH1" is a copy of the receipt confirming the same.
8. I retained Mr Branford McG Taitt Attorney-at-Law shortly thereafter in April of 2005 to act on my behalf for the purposes of claiming compensation for my injuries loss and damage.
9. As a result of the injury I was unable to work and advised Mr Taitt that I could no longer afford to pay for my medical treatment. I therefore instructed' him to request and facilitate payment by the Insurer which he did.
10. I am aware that Mr Taitt then and thereafter interacted with the Insurer and regularly informed me of the progress of the matter.
11. I am aware that the Insurer agreed to pay for my expenses and I continued thereafter to receive medical treatment and submitted the bills to Mr. Taitt who in turn passed them on to the Insurer.
12. At the request and on the behalf of the Insurer I agreed to be and was attended to by Mr. Arthur Edghill of the Diagnostic Clinic situate at Beckles Road in the parish of Saint Michael in this Island.

13. I am aware that expenses over the next several years which amounted to the sum \$10, 756.22 were paid by the Insurer.
14. I am aware that in 2007 Mr. Taitt duly filed a Writ of Summons in this matter against the Defendants on my behalf and duly served notice on the Insurer.
15. From 2004 until 2012 during the progress of this matter I did what was I was required to do by way of receiving medical treatment and gathering medical reports, financial and academic data and or documents for use by Mr Taitt in the quantification of my claim in order to submit the same to the Insurer.
16. At no point throughout this time did I, or to the best of my knowledge information and belief did Mr. Taitt, have any indication from the Defendants or the Insurer other than that it intended to negotiate a settlement of this matter.
17. In the circumstances I was shocked to learn from Mr. Taitt that counsel for the Insurer wrote him indicating that on behalf of the Insurer he was going to in effect dispute liability of the First Defendant after all of this time and in spite of the Insurer's actions and or challenge the pursuit of this matter by me.
18. For years I have relied and acted on the understanding that liability had been accepted in this matter by or on behalf of all parties based on the Second Defendant's admission of liability to me at the scene of the accident and the course of subsequent conduct of the Insurer namely the communication between my Insurer and the Insurer and the latter's payment for my repairs, the subsequent correspondence between my lawyer and the Insurer and the Insurer's cooperation and payments for my expenses and that for all these years nothing contrary to settlement was said or indicated. I therefore verily believed that this matter was going to be settled.
19. I therefore did not expect that I needed to and therefore did not instruct Mr. Taitt to cease communication with the Insurer and or proceed with any form of litigation but rather to continue to proceed to settlement.
20. Also as I was not working, I was not able to pay any further

costs to Mr. Taitt in order for him to file any interim applications on my behalf in this matter as may now be determined to have been required at the time.

21. I do not know and never knew Mr. Greene's residential address but by his accent I believed that he was from the United Kingdom. By reason of the foregoing I did not expect to be required to ascertain his whereabouts.
22. I would be further severely and unconscionably prejudiced if I was not able to pursue a claim for compensation by reason only of not having served the Second Defendant within the required time having relied on the aforementioned circumstances. I have already suffered significant and immeasurable hardship as a result of this accident, both physically and psychologically. I have had my career prospects totally derailed as a result of my disability to perform and my life has been in effect turned totally upside down. I have suffered significant financial loss as a result of not being able to work in my chosen field as well as being handicapped in the labour market. I still suffer from symptoms associated with my injury and have been advised by my doctors and verily believe that my condition is chronic.
23. In all the circumstances therefore I humbly and respectfully ask the Honourable Court to renew the Writ of Summons filed herein and grant an extension of time to serve the same against the Second Defendant.
24. I also fear that if the Defendants were allowed to retract their concession or admission of liability and this matter were now to be forced to go to trial so many years after the accident I would be significantly prejudiced in the conduct of this matter as the Claimant, as a result of lost evidence and failing memories and the effect thereof on the cogency of evidence, inaccessibility of the 2nd Defendant, impecuniosity of the Second Defendant that may not have been so earlier or unavailability of witnesses to give evidence at the trial.”

[13] The First Defendant filed an affidavit on 19 July 2013 sworn to by Mr. David Stoute, Director of the First Defendant. He deposed that:

- “1. I am a Director of the First Defendant and I have held this position for seven (7) years. I have the authority on behalf of the First Defendant to make this affidavit in support of an application for it to be removed as a party to the instant proceedings.
2. The Plaintiff's action is for personal injury, loss and damage sustained in a motor vehicle accident on 22nd July, 2004. Motor vehicle registration number H-192, owned by the First Defendant but driven by the Second Defendant collided with vehicle motor vehicle registration number 0-272, owned by Courtland Holder and driven by the Plaintiff.
3. The Plaintiff commenced legal proceedings by way of Writ of Summons filed on the 20th July, 2007. The First Defendant filed an Acknowledgement of Service on the 19th October, 2009.
4. I have been advised by the First Defendant's Attorney-at-Law P.K.H. Cheltenham Q.C. [sic] and verily believe that the First Defendant has a legitimate basis on which it ought to be removed as a defendant on the ground that there is no contractual or tortious relationship between the Plaintiff and the First Defendant, and consequently the First Defendant is not a proper party to this action.
5. I have been further advised by the First Defendant's Attorney-at-Law and verily believe that in matters of this nature, there is no joint interest between the driver of a hired motor vehicle and the owner of the hired motor vehicle. Consequently, the Second Defendant was at no

time driving as an agent or servant of the First Defendant.

6. In the circumstances, I respectfully ask for an order that the First Defendant be removed as a party to this action with costs to be paid by the Plaintiff to the First Defendant”.

The Issues

[14] The issues that arise for determination are:

- 1) Whether the First Defendant ought to be removed as a party to the action, on the ground that there is no contractual or tortious relationship between the Plaintiff and the First Defendant and, in consequence, is not a proper party to the action?
- 2) Whether the Defendants are estopped from relying on the provisions of section 20 (2) of the **Limitation of Actions Act Cap 231** and that the section should not apply to the action?
- 3) Whether the Defendants are estopped from denying or withdrawing admission or concession of liability?
- 4) Whether leave ought to be granted to the Plaintiff to continue her action on the question of quantum only as liability had earlier been admitted or conceded by or on the behalf of the Defendants or by virtue of the conduct by or on behalf of them?
- 5) Whether the Writ of Summons filed herein and issued on the 20th of July, 2007 ought to be renewed for one year as against the Second Defendant?
- 6) Whether the Plaintiff ought to be granted liberty to serve the renewed Writ of Summons on the Second Defendant outside of the jurisdiction or by substituted service by way of advertisement in a local Newspaper?
- 7) Whether the Plaintiff ought to be granted liberty to amend the Writ of Summons filed herein and issued on the 20th July, 2007 by

adding or substituting United Insurance Co. Ltd as a Defendant to the action?

The parties filed written submissions upon which this matter is being decided.

The First Issue

[15] Whether the First Defendant ought to be removed as a party to the action, on the ground that there is no contractual or tortious relationship between the Plaintiff and the First Defendant and, in consequence, is not a proper party to the action.

[16] This issue arises on the Defendants' summons.

The Submissions of the First Defendant

[17] Written submissions were filed on behalf of the First Defendant by Ms. Rhea A. Cheltenham on 13 November 2014. She submitted that the First Defendant hired motor vehicle registration number H-192 to the Second Defendant during his visit to Barbados. The First Defendant placed no stipulations on how the vehicle should be used, therefore, the Second Defendant had exclusive use of the vehicle and he determined the purpose for which the vehicle was used. No instructions as to the use of the vehicle were conferred on the Second Defendant by the First Defendant. All benefits derived from the journeys embarked upon in the vehicle accrued solely to the Second Defendant.

[18] Counsel contended that the fact that the First Defendant may have received a financial profit from hiring the car to the Second Defendant is an insufficient basis on which to establish relationship of principal and agent between the owner and driver of the vehicle. Ms. Cheltenham submitted further that there was no joint interest between the driver of a hired car and the owner of it, consequently the driver was not driving as the agent or servant of the First Defendant. She relied upon *Avis Rent-a-Car Ltd v Maitland (1980) 32 WIR 294 (Avis)*.

[19] Counsel contended that the law in **Avis** was supported by this factual scenario in that no relationship of agency can be established in these circumstances. Counsel submitted that the First Defendant is an improper party to the action and by virtue of **Order 15 Rule 6 (2) (a)** of the **Rules of the Supreme Court, 1982 of Barbados (RSC) (Order 15)**, ought to be removed as a party to the suit. She further submitted that there is no contractual or tortious relationship between the Plaintiff and the First Defendant, consequently, the First Defendant is not a proper or necessary party to this action. Counsel also relied upon:

- 1) **Morgans v Launchbury [1972] 2 All ER 606**; and
- 2) **Hewitt v Bonvin [1940] 1 K.B. 188**.

The Plaintiff's Submissions

[20] Mr. Taitt submitted that the First Defendant's application ought to fail for the following reasons: (1) The Application was premature/improperly

before the Court; (2) there were Insufficient Grounds to support it; (3) Misjoinder or Nonjoinder was not fatal; (4) the application was unwarranted.

[21] Counsel submitted that the First Defendant sought to argue that it was not a proper party because it was not and could not be liable. He submitted that the First Defendant was part of the chain of causation and was thereby “solidarily” liable. Furthermore, he contended that it is therefore a triable issue which the First Defendant is trying to litigate in advance of a Statement of Claim and Defence or trial by masking his application under **Order 15**.

[22] Mr. Taitt submitted that Order 18 of the RSC applies to this case. He further submitted that, where it is sought to dismiss the action, the application should not be made before the service of the Statement of Claim (relying upon The Supreme Court Practice (UK) (the White Book) and Order 18/19/2; **Wright v Prescott UDC (1916) LT 772 (Wright); Electrical Co v Att-Gen for Ontario [1919] AC 687**). Counsel pointed out that only a generally endorsed Writ was filed and there is no Statement of Claim. The First Defendant was, therefore, unaware of the entirety, or the particulars, of the Plaintiff’s case to properly purport to deny liability at this stage.

[23] Counsel for the Plaintiff referred to the particulars claimed by the Plaintiff in the Writ of Summons filed on July 20, 2007 and submitted

that the Defendant's Application, as confirmed by paragraph 5 of the Affidavit in Support, addressed only two of the three joint or alternative limbs of liability claimed by the Plaintiff, namely that the Second Defendant was the agent and or servant of the First Defendant, and failed to consider at all that the Plaintiff's Claim includes a third limb "*and or permitted driver*". Counsel submitted that by virtue of this pleading and the provisions of the **Road Traffic Act Chapter 295** of the **Laws of Barbados (the RTR)** it is well established that the owner of a vehicle has a tortious and or contractual relationship and or joint interest with the permitted driver of the vehicle and liability for the damages caused by the user of that vehicle and is, therefore, a proper party to an action for damages pursuant thereto. Counsel submitted that the RTR creates a statutory exception to the rules of privity so as to take account of liability arising in respect of a person who was permitted or authorised to drive other than the policyholder.

Joinder

[24] On the issue of misjoinder or nonjoinder, Mr. Taitt submitted that **Order 15 Rule 6 (1)** of the **RSC** provided that "no cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party...". He further submitted that the Plaintiff's Writ can also be amended and that, according to the White Book (1993), the court will generally give leave to amend a defect in pleadings rather than give judgment in ignorance of

facts which ought to be known before rights are definitely decided (White Book para 18/19/5). Counsel contended that in any event, the Plaintiff submitted that the joinder of the First Defendant was entirely proper by virtue of the fact the First Defendant is the Insured and the Second Defendant was the Permitted Driver of the First Defendant (per section 35 of the **RTR**) as well as the fact that he was a part of the chain of causation.

[25] Counsel for the Plaintiff submitted that the First Defendant's Application was unwarranted because the First Defendant suffered no real prejudice by being a party to the case. He contended that the First Defendant was insured; that its Insurer was fully seised (of the facts) and acting on its behalf, (it had legal counsel at no cost to it) liability was (implicitly) accepted. Counsel also averred that repairs were paid for and that the matter was in an agreed settlement process for more than 7 years. He submitted that there "...was expressly no intent to litigate during this time. Out of court settlement made the application pointless".

The Law

[26] The applicable principles of law quoted by counsel are found in **Order 15**

Rule 6 and **Order 18 Rule 19** of the **RSC Order 15 Rule 6** provides:

"1. No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party; and the Court may in any cause or matter determine the issues or question in dispute so far as they affect the rights and interest of the persons who are parties to the cause or matter

1. At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application
 - (a) Order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party
 - (b) Order any of the following persons to be added as a party namely
 - (i) Any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon
 - (ii) Any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well between the parties to the cause or matter but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorized

An application by any person for an order under paragraph (2) adding him as a defendant, must except with the leave of the Court, be supported by an affidavit showing his interest in the matters in dispute in the cause of matter”.

Order 18 Rule 19 (1) of the RSC provides that:

- “(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that
- (a) it discloses no reasonable cause of action or defence, as the case may be; or
 - (b) it is scandalous, frivolous or vexatious; or
 - (c) it may prejudice, embarrass or delay the fair trial of the action; or
 - (d) it is otherwise an abuse of the process of the Court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
- (2) No evidence shall be admissible on an application under paragraph (1) (a)”.

Discussion

[27] The Plaintiff filed a generally endorsed writ on 20 July 2007 for damages for personal injuries, loss and expense, interest thereon and costs against the Defendants, the said injuries having been sustained on or about the 22nd day of July 2004 when the motor vehicle registration number O272 driven by the Plaintiff was involved in a collision with motor vehicle registration number H 192 owned by the First Defendant and driven by the Second Defendant as its servant and or agent and or permitted driver and caused solely by the negligence of the Second Defendant in managing driving and controlling the said motor vehicle registration number H192.

[28] After the writ was filed, an Acknowledgement of Service was filed on behalf of the First Defendant by Mr. PKH Cheltenham QC in which he indicated his client's intention to defend the action after correspondence was exchanged between counsel for the Plaintiff and the Insurer which has been previously referred to in this decision and which form the subject matter of the other issues which I am called upon to decide. No Statement of Claim was filed and served.

[29] The issue of whether or not the First Defendant is properly joined in the action must be viewed in the light of the Plaintiff's pleadings. She alleges that the Second Defendant was driving as the servant and/or agent and/or the permitted driver of the First Defendant. She bears the burden

of proof of the allegations on the civil standard, namely, a balance of probabilities. The Plaintiff can only prove her case by leading evidence in support during the trial of the action.

[30] The First Defendant filed the affidavit of Mr. David Stoute in support of its application. There was no affidavit filed in opposition. This, in my view, is not fatal. The Plaintiff is entitled to have her case heard and the salient issues determined except where the case falls under **Order 19 Rule 19** of the **RSC**. This is the interpretation to be placed on **Order 15 Rule 6** of the **RSC**. Misjoinder shall not defeat the cause or matter “...and the Court may in any cause or matter determine the issues or question in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter”.

[31] Nowhere in the Rule relied upon by Ms. Cheltenham is there provision for a pre-emptive strike such as contained in her application. The Plaintiff has not accepted the averments in the affidavit of Mr. Stoute, rather, she has, in her submissions, put the First Defendant to proof by alleging that the application is premature. I am of the opinion also that it would be inequitable to rule on this issue in the absence of evidence by the Second Defendant whose testimony is crucial to a determination of the precise nature of the relationship between himself and the First Defendant. He ought to have this right be heard before a ruling is made. Counsel relied upon the case of **AVIS** in support of his submission.

[32] **Avis** is distinguishable from this case on the basis that, in **Avis**, the Court made its ruling after completion of the full hearing of the matter and the taking of evidence. **Avis** relied upon the principles relative to vicarious liability in running down collisions set out in **Morgans v Launchbury [1973] AC 127(Morgans)**. In **Morgans** the principles were distilled after a full hearing of the matter. The simple point to be made is that decisions in relation to liability based upon vicarious liability require a sufficient matrix of fact upon which the Court can base its findings. It is unnecessary to distill the principles relative to vicarious liability at this point in time.

[33] In **Wright v Prescott Urban Council (1916) 15 LGR 41, 81 JP 43 Neville J.** in dealing with applications to strike out under **Order XXV Rule 4 of the Rules of the Supreme Court (UK) (Order 19 Rule 1 of the RSC of Barbados)** opined as follows:

“I turn to the special order in the Rules of the Court, and there I find that the right to take a short cut like this arises when the pleadings are delivered, and not upon the issue of the writ. It appears to me, therefore, that the method which has been adopted, however honestly and with a desire to avoid expense, is a mistaken one, and that is the reason why, instead of yielding to the argument of counsel for the defendants, and let the matter stand over, I think it is right, when the practice of the court is not adhered to, that those who fail to adhere to it should not throw the costs of the mistake on the other side. It would not be fair that any costs of such a motion as this should fall on the plaintiff.”

[34] It must be said that some support for Mr. Taitt’s submission with respect to section 35 of the RTR may be found in **Eastern Caribbean Insurance Ltd. v Bicar LC 2010 CA 6 (Bicar)** and the decision in **Avis** in which

the Court lamented the absence of a section similar to section 35 in the Jamaican law. It is unnecessary at this point in time to make a conclusive decision on the issue.

Conclusion

[35] The application to strike out the First Defendant as a party is premature.

Disposal

[36] The application is dismissed.

The Second Issue

[37] The following issues arise on the Plaintiff's summons:

Whether the Defendant is estopped from relying on the provisions of **section 20 (2)** of the **Limitation of Actions Act Cap. 231 (LOA)** and that the section should not apply to the action?

Submissions of the Plaintiff

[38] Mr. Taitt, filed written submissions in support of the Plaintiff's application on 17 November 2014. He submitted that the Plaintiff's application is brought under **Section 52(1)** of the **LOA** and that the Defendant is estopped from relying on **Section 20(2)** of the **LOA**.

[39] Counsel submitted that on any of the bases outlined in **Section 53**, the Plaintiff and her counsel acted appropriately. He further submitted that the conduct of the Defendants' Insurer and, in consequence, the Defendants, was an integral influence on the Plaintiff's and her counsel's actions in the matter. He averred that the Plaintiff acted quickly and diligently in informing the relevant parties of the accident. That within

months of the accident the Insurer paid \$2,241.56 towards repairs. Moreover, in written response to her counsel, the Insurer stated that the circumstances surrounding this accident had been reported to it and asked that he quantify and submit the Plaintiff's claim supported by medical evidence. The Insurer further confirmed that it was prepared to entertain the request to advance funds to the Plaintiff and asked that the bills be forwarded for its consideration.

[40] Counsel submitted that, neither in its letter to himself of 4th May, 2005 nor in the 7 years since, did the Insurer state, or otherwise indicate, that it needed to complete any investigation into the circumstances surrounding the matter before it was able to attach any negligence to its insured or its insured's agent, servant or permitted driver or that it was unable to do so upon completion of any such investigation. Furthermore, it did not either expressly state that liability was not admitted or reject the statement in his letter that liability had been accepted.

[41] He submitted that the fact that the Insurer paid the sum of \$2,241.56 for the repairs to the Plaintiff's car well before they had been contacted by him was a sure act of acceptance of liability. It was also consistent with the conduct of the Insurer for 8 years from then until 2012.

[42] Mr. Taitt submitted also that it was believed and expected that the Plaintiff's personal injury claim would have been honoured upon its presentation to the Insurer's Attorney-at-Law. The ascertainment of the

whereabouts and address of the Second Defendant for service of the Writ of Summons on him was delayed due to the Plaintiff's reliance on these facts and the circumstances as deposed to in the affidavits filed on behalf of the Plaintiff.

[43] Counsel opined that the critical factors to be considered were: (i) the acceptance of liability by the Second Defendant Ben Greene; (ii) payment by the Insurer of the sum \$2,241.56 being the cost of the repairs to the car driven by the Plaintiff; (iii) the non-denial at any time by the Insurer of the assertion by the Plaintiff or her counsel that liability had been accepted; (iv) the invitation by the Insurer to submit a claim on behalf of the Plaintiff; (v) all other subsequent correspondence from the Insurer and its general conduct in the matter on the Defendants' behalf for 8 years up to and well beyond the times limited by the statute for the filing and service of a Writ of Summons up to the date of Mr. Cheltenham's letter; (vi) payment by the Insurer of the additional sum of \$10,756.20 over a period 5 years towards the Plaintiff's medical expenses; (vii) failure to file an acknowledgment of service for 15 months; (viii) and no word being received from the Insurer or its Attorney-at-Law for more than three years from the date of Acknowledgment of Service to Mr. Cheltenham's letter, of any intent to deny liability or otherwise resist the Plaintiff's claim, that liability was believed to be accepted and settled and that no advantage was earlier sought by the Plaintiff by seeking default

judgment for failure of acknowledgment by the Defendant of service within the time required after service.

[44] Counsel further submitted that the Plaintiff relied and acted on the admission of liability made to her personally by the Second Defendant at the scene of the accident and the Insurer's subsequent conduct (of which she was aware) and altered her position to her prejudice. As she was unemployed by reason of the accident, she was in any event, unable to cover the costs of the initiation of any court proceedings or at all to have the Second Defendant served either outside of the jurisdiction or by way of Substituted Service. Throughout the conduct of this matter the Plaintiff did what she was required to do by way of receiving medical treatment and gathering medical reports, financial and academic data and or documents for use by her counsel in the quantification of her claim in order to submit the same to the Insurer.

[45] Counsel averred that the Plaintiff also placed reliance on the fact that the action remained alive against the First Defendant on whose behalf the Insurer had acted and who was liable to pay damages to the Plaintiff. Mr. Taitt cited the case of **Lester Daniel v M & W Jordan Enterprises No 844 of 2007 (Unreported)** in support and stated that the circumstances in **Lester Daniel** mirrored the circumstances in the instant case. **Edwin Marshall v Cable And Wireless Bartel Limited No. 2515 of 2001 (Unreported) (Edwin Marshall)**.

[46] Counsel submitted that, in the instant case, the Insurer's letter of May 4, 2005 was more influential than that in **Edwin Marshall** because the Insurer did not state in its letter, or subsequently, that it needed to investigate the matter after earlier having paid for the Plaintiff's repairs. Furthermore, he contended that, in tandem and consistent with that letter, was the unmistakable and extensive course of conduct on the Insurer's part, both prior to and subsequent to that said letter.

[47] Counsel pointed out the reasons given by **Crane-Scott J** in **Lester Daniel** for deciding that the Defendant's actions were unconscionable and submitted that it would be even more unconscionable in the instant case considering the additional factors of the length of time and the periodic payments by the Insurer for a total of \$12,997.76.

[48] Counsel for the Plaintiff cited the case of **Angela Watkins v Marlene Holder and Brian Holder** Nos. 2173 of 2002 and 2555 of 2002 respectively and submitted that prejudice to the Plaintiff in the instant case was indisputable. Counsel referred to **Moore J's** extensive examination of the issue of prejudice in **Watkins** and the following cases cited by **Moore J**:

- (i) **Hartley v Birmingham City District Council [1992] 1WLR 1968;**
- (ii) **Rosemary Best v CP Hotels (Barbados) Ltd No 185 of 2004 (Unreported).**

[49] Counsel for the Plaintiff contended that, in the instant case, the Defendants, through the Insurer, had more than adequate notice of the claim to which the Insurer directed its mind for 8 years. In addition the Plaintiff remained under disability to date. He cited **Crane Scott J's** assessment of the balance of prejudice in **Lester Daniel**.

[50] Mr. Taitt submitted that **Lester Daniel** and the dicta of **Crane-Scott J** were squarely applicable to the instant case and for the reasons cited by the Learned Judge and for the reasons he submitted, the Plaintiff ought to be granted the orders applied for. Furthermore, counsel averred that the Plaintiff had a very strong case, evidenced by the conduct of the Insurer, with every likelihood of success.

[51] Counsel submitted that the Plaintiff's application was brought because of the late actions of the Defendant's counsel in an apparent and unexpected change of course from that set by the Insurer for the 8 preceding years. He further submitted that it would be unjust and unconscionable in all the circumstances to prevent the Plaintiff from proceeding with her claim against the Defendants and cutting her off from the very protection that the law of motor vehicle insurance conferred on her. Counsel cited the case of **Wendy Newton v Transport Board No. 2297 of 2001 (Unrep)**.

The First Defendant's Submissions

[52] Ms. Cheltenham contended that an application is irrelevant as the issue of limitation was never raised in the First Defendant's application. She

recalled that the Plaintiff acted in accordance with the provisions of the Act by filing the Writ within the requisite time. Counsel submitted that one of the issues before the court was the invalidity of the Writ due to the Plaintiff's failure to serve it on the Second Defendant (the only proper party to the action) and that no issue has been raised as to limitation. The provisions of s. 20 (2) of the **LOA** did not operate to cure an invalid writ and therefore those provisions were not applicable to the proceedings.

The Law

[53] **Section 20(2)** of the **Limitation of Actions Act Chapter 231 of the Laws of Barbados** provides as follows:

“20. (2) Except where subsection (3) applies, no action to which this section applies may be brought after the expiration of the period of 3 years from the later of the following dates.

- (a) the date on which the cause of action accrued; or
- (b) the date on which the person injured acquired knowledge of his cause of action.”

[54] **Section 52(1)** of the **Limitation of Actions Act** states:

“52 (1) If the Court considers that it would be equitable to allow an action to proceed having regard to the degree to which

- (a) the provisions of section 20 or 22 prejudice the plaintiff or any person whom he represents, or
- (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents the court may direct that those provisions shall not apply to the action, or do not apply to any specified cause of action to which the action relates.”

[55] **Section 53** sets out the considerations to be applied by the court in the exercise of the discretion vested in it under section 52. These considerations are:-

- “(a) the length of, and the reasons for the delay on the part of the plaintiff;
- (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 20 or, as the case may be, by section 22;
- (c) the conduct of the defendant after the cause of action arose, including the extent, if any, to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff’s cause of action against the defendant;
- (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
- (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages; and
- (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he might have received”.

Discussion

[56] The accident occurred on 22 July 2004. The generally endorsed writ was filed on 20 July 2007 within the three year period delimited in the **LOA**. I am of the view and hold that, in these circumstances, it is unnecessary to consider the disapplication of the limitation period under the provisions of the **LOA**.

Disposal

[57] The Plaintiff's application under this limb is dismissed.

The Third and Fourth Issues:

Whether the Defendants are estopped from denying or withdrawing admission or concession of liability? and

Whether leave ought to be granted to the Plaintiff to continue her action on the question of quantum only as liability had earlier been admitted or conceded by or on the behalf of the Defendants or by virtue of the conduct by or on behalf of them?

These two issues may conveniently be taken together.

The Plaintiff's Submissions

[58] Counsel submitted that, in the light of the acceptance or concession of liability by and the subsequent conduct of the Defendant up to and beyond the time limited by the **LOA** for service of a Writ, the Plaintiff did not serve the Second Defendant. He contended that the case law showed that the Plaintiff was entitled to rely on the correspondence and subsequent conduct of the Defendant which led the Plaintiff and her counsel to believe that liability was settled. He submitted that it only remained to resolve the issue of quantum and that the Defendant was estopped in the circumstances from reneging on the admission of liability and from pleading the limitation point.

[59] Counsel submitted that there could be no doubt that the Insurer, by its letters and by its conduct repeated and thereby reinforced, over a period of several years, accepted liability in this case. From its letter of May 5 2004 to the payment of a total of \$13,000 starting with its first payment for the repairs to the Plaintiff's vehicle even before Counsel for the plaintiff had written to it, the Insurer demonstrated that liability was settled. He cited the cases of **Best** and **Lester Daniel** and further submitted that it would not be open to the Defendant "to concede the limitation point whilst disputing the Plaintiff's claim that the Defendant was estopped from disputing liability".

[60] It was submitted that, whereas the principle of estoppel which would make it unconscionable for the defendant to plead the period of limitation arose only by implication from the Defendant's letter of 4th May, 2005 and subsequent conduct of the Defendant, the issue of the Defendant being estopped from reneging on the admission of liability flowed directly therefrom as well. Any proper consideration of the letters and of the subsequent and extended conduct of the Insurer showed that the only issue left to be determined was the issue of quantum.

[61] Counsel contended that the Plaintiff stood to be prejudiced as the bearer of the burden of proof if the Defendants were also allowed to retract the admission or concession of liability due to the likelihood of failing memories and the effect thereon on the cogency of evidence so many

years after the accident, inaccessibility of the Second Defendant and unavailability of witnesses to give evidence at the trial. He submitted that, comparatively, the Defendant did not stand to be prejudiced at all due to fact that any aforementioned disadvantage to the Plaintiff constituted a distinct advantage to the Defendant. The Second Defendant's legal liabilities would also be met by the Insurer by way of subrogation as was the case with the First Defendant.

[62] Mr. Taitt submitted that there is, to date, no pleading filed in response to and in opposition to the Plaintiff's application and, to date, no stated intent by Counsel for the Defendant to respond to or oppose the Plaintiff's application.

The First Defendant's Submissions

[63] Counsel submitted that the onus was on the Plaintiff to prove that the Second Defendant admitted liability after the accident occurred. She further submitted that any determination of this issue could not be made against a party who had made no appearance in the proceedings. Counsel also contended that the First Defendant was an improper party to the action and consequently should be removed. Therefore, issues of liability and quantum bore no relevance in proceedings where no appropriate Defendant was before the court.

[64] Counsel submitted that the issue of estoppel was not a relevant consideration for the court in these proceedings because:

- 1) The Plaintiff filed a writ of summons with no attached particulars of claim. Consequently, the First Defendant was not in a position to plead its position to a matter which bore no particulars; and
- 2) The First Defendant had no communication with the Plaintiff prior to these proceedings. No statements or representations were ever made to the Plaintiff by the First Defendant which they could now be estopped from relying upon.

[65] Ms. Cheltenham submitted that prior communications between the Plaintiff and an insurance company could not be construed as an admission of liability. She submitted that these communications were conducted on a ‘without prejudice’ basis. The onus was on the Plaintiff to file the writ and serve it on all parties within the stipulated time. She had only complied with the former and the First Defendant ought not to be prejudiced or penalized for the Plaintiff’s errors and inaction in the circumstances. Accordingly, the Plaintiff could not now rely on these exchanges in an effort to advance her case. Counsel submitted that, the Plaintiff should not be granted the relief she sought.

Discussion

[66] Mr. Taitt submitted that the Defendants were estopped from denying or withdrawing admission or concession of liability for the personal injuries of the Plaintiff. He applied for such an order under paragraph 5 of his summons filed 15 August 2013. The facts reveal that only the First

Defendant was served with the writ. The Second Defendant was never served. Under and by virtue of paragraph 4 of the said summons, counsel sought an order that the Plaintiff should be at liberty to serve the renewed Writ of Summons on the Second Defendant outside of the jurisdiction or by substituted service by way of advertisement in a local Newspaper.

[67] These two applications are incongruous with each other. If the Court grants the first application, then the second is rendered inutile. In **Lester McDonald Daniel v. M & W Jordan Enterprises Inc. et al No. 844 of 2007 (unrep) Crane-Scott J** examined the conduct of the Insurance Company to determine whether the Company, by its conduct had accepted liability for the personal injuries of the Plaintiff. **Crane-Scott J** said at paragraphs 25 and 26, 31 to 33:

“[25] In the absence of a Release and Discharge or any express disclaimer or reservation to the contrary, the Court is satisfied that by settling the claim in respect of the Plaintiff’s car, Caribbean Home Insurance Ltd must be taken to have also accepted liability for the Plaintiff’s personal injuries and any damages arising in connection therewith.

[26] The Court is satisfied that by settling the Plaintiff’s claim in respect of his car, the Defendants’ insurers, Caribbean Home, would have led the Plaintiff and his attorney-at-law to believe that liability was no longer in issue and that they would simply have been awaiting submission by the Plaintiff’s attorney-at-law of the information requested by their letter of July 8, 2003, (“**NOS 2**”) to permit them to quantify and settle the Plaintiff’s personal injury claim.”

[68] The learned judge continued at paragraphs 31 to 33:

“ [31] Having by its conduct and earlier correspondence, led the Plaintiff’s attorney-at-law to believe that it had accepted liability for the Plaintiff’s claim and invited the Plaintiff through his attorney-at-law to submit a quantified claim with a view to settling his claim for personal injuries, this Court finds that it was both unreasonable and unconscionable for the Defendants’ insurers to sit back no doubt with the view of taking the benefit of the limitation point without first informing the Plaintiff or his attorney-at-law *prior to the expiry of the limitation period* that it proposed to do so.

[32] Given Caribbean Home Insurance Co. Ltd’s earlier dealings with the Plaintiff and the fact that it had previously i) accepted liability for the accident; ii) settled the claim in respect of his car, and iii) invited his attorney-at-law to submit a quantified claim for his personal injuries, the company’s subsequent failure to warn the Plaintiff of the consequences of his not submitting a quantified claim or filing action prior to the expiry of the limitation period, is unconscionable.

[33] Additionally, the letters of February 1, 2006 (“*NOS 4*”) and October 18, 2006 (“*NOS 6*”) advising the Plaintiff’s legal representative of the reasons for the closure of their file appears very highhanded and, in the Court’s view, leaves much to be desired.”

[69] **Lester Daniel** may be distinguished from the instant case on the basis that the issue in **Lester Daniel** concerned the disapplication of the statutory period of limitation under the **LOA**. The instant case is not so concerned since the writ was filed within the limitation period. The findings of **Crane-Scott J** in **Lester Daniel** were relevant to an application to file a writ out of time, which the Court allowed. Mr. Taitt’s submissions suggest that this Court can apply the principle of estoppel in an interlocutory hearing so as to bring finality to an issue of liability where all necessary parties are not before the Court.

[70] The Plaintiff has applied to serve the Second Defendant outside of the period contained in the **RSC**. Counsel submitted that the First Defendant admitted liability at the scene of the accident. It would make no sense to allow service out of time if the issue of estoppel could resolve the entire matter. I consider that this issue is a triable one to be determined on the evidence. Mr. Taitt is also caught by his own submission that such matters cannot be determined on a generally endorsed writ (**Wright v Prescott** above). It must be observed that counsel for the Plaintiff made his application and submissions with reference to the Defendants. Only one Defendant has been served. It would be wrong to make a finding of estoppel against the Second Defendant in the absence of affording him the right to be heard.

[71] The Plaintiff has not applied for judgment against the Defendants in this matter pursuant to **Order 14** of the **RSC**. In any event no such application could be made in light of the fact that no statement of Claim was filed and served.

[72] **Order 14** provides as follows:

“Where in an action to which this rule **applies a statement of claim has been served on a defendant** (emphasis mine) **and that defendant has given notice of intention to defend the** action, the plaintiff may, on the ground that that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.

(2.) Subject to paragraph (3), this rule applies to every action by writ other than an Admiralty action or a Probate action or an action that includes

(a) a claim by the plaintiff for libel, slander, malicious prosecution, false imprisonment or seduction, or

(b) a claim by the plaintiff based on an allegation of fraud.

(3) This Order does not apply to an action to which Order 80 applies.

2. An application under rule 1 must be made by summons Supported by an affidavit verifying the facts on which the claim, or the part of a claim, to which the application relates is based and stating that in the deponent's belief there is no defence to that claim or part as the case may be, or no defence except as to the amount of any damages claimed”.

[73] The commentary in the **Supreme Court practice UK 1999 Vol 1** (the White Book) is as follows:

“Service **of statement of claim** - This is a condition precedent to an application by the plaintiff under O.14. The statement of claim may be endorsed on the writ or it may be served with or accompany the writ....

The statement of claim must be complete and good in itself; any defect or omission cannot be corrected or supplemented by the plaintiff's affidavit....If the defect is one of substance, the application for summary judgment will be dismissed.”

Conclusion

[74] In the absence of an application for judgment under **Order 14** of the **RSC** and, having regard to (1) my conclusion that the issue with respect to the First Defendant as a proper party to the suit cannot be resolved without a proper hearing on the merits of the case (2) the fact that the Plaintiff seeks leave of this court to serve the Second Defendant out of time, which application has not yet been disposed of (3) my finding that, in the absence of representation on behalf of the Second Defendant, it would be

improper to make a finding of estoppel against the Defendants, and (4) that such an order would, in effect be a finding of liability in the absence of an application under **Order 14** of the **RSC**, the Plaintiff's application with respect to the relief claimed under paragraphs 5 and 6 of her summons is without merit.

Disposal

[75] The application is dismissed.

The Fifth Issue

[76] Whether the Court ought to grant the application for an order that the Writ of Summons filed herein and issued on the 20th July, 2007 shall stand renewed for one year as against the Second Defendant?

The Plaintiff's Submissions

[77] The Plaintiff's submissions were largely those proffered in relation to the issue of the disapplication of the limitation period previously set out in this decision. Her counsel prayed in aid of his submissions with respect to **section 37** of the **RTR** and relied heavily upon the acceptance of liability and the payment of moneys by the insurer to ground his submission that it would be unjust and unconscionable to prevent the Plaintiff from proceeding with her claim against the Defendants and cutting her off from the very protection that the law of motor vehicle insurance offers her.

The First Defendant's Submissions

[78] Ms. Cheltenham contended that there was no evidence that the Writ of Summons was ever served on the Second Defendant, Ben Greene. She submitted that a party to an action had twelve (12) months in which to serve a Writ on a Defendant and that the court had the ability to extend the period of time for service. However, she stated that an application for an extension must be made within those twelve (12) months of the first expiry and that the Plaintiff had provided no evidence that she made any attempts to serve the Second Defendant with the Writ of Summons on or before the 20th July 2008. Counsel further submitted that, in accordance with **Order 6** of the **RSC**, the Plaintiff did not seek leave from the court to have the time for service of the Writ extended.

[79] It was also submitted that, if an application was never been put before the court before the expiry of one (1) year, then the court had no power to extend the validity of a writ beyond the stated time. Accordingly, the Plaintiff's request for permission to renew the Writ of Summons and effect substituted service on the Second Defendant must be denied.

The Law

[80] **Order 6 Rule 7** of the **RSC** provides:

“7. (1) For the purpose of service, a writ, other than a concurrent writ, is valid in the first instance for 12 months beginning with the date of its issue and a concurrent writ is valid in the first instance for the period of validity of the original writ that is unexpired at the date of issue of the concurrent writ.

(2) Where a writ has not been served on a defendant, the Court may by order extend the validity of the writ from time to time for such period, not exceeding 12 months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order, if an application for extension is made to the Court before that day or such later day, if any, as the Court may allow”.

Discussion

[81] It is conceded that the writ was not served on the Second Defendant at all.

Mr. Cheltenham filed an Acknowledgement of Service on behalf of the First Defendant on 19 October 2009 indicating his client’s intention to contest the proceedings. It is incumbent on the Plaintiff to satisfy the Court of the basis on which the Court ought to exercise its discretion in her favour on a balance of probabilities. The Court has a discretion whether to renew the writ.

[82] The application to renew the writ must be made within the appropriate period of validity from the day of its issue. The Court, however, is given express power to allow service after the expiry of the appropriate period from the date of its issue, but the application must be made within the appropriate period of the first expiry. In exceptional circumstances and where the interests of justice so require the court can entertain an application to extend the validity of the writ outside these limits under **O.2, r.1 or O.3, r.5** of the **RSC**.

[83] The learned authors of the Supreme Court Practice 1999 Vol. 1 at page 56 paragraph 6/8/9 opine that “ ... sufficient or good reason justifying the exercise of discretion to extend the validity of the writ will arise: where

there has been an agreement between parties, express or implied, to defer service of the writ; or where the delay in the application to extend the validity of the writ has been induced, or contributed to, by the words or conduct of the defendant or his representatives; or, perhaps, where the defendant has evaded service or, for other reasons without the plaintiff's fault, the writ could not have been served earlier even if the application had been made and granted earlier" (**per Meagen J., in Heaven v Road and Rail Wagons Ltd [1965] 2 Q.B. 355 at 365**). Thus, it is a sufficient reason that the defendant's insurers have stated that there is no need to serve the writ pending negotiations for a settlement (**North v Kirk (1967) 111 S. J. 793**), but the mere fact that negotiations for a settlement are in progress is not a good reason for allowing the renewal and a fortiori, it is not a good reason for renewal where the application is made after the negotiations have ceased. It is also a good reason for renewing the writ that the defendant cannot be traced so as to be served, especially if he is out of the jurisdiction or is elusive".

[84] The Plaintiff's Writ of Summons has expired. Counsel for the First Defendant contended that in failing to serve the writ within twelve (12) months, and in failing to seek an extension of time for service within that twelve (12) month period, the Plaintiff's writ died. Counsel relied on the cases of **Singh (Joginder) v Duport Harper Foundries Ltd [1994] 2**

All ER 889 (Singh v Duport) and Bernstein and another v Jackson and others [1982] 2 All ER 806 (Bernstein).

[85] In **Heaven v Road and Rail Wagons Ltd. [1965] 2 Q. B. 355 (Heaven)**, **Megaw J** referred to the decision of the court in **Battersby v. Anglo-American Oil Co. Ltd. [1945] K. B. 23** which held that a writ which had not been served within the time prescribed by the rules was a nullity. **Megaw J**, relying on the case of **Sheldon v Brown Bayley's Steel Works Ltd. [1953] 2 Q. B. 393**, disagreed with that view and said at pgs. 359-360:

“A writ, unrenewed, is not a nullity after twelve months. It remains a writ. If a defendant, on whom a writ is served out of time, enters an unconditional appearance, he thereby waives what is an irregularity in service. This could not be so if the out-of-time writ were a nullity. On that point, the recent revision of the Rules of the Supreme Court confirms, or reinforces, *Sheldon v. Brown Bayley's Steel Works Ltd.*”

[86] I agree with the observations of **Megaw J.** in **Heaven.** In the circumstances, I reject the submission that the validity of the Plaintiff's Writ of Summons cannot be extended because the writ has died. The **RSC** expressly provides for the renewal of a writ and the extension of time to serve it (**Order 5** and **Order 7** of the **RSC**).

[87] In **Singh v Duport**, which Counsel for the First Defendant relied on, the reason given by the Court of Appeal for ruling against the renewal of the writ was that the specific circumstances which needed to be present before the judge could exercise his discretion were not present. Moreover, in **Bernstein**, the circumstances in which the Court of Appeal gave its

judgment were very different to the present matter. In that case, the respondent argued that the failure of the plaintiff to apply for the renewal of the writ was an irregularity which could be cured by the provision in the Rules which allowed for proceedings to continue despite irregularities in procedure.

[88] This is not the argument advanced here. I consider **Bernstein** to be inapplicable to this matter.

[89] The general principle with regard to the court's discretion to order the renewal of a writ is that, in the absence of exceptional circumstances, the court will not exercise its discretion in favour of renewal after the period allowed for service has expired, if the effect of doing so would be to deprive a defendant of the benefit of a limitation which has accrued: **Heaven v. Road and Rail Wagons Ltd. [1965] 2 Q. B. 355.**

[90] However, the **White Book**, 1991 vol. 1, Part 1 states that the decision of the House of Lords in **Heaven v. Road and Rail Wagons Ltd. [1965] 2 Q.B. 355** must be read in the light of the decision of the House of Lords in **Kleinwort Benson Ltd. v. Barbarak Ltd., The Myrto (No. 3) [1987] A.C. 597 (Kleinwort Benson)**. In that case, **Lord Brandon** of Oakbrook examined the authorities where applications for extensions were made after expiry of the time limited for service of the writ after the limitation period had expired.

[91] **Lord Brandon** opined that a “good cause” or “good reason” and not “exceptional circumstances”, was required to justify extension of a writ.

He said further at page 622:

“I think on the whole that it has been unhelpful to put the condition for extension as high as “exceptional circumstances” an expression which conveys to my mind at any rate a large degree of stringency...Whether there is or is not good reason in any particular case must depend on all the circumstances of that case, and must therefore be left to the judgment of the judge...”

[92] **Lord Brandon** stated that the applicant for an extension must give a satisfactory explanation for his failure to apply for extension before the validity of the writ expired.

[93] In the present matter, the Plaintiff gave several reasons for not applying for an extension of time to serve the writ within the time limit. Counsel for the Plaintiff submitted that the Plaintiff was unable to serve the Second Defendant because she was unemployed as a result of the accident and was unable to cover the costs of the initiation of any court proceedings or to have the Second Defendant served either outside of the jurisdiction or by way of Substituted Service. This was not challenged. A good reason for extending the validity of a writ is the impossibility or difficulty in serving the defendant. Thus, the Court accepts the Plaintiff’s difficulty in serving the Second Defendant as a good reason that would justify the extension of the Writ of Summons.

[94] It was further submitted that the Plaintiff's failure to apply for an extension before the validity of the writ expired was based on the following circumstances:

- “(i) acceptance of liability by the Second Defendant Ben Greene;
- (ii) payment by the Insurer of the sum \$2,241.56 being the cost of the repairs to the car driven by the Plaintiff;
- (iii) the non-denial at any time by the Insurer of the assertion by the Plaintiff or her counsel that liability had been accepted;
- (iv) the invitation by the Insurer to submit a claim on behalf of the Plaintiff;
- (v) all other subsequent correspondence from the Insurer and its general conduct in the matter on the Defendants' behalf for 8 years up to and well beyond the times limited by the statute for the filing and service of a Writ of Summons up to the date of Mr. Cheltenham's letter;
- (vi) payment by the Insurer of the additional sum of \$10,756.20 over a period 5 years towards the Plaintiff's medical expenses;
- (vii) failure to file an Acknowledgment of Service for 15 months;
- (viii) there was no word from the Insurer or its Attorney-at-Law for more than three years from the date of acknowledgment of service to Mr. Cheltenham's letter of any intent to deny liability

or otherwise resist the Plaintiff's claim that liability was believed to be accepted and settled, and

- (ix) that no advantage was earlier sought by the Plaintiff by seeking default judgment for failure of acknowledgment by the Defendant of service within the time required after service."

Discussion

[95] The Plaintiff deposed that the Second Defendant told her that he accepted liability for the accident. This has not been contradicted by the First Defendant in the affidavit of Mr. Stoute, its Director. No affidavit has been filed by Mr. John Chandler, the servant of the Insurer to deny the averments in the Plaintiff's affidavit. Mr. Cheltenham's summons filed herein is very specific. It relates only to removal of the First Defendant as a party to the suit. It does not deal with the issue of liability on the part of the Second Defendant or the issue of quantum.

[96] The reality is that there would be no suit if the First Defendant was removed and the Plaintiff was unable to obtain leave to extend the writ and serve it on the Second Defendant.

[97] In looking to the justice of the case, the Court can look to the evidence of the conduct of the Insurer. Mr. Taitt filed an Affidavit on 15 August 2013 in support of the Plaintiff's application. There was no objection to it. He attached thereto several items of correspondence which I consider relevant to the exercise of my discretion. Exhibit KH1 is a letter from

Mr. Taitt to the Claim's Manager of the Insurer setting out the circumstances of the accident and requesting the insurer to confirm its acceptance of liability in the matter and also enquiring whether the insurer would be willing to advance moneys to enable his client to continue her medical treatment. KH2 is a response to KH1 signed on behalf of the insurer by Mr. Chandler and addressed to Mr. Taitt. Paragraph 2 is instructive and reads

“the circumstances surrounding this accident have been reported(emphasis mine) and we ask that you quantify and submit your client's claim supported by the medical evidence and appropriate legal authorities for our consideration”.

[98] The letter continued with a request that the plaintiff grant her permission to be medically examined by Mr. Arthur R. Edgehill FRCS. In response, Mr. Taitt's letter of 27 June 2005 stated that the plaintiff had no objection to the examination and requested payment of expenses incurred in the sum of \$3,623.70 which was paid by the Insurers by virtue of a cheque enclosed under cover of a letter dated 30 June 2005 addressed to Mr. Taitt. None of the correspondence signed by or on behalf of the insurer was headed “Without Prejudice”. The subsequent correspondence is concerned with request and payment for, *inter alia*, MRI scans, medical reports (Summit Centre) and other outlays.

[99] Exhibit KH14 is a letter dated 22 June 2007 from the Insurers to Mr. Taitt noting that it was almost three (3) years since the accident occurred and seeking to ascertain whether a follow up appointment with Mr. Edgehill was still required. Exhibit KH5 is addressed to Mr. Taitt by Mr. Chandler and is dated 7 August 2007 and reads as follows:

“We refer to the captioned and acknowledge receipt of the Notice of Proceedings 2007, No. 1338 in the High Court of Justice, Civil Division between Keeley Holder (Plaintiff) and Stoute’s Car Rental (First Defendant) and Ben Greene (Second Defendant). During the telephone conversation (Taitt/Chandler) of today’s date you confirmed that this action was primarily commenced to protect your client’s interest. However, should you decide to proceed further with this matter we would appreciate, if you could give us fourteen (14) days’ notice prior to your intention to proceed.”

[100] Exhibit KH16 is a letter from Mr. Chandler to Mr. Taitt enclosing a cheque for \$1,500.00 in the name of Mr. David O.C. Corbin being payment for the Plaintiff’s medical report and requesting a copy of the report with the official receipt of acknowledgment of payment. KH18, the letter of 12 October 2009 encloses a report on Mr. Lyndon Waterman to Mr. Taitt and advising that Mr. Cheltenham had been instructed in the matter and directing that all future correspondence be directed to his

office. Exhibit KH19 is Mr. Cheltenham's letter to Mr. Taitt advising him that he had filed the Acknowledgment on behalf of the First Defendant who had been "improperly forced into this action" and advising that if Mr. Taitt had not served the Second Defendant within the one year window or any extension granted by the Court under the RSC, then the Writ had died.

[101] It is clear to the Court that the Insurer was fully seised of the circumstances surrounding the accident (see Exhibit KH2 paragraph 70 above) when it wrote the correspondence under reference, none of which is 'Without Prejudice'. It cannot be said, as Mr. Cheltenham alleged in KH19, that the First Defendant had been improperly forced into this action. The context of the correspondence, the payment by the Insurers of \$2,241.56 for the cost of the repairs to the car driven by the Plaintiff and payment in the sum of \$10,756.20 over a period of 5 years towards the Plaintiff's medical expenses, suggest to me, and I find as a fact, that the Insurers acted as representatives of the First and Second Defendants and were prepared to settle, and had embarked upon the settlement of the Plaintiff's matter without the filing of legal proceedings in Court. It is equally apparent that the Plaintiff has suffered severe personal injuries loss and damage whilst it has not been alleged that the Defendants will be prejudiced or suffer any loss by the renewal of the writ.

[102] Mr. Taitt, as counsel, informed the Insurer that the reason for filing was to protect his client's interest. The Insurer continued to correspond with Mr. Taitt after the writ was filed. (See Exhibits KH14 and 16 and 18). In the circumstances, I am of the opinion, and hold, that the delay in the application to extend the validity of the writ had been induced, or contributed to, by the words, correspondence and conduct of the defendants or their representatives (the Insurer), who impliedly conveyed to the Plaintiff's Attorney-at-Law that they would settle the matter without service of the Writ on the Second Defendant. Their only reservation being that contained in Exhibit KH15, namely that Mr. Taitt give them fourteen (14) days' notice of his intention to proceed with the matter.

[103] It remains only for me to observe that Ms. Cheltenham filed submissions with respect to this issue without entering an appearance on behalf of the Second Defendant. She submitted that the Plaintiff could not rely upon "Without Prejudice" correspondence from the Insurer. This argument is untenable due to the fact that the correspondence from the Insurer is not headed "Without Prejudice".

Disposal

[104] In the circumstances, the Court exercises its discretion in favour of renewing the writ for a period of one year from today's date.

The Sixth Issue

[105] Whether the Plaintiff ought to be granted liberty to serve the renewed Writ of Summons on the Second Defendant outside of the jurisdiction or by substituted service by way of advertisement in a local Newspaper?

[106] It is conceded by both sides that the Second Defendant resides overseas and has not been served with the writ. Having ordered that the writ be renewed for one year, it would make nonsense of that order, to deny the Plaintiff the opportunity to serve it on the Second Defendant. In addition, if the issues of estoppel, joinder of parties (including vicarious liability or lack thereof raised by Ms. Cheltenham) and striking out of the First Defendant are to be properly addressed, natural justice requires that the Second Defendant be given the opportunity to meet the case alleged against him. Natural justice also requires that the Plaintiff be given the opportunity to prove and the Defendants to disprove whether or not the Second Defendant accepted liability for the accident. Whilst, I have held that the issue of estoppel cannot be decided without a full hearing, the conduct of the Insurer does suggest that liability for the accident is not in dispute. Counsel for the First Defendant has never alleged that liability of the Second Defendant for the accident is in doubt.

Disposal

[107] The Court orders that the Plaintiff has liberty to serve the Second Defendant with the renewed Writ of Summons outside of the jurisdiction by substituted service.

The Seventh Issue

[108] Whether the Plaintiff ought to be granted liberty to amend the Writ of Summons filed herein and issued on the 20th July, 2007 by adding or substituting United Insurance Co. Ltd as a Defendant to the action.

The Plaintiff's Submissions

[109] Mr. Taitt submitted that the court would generally give leave to amend a defect in pleadings rather than give judgment in ignorance of facts which ought to be known before rights are definitely decided. He contended that, if the First Defendant was struck from the action as a party, the Insurer's presence before the Court in substitution would be necessary to ensure that all matters in dispute in the cause or matter could be effectually determined and adjudicated upon pursuant to **Order 15 Rule 6(1) RSC**. He asserted that, not only was the Insurer seised of the facts of this case and had been actively involved in its conduct on behalf of the First Defendant, it was the party who was contractually bound to indemnify the First Defendant for the damages claimed by the Plaintiff. He relied upon **sections 37 (1), 38(1) and 43(1) of the Road Traffic Act**

Chapter 295 of the Laws of Barbados and **Eastern Caribbean Insurance Ltd v Bicar LC 2010 CA 6 (Bicar)**.

The First Defendants' Submissions

[110] Counsel submitted that consideration can only be given to adding the Insurer to the proceedings if there is a valid writ to the action. She submitted that, since the Plaintiff's Writ of Summons was served on a First Defendant which was improperly added, and furthermore never served on the Second Defendant, or renewed within the requisite period, the Writ was no longer valid.

[111] Moreover, the First Defendant contended that, in matters of this nature, an insurer was never party to proceedings and rather was engaged through **section 37** of the **Road Traffic Act Cap. 295** through a process of subrogation. As a result, the Insurer would be an improper party to the proceedings. Counsel submitted that no relationship of agency existed between the two which would cause the Insurer to be a proper party to these proceedings.

The Law

[112] **Order 16 Rule 6** of the **RSC** has already been quoted in this decision.

The relevant sections of the **RTR** relied upon by Mr. Taitt are as follows:

Sections 37 (2), 38 (1) and 43 (1) of the **Road Traffic Act, Cap. 295** of the Laws of Barbados provide as follows:

“37. (1) No person shall use or cause or permit any other person to use a motor vehicle on a public road unless there is in force in

relation to the user of the vehicle by that person or that other person, as the case may be, a policy of insurance or such security in respect of third party risks as complies with the requirements of this Act.

38. (1) For the purposes of this Act, a policy of insurance is a policy that is issued by a vehicle insurer and, subject to subsection (2) , insures the persons or categories of persons specified in the policy against

(a) liability in respect of any sum to a maximum of

(i) \$10 000 000, which such persons or categories of persons shall become liable to pay in respect of death of or bodily injury to one person in any one accident; or

(ii) \$30 000 000, which such persons or categories of persons shall become liable to pay in respect of death or bodily injury in the aggregate to any number of persons in any one accident; and

(b) any sum not exceeding \$50 000 which such persons or categories of persons shall become liable to pay in respect of damage to property,

arising out of the use of a motor vehicle on a public road.

43. (1) Where, after a certificate of insurance has been issued under section 38(7) in favour of the person by whom a policy has been effected, judgment in respect of any liability required to be covered by a policy under section 38(1), (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to this section and to any limitations on the total amount payable under the policy in consequence of that subsection, pay to the persons entitled to the benefit of the judgment any sum payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments”.

Discussion

[113] Mr. Taitt submitted that the Insurer is a de facto party in action. He cited **sections 37 (1), 38(1) and 43(1) of the Road Traffic Act and Bicar** in support.

[114] In **Bicar**, the appellant (“the Insurer”) issued a policy of insurance, pursuant to the **Motor Vehicles Insurance (Third-Party Risks) Act** Cap. 8.02 (“the Act”), to John Noel in respect of his motor vehicle. The certificate of insurance provided that the persons or classes of persons entitled to drive were the policyholder and “any other person who is driving on the policyholder’s order or with his permission”. Mr. Noel decided to sell the motor vehicle to one Mr. Monroe. Mr. Noel gave the motor vehicle to Mr. Monroe to facilitate the sale and whilst driving the motor vehicle at about 2:00 a.m. one Saturday morning, collided with a vehicle driven by the respondent, Edmund Bicar. Mr. Bicar sustained serious injuries and his motor vehicle was damaged. Mr. Bicar brought an action against Mr. Monroe, as the driver, and against Mr. Noel on the ground that he was vicariously liable. The vicarious liability claim was dismissed but it was held that Mr. Monroe was driving with the permission of Mr. Noel and was liable for the accident. Judgment was given in favour of Mr. Bicar as against Mr. Monroe.

[115] When neither Mr. Monroe nor the Insurer paid the judgment debt, despite demand made by Mr. Bicar, he brought a second action against

the Insurer in reliance on section 9 of the Act. The Insurer contended that they could not be liable as no judgment had been obtained against Mr. Noel, the insured; and, Mr. Monroe, who was legally liable to pay the judgment debt, was “not a person who is insured by the policy”. **Cottle J** found, applying section 4(7) of the Act that the Insurer had contracted to indemnify Mr. Noel and any authorised driver. Mr. Monroe was such an authorised driver so that the Insurer was liable to pay Mr. Bicar on account of the judgment debt. The Insurer appealed on the ground that Mr. Monroe was not an authorised driver. Mr. Bicar counter-appealed on the ground that the claim was based on breach of statutory duty under section 9 of the Act and not the indemnity provisions under section 4(7).

[116] The Eastern Caribbean Court of Appeal held, inter alia, that the policy of insurance between the Insurer and Mr. Noel extended to any person driving with the policyholder’s permission (although not as his servant or agent). Moreover, the Court of Appeal expressed the view that, under section 9(1) of the Act, it was the right of the third party to recover from the Insurer in respect of a legal liability covered under the policy arising whether from the acts of the policyholder or from the policyholder’s authorised or permitted driver.

[117] Section 9 of the **Motor Vehicles Insurance (Third-Party Risks) Act** Cap. 8.02 of St. Lucia, which was relied on by the respondent in **Bicar**, is similar to s. 43 of the **Road Traffic Act** of Barbados which the Plaintiff

relies on in his contention that the Insurance Company can be added as a party in this action. Both provisions impose a duty on Insurers to satisfy judgment against persons insured in respect of third-party risks.

[118] In **Bicar** the matter went to trial and judgment was given in favour of Mr. Bicar. Mr. Bicar then relied on s.9 of the **Motor Vehicles Insurance (Third-Party Risks) Act Cap. 8.02** of the Laws of St. Lucia to claim payment of the judgment debt from the Insurer of Mr. Noel. In the present matter, no judgment has been obtained against the First or Second Defendant that would enable the Plaintiff to invoke **s. 43** of the **Road Traffic Act** against the Insurer of the hired vehicle driven by the Second Defendant.

[119] I am of the opinion that there is no need to add the Insurer as a Defendant to the proceedings at this point in time. Its presence in the case is not necessary to decide the issue of liability between the parties. It has not been alleged that the Insurer is unwilling to indemnify the Plaintiff under the policy of insurance. In fact, the Plaintiff's position is that the Insurer has paid under the policy thus far and I see no need to doubt that it will pay once these issues which have been canvassed here are resolved. On the issue of the knowledge possessed by the Insurer in relation to the acceptance of liability by the Second Defendant, that evidence may be obtained by issuing a subpoena to the Insurer's employee to give the appropriate evidence, it is unnecessary to join the Insurer for this purpose.

[120] No evidence has been led as to who are the witnesses to the accident and how their recall of events may be affected. The medical evidence and the evidence of Mr. Lydon Waterman are documentary and may be used as *aides memoire* at trial.

Disposal

[121] The application is dismissed.

[122] The Court, therefore, orders as follows:

1. That the First Defendant's application to be removed as a party to these proceedings, is premature and is dismissed.
2. That the Plaintiff's application for an order that the Defendant is estopped from relying on the provisions of section 20 (2) of the Limitation of Actions Act Cap 231 and that the section should not apply to the action is dismissed.
3. That the Plaintiff's application for an order that the Defendants are estopped from denying or withdrawing the alleged admission or concession of liability is dismissed.
4. That the Plaintiff's application for an order that leave be granted to the Plaintiff to continue her action on the question of quantum only as liability had earlier been admitted or conceded by or on the behalf of the Defendants or by virtue of the conduct by or on behalf of them is dismissed.

5. That the Writ of Summons filed herein and issued on the 20th July, 2007 be renewed for one year from today's date as against the Second Defendant.
6. That the Plaintiff has liberty to serve the renewed Writ of Summons on the Second Defendant outside of the jurisdiction.
7. That the Plaintiff's application for an order to amend the Writ of Summons filed herein and issued on the 20th July, 2007 by adding or substituting United Insurance Co. Ltd as a Defendant to the action is dismissed.
8. That each party shall bear their own costs or that the costs of the applications shall be the costs in the cause.

William J. Chandler

High Court Judge