**COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**COMMON LAW AND EQUITY DIVISION**

**2016/CLE/gen/00247**

**BETWEEN**

**JARED ROSEN**
**(Executor for the Estate of the late Raymond Donat Charron Jr.)**

**First Plaintiff**

**AND**

**LOTTIE MAE CHARRON**

**Second Plaintiff**

**AND**

**MITCHELL ENTERPRISES LTD. d/b/a REGIONAL AIR SERVICES**

**First Defendant**

**AND**

~~**CHAD ADDERLEY**~~

~~**Second Defendant**~~

**AND**

**LYNDEN STEPHENSON MITCHELL**

**Third Defendant**

**AND**

**EXECUTIVE JET SERVICES LLC**

**Fourth Defendant**

**AND**

**AEROLOGISTICS II LLC**

**Fifth Defendant**

**AND**

**MICHAEL HUMPHREY**

**Sixth Defendant**

**AND**

**CALVIN HUMPHREYS**

**Seventh Defendant**

**Before:** The Honourable Madam Justice Indra H. Charles

**Appearances:** Ms. Ashley Carroll of Bowe Partners & Associates for the Plaintiffs
Ms. Meryl Glinton of Maurice O. Glinton & Co. for the First and Second Defendants

**Hearing Date:** 28 February 2019

**Civil Practice - Writ - Extension of time - Writ issued but not served - Application for extension of validity after expiration of writ and after statutory limitation expired - Application to strike out action - Whether action to be dismissed or extension granted - Whether reasons given were satisfactory - Balancing hardship between the parties - R.S.C., Ord. 6, r. 7 and Ord. 3 r. 4**

On 27 February 2015, the Plaintiffs filed a Complaint in the United States District Court for the Southern District of Florida ("the Florida Court") against the seven Defendants. Motions to dismiss were filed in the Florida Court asserting that that Court does not have jurisdiction to hear the action. Subsequently, and on 24 February 2016, i.e. four days before the deadline to commence an action under the Limitation Act, the Plaintiffs filed the present action against the First to Third Defendants in The Bahamas in respect of a claim for damages for negligence which resulted in the death of the Second Plaintiff's husband. It is alleged that the deceased died due to the collapse of a landing gear and/or other mechanical components of the Hawker Beechcraft Aircraft at the Linden Pindling International Airport, Nassau, The Bahamas.

On 22 February 2017, some 359 days after the deadline to commence this action under the Limitation Act, the Plaintiffs filed an Amended Generally Indorsed Writ adding the Fourth to Seventh Defendants.

The present application only concerns the First Defendant who applies to strike out the action on the basis that to date, it had not been properly served. The Plaintiffs averred that the reason for the delay was an erroneous impression on the part of their attorney that the First Defendant's registered office for service was at J. Roberts & Co. and such error was caused by a representative of the Company Registry providing him with erroneous information.

On the other hand, the First Defendant asserted that the Profile of companies are online and further, since 3 March 2017, J. Roberts & Co. informed them that his law firm did not represent the First Defendant or, for that matter, any of the Defendants. To date, the First Defendant has not been served either at its registered office or by substituted service. The First Defendant applied to strike out the Writ of Summons and the Amended Writ of Summons.

**HELD:** dismissing the application to extend the validity of the Writ of Summons and the Amended Writ of Summons with costs to the First Defendant.

*1.* Where a plaintiff seeks an extension of the validity of a writ under the provisions of Ord. 6, r. 7; the application has to be made during the original validity of the writ or during the twelve months. If a plaintiff has not conformed with the requirements of the rule, that

plaintiff could not be granted relief although in exceptional circumstances and where the interests of justice so require, the court would consider an application to extend the validity of the writ under R.S.C., Ord. 6 r.7 and Ord. 3, r. 4. But, before the court will extend the validity of the writ the applicant must show that there is good reason for such an extension, and where appropriate provide a satisfactory explanation for the failure to apply during the period of the original validity: **Kleinwort Benson Ltd v Barbrak Ltd, The Myrto (No 3)** *[1987] 2 All ER 289, [1987] AC 597)* applied.

2. The decision whether an extension should be allowed or disallowed is a discretionary one for the judge who is dealing with the relevant application: **Jones v Jones [1970] 2 Q.B. 576** applied. In exercising that discretion, the judge is entitled to have regard to the balance of hardship between the parties. In doing so, the judge may well need to consider whether allowing an extension will cause prejudice to the defendant in all of the circumstances of the case.

3. Since the present application to extend time fell within what Lord Brandon in **Kleinwort Benson Ltd** described as a Category 3 case, the Plaintiffs need to satisfy the two-stage test: first, to demonstrate that there are good reasons for extending time and second, to weigh all relevant factors and balancing the hardship between the parties before the extension is granted.

4. In the present case, the Plaintiffs have failed to demonstrate a good reason: filing an action in a country where the court lacked jurisdiction and awaiting the results therein, is not a good reason. As heart-rending as the facts of this case are, in that a young man in the prime of his life allegedly died as a result of the negligence of the Defendants (including the First Defendant), the Plaintiffs are the authors of their own misfortune. This action should have been filed in the Supreme Court of The Bahamas.

5. In addition, this action is fraught with insurmountable legal hurdles.

## RULING

**Charles J.**

**Introduction**

[1] There are a number of extant applications before the Court namely:

(i) A Summons filed on 24 February 2017 by the First Plaintiff, Jared Rosen (Executor of the Estate of the late Raymond Donat Charron Jr.) and the Second Plaintiff, Lottie Mae Charron (“the Plaintiffs”) against seven Defendants (“the Defendants”) including the First and Second Defendants for:

a) An Order that the Plaintiffs be at liberty to serve a Concurrent Writ of Summons and Notice of the said Concurrent Writ of Summons and all consequential process upon the Fourth, Fifth, Sixth and Seventh Defendants respectively in the United States of America and;

b) Leave to extend the validity of the Concurrent Writ of Summons and Notice of the said Concurrent Writ of Summons pursuant to Order 6 Rule 7 of the Rules of the Supreme Court ("RSC").

(ii) A Summons filed by the First Defendant on 14 March 2017 seeking:

a) Leave to enter a Conditional Appearance pursuant to RSC O. 12 r. 6 on the grounds that the Applicant intends to apply to set aside service of the Writ filed on 24 February 2016 and to set aside the Writ filed on 22 February 2017 (Leave to enter Conditional Appearance was already granted on 28 September 2017);

b) An Order that the Writ filed on 24 February 2016 and service thereof, be set aside; (iii) an Order that the Writ filed on 22 February 2017 be set aside and;

c) An Order that the Plaintiffs do give security for costs pursuant to RSC O. 23 6. 1(a).

(iii) A Summons filed by the Plaintiffs on 8 November 2018 seeking the following:

a) Leave to extend the validity of the Writ of Summons and Amended Writ of Summons pursuant to RSC O. 6 r. 7;

b) Leave to re-amend the Amended Writ of Summons filed herein on 22 February 2017 in accordance with the draft Re-Amended Writ of Summons attached pursuant to RSC O. 20 r. 5 and;

c) Leave to file the Statement of Claim in accordance with the draft Statement of Claim attached pursuant to RSC O. 3 r. 4.

(iv) A Summons filed by the First Defendant on 25 February 2019 for:

a) An Order that paragraphs 17 -19 and 24 – 26 of the Affidavit of Lottie Mae Charron be struck out pursuant to RSC O. 41 rr. 5(2) and 6 and;

b) An Order that the Writ of Summons and Amended Writ of Summons be struck out pursuant to s. 66(3) of the Supreme Court Act.

[2] For present purposes, the Court is concerned with the Summons filed on 14 March 2017 and the Plaintiffs' Application filed on 8 November 2018. The Summons filed on 24 February 2017 by the Plaintiffs will be heard ex parte on Wednesday, 29 January 2020 at 2.30 p.m.

**Chronology**

[3] In order to fully understand the issues which are before the Court, it is helpful to chronicle some important events commencing with the death of Raymond Donat Charron Jr. ("the deceased") on 28 February 2013. It is alleged that the deceased died due to a collapse of the landing gear and/or other mechanical components of the Hawker Beechcraft Model 1900 C Aircraft Tail No. N 413 CM, Serial No. UC-13.

[4] On 27 February 2015, the Plaintiffs filed a Complaint in the United States District Court for the Southern District of Florida, U.S.A. ("the Florida Court") against the seven Defendants.

[5] On 25 May 2015, the Plaintiffs filed an Amended Complaint in the Florida Court ("the Florida Complaint").

[6] On 17 August 2015, the First, Second and Third Defendants (collectively the "First to Third Defendants") filed a Motion to Dismiss the Florida Complaint.

[7] On 24 February 2016, the Plaintiffs filed a Writ of Summons endorsed with a Statement of Claim against the First to Third Defendants in The Bahamas. This Writ of Summons was filed 4 days before the deadline to commence this action under the Limitation Act.

[8] On 25 March 2016, the Florida Complaint against the First to Third Defendants were dismissed on the basis that they were not properly within the jurisdiction of the Florida Court.

[9] On 12 May 2016, the Fourth, Sixth and Seventh Defendants filed a Motion to Dismiss the Florida Complaint against them on the basis that since the First to Third Defendants are going to be tried in The Bahamas, they are also willing to be tried there since the accident occurred in The Bahamas.

[10] On 19 May 2016, the Fifth Defendant followed suit and filed a Motion to Dismiss the Florida Complaint in the Florida Court.

[11] On 22 February 2017, the Plaintiffs filed an Amended Generally Indorsed Writ ("the Amended Writ") adding the Fourth to Seventh Defendants. The Amended Writ was therefore filed almost a year (359 days) **after** the deadline to commence this action under the Limitation Act.

[12] On 23 February 2017, the Writ of Summons and the Amended Writ of Summons were purportedly served on the First Defendant.

[13] On 24 February 2017, the Plaintiffs filed a Concurrent Writ of Summons and Notice of Concurrent Writ of Summons seeking an Order that it be served upon the Fourth, Fifth, Sixth and Seventh Defendants respectively in the USA and for leave to extend the validity of the Concurrent Writ of Summons. The Writ of Summons expired on this day.

[14] On 14 March 2017, the First and Second Defendants filed a Summons seeking, among other things, leave to enter a Conditional Appearance.

[15] On 28 September 2017, the First and Second Defendants were granted leave to enter a Conditional Appearance.

[16] On 11 December 2017, the parties appeared before the Court for the hearing of the remaining applications. Upon hearing both Counsel, the Court ordered, among other things, that the service of the Writ of Summons and purported Amended Writ of Summons on the Second Defendant be set aside pursuant to Ord. 6 r. 7 (1) and Ord. 12 rr.7(1) and that this action be struck out and dismissed as against the Second Defendant pursuant to S.9 of the Limitation Act,1995. The Court proceeded to give directions on the hearing of the remaining six applications on 24 May 2018.

[17] On 14 May 2018, the Plaintiffs' previous attorney, Lex Justis, filed an application to withdraw as Counsel.

[18] On 24 May 2018, the Law Firm of Karam, Missick & Bowe (now "Bowe Partners & Associates") was appointed to replace Lex Justis, the previous attorneys for the Plaintiffs. The matter was then adjourned to Monday 15 October 2018.

[19] On 15 October 2018, Mr. George Missick who appeared by the Plaintiffs sought an adjournment. The matter was adjourned to 2 November 2018.

[20] The Court heard the parties briefly on 2 November 2018 and Ms. Carroll, who appeared for the Plaintiffs, indicated that she will file a Summons to amend which was eventually filed on 8 November 2018.

[21] On 25 February 2019, the First Defendant filed a Summons seeking (i) an Order to strike out certain paragraphs of the Affidavit of Lottie Mae Charron filed on 22 February 2019 and (ii) an Order to strike out the Writ of Summons and the Amended Writ of Summons.

[22] On 28 February 2019, the Court heard the parties and reserved its Ruling which was delayed because of the Transcript of Proceedings which was received on 8 January 2020. The Court apologizes for the inordinate delay.

**Discussion**

**Application to set aside the service of the Writs/ extend the validity of the Writ**

[23] The Plaintiffs submit that the Court has jurisdiction to extend the validity of the Writ of Summons and Amended Writ of Summons pursuant to RSC Ord. 6 r. 7 and Ord. 3 r. 4.

[24] RSC O. 6 r.7 provides as follows:

> **"7. (1) For the purpose of service, a writ (other than a concurrent writ) is valid in the first instance for twelve 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 which 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 twelve 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."** [Emphasis added]

[25] Ord. 3 r.4 (1) provides that "the Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these Rules, or by any judgment, order or direction, to do any act in any proceedings". Ord. 3 r. 4(2) states that the Court may extend any such period referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.

[26] Learned Counsel for the Plaintiffs Ms. Carroll argues that the service of the Writ of Summons and Amended Writ of Summons was conducted properly within the parameters of O. 6 r. 7(1) having been served on the First and Third Defendants on 23 February 2017. She submits that since the Generally Endorsed Writ of Summons was issued on 24 February 2016, the final day for service of that Writ

was midnight on 23 February 2017 as illustrated by Salmon L.J. in **Trow v IND Coope (West Midlands) Ltd and Another** [1967] 2 Q.B. 899 at 929(f).

[27] It is not in dispute that the time for service in the present action expired at midnight on 23 February 2017.

[28] What is in dispute is whether the First Defendant (with whom we are concerned) was properly served on 23 February 2017 (some hours before the Writ of Summons was about to expire) or at all, and whether the Court should extend time to serve the Writ of Summons and the Amended Writ of Summons.

[29] The facts with respect to service upon the First Defendant can be gleaned from the Affidavits of Monique McCartney filed on 14 March 2017 and 3 October 2017 respectively on behalf of the Plaintiffs and the Second Affidavit of Chad Adderley filed on 12 October 2017 as well as the Affidavit of Stephanie Cox, Legal Secretary of the Attorneys for the First Defendant sworn to on 8 January 2018. The Plaintiffs also rely on the 1st Affidavit of Lottie Mae Charron, the widow of the deceased, which was filed on 22 February 2019.

[30] In her Affidavit of 14 March 2017, Ms. McCartney stated that "*under the direction of Lex Justis Chambers, Counsel & Attorneys-at-Law, she did on Thursday, 23 February 2017, personally served the Registered Agent of the First Defendant at the offices of J. Roberts & Co, Counsel & Attorney-at-Law*…."

[31] In paragraph 8 of the Second Affidavit of Mr. Adderley filed on 12 October 2017, he stated that the Plaintiffs served the law firm of J. Roberts & Co. , a law firm who (sic) is no longer the registered office of the First Defendant. Mr. Adderley stated that the Plaintiffs' Counsel should have been aware of this as he is informed by Mr. Roberts that he had returned the documents to the Plaintiffs and informed them, by letter dated 3 March 2017, that his law firm was not the registered office of the First Defendant : see Exhibit "C.A. 1".

[32] Stephanie Cox, Legal Secretary of the Attorneys for the First Defendant, swore an affidavit on 8 January 2018 wherein she stated, in paragraph 3, that on 11 December 2017, she caused a search to be conducted at the Corporate and Business Registry of the Registrar General's Department of the Commonwealth of The Bahamas for the Registered Office of the First Defendant. At paragraph 4, she stated that a review of the Company Profile revealed that the said Profile lists the Registered Agent's name and address as well as the Registered Office of the First Defendant as Cassietta Z, McIntosh, Peach Tree Street, McIntosh Building, P.O. Box F- 44239, Freeport, Grand Bahama: Exhibit "V.S.C. 1."

[33] The Plaintiffs attempt to address the issue of service on the First Defendant in the 1st Affidavit of Mrs. Charron filed on 22 February 2019. In paragraph 5, Mrs. Charron averred that she was informed by Mr. McCartney (her former Attorney) that he visited the Company's Registry Department and was told by a representative that the First Defendant's registered office was the law firm of J. Roberts & Co.

[34] In paragraph 10, she stated that the assertion by Mr. Adderley that J. Roberts & Co., a law firm, is no longer the registered office of the First Defendant, means that Roberts & Co. previously served as the registered office of the First Defendant and that Mr. McCartney was not given up-to-date information from the Company's Registry.

[35] Learned Counsel Ms. Carroll submitted that Mrs. Charron further stated that her former attorney was informed by a representative of the Company Registry that the registered office of the First Defendant was the law firm of J. Roberts & Co. and therefore, that misinformation by the representative of the Company Registry was responsible for the First Defendant being served at the wrong address.

[36] Taking Ms. Carroll's argument one step further, it meant that sometime prior to 23 February 2017, Mr. McCartney received the incorrect information from a representative at the Company Registry. On 3 March 2017, J. Roberts & Co. wrote

to Mr. McCartney informing him that his Law Firm was not the registered office of the First Defendant or, for that matter, of any of the Defendants. Having received that letter from J. Roberts & Co. on 3 March 2017, one would expect that the Plaintiffs will act with promptitude to locate and serve the registered office of the First Defendant but, up to today, the First Defendant has not been served whether at its registered office or by substituted service.

[37] Since 25 March 2016, the Plaintiffs were aware that the Florida Court had dismissed the case against the First to Third Defendants and that they need to act quickly.

[38] Additionally, the Plaintiffs should have made an application promptly thereafter to extend the validity of the Writ of Summons and the Amended Writ of Summons rather than wait until 8 November 2018, nearly 18 months after they were informed by J. Roberts & Co. that the service was ineffective. They were also aware of developments taken in the Florida Court with respect to the Motions to dismiss.

[39] The fact of the matter is that the First Defendant was not properly served on 23 February 2017 and to date, has not been served at its registered office or by substituted service.

[40] That said, it cannot be disputed that the Court has the discretion to extend the validity of a Writ after its expiration but the applicant must show that there is good reason for such an extension, and where appropriate provide a satisfactory explanation for the failure to apply during the period.

**Whether good reason given for the court to extend time for service?**

[41] The issue of the Court's powers to extend the time for service of proceedings has been the subject of judicial deliberation in a plethora of cases. In **Singh v Dupont Harper Foundries Ltd** [1994] 2 All ER 889, Farquharson LJ after considering a number of earlier decisions of the English Court of Appeal said:

> **"It is difficult to reconcile the authorities cited above but the following propositions should be applied: (1) Where a litigant seeks an**

> **extension of the validity of a writ the provision of RSC Ord 6, r 8 will apply. (2) An application under that rule must be made during the validity of the writ, i.e. four months in the usual case, or during the four months next following. (3) Only one extension of time can be granted on a particular application and that must be for a period not exceeding four months. (4) If the litigant has not conformed with the requirements of the Rule he cannot be granted relief under Ord 6, r 8. (5) In exceptional circumstances and where the interests of justice so require the court will entertain an application to extend the validity of the writ under the provisions of Ord 2, r 1 and Ord 3, r 5. Before the court will extend the validity of the writ the applicant must show that there is good reason for such an extension, and where appropriate provide a satisfactory explanation for the failure to apply during the period of the original validity (see *Kleinwort Benson Ltd v Barbrak Ltd, The Myrto (No 3)* [1987] 2 All ER 289, [1987] AC 597).** [Emphasis added]

[42] Megaw J in **Heaven v Road and Rail Wagons Ltd** [1965] 2 QB 355 at 365 said:

> **"Exceptional cases, justifying a departure from the general rule, might well arise where there has been an agreement between the 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, could not have been served earlier even if the application had been made and granted earlier."**

[43] With respect to the First Defendant not being served, the Plaintiffs have to provide a good reason. This was elucidated by our Court of Appeal in **Frances Farmer et al v. Security & General Insurance Company Ltd (The Court appointed representative of the estate of the late Gemason Smith, Deceased)** SCCIV app No. 93 of 2011. At para. 40, Conteh JA stated:

> **"…The test accepted now for the renewal of an expired writ is whether or not the applicant for renewal or extension of the validity has a good cause or reason…."**

[44] Referring to the leading cases on the issue, Conteh JA stated at paras. 43 - 46:

> **"43. Lord Brandon, with respect, gave what may reasonably be described as a comprehensive *tour d' horizon* of the operation of the**

**provisions of the Rule on the extension of the validity of a writ through the case law. His Lordship stated at p.616: "…there is a considerable body of authority on the principles to be applied by the court where, on an application for the extension of the validity (in which I include the renewal) of a writ, questions of limitation are involved."(**Emphasis added)

**44. Lord Brandon then proceeded to examine some of the leading cases in the field, such as *Battersby v. Anglo-American Co. Ltd*, (1945) KB 23 (a pre-1965) English Ord. 6 r.8 decision; *Heaven v Road and Rail Wagons Ltd.* (1965) 2 QB. 355, in which Megaw J. introduced the requirement of "exceptional circumstances" to warrant the exercise of the court's discretion in favour of an applicant seeking an extension of a writ. Megaw J's decision was expressly approved by the English Court of Appeal in *Baker v. Bowketts Cakes Ltd.* (1966) 1 WLR 861 in which Lord Denning MR, however, at p.866, referred to the need "*for sufficient reason*" and "*good cause*" rather than "*exceptional circumstances*" to justify extension of the validity of a writ.**

**45. Lord Brandon in his survey, also referred to the case of *Jones v Jones (*1970) 2 QB 576 and, at p.561, he quoted Sachs L.J. in *Jones*, supra, at pp 586-587:**

> **"Where it is desired to deprive a defendant of his ability to plead a Statute of Limitation, naturally the good cause to be put forward must be strong. It is quite impossible to define the circumstances which can constitute 'good cause….'** [Emphasis added]

**46. It is, we think, pertinent to point that Lord Brandon in *Kleinwort Benson Ltd* supra, at p.619, in commenting on *Jones v. Jones*, supra stated:**

> **"I regard this case as a significant milestone on the road of authority with cases of this kind and I do so for two reasons. First, it strengthens the view already adumbrated in earlier cases that what is required to justify extension is 'good cause' or 'good reason' rather the more stringent 'exceptional circumstances.' Secondly, it introduced for the first time as a relevant consideration the balance of hardship to the plaintiff if extension is refused and hardship to the defendant if it is allowed."** [Emphasis added]

[45] Additionally, in **Kleinwort Benson Ltd. v Barbrak Ltd.** [1987] 1 A.C. 597, Lord Brandon (with whom the other members of the House of Lords agreed) formulated

three categories of cases in which an application for an extension of time for service might be made. He said: 'Category (1) cases are where the application for extension is made at a time when the writ is still valid and before the relevant limitation period has expired. Category (2) cases are where the application for extension is made at a time when the writ is still valid but the relevant period of limitation has expired. Category (3) cases are where the application for extension is made at a time when the writ has ceased to be valid and the relevant period of limitation has expired'. 'Good reason is necessary for an extension in both category (2) cases and category (3) cases. **But in category (3) cases, the applicant for an extension has an extra hurdle to overcome, in that he must also give a satisfactory explanation for his failure to apply for extension before the validity of the writ expired** [Emphasis added].

[46] In the present case, the Plaintiffs contend that there is a good reason for the Court to accede to their application.

[47] Learned Counsel, Ms. Carroll who appeared for the Plaintiffs, submits that the failure to apply to extend the validity of the Writ of Summons was due to the fact that the Plaintiffs had commenced legal action in this matter in the Florida Court against the First through Seventh Defendants by way of a First Amended Complaint which was later challenged by the Defendants in their respective Motion to Dismiss the Plaintiff's First Amended Complaint on the grounds of *Forum Non Conveniens*: see the Affidavit of Monique McCartney.

[48] In an attempt to minimize legal cost and not to waste judicial time, the Plaintiffs decided to wait for the Florida Ruling. Upon realizing that they would not receive a Ruling by that Court before the expiration date of the Writ, the Plaintiffs amended their Generally Endorsed Writ on 22 February 2017 to include the parties who are resident in the United States and to effect service of the same on all parties resident in the Bahamas. She submits that this explanation constitutes a good reason for the Plaintiffs' failure to apply to extend the validity of the Writ of Summons before the expiration.

[49] According to learned Counsel, the Florida Court eventually provided its Ruling on 12 May 2017 in favor of the Fourth through Seventh Defendants in recognizing the Bahamian courts as an adequate alternative forum for the instant action. She contends that due to the decision of the Florida Court to dismiss the Plaintiffs' First Amended Complaint, the Plaintiffs' hardship would outweigh the hardship of the First Defendant if an extension were not granted as they would be unable to seek legal recourse in this matter.

[50] Further, she says, all of the Defendants made applications to have the Plaintiffs' Florida action dismissed on the basis that the Bahamian courts were the appropriate forum for the action and they have agreed to be parties to this action. The Plaintiffs next submit that the Defendants were fully aware of the Plaintiffs' intention to bring an action and will not suffer any prejudice if the application was allowed.

[51] Learned Counsel Ms. Glinton argued that this is not a case in which an extension should be granted. She refers to section 66(3) of the Supreme Court Act which states as follows:

> **"Save as may otherwise be provided by rules of court, documents in respect of –**
>
> **a) proceedings in which the majority of the parties thereto reside or have their principal place of business in the northern region;**
> **b) proceedings in which the subject matter of the cause of action is located in the northern region, or**
>
> **c) proceedings in which the cause of action arose in or the subject matter has a closer connection with, the northern region, shall be filed in the office located in Freeport…."**

[52] Learned Counsel Ms. Glinton opines that the Writ of Summons and the Amended Writ of Summons should have been filed in the northern region (Grand Bahama) instead of New Providence and having been filed in the wrong Court, it should be struck out.

[53] In my opinion, the striking out of an action because it was filed in the wrong court in the same jurisdiction is a draconian measure. When one looks at the facts of the present case, the incident took place at the Linden Pindling International Airport which is located in Nassau. Except for the Defendants, the Plaintiffs do not reside in the northern region. What normally happens when an action is filed in the wrong court is to transfer the file to the court in which the subject matter has a closer connection. In any event, I believe that the action is filed properly in the Court which the cause of action has a closer connection.

[54] Secondly, says Ms. Glinton, the Florida Court dismissed the Plaintiffs' Complaint against the First to Third Defendants on 25 March 2016, nearly a year before the Writ would have become invalid and so, their only option was to institute a claim against the First to Third Defendants in The Bahamas. Instead of doing so, the Plaintiffs say that they decided to wait for the Florida Court Ruling against the Fourth to Seventh Defendants in an attempt to save costs.

[55] In addition, learned Counsel Ms. Glinton submits that the Plaintiffs were aware from 5 March 2017 that the Writ of Summons and Amended Writ of Summons were not served on the First Defendant and yet, no application was made until 8 November 2018 to serve the First Defendant.

[56] The present case falls within the ambit of what Lord Brandon referred to as the category (3) cases in that the application for extension is made at a time when the Writ of Summons has ceased to be valid and the relevant period of limitation has expired. Thus, good reason is necessary for an extension. What is a good reason will depend on all the circumstances of the case. Besides advancing a good reason, the Plaintiffs has an added hurdle to overcome, in that they must also give a satisfactory explanation for their failure to apply for extension before the Writ expired.

[57] The decision whether an extension should be allowed or disallowed is a discretionary one for the judge who deals with the relevant application. **Jones v**

**Jones [1970] 2 Q.B. 576** shows that, in exercising that discretion, the judge is entitled to have regard to the balance of hardship between the parties. In doing so, the judge may well need to consider whether allowing an extension will cause prejudice to the defendant in all of the circumstances of the case.

[58] The hardship to the Plaintiffs would be being shut out from pursuing their claim. But, Parliament has laid down a three-year limitation period for claims of negligence the Plaintiffs were well aware of this statutory limitation. The Court has to be satisfied that good reasons have been advanced for any delay; otherwise, it will open the floodgates to many applications of this nature.

[59] The hardship as it relates to the First Defendant was explained in the Third Affidavit of Mr. Adderley filed on 25 February 2019. At paragraph 23, he states:

> **"Mrs. Charron seeks to induce the Court to extend the period of time to allow her claims to proceed three years after the expiry of time under the Limitation Act. I am advised by my attorneys that one of the reasons why the Limitation Act exist is to stop claimants from bringing their claims long after the cause of action arose in circumstances which would prejudice the defendant. To that end, I must point out that the First Defendant has not operated as a business since in or about the year 2013. Around that same time, the aircraft in question was returned to the Fifth Defendant. However, I was informed by the Sixth Defendant that the aircraft in question was sold in or about the year 2014. Those facts make it particularly difficult for any trial of this action to be fair."**

[60] Learned Counsel Ms. Glinton also contends that the First Defendant would be seriously prejudiced in having to defend against a claim in circumstances where the aircraft itself is no longer available and in finding witnesses after six years.

[61] It eludes me as to the reason for choosing to institute this action in the Florida Court when the death took place in The Bahamas. Had the Plaintiffs chosen the Supreme Court of The Bahamas from day one, they may not have been in the dilemma in which they now find themselves including awaiting any rulings of any courts. As heart-rending as the facts of this case are, in that a young man in the prime of his life, allegedly died as a result by the negligence of the Defendants, the

Plaintiffs are the authors of their own misfortune. This action should have been filed in the Supreme Court of The Bahamas. The Plaintiffs have provided no good reason why they did not seek to make their applications to extend the validity of the Writ of Summons and Amended Writ of Summons before 8 November 2018.

[62] Another insurmountable hurdle which the Plaintiffs may face is their attempt to serve a Concurrent Writ of Summons and Notice of the said Concurrent Writ of Summons on the Fourth, Fifth, Sixth and Seventh Defendants outside of the limitation period. However, I will make no further comment on this issue as I have fixed a date to hear that application.

[63] Learned Counsel, Ms. Carroll concedes that the Plaintiffs made errors in their Writ of Summons and Amended Writ of Summons but argues that it would be a draconian measure to strike out which only should be exercised in circumstances where the First Defendant can prove that it has suffered prejudice. She submits that the First Defendant has failed to provide any evidence that it suffered prejudice as a result of the Plaintiffs' errors. She further submits that it is the Plaintiffs' intention to re-amend the Writ of Summons with a view to curing the defects complained of by the First Defendant. There is also a difficulty with the Amended Writ because pursuant to Ord. 20 r. 9(2), an amended writ must be endorsed with a statement that it has been amended specifying the date on which it was amended and the number of the rule of this court in pursuance of which the amendment was made. That provision is mandatory. So, even if the validity of the Amended Writ of Summons were extended, it would have to be struck out as being invalidly or improperly amended.

[64] Simply put, this action and the applications sought by the Plaintiffs are fraught with insurmountable legal hurdles.

[65] Applying the legal principles to the present case, I bear in mind that the application for extension falls within the ambit of a Category 3 case. Thus, it calls for the application of the two-stage test. First, to ascertain if there are good reasons for

extending time and second, weighing all relevant factors and balancing the hardship between the parties before deciding whether the Writ of Summons and the Amended Writ of Summons should be extended as a matter of discretion. Lord Brandon in **Kleinwort** referred to an 'accrued right of limitation' when considering the correctness of a right being extended.

[66] In the exercise of my discretion judicially and taking all matters into account, I am not satisfied that this is a case which justifies extending the period of time for service on the First Defendant. I am also not satisfied that I should extend the validity of the Writ of Summons and the Amended Writ of Summons as it relates to the First Defendant.

[67] In the circumstances, I will make an Order that the Writ of Summons and the Amended Writ of Summons against the First Defendant be struck out with costs to the First Defendant to be taxed if not agreed. The Court will summarily assess costs on Wednesday, 29 January 2020 at 2:30 p.m.

Dated this 22nd day of January, A.D., 2020

**Indra H. Charles**
**Justice**